IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: FCC 11-161	)	No. 11-9900

RESPONSE OF FEDERAL COMMUNICATIONS COMMISSION TO PETITIONERS' MOTION TO ESTABLISH A PROCEDURAL SCHEDULE

The Federal Communications Commission respectfully files this response to the petitioners' June 11, 2012, motion to establish a procedural schedule, which asks the Court to issue an order directing the parties to file briefs at prescribed intervals and proposes a briefing format that would allow petitioners and their supporting intervenors in this case to file up to 28 opening, supplemental and reply briefs aggregating 223,000 words.

Concurrently with this response, the Commission is filing a motion to hold this case in abeyance pending agency action on numerous petitions for administrative reconsideration of the *Order* on review. If that motion is granted and the Court's review is deferred pending further agency action, the scope of the issues on review may well be narrowed in ways that would bear on future briefing proposals. Should the Court decide to issue a briefing schedule at this time, however, we respectfully request that the Court adopt the alternative proposal outlined below in Argument II. As we explain below, although the complexity of this case reasonably requires briefing volumes greater than those customarily

permitted in most civil appeals, the 223,000-word allocation petitioners seek vastly exceeds what is needed fairly to present their challenges to the FCC order on review (*Connect America Fund,* 26 FCC Rcd 17663 (2011) ("*Order*")) and will impose an undue burden on the Court and the respondents.

Counsel for respondent United States have authorized Commission counsel to represent that the United States supports the views expressed in this response.

Argument

I. Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure generally provides that a petitioner may file a principal brief of up to 14,000 words and a reply brief of up to 7,000 words. Under this Court's local rules, "[m]otions to exceed the [otherwise applicable] word count will be denied unless extraordinary and compelling circumstances can be shown." 10th Circuit Rule 28.3. Further, "[i]n civil cases involving more than one appellant or appellee, including consolidated cases, all parties on a side (including intervenors) must – to the extent practicable – file a single brief." 10th Circuit Rule 31.3(A). *See also id.* Rule 31.3(B) (requiring "[a]ny brief filed separately by one of multiple parties [to] contain a certificate plainly stating the reasons why the separate brief is necessary").

There are sound reasons for these limits on briefing volumes. Excessive briefing imposes burdens on the Court (as well as opposing parties), because "extra

argument means extra judicial time, which must be carefully apportioned." *United States v. Torres*, 170 F.3d 749, 751 (7th Cir. 1999). Thus, courts will not "permit[] litigants on the same side of a case, and occupying common ground, . . . as many words as there are warm bodies, multiplied by 14,000." *Id.* Rather, the rules generally "give 14,000 words per brief," the court "allot[s] one brief to parties sharing common interests," and "[a] longer presentation depends on a demonstration of need, not on the raw number of litigants." *Id.*

Permitting a party to file an inordinately lengthy brief not only burdens the court and opposing counsel, it poorly serves the party itself. "[T]he more issues a brief presents, the less attention each receives," *Knox v. United States*, 400 F.3d 519, 521 (7th Cir. 2005), and courts "have emphasized the importance of winnowing out weaker arguments on appeal and focusing only on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). This Court's *Practitioners' Guide* confirms this point: "A brief that assigns dozens of errors and treats each as being of equal importance when some are clearly not *lessens* the stronger arguments. As Justice Frankfurter once said, a bad argument is like the clock striking thirteen, it put in doubt the others." *Practitioners' Guide to the United States Court of Appeals for the Tenth Circuit* 41 (8th Revision, March 2012) (emphasis added).

Guided by these principles, the Court should reject petitioners' briefing proposal. Petitioners propose opening briefs totaling 109,000 words (Mot. at 3-6), two supplemental opening briefs totaling 31,500 words (*id.* at 8-10), and three briefs by their supporting intervenors totaling 12,000 words (*id.* at 10) – generating a total of 152,500 words to which the Commission and its supporting intervenors must respond.[1] Petitioners further propose to file nine reply briefs totaling 50,500 words, an unspecified number of supplemental reply briefs totaling 14,000 words, and three supporting intervenors' reply briefs totaling 6000 words – for an additional aggregate briefing volume of 70,500 words. Mot. at 11.

