No. 11-9900

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: FCC 11-161

On Petitions for Review of an Order of
The Federal Communications Commission

UNCITED REPLY BRIEF OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

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GLOSSARY

1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§151-276
ARC	Access Recovery Charge
CAF	Connect America Fund
Commission or FCC	Federal Communications Commission
FCC Br.	Respondents FCC and the United States of America
IB	Intervenors' Brief
ICC	Intercarrier compensation
ICC Br.	Joint Intercarrier Compensation Brief
ILEC	Incumbent Local Exchange Carrier
LEC	Local Exchange Carrier
NASUCA	National Association of State Utility Consumer Advocates

Order	*In the Matter of Connect America Fund,* WC Docket No. 10-90, *A National Broadband Plan for Our Future,* GN Docket No. 09-51, *Establishing Just and Reasonable Rates for Local Exchange Carriers,* WC Docket No. 07-135, *High-Cost Universal Service Support,* WC Docket No. 05-337, *Developing an Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, *Lifeline and Link-Up,* WC Docket No. 03-109, *Universal Service – Mobility Fund,* WT Docket No. 10-208, Report And Order And Further Notice of Proposed Rulemaking, FCC 11-161 (adopted October 27, 2011, released November 18, 2011)
Respondents	FCC and the USA
SLC	Subscriber line charge
USF	Universal Service Fund

I. ARGUMENT

A. The FCC's reliance on §405(a) is misplaced.

Respondents argue that NASUCA's issue was not raised below and is barred by §405(a). RB. 4-5, 10. The authority cited by the FCC is from only the D.C. Circuit. The illegality of the holding-company ARC was in fact raised in the Petition for Reconsideration of the Public Service Commission of the District of Columbia (filed Dec. 29, 2011). The argument need not have been raised by petitioners themselves to avoid the §405(a) bar. *Amer. Elec. Power Serv. Corp. v. FCC*, No. 11-1146, slip op. at 13 (D.C. Cir., Feb. 26, 2013). The agency had the "opportunity" to respond to this issue, which is all that §405(a) requires, and was the key factor in *Sorenson Commc'ns Inc. v. FCC*, 659 F.3d 1035, 1044 (10th Cir. 2011) cited by the FCC; *see also, AT&T v. FCC*, 974 F.2d 1351, 1354 (D.C. Cir. 1992). Indeed, the FCC asserts that the statutory basis for the ARC was "fully explained...." RB 3

Crucially, the D.C. Circuit has held that denial of reconsideration is not itself appealable. *Southwestern Bell Tel. Co.*

v. FCC, 180 F.3d. 307, 311 (D.C. Cir. 1999); *AT&T v. FCC*, 363 F.3d 504, 511 (D.C. Cir. 2004).

Finally, the FCC has not yet acted on the DC PSC's Petition for Reconsideration. The FCC has delayed ruling on reconsiderations for years after asking for stays of pending appeals.[1]

[1] On May 17, 2013, the FCC "dismissed or denied" Petitions for Reconsideration of an order for which *NASUCA v. FCC*, DC Cir Case Nos. 08-1226 and 08-1353 has been held in abeyance. See *Petition of US Telecom for Forbearance Under 47 U S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, FCC 13-69.

B. The *Order* does not set forth FCC authority to adopt the ARC.

The FCC's assertion (RB 3) that the *Order* "fully explained the statutory basis for the ARC" is wrong. As NASUCA's Brief pointed out (at 5), in the full discussion of access charges (*Order*, ¶¶847-932), there was no mention of authority for the ARC; neither is there any such mention in the different 21 paragraphs now cited by the FCC. NASUCA is not asking that the Commission repeat its jurisdiction "incessantly"[2] over time, but just once, in the course of adopting the unprecedented revenue transfer in the *Order*.

The FCC cites (RB 6) first the Supreme Court's confirmation of authority under §201(b) "to adopt rules implementing the Communications Act"; and second, its own determination — that §251(b)(5) covers intrastate communications. From those two premises, the FCC's Brief concludes that "[b]ecause the ARC recovers some of the intrastate access revenues reduced by the Order pursuant to that federal authority, the ARC falls well within the FCC's statutory powers." RB 6.

