IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NO. 11-9900

IN RE: FCC 11-161

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

UNCITED ADDITIONAL JOINT UNIVERSAL SERVICE FUND ISSUES REPLY BRIEF (DEFERRED APPENDIX APPEAL)

[Counsel for Petitioners Listed on Following Pages]

June 12, 2013

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GLOSSARY

Act	Telecommunications Act of 1996
CAF	Connect America Fund
CETC	Competitive Eligible Telecommunications Carrier
CLEC	Competitive Local Exchange Carrier
ETC	Eligible Telecommunications Carrier
FCC or Commission	Federal Communications Commission
ILEC	Incumbent Local Exchange Carrier
MPSC	Michigan Public Service Commission
NECA	National Exchange Carrier Association
RLEC	Rural Local Exchange Carrier
RUS	Rural Utilities Service
USAC	Universal Service Administration Company
USF	Universal Service Fund

I. GRANTING ILECS AN EXCLUSIVE RIGHT OF FIRST REFUSAL CONFLICTS WITH THE FCC'S COMPETITIVE NEUTRALITY PRINCIPLE AND THE ACT'S GOAL TO PROMOTE LOCAL COMPETITION.

In responding to objections that the *Order*'s right of first refusal (ROFR) for Price Cap ILECs disregarded the Commission's own competitive neutrality principle, Respondents maintain that the FCC's competitive neutrality goals protect consumers, not competitors. Resp. Add'l USF Br. at 6.[1] Thus, they reason, competitive neutrality is properly trumped by the FCC's duty to promote broadband deployment and its "predictive judgment" that limiting USF to large ILECs would provide "more bang for the buck" than distributing any USF to rural CLECs. *Id*. at 8-9. This defense fails on several levels.

Contrary to the FCC's claim, RICA never argued that "section 214(e)(2) requires that the statute's universal service principles be served only by providing support for multiple ETCs in one area." Resp. Add'l USF Br. at 5. An ETC is not entitled to USF support solely by virtue of being an ETC. Rather, RICA's point was that a blanket right of first refusal for Price Cap ILECs would thwart local competition from rural CLECs in violation of the Act. In. Br. at 9-10. The FCC "must see to it that *both* universal service and local competition are realized; one cannot be sacrificed in favor of the other." *Alenco Communications, Inc. v. FCC*,

[1] Petitioners' Uncited Joint Universal Service Fund Additional Issues Brief is cited herein as "In. Br." and the Federal Respondents' Uncited Response to the Joint Universal Service Fund Additional Issues Brief is cited as "Resp. Add'l USF Br. "

201 F.3d 608, 615 (5th Cir. 2000) (emphasis in original). This conclusion follows from the Act's core goal "to end local telecommunications monopolies and engender competition in local telecommunications markets." *Verizon N., Inc. v. Strand*, 309 F.3d 935, 939 (6th Cir. 2002). Section 214(e) contemplates designation of multiple ETCs in a single area, reinforcing the Act's local competition-promoting objective.

Nor do petitioners misunderstand that the Act's universal service provisions protect consumers, not providers. Resp. Add'l USF Br. at 6. The neutrality rule seeks to minimize disparities in USF treatment favoring "one provider over another," e.g. favoring ILECs over CLECs. It does this not to protect individual competitors, as such, but to ensure that "no entity receives an unfair competitive advantage *that may skew the marketplace or inhibit competition*." *Universal Service Order*, ¶ 48 (emphasis added). Stated differently, the Act's goal of promoting local competition is not to benefit individual providers, but to benefit consumers through local competition. Favoring Price Cap ILECs over rural CLECs in distributing critical USF support because doing so will produce more "bang for the buck" flouts both the FCC's own competitive neutrality principle and the statute's directive that it "end local monopolies," *Verizon N., Inc. v. Strand, supra*, 309 F.3d at 939, not perpetuate them.

Implicitly acknowledging that its competitive neutrality principle does not permit it to disregard the impact of its *Order* on rural CLECs altogether, Respondents argue that the FCC has not excluded rural CLECs from USF eligibility, it has only put in place a limited five-year right of first refusal. Resp. Add'l USF Br. at 4. This "interim rule, they argue, is entitled to substantial deference." *Id*. The notion that its rule is only temporary and that the court should accord it less scrutiny should be rejected out of hand.