Assuming that 14,000 words corresponds to approximately a 60-page brief in 14-point type, petitioners' proposal calls for more than (a) 650 pages of opening and initial supplemental briefs by petitioners and their intervenors, (b) nearly 640 pages of responsive briefs by the FCC and its supporting intervenors,[2] and (c) more than 300 pages of reply and supplemental reply briefs by petitioners and their supporting intervenors. Taken together, this briefing proposal would authorize a total of roughly *sixteen hundred pages* of briefs – or, stated another way, approximately *26 ½ full-sized briefs*.

[1] Petitioners later assert that the total allotment of words for the "initial round of briefs" is "only 142,500." Mot. at 16. It is unclear how petitioners arrived at that figure, which appears inconsistent with their itemized list of proposed briefs.

[2] Petitioners propose to allot the government respondents a word count "equal to [the] total of Petitioners Briefs" (presumably 140,500 words) and respondents' supporting intervenors 8750 words. Mot. at 10.

Petitioners argue that this volume of briefing is warranted because there are an unusual number of petitioners (31) and supporting intervenors (40), because the order on review is lengthy, and because it comprehensively restructures the previously existing intercarrier compensation regimes and universal service support programs. Mot. at 15-17. But the various assignments of error listed in petitioners' Appendix of Issues Raised (filed contemporaneously with the motion) largely distill to two sets of challenges: (1) attacks on the Commission's statutory authority to adopt a bill-and-keep intercarrier compensation regime (and the reasonableness of the regulatory measures the agency employed to transition to such a regime); and (2) statutory and Administrative Procedure Act challenges to the sufficiency and scope of the Commission's modified universal service support program.[3] Petitioners and their supporting intervenors – who are limited to addressing issues raised by the petitioners themselves[4] – should not need the equivalent of nearly 11 full-sized opening and supplemental briefs (152,500 words) to address those two overarching sets of issues (or related subsidiary issues).

---

[3] Petitioners' liaison counsel properly acknowledges that the petitioners' Appendix of Issues Raised appears to contain "significant" or "very significant" "overlap" in places. Appendix of Issues Raised at 73, 76; *see also id.* at 36, 48, 52 (noting the presence of additional possible overlap).

[4] *See* Order Governing Motion Practice in the Consolidated Proceedings, 10th Cir. No. 11-9900, at 6 (March 13, 2012) (citing *Arapahoe Cy. Pub. Airport Auth. v. FAA*, 242 F.3d 1213, 1217-18 n.4 (10th Cir. 2001)).

Nor does the fact that the *Order* on review is itself lengthy justify the word counts petitioners propose. Contrary to petitioners' suggestion (Mot. at 15-16), there is no direct arithmetic correlation between the length of an order and the number of words needed to challenge it, and, in our experience, no court has ever set word limits on such a basis. Indeed, petitioners' unwarranted proposal (Mot. at 5) for a full-size 14,000-word opening brief for Transcom Enhanced Services Inc. and Halo Wireless – which appear to distinguish themselves from other petitioners primarily through a challenge to just *two paragraphs* of the *Order*[5] – itself belies any arithmetic correlation between the *Order*'s size and the appropriate word limits for the parties' briefs.[6]

At the same time, we acknowledge the breadth and complexity of the regulatory actions taken in the *Order* on review. In that *Order*, the FCC undertook comprehensive reform of two major federal regulatory regimes: the universal service program, which subsidizes the provision of telephone service in areas where the cost of providing service is high; and the intercarrier compensation

---

[5] *See Order* ¶¶ 1005-06 (rejecting Halo's proposed interpretation of one intercarrier compensation rule); *see also* Appendix of Issues Raised at 73 (noting "significant overlap" between the Transcom/Halo issues and those raised by other petitioners).

[6] The allotment of a full-size brief to Transcom and Halo also ignores the fact that those parties participated only briefly in the proceedings before the agency. Although they each proffered a couple *ex parte* letters, the only formal pleading filed by either party was a 12-page reply comment submitted by Halo on April 18, 2011.

system, which provides a framework for telephone companies to compensate each other for the cost of originating and terminating telecommunications traffic. The scope of the *Order* and the importance of the case to the varied stakeholders reasonably require a greater volume of briefing than the average case. Below, we offer an alternative briefing proposal, which we urge the Court to adopt in the event that this case is not held in abeyance.

