

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

**AMICUS BRIEF OF THE STATE MEMBERS
OF THE
FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE
IN SUPPORT OF PETITIONERS**

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GLOSSARY

ABC Plan	“America’s Broadband Connectivity” Plan filed on July 29, 2011 by the USTelecom Association (sponsored by AT&T, Verizon, CenturyLink, Windstream, Frontier, FairPoint Communications, the National Telecommunications Cooperative Association (NTCA), OPASTCO, and the Western Telecommunications Alliance (WTA)) ¹
APA	The federal Administrative Procedure Act
ARC	Access Recovery Charge
Board, Joint Board	The Federal-State Joint Board on Universal Service consisting of three FCC commissioners, four State Members who are State regulatory commissioners (currently from Pennsylvania, Nebraska, South Carolina, and Vermont) nominated by the National Association of Regulatory Utility Commissioners and approved by the FCC, and one State-appointed utility consumer advocate (currently the Colorado Consumer Counsel) nominated by the National Association of State Utility Consumer Advocates. 47 U.S.C. §254.
CLEC	Competitive Local Exchange Carrier
ETC	Eligible Telecommunications Carrier
ICC	Intercarrier Compensation
IXC	Interexchange (Long Distance) Carrier
LEC	Local Exchange Carrier

¹ JA at 2986, 2988, 3002, 3006, 3034, 3068; 3137 & 3142.

<i>Order</i> ²	The Report and Order and Further Notice of Proposed Rulemaking appealed from
RLEC Plan	A plan filed by the Joint Rural Associations (NECA, NTCA, OPASTCO, and WTA) on April 18, 2011 ³
SLC	Subscriber Line Charge
State Members	State Members of the Federal-State Joint Board on Universal Service
State Plan	State Members' Comments filed May 2, 2011 ⁴
USF	State or the federal Universal Service Fund

² *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (JA at 390-1141). The FCC often promulgates rules by means of what it refers to as “orders” although the APA defines an “order” as “the whole or a part of a final disposition in a matter other than rule making but including licensing.” 5 U.S.C. §551(6); *see also id.* §551(7) (defining “adjudication” as “agency process for the formulation of an order”).

³ JA at 2141-2273.

⁴ JA at 2654-2830.

INTEREST OF *AMICI CURIAE*

The State Members constitute a majority of the Joint Board, tasked by Congress to ensure federal universal service policies adhere to articulated principles and to recommend redefinitions of supported services. 47 U.S.C. §§254(b), 254(c)(1)(C), 254(c)(2).

ARGUMENT

I. The *Order* Violates Dual Sovereignty.

Contrary to dual sovereignty, the *Order* establishes a zero ICC rate for intra-state access charges and requires State implementation and enforcement.⁵ This “economic dragooning [of] the States with no real option but to acquiesce”⁶ is not enticement but direct and indirect coercion⁷ that “conscript[s] state [utility commissions] into the [FCC’s] national bureaucratic army.”⁸

II. Expansive Interpretation Of §251(b)(5) Overreaches.

Again overreaching,⁹ the FCC usurps intrastate access ratemaking, using §251(b)(5) to rationalize, “That which is not forbidden is permitted.”¹⁰ Agencies have no inherent powers, only those granted by Congress which “does not alter the

⁵ *Order* ¶813 (JA at 667).

⁶ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. ___, 132 S.Ct. 2566, 2605 (2012).

⁷ *Id.*, 132 S.Ct. at 2602.

⁸ *Id.*, 132 S.Ct. at 2607.

⁹ Lyons, *Tethering the Administrative State: The Case Against Chevron Deference for FCC Jurisdictional Claims*, 36 J. Corp. L. 823 (2011).

¹⁰ *Order* ¶765 (JA at 643).

fundamental details of a regulatory scheme in vague terms or ancillary provisions.”¹¹ Federal statutes must *clearly and manifestly* supplant state regulation.¹²

Section 251(b)(5) is neither jurisdiction-conferring nor FCC-empowering, obligating only LECs. The FCC may establish a “pricing methodology,”¹³ but States must “implement that methodology, determining the concrete result in particular circumstances.”¹⁴ “Bill-and-keep” predetermines a zero rate.

III. Due Process And APA §553 Notice Requirements Were Violated.

A. Due Process Precluded *Ex Parte* Contacts.

This rulemaking intended to cull small companies¹⁵ by depriving them of vital terminating access revenues, conferring a billion dollar annual windfall on wireless carriers and wireline IXCs and effectively forcing fire sale consolidations.

¹¹ *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 464 (2001); *American Bus Ass’n v. Slater*, 231 F.3d 1, 8 (statutory silence on granting a power is not an ambiguity but a *denial* of that power) (Sentelle, J., concurring).