The Rule is not interim, but final and includes a five-year ROFR for Price Cap ILECs. The issue here is whether that ROFR can be squared with the competitive neutrality principle the FCC claims to be applying. That principle obligates the FCC to demonstrate that it has *minimized* treatment disparities among carriers. But a five-year ROFR for Price Cap ILECs *exacerbates* those disparities. The telecommunications and broadcast industries the FCC regulates have long been characterized by continuous and rapid technological change. *Nat'l Broadcasting Co. v. U.S*. 319 U.S. 190, 219 (1943); *MCI Telecommunications Corp. v. AT&T Co*., 512 U.S. 218, 235 (1994). There is nothing "interim" about giving ILECs a five-year clear path; it is a competitive death sentence for rural CLECs in the dynamic telecommunications industry.

Finally, the Commission earns no judicial pass for exercise of its "predictive judgment" that granting Price Cap ILECs an exclusive ROFR would advance universal service because rural CLECs cannot deploy broadband as readily. The statute forbids it that policy choice, requiring it, instead, to promote local competition with ILECs. *Allenco*, *supra*.

The FCC's conclusion, moreover, that Price Cap ILECs, not rural CLECs, could and would expand broadband is not a "predictive judgment" at all, much less one entitled to deference. Respondents assert that these ILECs, with a large existing wireline presence "capable of supporting broadband," are better able to extend broadband to rural areas. Resp. Add'l USF Br. at 8. The record, however, demonstrates that existing Price Cap ILEC facilities simply are not upgradable to meet the broadband quality conditions set in the *Order*. See In. Br. at 13. Thus, these ILECs must replace, not simply upgrade their existing facilities, eliminating the advantage over rural CLECs the Commission simply presumes but does not substantiate.

The FCC's determination that Price Cap ILECs will better advance rural broadband also contradicts its own prior determination that rural CLECs are more likely to do so. In. Br. at 12-13 (citing *Access Charge Reform*, 16 FCC Rcd 9923, ¶ 65 (2001)). The FCC's *Order* itself never mentions its earlier determination, much less explains its about face. On brief, Respondents ignore the *Access Charge Reform* order altogether, claiming instead that petitioners are "[r]elying on comments filed more than a decade ago." Resp. Add'l USF Br. at 8. But it is the

Commission that relied on those public comments in fashioning its *Access Charge Reform* order, an order it has never disavowed. Doing so on brief is prohibited *post hoc* rationale, "though by subtraction of old reasons rather than addition of new ones." *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 353 (D.C. Cir. 1985). *See also Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006).

Nor, finally, is the FCC's determination that it will get more "bang for the buck" by granting Price Cap ILECs an exclusive ROFR salvaged by Respondents' explanations that rural CLECs get relatively little current high cost support relative to price cap carriers ($25 million vs. $1 billion), Resp. Add'l USF Br. at 10, or that price cap carriers are able to serve "95 percent of the Nation's access lines" with only 25 percent of high cost support. *Id*. These latter points are *non-sequiturs*—statistics, not justifications for the ROFR. More high cost support, in absolute dollars, goes to price cap carriers than rural CLECs because they serve far more customers. They receive only 25 percent of *all* high cost support, not because they are the most efficient at serving rural customers, but for the opposite reason – most of the territory they serve is not high cost. There is simply no connection between these percentages and the likelihood that Price Cap ILEC ROFR will better promote the deployment of broadband to rural customers.

II. MANDATORY REFERRAL TO A FEDERAL-STATE JOINT BOARD UNDER §410(C) IS A PREREQUISITE TO FCC ICC ACTIONS.

Quoting §410(c), Respondents concede that the trigger for a mandatory referral is "any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking." Resp. Add'l USF Br. at 12. Obviously, the Order is the product of "a notice of proposed rulemaking." However, Respondents contend that the rulemaking that led to the *Order* did not regard a separation of inter- and intrastate costs. *Id*., at 13.

That contention cannot withstand even casual scrutiny. The subject rulemaking clearly "regard[ed] the jurisdictional separation of inter- and intrastate costs." Indeed, the agency acknowledges that the underlying rulemaking "sought comment on the implications of the jurisdictional separations process." *Order* ¶932. In the NPRM the Commission said that although it was evaluating separations changes in a separate proceeding:

> For the recovery mechanisms discussed below, we seek comment on how each approach may affect and be affected by the existing separations process and any future separations reform. Specifically, we seek comment on whether the recovery mechanisms under consideration here would affect the costs currently allocated to intrastate categories. Parties should address these and any other issues relevant to the relationship between a recovery approach and the separations process.

