IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NO. 11-9900

IN RE: FCC 11-161

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

RESPONSE OF THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA TO THE PETITION FOR REHEARING EN BANC OF ALLBAND COMMUNICATIONS COOPERATIVE AS TO ISSUES RAISED IN THE ADDITIONAL UNIVERSAL SERVICE FUND ISSUES BRIEFS

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Pursuant to the panel's order dated July 10, 2014, respondents Federal Communications Commission ("FCC") and United States of America submit this response to the petition for rehearing en banc filed by Allband Communications Cooperative ("Allband"). As we explain below, Allband has not come close to satisfying the stringent standard for rehearing of the panel's May 23, 2014 decision. *See In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014). The Court therefore should deny Allband's petition.

BACKGROUND

I. In the order on review, the FCC comprehensively reformed two of its largest and most complex regulatory programs: universal service and

intercarrier compensation. *Connect America Fund*, 26 FCC Rcd 17663 (2011) ("*Order*") (JA at 390). As relevant to Allband's claims, the *Order* adopted reforms to support voice and broadband services more efficiently through federal universal service subsidies. In particular, to implement "responsible fiscal limits" on high-cost loop support subsidies, the *Order* imposed on all eligible telecommunications carriers a presumptive per-line loop support cap of $250 per month – to be phased in over three years. *See Order* ¶¶274, 279 (JA at 492, 493); 47 C.F.R. § 54.302.

Relatedly, the *Order* also established a waiver process for carriers that can demonstrate that "reductions in current support levels would threaten their financial viability, imperiling service to consumers in the areas they serve." *Order* ¶539 (JA at 566); *see generally id.* ¶¶539-544 (JA at 566-69). With respect to waivers of the $250 per-line cap, the FCC specifically warned carriers that it "d[id] not anticipate granting … waivers" of an "undefined duration," but rather "expect[ed] carriers to periodically re-validate any need for support above the cap." *Id.* ¶278 (JA at 493).

II. Shortly after the *Order* was released, Allband sought a waiver of the $250 per-line cap. *See Allband Communications Cooperative Petition for Waiver of Certain High-Cost Universal Service Rules*, 27 FCC Rcd 8310 (Wireline Comp. Bur. 2012) ("*Allband Waiver Order*"). After evaluating

Allband's request pursuant to its delegated authority, *see Order* ¶544 (JA at 569), the FCC's Wireline Competition Bureau ("WCB") found "good cause to grant a waiver of [the $250 per-line cap] for three years." *Allband Waiver Order* ¶10. "During this time," WCB "expect[ed] Allband to actively pursue any and all cost-cutting and revenue generating measures in order to reduce its dependency on federal high cost [universal service fund ("USF")] support." *Id.* ¶14. The Bureau also acknowledged Allband's assertion that it had received loans from the U.S. Department of Agriculture's Rural Utilities Service ("RUS") to aid in constructing its telecommunications facilities, and that it would not be able to make full annual loan payments without a waiver of the cap. *Id.* ¶¶6, 7. WCB noted, however, Allband's stated "willingness … to work with RUS to rework its loan terms." *Id.* ¶14.

WCB "d[id] not find it to be in the public interest to grant Allband an unlimited waiver," as Allband had requested. *Allband Waiver Order* ¶13. Rather, "consistent with the Commission's direction" in the *Order*, WCB found that it should "reassess [Allband's] financial condition to determine whether a waiver remains necessary in the future." *Id.* (citing *Order* ¶278 (JA at 493)). To that end, WCB set forth the showing Allband would be

required to make in the event that it seeks further relief at the end of the three-year waiver period. *Id.* ¶16.[1]

III. On judicial review of the *Order*, Allband made several attacks on the $250 per-line cap on high-cost loop support. It asserted that the cap would effect an unconstitutional taking of its property. Additional Universal Service Fund Issues Principal Brief ("Br.") at 33-34. It argued that the rule violated due process by retroactively reversing USF programs and funding levels that it had come to rely upon. Br. at 32, 33, 35-36. Allband claimed that the per-line cap constitutes an unlawful breach of its loan agreement with RUS, citing *United States v. Winstar*, 518 U.S. 839 (1996). Br. at 37. It contended that the cap "should be reversed as applied to Allband based on estoppel principles." Br. at 35. And it asserted, finally, that the cap violates statutory sufficiency principles, Br. at 31 (citing 47 U.S.C. §§ 254(b)(5) & 254(e)), and arbitrarily "fails to recognize that the destructive impacts upon Allband … are wholly unnecessary to achieve" the *Order*'s stated goals, Br. at 35-36.