¹² *Bates v. Dow Agrosiences LLC*, 544 U.S. 431, 449 (2005); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

¹³ *Order* ¶773 (JA at 647).

¹⁴ *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 384 (1999).

¹⁵ “[I]t may not serve the public interest for consumers across the country to subsidize the cost of operations for so many very small companies,” NPRM at ¶217 (http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-13A1.pdf at 76).

Not merely “valuable privileges”¹⁶ were at stake but property *rights* in “extremely compelling circumstances,”¹⁷ and pending adjudications.¹⁸

Ex parte contacts may be banned in informal proceedings “involv[ing] competitive interests of great monetary value [that] confer[] preferential advantages,”¹⁹ and where “the very existence of [owners is] in jeopardy attack[ing] them at a vital spot.”²⁰

B. Opportunity For Comment Was Inadequate.

The largest carriers filed the ABC Plan, including a sophisticated computer model made available only on the industry consultant’s computer in Cincinnati for compensation.²¹

¹⁶ *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959).

¹⁷ *Vt. Yankee Nuclear Corp. v. NRDC*, 435 U.S. 519, 543 (1978).

¹⁸ *Order* ¶975 & n.2044; ¶1419 (JA at 757, 879).

¹⁹ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 62 (D.C. Cir. 1977) (Mackinnon, J., concurring).

²⁰ *Morgan v. United States*, 304 U.S. 1, 20 (1938).

²¹ JA at 3780, 3842; 3775.

Three days later, the FCC *redirected* the rulemaking by requesting,²² within only 34 days, without focusing the inquiry, comments on a divergent, factually-clashing panoply of complex proposals—principally the ABC Plan, and the RLEC and State Plans.

“Paying-to-comment” in Cincinnati within the abbreviated period was intolerable. The time allotted to assess and comment was grossly inadequate.

On October 7, 17, and 19, 2011, FCC staff inundated the record with an astounding array of supplemental materials.²³ The FCC relied on them to justify “bill-and-keep.”²⁴

No real opportunity to reply was afforded because the important was indistinguishable from the merely peripheral.

C. Extensive Industry 11th Hour *Ex Parte* Contacts Prevented Comment.

Industry *ex parte* contacts intensified up to the Sunshine period (beginning October 21). For example:

²² JA at 349-368; JA at 377 (reply comments filing extension).

²³ JA at 3847, 3918, 3947.

²⁴ *Order* ¶¶742-743 & nn.1295-1296 (JA at 632-634); ¶744 & n.1304 (JA at 634-635).

Two October 21 Verizon *ex parte* filings revealed discussions with a Commissioner about the “reform order *now circulating* [and the ABC Plan].”²⁵

The *Order* reflects Verizon’s October 20 *ex parte*²⁶ giving holding companies discretion to allocate ARC amounts,²⁷ and AT&T’s five October 21 *ex parte* filings²⁸ describing discussions about ICC, high-cost support through the USF mechanism, SLC upper limit, and ETC obligations.

No one could react adequately and timely to these filings. The Commission voted only six days later, but *Order* drafting continued for 22 days, ample time to incorporate these one-sided suggestions.²⁹

The rule should be vacated.

²⁵ JA at 4004 & 4005 (emphasis added).

²⁶ JA at 3980.

²⁷ *Order* ¶910 (JA at 717).

²⁸ JA at 3982, 3983, 3984, 3992;
<http://apps.fcc.gov/ecfs/document/view?id=7021716987>.

²⁹ *Action for Children’s Television v. FCC*, 564 F.2d 458, 476 (D.C. Cir. 1977) (*ex parte* contacts vitiate agency informal rulemaking if they may have materially influenced the action ultimately taken).

Respectfully submitted,

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2. Pursuant to Fed. R. App. P. 32(a)(7)(C), this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) 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. Pursuant to Fed. R. App. P. Rule 29(c)(5), I certify that (1) the text of this brief was authored by me as the State Chairman of the Federal-State Joint Board on Universal Service; (2) no other party's counsel authored this brief in whole or in part; and (3) no party or party's counsel (or any other person) contributed money intended to fund preparation or submission of this brief.
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/s/ James H. Cawley

July 17, 2013

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I hereby certify that, on July 17, 2013, I caused the foregoing document to be sent electronically to FCC_briefs_only@ca10.uscourts.gov. I also certify this document will be furnished through ECF electronic service to all parties in this case through the Clerk's Office of the 10th Circuit. This document is available for viewing and downloading on the CM/ECF system.

/s/ James H. Cawley

July 17, 2013