Connect America Fund NPRM, 26 FCC Rcd. 4554, ¶563.

These words make clear the FCC was establishing a proceeding "regarding" separations, therefore a §410(c) referral was mandatory. Second, the *Order* specifically requires: "Any carrier seeking additional recovery will be required to conduct a separations study to demonstrate the current use of its facilities." *Order* ¶932.

Moreover, the new rules also unquestionably "regard" both inter- and intrastate costs. The *Order* combines intra- and interstate revenue recovery via the newly formed ARC, even though it did not create any related and required corresponding changes to specific cost allocation rules. Cost recovery, or revenues, is integrally tied to cost allocation because under *Smith* and *Crockett*, the relative jurisdictional costs must be recovered somewhere. Likewise, the *Order* established new changes to the USF recovery mechanism via a new rule added to the chapter of the Commission's rules entitled "Jurisdictional Separations Procedures" -- 47 C.F.R. §36.621(a)(5). That rule states that "study area unseparated loop costs may be limited annually pursuant to a schedule announced by the Wireline Competition Bureau." This rule allows the Commission's staff to make unilateral changes to the level of combined inter- and intrastate - loop costs allowed for recovery from the federal universal service program and therefore affects the relative amounts of costs to be recovered from the interstate and intrastate jurisdictions.

Respondents nonetheless argue that not all of its Part 36 rules affect jurisdictional separations. Resp. Add'l USF Br. at 13. While it might be possible that some rules contained in Part 36 do not involve jurisdictional separations, rules dealing with USF in Part 36 unquestionably affect separation of costs between jurisdictions. Prior Part 36 rules governing the USF were in fact adopted as part of a jurisdictional separations proceeding based on a Joint Board recommendation made under §410(c). *Amendment of Part 67 of the Comm'n's Rules & Establishment of a Joint Bd.*, 96 F.C.C.2d 781 (1984). The Commission's subsequent decision to place an indexed "cap" on USF distributions, similar to the cap rule adopted in the *Order*, was referred to a joint board pursuant to §410(c) as well. *In the Matter of Amendment of Part 36 of The Commission's Rules And Establishment of a Joint Board*, CC Docket No. 80-286, 1993 FCC LEXIS 6555, ¶¶32-33 (1993), *adopted in Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 80-286, Report and Order, 9 FCC Rcd 303 (1993*); see also Fed.-State Joint Bd. on Universal Serv.*, 12 FCC Rcd. 8776, ¶282 (1997). Section 36.603, cited by Petitioners, which also affects costs that must be recovered in state rates, was itself adopted after a Federal-State referral. *Multi-Association Group (MAG) Plan*, 16 FCC Rcd. 19613 (2001). The FCC offers no principled basis for why some Part 36 limitation rules require referral to a joint board under §410(c) while others do not. Since the Part 36 rules implemented in the Order in fact have a direct impact on jurisdictional separations processes, referral to a joint board under section 410(c) was required and should be mandated by the court.

Respondents miss the point of Petitioners' related *Smith v. Illinois Bell Telephone*, 282 U.S. 133 (1930), and arbitrary and capricious arguments.[2] Resp. ICC Br. at 47-54. Petitioners demonstrated that the *Order* either requires interstate costs to be effectively recovered through intrastate ratemaking in violation of *Smith* and separations rules, or not recovered at all. Respondents do not address this argument. Respondents cannot contend both that intra- and inter-state costs will be recovered by federal mechanisms (the ARC and CAF) and that no separations changes were established. Resp. Add'l USF Br. at 14; Resp. ICC at Br. 47. Likewise, the FCC contention, Resp. Add'l USF Br. at 13-14, that the Order did not change jurisdictional allocations, only prohibited carriers from recovering their costs, is a significant unconstitutional takings issue.