II. Should the Court decide to issue an order establishing a briefing schedule at this time, we respectfully suggest that it set a limit of 56,000 words for opening briefs on each side, inclusive of briefs for supporting intervenors, to be allocated among the primary parties (*i.e.*, petitioners and respondents) and the supporting intervenors on each side as they see fit. We also see no reason for a subsequent round of supplemental briefs. A limit of 56,000 words per side for opening briefs in this case should be sufficient to allow both sides to brief the issues raised: It is the equivalent of four full-sized briefs in other cases, and amounts to approximately 240 pages per side in 14-point type. In our view, a proportionate allotment of 28,000 words for reply briefs by petitioners and their intervenors also would be appropriate.

While these expanded word limits would impose additional burdens on the Court and the parties, we believe that they are justified by the range and complexity of the issues raised in the case. By contrast, the "limits" petitioners

propose are effectively no limits at all, and indicate that the petitioners have made no meaningful attempt to winnow or consolidate their arguments in order to present them to the Court with a modicum of concision. The Court should not reward the petitioners' failure to exercise sufficient discipline by granting their request for a truly extraordinary expansion of the page limits.

Finally, we note that petitioners propose that respondents FCC and United States file their brief approximately 90 days after the petitioners' opening briefs. That interval is sufficient if the Court adopts the 56,000 word-count limit we propose. If the Court were to grant each side significantly more words in this case, a longer interval may be needed.

Conclusion

For all of the foregoing reasons, if the Court decides to issue a briefing order at this time, rather than hold the case in abeyance, the Court should deny petitioners' motion and establish a briefing proposal as outline above.

Respectfully submitted,

Sean A. Lev
Acting General Counsel

Peter Karanjia
Deputy General Counsel

Jacob M. Lewis
Associate General Counsel

/s/Laurence N. Bourne
James M. Carr
Laurence N. Bourne
Counsel

Federal Communications Commission
Washington, DC 20554
(202) 418-1762

June 25, 2012

11-9900

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: FCC 11-161, Petitioners

v.

Federal Communications Commission
and United States of America, Respondents.

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of the Order Governing Motion Practice dated March 13, 2012, I hereby certify that the accompanying Response to Petitioners' Motion to Establish a Procedural Schedule contains 1,834 words.

/s/ Laurence N. Bourne

Laurence N. Bourne
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1750

June 25, 2012

CERTIFICATE OF DIGITAL SUBMISSION

I, Laurence N. Bourne, hereby certify that with respect to the foregoing:

(1) there are no required privacy redactions to be made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection version 11.0.5002.333, and according to the program are free of viruses.

/s/ Laurence N. Bourne

Laurence N. Bourne
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1750

11-9900

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: FCC 11-161, Petitioners

v.

Federal Communications Commission and United States of America, Respondents.

CERTIFICATE OF SERVICE

I, Laurence N. Bourne, hereby certify that on June 25, 2012, I electronically filed the foregoing Response to Petitioners' Motion to Establish a Procedural Schedule with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Joseph K. Witmer
Kathryn G. Sophy
Bohdan R. Pankiw
Pennsylvania PUC
P.O. Box 3265
Harrisburg, PA 17105-3265
Counsel for: Pennsylvania PUC

Charles A. Zdebski
James C. Falvey
Jennifer E. Lattimore
Eckert Seamans Cherin & Mellott
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006
Counsel for: Core Communications, Inc.

Ernest C. Cooper
Robert G. Kidwell
Howard J. Symons
Mintz Levin Cohn Ferris Glovsky & Popeo PC
701 Pennsylvania Avenue, N.W.

David Bergmann
3293 Noreen Drive
Columbus, OH 43221-4568
Counsel for: NASUCA

Suite 900
Washington, D.C. 20004
Counsel for: NCTA

Paula Marie Carmody
MD Office of People's Counsel
Suite 2102
6 St. Paul Street
Baltimore, MD 21202
Counsel for NASUCA

Christopher J. White
New Jersey Division of Rate Counsel
P.O. Box 46005
Newark, NJ 07101
Counsel for NASUCA

Russell M. Blau
Tamar Finn
Bingham & McCutchen, LLP
2020 K Street, N.W.
Washington, D.C. 20006
Counsel for: NTCA and OPASTCO

David A. LaFuria
Russell D. Lukas
Todd B. Lantor
David L. Nace
Lukas, Nace, Gutierrez & Sachs, LLP
Suite 1200
8300 Greensboro Drive
McLean, VA 22102
Counsel for: Cellular South, Inc.,et al.

