
**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

No. 11-9900

IN RE: FCC 11-161

On Petitions for Review of Orders of the
Federal Communications Commission

**UNCITED BRIEF OF INTERVENORS SUPPORTING RESPONDENTS IN
RESPONSE TO THE BRIEF OF THE NATIONAL ASSOCIATION OF
STATE UTILITY CONSUMER ADVOCATES**

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, intervenors AT&T Inc., Verizon, and Verizon Wireless respectfully submit the following corporate disclosure statements:

AT&T Inc. AT&T Inc. is a publicly traded corporation that, through its wholly owned affiliates, is principally engaged in the business of providing communications services and products to the general public. AT&T Inc. has no parent company, and no publicly held company owns 10 percent or more of its stock.

Verizon and Verizon Wireless. The Verizon companies participating in this filing are Cellco Partnership, d/b/a Verizon Wireless, and the regulated, wholly owned subsidiaries of Verizon Communications Inc. Cellco Partnership, a general partnership formed under the laws of the State of Delaware, is a joint venture of Verizon Communications Inc. and Vodafone Group Plc. Verizon Communications Inc. and Vodafone Group Plc indirectly hold 55 percent and 45 percent partnership interests, respectively, in Cellco Partnership. Both Verizon Communications Inc. and Vodafone Group Plc are publicly traded companies. Verizon Communications Inc. has no parent company. No publicly held company owns 10 percent or more of Verizon Communications Inc.'s stock. Insofar as relevant to this litigation, Verizon's general nature and purpose is to provide communications services,

including broadband Internet access services provided by its wholly owned telephone-company and Verizon Online LLC subsidiaries and by Verizon Wireless.

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STATEMENT OF RELATED CASES

Intervenors adopt the Statement of Related Cases set forth in the Federal Respondents' Uncited Response to the Joint Preliminary Brief of the Petitioners.

GLOSSARY

ARC	Access Recovery Charge
Communications Act or Act	Communications Act of 1934, as amended (47 U.S.C. § 151 <i>et seq.</i>)
FCC	Federal Communications Commission
FCC Br.	Federal Respondents' Response to the Brief of the National Association of State Utility Consumer Advocates (filed Mar. 18, 2013)
ICC	Intercarrier Compensation
LEC	Local Exchange Carrier
NASUCA	National Association of State Utility Consumer Advocates
<i>Order</i>	Report and Order and Further Notice of Proposed Rulemaking, <i>Connect America Fund</i> , 26 FCC Rcd 17663 (2011)
Pet. Br.	Brief of the National Association of State Utility Consumer Advocates (filed Oct. 23, 2012)

INTRODUCTION AND SUMMARY OF ARGUMENT

The FCC shows in its brief that NASUCA's challenges to the *Order's* adoption of the ARC were not preserved for judicial review and lack merit.

Intervenors write separately to emphasize two points.

I. Contrary to NASUCA's claim, the *Order* clearly identifies the FCC's legal authority to adopt the ARC. The *Order* explains that the ARC is an interim measure that is part of the agency's efforts to facilitate the transition to bill-and-keep, *see, e.g., Order* ¶ 847 (JA____), and the *Order* contains a subsection that sets forth the FCC's authority to adopt such transition mechanisms, *see id.* ¶¶ 809-810 (JA____). Nothing more was required.

II. NASUCA's argument that permitting carriers to allocate the ARC at a holding-company level violates the prohibition of unreasonable discrimination in 47 U.S.C. § 202(a) is equally without merit. As the FCC explains (at 10-11), holding-company flexibility serves neutral purposes that are consistent with § 202(a). But NASUCA's argument also fails for a more basic reason. Section 202(a) applies only to "common carriers," and holding companies are not common carriers.

ARGUMENT

I. THE *ORDER* EXPLAINS THE FCC’S AUTHORITY TO ADOPT THE ARC

As the FCC demonstrates, the ARC forms an important component of the *Order*’s comprehensive ICC reforms. *See* FCC Br. 5-6. The *Order* fully explains the FCC’s legal authority to adopt those broader ICC reforms under 47 U.S.C. §§ 201, 251(b)(5), and 332. *See Order* ¶¶ 760-781 (JA____-____). Nonetheless, NASUCA argues (at 5) that the FCC’s explanation of the ARC is deficient because the FCC supposedly failed to “mention” its “legal authority” in the specific subsection of the *Order* “devoted to the Recovery Mechanism.”

But, in the very first paragraph NASUCA cites as lacking sufficient explanation, *see* Pet. Br. 5 & n.2 (citing *Order* ¶¶ 847-932 (JA____-____)), the FCC made clear that the ARC is a “transitional recovery mechanism” intended to facilitate a “gradual transition” to bill-and-keep, *Order* ¶ 847 (JA____); *see also*, *e.g.*, *id.* ¶¶ 36-38, 849, 910 n.1791 (JA____-____, ____, ____). The *Order* contains a separate subsection in which the FCC expressly identified its legal authority to “[s]pecify the [t]ransition” to bill-and-keep. *Id.* ¶¶ 809-810 (JA____). The FCC had no obligation to repeat that analysis every time it adopted a specific transition measure. *See Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993) (noting that the FCC “need not repeat itself incessantly”).