Smith v. Illinois and *Crockett Telephone* remain relevant because Respondents did adopt rules "regarding" inter- and intra-state costs. *Southwestern Bell*, relied on in Resp. Add'l USF Br. is inapposite because here Respondents did

[2] Indeed, Respondents fail to explain why downward trends in access revenues or its predictive judgment that rural LECs will be able to recover their costs justify the FCC's departure from prior precedent and abandonment of rate-of-return regulation. *See* Pet. ICC Br. at 49-57.

more than simply determine the amount of USF to be provided; they also altered the rules determining whether certain costs were recoverable at all in the interstate jurisdiction.

The FCC cannot avoid the statute simply by ignoring the impact of its rules on cost recovery and therefore the allocation of costs. In these circumstances, a §410(c) referral to the Federal-State Joint Board was mandatory.

III. THE FCC HAS FAILED TO JUSTIFY ITS REFUSAL TO MODIFY ETC OBLIGATIONS.

Respondents argue that the FCC was under no obligation to address Petitioners' continuing obligations as ETCs in areas where they can no longer receive support due to the presence of an "unsubsidized competitor," because nothing in the Act requires that an "eligible" carrier actually receive support. Resp. Add'l USF Br. at 17-18. This assertion raises hair-splitting to a new height. If the FCC will not permit any carrier to receive any high-cost support for serving an area, saying that formerly eligible carriers are still "eligible" in those areas relieves the word of all meaning.[3] More importantly, the response completely misses the point: where there are unsubsidized competitors and no support is

[3] Respondents' further argument that Petitioners do not "need" universal service support to provide service in areas served by unsubsidized competitors, Resp. Add'l USF Br. at 19, is a red herring. For purposes of this section, Petitioners assume *arguendo* that the FCC was justified in denying support to these areas; the issue is what legal consequences flow from that denial.

available, there is no justification for burdening any provider with ETC service obligations.

Respondents' argument that unsubsidized competitors will not necessarily engage in cream-skimming, Resp. Add'l USF Br. at 20, is addressed in Pet. Uncited Principal USF Reply Brief at 26.

Finally, contending that Petitioners are not really harmed by their continuing service obligations because they might obtain relief from them sometime in the future by means of a deferred further rulemaking proceeding, a waiver, or forbearance, Resp. Add'l USF Br. at 20-22, Respondents insist that the FCC has discretion as to when and how to address this issue. Our initial brief showed that there are substantial limits on this discretion, In. Br. at 28, and the Respondents simply have not addressed those issues in their brief.

IV. THE *ORDER* AS APPLIED TO ALLBAND COMMUNICATIONS COOPERATIVE IS UNCONSTITUTIONAL, CONTRARY TO OR INCONSISTENT WITH FCC'S STATUTORY USF DUTIES AND AUTHORITY, VIOLATES ESTOPPEL AND CONTRACT LAW PRINCIPLES, AND IS ARBITRARY AND CAPRICIOUS.

Respondent (Resp. Add'l USF Br. at 22-31) fails to respond adequately to Allband's constitutional, statutory, and other claims (In. Br., pp 29-38).

Respondents ignore Allband's circumstances. Due to the Act's 1996 Amendments establishing the USF to encourage universal service in rural areas (Section 254), Allband was formed in 2003 as a non-profit cooperative to serve its unserved territory. In 2004-2005, Allband: was granted necessary licenses and ETC status by the Michigan Public Service Commission (MPSC), was recognized as an ILEC by the FCC to enable USF support,[4] and received approval of a 20-year $8 million loan from the RUS. By late 2006, Allband: was allowed to join the National Exchange Carrier Association (NECA) pools, was recognized by the Universal Service Administration Company (USAC) as an ILEC to receive USF support, undertook its plant construction, and activated its first customer. In January 2008, Allband also began receiving USF High Cost Loop Support from USAC/NECA.

On July 28, 2008, Allband received an investigatory inquiry from a Congressional Committee as being within the top ten recipients of USF per-line subsidies (given Allband's newly constructed undepreciated plant and recent commencement of service), requiring extensive responses by Allband.

The FCC *Order* followed in 2011, imposing an arbitrary per-line cap and an adverse benchmark regression rule limiting USF support, despite Allband's rulemaking filings asserting that such action would financially destroy Allband and its RUS loans. Allband thereafter filed its Court appeal, and an exhaustively documented Waiver Petition, and a Petition for Stay of the *Order* with the FCC.