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[2] See IB at 2, quoting *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993).

This assumption of enormous authority would validate *any* FCC action undertaken based on those two premises. As the Supreme Court recently found in *Arlington v. FCC*, ___ S.Ct. __ (May 20, 2013), slip op. at 16-17, the FCC's authority is substantial, but it must be tied to a specific statutory provision. And there is nothing in §§201 or 251(b)(5) allowing the FCC to create a new mechanism to collect lost intrastate carrier revenues from customers. States have primary authority over intrastate services, §152(b). In the absence of a specific Congressional directive, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378, there is no FCC intrastate authority. There is none here.

The FCC asserts (RB 3) that *AT&T* gives it the authority to adopt the ARC. The FCC's authority to assert jurisdiction over all telecommunications — intrastate and interstate — is one of the fundamental issues in this appeal. See ICC Brief and Reply Brief. Even accepting arguendo the FCC's §251(b)(4) assertion, however, the FCC's mere assertion on brief (RB 6) cannot stretch that authority far enough to allow turning carriers' lost interstate and intrastate ICC revenues into an interstate charge on customers. Under the FCC's current argument, the Commission "merely

mentioned" its previous interstate ICC revenue recovery measures. RB. 7. NASUCA's discussion of these measures (NASUCA Br. 8-11) **distinguished** them from the ARC; the FCC effectively concedes the distinction.

Intervenors assert that the FCC's broad authority to create "interim" measures as part of its orders gives it the power to impose the ARC, citing the FCC's own arguments in the *Order*. IB at 2-4. Neither the changes to interstate access charges approved in *NARUC v. FCC*, nor the tweaks to the interstate USF in *Rural Cellular*, nor the temporary separations freeze in *MCI* cited (*id.*), involved the inter/intrastate transfer here. *Sorenson* involved the setting of interim rates for interstate services, and does not help the Intervenors either.

Intervenors wrongly assert (IB at 3) that NASUCA "does not dispute that the ARC is an interim measure that falls well within the FCC's authority to transition to bill-and-keep." The core of NASUCA's argument on brief was that the FCC had no such authority — and cited none — to adopt the ARC.

C. The FCC violated the law by allowing the ARC to be charged on a holding-company basis.

With regard to the holding-company issue (NASUCA Br. 11-13), the FCC trots out the §405(a) argument. But, as discussed in NASUCA's Brief (n.8) and in Part a. above, the D.C. PSC did file a Petition for Reconsideration on precisely this issue; the FCC has still not ruled on the Petition.

The FCC then argues, RB 11, that requiring customers of an ILEC's holding company in one state to pick up lost revenues from another state is neutral and rational, because it 1) minimizes the increase experienced by any one customer; and 2) limits the impact on the CAF. First, minimizing the impact on all the customers of one ILEC is accomplished by *increasing* the impact on customers in other states. Second, limiting the impact on the CAF prevents the burden from being spread to all customers nationwide, as the FCC admits, RB n.5. The FCC cannot have it both ways. This is neither neutral nor rational.[3]

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[3] The FCC argues that (RB 12-13), *Connecticut Office of Consumer Counsel v. FCC*, 915 F.2d 75, 79 (2nd Cir. 1990) approved the FCC's restraints on states' "incentive to target telecommunications companies as sources of revenue, with the bulk of the tax incidence ultimately falling on out-of-state residents through nationwide

Even less rational is Intervenors' argument (IB 4-5) that NASUCA's challenge to the ARC on a holding company basis fails because holding companies are not common carriers. It is not the holding companies that are charging the ARC — the subject of NASUCA's challenge — it is the holding-company-owned common carrier ILECs that will be charging customers for revenues lost by ILECs in other states.[4]

II. CONCLUSION

Respondents' and Intervenors' arguments regarding the FCC's authority for adopting an intrastate-revenue-replacing ARC, especially on a holding company basis, are unavailing. The ARC must be reversed.

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averaging...." Here the FCC simply shifted that incentive to the ILEC holding companies.

[4] *Diamond Int'l Corp. v. FCC*, 627 F.2d 489, 493 n.7 (D.C. Cir. 1980), cited by Intervenors, addressed variations in intrastate tariffs, a different issue.

Respectfully submitted,

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