[1] Allband sought full Commission review of the WCB's Order, asking the FCC to extend the waiver of the $250 per-line cap until 2026, when Allband's RUS loans are scheduled to be fully repaid. Petition of Allband Communications Cooperative for Waiver of Part 54.302 and the Framework to Limit Reimbursable Capital and Operating Costs, WC Docket No. 10-90 *et al.* (filed Aug. 24, 2012). That petition remains pending before the agency.

IV. A panel of this Court rejected each of these claims, several of which it also found Allband had inadequately briefed. *See In re: FCC 11-161*, 753 F.3d at 1089-93 (slip op. at 131-38). With respect to Allband's takings/confiscation claim, the panel noted that the FCC's regulation of USF *subsidies* is "not reasonably comparable" to the regulatory "*rate*-setting" involved in the cases upon which Allband predicated its argument. *Id.* at 1091 (slip op. at 135) (emphasis added). In any event, the panel found Allband's takings claim to be unripe because it had received a three-year waiver of the $250 per-line cap and had an opportunity to seek an additional waiver at the end of that period. *Id.* at 1091-92 (slip op. at 135).

The panel also rejected Allband's suggestion – argued both as a matter of due process and contract law – that it had a legally protected reliance interest in existing USF subsidy levels; instead, the panel stressed, the FCC had "never promised Allband or any other carriers that they would continue to receive USF funding indefinitely." *Id.* at 1092 (slip op. at 137). The panel noted, in any event, that the Commission had taken Allband's individual circumstances into effect by issuing the three-year waiver. *Id.* And it rejected Allband's one-sentence estoppel claim as "inadequately briefed" and, on the merits, baseless. *Id.* (slip op. at 136-37).

Finally, the panel credited the FCC's explanation that "there were systemic inefficiencies in the existing USF funding system" that justified the changes the agency had adopted, including the $250 per-line cap. *Id.* at 1093 (slip op. at 137-38). Accordingly, regardless of Allband's individual circumstances – which the waiver otherwise reasonably takes into account – there was no basis for Allband's claim that the per-line cap violated the statute or was arbitrary and capricious. *Id.*

V. Allband now seeks rehearing en banc of the panel's decision – arguing that the panel overlooked or incorrectly rejected some of its arguments. *See* Rehearing Petition at 1-2.

ARGUMENT

The standard for granting rehearing en banc is rigorous: That extraordinary procedure is reserved for cases in which "the panel decision conflicts with a decision of the United States Supreme Court or of [this] court," Fed. R. App. P. 35(b)(1)(A), or cases involving "one or more questions of exceptional importance." Fed. R. App. P. 35(b)(1)(B); *see also* 10th Cir. Rule 35.1(A) ("A request for en banc consideration is disfavored."). Accordingly, this Court rarely grants rehearing – and Allband has entirely failed to justify rehearing under this stringent standard. In particular, Allband has established neither an "exceptional" issue to be reconsidered, nor a

conflict between the panel's decision and a decision of the Supreme Court or this Court.[2]

I. Allband's petition fails from the start because its sole challenge – to the application of the $250 per-line high-cost subsidy cap to its own particular circumstances – is not ripe for review. Since Allband currently has a three-year waiver of that cap (and may seek an extension of that waiver), the cap does not currently apply to Allband at all, and the harms Allband contends will befall it under the cap are entirely speculative. Thus, even if the panel had overlooked or misconstrued some point of fact or law in its decision – and it did not – any such error could not possibly constitute the type of "exceptional[ly] importan[t]" issue that is a prerequisite to en banc rehearing.

The panel in this case expressly held that the waiver rendered Allband's takings-based challenge to the cap unripe. *In re: FCC 11-161*, 753 F.3d at 1091-92 (slip op. at 135). Allband's other substantive challenges to the cap are unripe for the same reason: Any harm to Allband from the cap is entirely speculative because the cap currently does not – and may never –

[2] Allband does not ask for panel rehearing, but it would not qualify for relief under that exacting standard either. Panel rehearing is not available unless "a significant issue has been overlooked or misconstrued by the court." 10th Cir. Rule 40.1(A); *see also* Fed. R. App. P. 40(a)(2).

apply to Allband. "A claim is not ripe for adjudication if," as here, "it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted); *see also Utah v. U.S. Dep't of Interior*, 210 F.3d 1193, 1198 (10th Cir. 2000) (challenges predicated on harms that were "contingent, not certain or immediate," were unripe). Finally, although Allband suggests that the Court should not defer review of the cap because of the expense of seeking a further waiver (Rehearing Petition at 13), it is well settled that the potential expense of participating in administrative proceedings does not satisfy threshold justiciability requirements. *See FTC v. Standard Oil Co. of California*, 449 U.S. 232, 243-45 (1980).