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[4] *In the Matter of Allband Communications Cooperative Petition for Waiver of Sections 69.2(hh) and 69.601 of the Commission's Rules in WC Docket No. 05-174*, released August 11, 2005 (Allband Order).

On July 25, 2012, Allband was granted only a 3-year waiver, in lieu of Allband's requested longer-term waiver, despite FCC findings that Allband was a lean, efficient, well managed entity.[5] On August 24, 2012, Allband filed at the FCC an Application for Review of the waiver order seeking relief relative to the per-line cap and benchmarking regression rule.

Despite the above circumstances, Respondents assert that Allband's argument that the *Order* effects an unconstitutional taking of property "…is not ripe for judicial review" because the Allband was granted a three year waiver, and "the opportunity for a further waiver at the end of that period." Resp. Add'l USF Br. at 25-26. Respondents thus admit the FCC has *not* granted Allband a waiver of its *Order* for the remaining life of Allband's RUS loans. Thus, the *Order* still imperils Allband and its RUS loans.

Respondent's attempt (Resp. Add'l USF Br. at 30-31) to explain away the unconstitutional and arbitrary nature of the *Order* as applied to Allband on the basis that the *Order* provides a waiver remedy is illusory. The existence of a discretionary waiver provision does not cure the constitutional infirmities of the *Order* as applied to Allband. *FCC v. Fox Television Stations, Inc,* 132 S. Ct. 2307, 2318 (2012) a " 'policy of forbearance'… does not suffice to make the issue

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[5] *Allband Communications Cooperative Petition for Waiver of Certain High-Cost Universal Service Rules*, 27 FCC Rcd 8310 (WCB 2012) July 25, 2012.

moot… the due process protection against vague regulations 'does not leave [regulated parties]… at the mercy of *noblesse oblige*.' ")

Respondents' answer (Resp. Add'l USF Br. at 26) to Allband's claim of unlawful retroactive action also misses the mark. Respondents assert the *Order* "is entirely prospective: it does not mandate the return of USF disbursements already made, but only reduces or eliminates federal subsidies going forward."[6] Respondents ignore the reality that Allband's 20-year RUS loans were granted and utilized to construct new plant to provide service, in reliance upon the existing USF revenue stream as security for the duration of the loans. Allband's constructed plant cannot now be removed. Allband cannot retroactively alter the loan terms. The *Order* may not now retroactively renege upon or ignore this nexis between the RUS loans and the needed USF revenue stream to secure payment of the loans.

Allband's retroactivity claims meet all of the criteria of *Landgraf v. USI Film Products, Inc*, 511 U.S. 244 (1994), summarized by Respondent FCC. Resp. Add'l USF Br. at 26. Allband's claims also mirror the situation found unlawful in *United States v Winstar*, 518 U.S. 839 (1996). The FCC could have readily fashioned the *Order* (or a waiver) to apply prospectively to new RUS loans or capital investment decisions, as Allband advocated, to avoid a retroactive

[6] To clarify, the USF subsidy is funded by ratepayers through rate surcharges, whereas Allband's RUS loans are funded or backed by federal taxpayers.

destructive impact upon Allband, its customer services, and its RUS loans, with no compromise to the *Order's* stated objectives. The FCC has refused to do so.

Respondents erroneously assert that Allband has waived certain arguments by not filing a petition for reconsideration of the *Order*. Resp. Add'l USF Br. at 26-28. To the contrary, Allband has preserved its claims by filing: an appeal of the *Order* herein, a Petition for Waiver of the *Order,* a Petition for Stay of the *Order* at the FCC, and an Application for Review of the July 25, 2012 waiver order before the FCC. The assertion that yet further procedural hurdles are prerequisite for Allband to preserve its claims and remedies are specious.

Respondents also erroneously assert (Resp. Add'l USF Br. at 26-28) that Allband waived its argument that the *Order*, including its provision for a benchmarking rule, is impermissibly vague, in violation of the Fifth Amendment (and Due Process) as supported by *Fox*, 132 S. Ct. at 2307. The FCC's various orders amending the benchmarking rule demonstrate the ever-changing nature of this rule, providing no predictability for Allband. The major foundational problem remains that the arbitrary per-line cap and unclear benchmarking limits for USF reimbursements renders the *Order* unlawful as applied to Allband.