As the *Order* explains, transitional measures have long been a “‘standard tool of the [FCC]’” that permit it to “‘avoid excessively burdening carriers’” as they “‘adjust to [a] new pricing system.’” *Id.* ¶ 809 (quoting *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095, 1135-36 (D.C. Cir. 1984)) (JA____). Courts afford the FCC “‘substantial deference’” when it adopts such interim measures. *Id.* (quoting *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1106 (D.C. Cir. 2009)); see *Sorenson Communications, Inc. v. FCC*, 659 F.3d 1035, 1046 (10th Cir. 2011) (“Because the provisions under review are merely transitional, our review is especially deferential.”) (internal quotation marks omitted); *MCI Telecomms. Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984) (FCC has authority to adopt “[i]nterim solutions” to ameliorate “unfairness of abruptly shifting policies”).

Although NASUCA intimates (at 6) that the ARC is a “novel charge,” it does not dispute that the ARC is an interim measure that falls well within the FCC’s authority to specify the transition to bill-and-keep.* Nor could it, for the ARC is an integral component of the uniform ICC regime adopted in the *Order*. See FCC Br. 5-6. The ARC facilitates the gradual implementation of bill-and-keep

* The FCC ably refutes NASUCA’s claim (at 8-11) that the ARC, unlike past transition measures such as the subscriber line charge (which NASUCA concedes (at 3) “was within [the FCC’s] established authority”), improperly offsets reductions in past intrastate access charge revenues. See FCC Br. 6-8.

by providing carriers a cushion against the revenue losses associated with declining ICC payments. *See Order* ¶¶ 847-849, 905-907 (JA____-__, ____-__). Moreover, consistent with the FCC’s broader ICC reforms, the ARC provides carriers with recovery from customers rather than other carriers. *See id.* ¶¶ 906-907 (JA____-__).

II. ALLOCATING THE ARC AT THE HOLDING-COMPANY LEVEL DOES NOT VIOLATE 47 U.S.C. § 202

The FCC reasonably provided the parent companies of incumbent LECs the flexibility to allocate ARCs at the holding-company level. *See Order* ¶ 910 (JA____); FCC Br. 8-13. NASUCA maintains (at 13) that such flexibility constitutes “‘unjust or unreasonable discrimination’” in violation of 47 U.S.C. § 202(a), because it allows different incumbent LEC subsidiaries of a single holding company to charge different ARCs in different states.

NASUCA’s discrimination argument fails at the threshold because § 202(a) applies only to common carriers, and holding companies are not “engaged as a common carrier for hire, in interstate or foreign communication by wire.” 47 U.S.C. § 153(11) (defining common carrier); *see US West, Inc. v. FCC*, 778 F.2d 23, 26 (D.C. Cir. 1985) (explaining that “holding companies” are not “common carriers” and that the FCC’s primary jurisdiction extends only to “holding companies’ subsidiaries”); *Allnet Communications Servs., Inc. v. National Exch. Carrier Ass’n, Inc.*, 741 F. Supp. 983, 984 (D.D.C. 1990) (rejecting tariff challenge against association because “title II” of the Communications Act, which includes

§ 202, “proscribe[s] the activities of common carriers” and “NECA is not a common carrier”); *cf. Union Tel. Co. v. Qwest Corp.*, 495 F.3d 1187, 1195 (10th Cir. 2007) (§ 202(a) provides that “telecommunications carriers may not unreasonably discriminate”).

Thus, any variation among the ARCs that a holding company’s different subsidiary LECs in different states charge their customers does not implicate § 202(a). Indeed, that has been settled law for more than 30 years: § 202(a) has never “require[d] that [tariff] charges be identical in each state. Rather, it is to be expected under the statutory scheme that there will be variations from state to state.” *Diamond Int’l Corp. v. FCC*, 627 F.2d 489, 493 n.7 (D.C. Cir. 1980) (*per curiam*).

CONCLUSION

For the foregoing reasons, and those set forth in the FCC’s brief, the Court should deny NASUCA’s petition for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitations, Typeface Requirements, Type Style Requirements, Privacy Redaction Requirements, and Virus Scan

1. This brief contains 991 words of the 21,400 words the Court allocated for the briefs of intervenors in support of the FCC in its October 1, 2012 Order Consolidating Case No. 12-9575 with Other FCC 11-161 Cases, Establishing Windstream Briefing Schedule, and Modifying Intervenor Participation. The intervenors in support of the FCC have complied with the type-volume limitation of that order because their briefs, combined, contain a total of fewer than 21,400 words, excluding the parts of those briefs exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 10th Cir. R. 32(a) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.
3. All required privacy redactions have been made.
4. This brief was scanned for viruses with Symantec Endpoint Protection (version 12.1.671.4971, updated on April 24, 2013) and, according to the program, is free of viruses.

/s/ Scott H. Angstreich
Scott H. Angstreich

April 24, 2013

CERTIFICATE OF SERVICE

I hereby certify that, on April 24, 2013, I caused the foregoing Uncited Brief of Intervenors Supporting Respondents in Response to the Brief of the National Association of State Utility Consumer Advocates to be filed by delivering a copy to the Court via e-mail at FCC_briefs_only@ca10.uscourts.gov. I further certify that the foregoing document will be furnished by the Court through (ECF) electronic service to all parties in this case through a registered CM/ECF user. This document will be available for viewing and downloading on the CM/ECF system.

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April 24, 2013