John H. Jones
Office of the Ohio Attorney General
150 E. Gay Street, 16th Floor
Columbus, OH 43215
Counsel for: PUC of Ohio

Benjamin H. Dickens
Gerard J. Duffy
Mary J. Sisak
Robert M. Jackson
Blooston & Mordkofsky
2120 L Street, N.W., Suite 300
Washington, D.C. 20037
Counsel for: Choctaw Telephone Company, et al.

Craig S. Johnson
Johnson & Sporleder
304 E. High Street
P.O. Box 1606
Jefferson City, MO 65102
Counsel for: Choctaw Telephone Company

David R. Irvine
Jenson Stavros & Guelker
747 East South Temple, Suite 130
Salt Lake City, UT 84102
Counsel for: Direct Communications Cedar Valley, LLC, et al.

David H. Solomon
Craig E. Gilmore
Charles L. Keller
Wilkinson Barker Knauer, LLP
2300 N Street, N.W., Suite 700
Washington, D.C. 20037
Counsel for: T-Mobile USA, Inc.

Donna N. Lampert
Mark J. O'Connor
Jennifer P. Bagg
E. Ashton Johnston
Joseph Bissonnette
Helen E. Disenhaus
Justin L. Faulb
Lampert, O'Connor & Johnston, PC
1776 K Street, N.W., Suite 700
Washington, D.C. 20006
Counsel for: Transcom Enhanced Services, Inc ., et al.

William S. McCollough
McColloughHenry, PC
1250 South Capital of Texas Highway
Suite 2-235
West Lake Hills, TX 78746
Counsel for: Halo Wireless, Inc.

Christopher M. Heimann
Gary L. Phillips
Paul K. Mancini
AT&T Inc.
1120 20th Street, N.W., Suite 1000
Washington, DC 20036
Counsel for: AT&T

Jonathan E. Nuechterlein
Elvis Stumbergs
Heather M. Zachary
Daniel Deacon
Wilmer Cutler, et al.
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1420
Counsel for: AT&T Inc.

Bridget Asay
State of Vermont office of the Attorney General
109 State Street
Montpelier, VT 05609
Counsel for: Vermont PSB

Nancy C. Garrison
Robert B. Nicholson
U.S. Department of Justice
Antitrust Division, Appellate Section
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Counsel for: USA

Scott H. Angstreich
Brendan J. Crimmins
Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Counsel for: Verizon

Christopher J. Wright
Wiltshire & Grannis LLP
1200 18th Street, N.W.
Washington, D.C. 20036
Counsel for: Level 3 Communications, LLC and Sprint Nextel Corporation

Glenn Richards
Pillsbury Winthrop Shaw Pittman
2300 N Street, N.W.
Washington, D.C. 20037-1122
Counsel for: The Voice on the Net Coalition

Thomas Jones
David Paul Murray
Nirali Patel
Willkie, Farr & Gallagher LLP
1875 K Street, N.W.
Washington, D.C. 20006
Counsel for: tw telecom, inc.

Robert A. Long, Jr.
Gerald J. Waldron
Yaron Dori
Enrique Armijo
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
Counsel for: CenturyLink, Inc.

David E. Mills
J.G. Harrington
Dow Lohnes PLLC
1200 Ner Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036-6802
Counsel for: Cox Communications, Inc.

Clare E. Kindall
Assistant Attorney General
Department Head-Energy
Office of the Attorney General
Ten Franklin Square
New Britain, CT 06051
Counsel for Connecticut PURA

Genevieve Morelli
ITTA
1101 Vermont Avenue, N.W.
Suite 501
Washington, D.C. 20005
Counsel for: ITTA

Craig S. Johnson
Johnson & Sporleder, LLP
304 E High Street, Suite 200
P.O. Box 1670
Jefferson City, MO 65102
Counsel for: Choctaw Telephone Company

Carl W. Northrop
Telecommunications Law
Professionals PLLC
875 15th Street, N.W., Suite 750
Washington, D.C. 20005
Counsel for: MetroPCS Communications, Inc.