Respondents (Resp. Add'l USF Br. at 28) assert that Allband's unconstitutional bill of attainder argument fails "because the prohibition … applies to legislative acts and not to … administrative agencies, like the FCC." However, a major genesis of the *Order* was a legislative investigation by a major Congressional Committee having FCC oversight authority, to which Allband was required to produce an exhaustive submission. The *Order* has now unlawfully continued the Congressional Committee's direct focus on Allband, the only entity that will be financially destroyed by the *Order*. One may ask -- if the Constitution forbids even Congress from imposing an unconstitutional and punitive bill of attainder against one or a few entities, then should not the same prohibition apply to the FCC as a Congressional established agency when it implements the punitive action as an outgrowth of the Congressional activity? At the very least, the *Order* as applied to Allband unnecessarily and irrationally targets Allband in a manner defying Due Process and Equal Protection principles.

Respondents erroneously assert (Resp. Add'l USF Br. at 28-30) that the FCC's *Order* does not constitute an unlawful breach of (or interference with) Allband's loan contracts with the United States, entered into by the RUS, a sister agency to the FCC. Respondents assert that the FCC was not a party to the loan agreement, and "never represented that Allband would receive federal universal support for the duration of its RUS loan." To the contrary, all involved (FCC, RUS, Allband, MPSC, and NECA/USAC) knew through all phases of Allband's creation, loan commitments, and plant construction that the USF revenues for the life of the RUS loans constituted a *sine qua non* prerequisite. Respondents cannot now credibly deny or minimize the substantial reliance by Allband (and the above entities) upon the USF revenues. Just like the conduct found unlawful in *United States v Winstar*, 518 U.S. at 839, the *Order* purports to retroactively change the USF program (as applied to Allband) in a manner that destroys the financial security (the USF revenue stream) underlying Allband's RUS loans. The *Order* constitutes an action by the United States breaching or interfering with Allband's contractual relationship associated with its RUS loan commitments.

Respondents erroneously disclaim (Resp. Add'l USF Br. at 29-30) Allband's assertion that the *Order* as applied to Allband should be reversed on estoppel principles. Allband readily meets the cited criteria for estoppel under the cases cited, *Tsosie v. U.S.*, 452 F.3d 1161, 1166 (10^{th} Cir. 2006), and *Wade Pediatrics v. Dept of Health and Human Services*, 567 F.3d 1202, 1203 (10^{th} Cir. 2009). Through Allband's active participation in the rulemaking process, and Allband's numerous filings over several years, the FCC clearly knew of Allband's (and RUS's) reliance on the USF revenues to secure the RUS loans. Allband (and the RUS) also could never have foreseen the *Order* or its unreasonable result. By its *Order*, the FCC has undertaken "affirmative misconduct" by unnecessarily and punitively targeting Allband, instead of fashioning an order (or issuing a waiver order) to avoid unlawful adverse impacts upon Allband.

Respectfully submitted,

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On behalf of the Joint Petitioners
listed on the cover of this filing[7]

[7] Rural Independent Competitive Alliance joins only in Section I; the Arizona Corporation Commission, Choctaw Telephone Company, National Association of Regulatory Commissioners, National Telecommunications Cooperative Association, Rural Telephone Service Co. *et al*. and Vermont Public Service Board join only in Section II; CenturyLink, Inc. and Consolidated Communications Holdings, Inc. join only in Section III; and Allband Communications Cooperative joins only in Section IV of this brief.

CERTIFICATE OF COMPLIANCE

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

1. This filing complies with the type-volume limitation of the Third Briefing Order and Summary of Deadlines for Uncited Briefing because it contains 4,013 words, excluding the parts of the filing exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing 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 filing has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

3. All required privacy redactions have been made.

4. This filing was scanned for viruses with Sophos Anti-Virus Program, last updated on June 12, 2013, and according to the program is free of viruses.

/s/ *Harvey L. Reiter*

June 12, 2013

CERTIFICATE OF SERVICE

I hereby certify that, on June 12, 2013, per the Court's order of October 18, 2012, I caused the foregoing document to be electronically filed with the Court via e-mail. I also certify this document was furnished through ECF electronic service to all parties in this case through a registered CM/ECF user. This document is available for viewing and downloading on the CM/ECF system.

/s/ *Harvey L. Reiter*

June 12, 2013

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