Mark A. Stachiw
MetroPCS Communications, Inc.
2250 Lakeside Blvd.
Richardson, TX 75082
Counsel for: MetroPCS Communications, Inc.

Gregory J. Vogt
Law Offices of Gergory J. Vogt, PLLC
2121 Eisenhower Avenue, Suite 200
Alexandria, VA 22314
Counsel for: National Exchange Carriers Association, Inc.

Paul M. Schudel
Thomas J. Moorman
Woods & Aitken LLP
301 South 13th Street, Suite 500
Lincoln, Nebraska 68508
Counsel for: Nebraska Rural Independent Companies

Matthew A. Brill
Latham & Watkins
555 11th Street, Suite 1000
Washington, D.C. 20004
Counsel for: Rural Cellular Association

Steven H. Thomas
McGuire Craddock & Strother, PC
2501 N. Harwood, Suite 1800
Dallas, TX 75201
Counsel for: Halo Wireless

Sidney Powell
Torrence E. Lewis
3831 Turtle Creek Blvd. #5B
Dallas, TX 75219
Counsel for: Transcom Enhanced Services, Inc.

Walter H. Sargent
1632 N. Cascade Avenue
Colorado Springs, CO 80907
Counsel for Transcom Enhanced Services, Inc., et al..

Michael B. Wallace
Rebecca Hawkins
Wise Carter Child & Caraway, P.A.
401 E. Capitol Street
Heritage Building, Suite 600
Jackson, MS 39201
Counsel for: Cellular South, Inc.

Caressa D. Bennet
Kenneth C. Johnson
Daryl A. Zakov
Anthony K. Veach
Bennet & Bennet, PLLC
4350 East West Highway, Suite 201
Bethesda, MD 20814
Counsel for: Rural Telecommunications Group, Inc. and Central Texas Telephone Cooperative, Inc.

Samuel L. Feder
Elaine J. Goldenberg
Jenner & Block LLP
1099 New York Avenue, N.W.
Washington, D.C. 20001
Counsel for: Comcast Corporation

John B. Messenger
5700 Georgia Avenue
West Palm Beach, FL 33405
Counsel for: YMax Communications Corp.

Robert A. Fox
1500 SW Arrowhead Road
Topeka, KS 66604
Counsel for The State Corporation Commission of the State of Kansas

Patricia A. Millett
Kevin Amer
Sean Conway
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Counsel for: Gila River Indian Community, et al.

Don L. Keskey
505 N. Capitol Avenue
Lansin, MI 48933
Counsel for: Allband Communications Cooperative

Ivan C. Evilsizer
Evilsizer Law Office, PLLC
2301 Colonial Drive, Suite 2B
Helena, MT 59601-4995
Counsel for: Ronan Telephone Company, et al.

Alan L. Smith
1169 East 4020 South
Salt Lake City, UT 84124
Counsel for Direct Communications Cedar Valley, LLC, et al.

Roger D. Dixon, Jr.
Law Offices of Dale Dixon
7316 Esfera Street
Carlsbad, CA 92009
Counsel for: North County Communications Corporation

David Cosson
2154 Wisconsin Avenue, N.W.
Washington, D.C. 20007
Counsel for: Eastern Nebraska Telephone Company

H. Russell Frisby, Jr.
Dennis Lane
Harvey L. Reiter
Stinson Morrison Hecker
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Counsel for: Eastern Nebraska Telephone Company

Robin K. Lunt
James B. Ramsay
NARUC 1101 Vermont Avenue, N.W., Suite 200
Washington, D.C. 20005
Counsel for: NARUC

Maureen A. Scott
Janet F. Wagner
Wesley C. Van Cleve
Arizona Corporation Commission
Legal Division
1200 West Washington
Phoenix, AZ 85007
Counsel for: Arizona Corporation Commission

Raymond L. Doggett, Jr.
D. Mathias Roussy, Jr.
Virginia State Corporation Commission
Office of General Counsel
P.O. Box 1197
Richmond, VA 23218-1197
Counsel for: Virginia State Corporation Commission

Rick Chessen
Neal M. Goldberg
Jennifer McKee
Steven F. Morris
NCTA
25 Masschusetts Avenue, N.W.
Suite 100
Washington, D.C. 20001
Counsel for: NCTA

/s/ Laurence N. Bourne