II. On the merits, there is no substance to Allband's claim that the panel overlooked or misconstrued issues presented to it.

a. Allband contends that the panel ignored its argument – barely framed in its opening merits brief (*see* Br. at 37) – that limiting its subsidy to $250 per line would breach the government's contractual obligations. Rehearing Petition at 8-10 (citing *United States v. Winstar Corp.*, 518 U.S. 839). But although the panel did not cite *Winstar*, it did expressly address the argument that Allband presented – specifically citing the page of Allband's opening brief that referred to that case. *In re: FCC 11-161*, 753 F.3d at 1092

(slip op. at 137) (citing Br. at 37). *Winstar* and related cases (*e.g.*, *Resolution Trust Corp. v. FSLIC*, 25 F.3d 1493 (10th Cir. 1994)) hold that the federal government may be liable when it breaches a regulatory contract; but the predicate of such cases is that a regulatory contract, in fact, exists. The panel correctly found that there was no such contract here, because "the FCC, in its pre-order USF funding system, never promised Allband or any other carriers that they would continue to receive USF funding indefinitely." *In re: FCC 11-161*, 753 F.3d at 1092 (slip op. at 137); *see also id*. at 1064 (slip op. at 80) (the Communications Act does not "guarantee[]" that USF "disbursements will be the same from year to year").[3]

Nor does the $250 per-line cap unlawfully abridge any non-contractual reliance interest on Allband's part. Contrary to Allband's repeated assertions, the per-line cap does not constitute unlawful retroactive rulemaking – *i.e.*, a rule that "impair[s] rights a party possessed when he acted, increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed," *Landgraf v. USI Film Prods., Inc.*, 511 U.S.

[3] As the Commission noted in its response brief, RUS also "did [not] agree to provide Allband universal service support (indeed, it had no authority to do so)." Federal Respondents' Final Response to the Additional Universal Service Fund Issues Brief of Petitioners at 29. Allband identifies no federal government contractual commitment – in its loan agreement with RUS, or elsewhere – that the FCC's USF reforms could even arguably violate.

244, 280 (1994). Where the cap regulation applies – and it does not apply to Allband while it enjoys a waiver – the rule is entirely *prospective*: It does not mandate the return of USF disbursements already made, but only potentially reduces federal subsidies going forward. *See In re: FCC 11-161*, 753 F.3d at 1072-73 (slip op. at 95-97) (rejecting other petitioners' retroactivity arguments).

Moreover, while prospective regulation must give adequate attention to steps taken in reasonable reliance on prior rules, there is no presumption against such "secondary" retroactive effects. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring); *see also DirecTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997). And even if there were some basis to Allband's argument that it has a reasonable reliance interest in the old USF regime that would be negatively affected by immediate application of the new per-line cap, the panel properly found that "the FCC has effectively considered Allband's unique situation by granting Allband's petition for waiver and authorizing Allband to seek an additional waiver at the end of three years." *In re: FCC 11-161*, 753 F.3d at 1092 (slip op. at 137).

b. The panel also properly rejected Allband's insubstantial due process arguments. With respect to Allband's "takings-type" claim that the per-line

cap violates the Due Process Clause, the panel correctly determined that the claim was "not yet ripe because the FCC has exempted Allband for a period of three years …, and has also afforded Allband the opportunity to seek an additional waiver at the end of that time period." *In re: FCC 11-161*, 753 F.3d at 1091-92 (slip op. at 135). Under established Supreme Court and Tenth Circuit precedent, no takings claim is ripe until a party has invoked the waiver process that the agency made available and been denied. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985); *Alto Eldorado P'ship v. County of Santa Fe*, 634 F.3d 1170, 1175-77 (10th Cir. 2011).

On the merits, the panel also reasonably distinguished the takings issue presented in cases such as *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 690 (1923), from the argument Allband presented here. *Bluefield* and similar cases involved the constitutionality of regulators' limitations on the *rates* utilities may charge to customers, whereas here Allband challenged the level of government *subsidies* it could receive. The panel properly found that the subsidy cap directly at issue here "is not reasonably comparable to a rate-setting order." *In re: FCC 11-161*, 753 F.3d at 1091 (slip op. at 135). Allband's criticism of the panel's statement (*id.*) that Allband is not a "public utility" does not affect

the correctness of its holding on the takings question, and presents no exceptional issue for en banc rehearing. *See* Rehearing Petition at 12-13.[4]

In its merits brief, Allband cited *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012), to support its contention that the so-called "benchmarking rule" was impermissibly vague in violation of the Due Process Clause. *See* Br. at 32-33.[5] The FCC subsequently repealed the benchmarking rule, and Allband no longer presses its vagueness challenge – acknowledging that it is moot. *See* Rehearing Petition at 11 n.5.

Instead, Allband now argues that language in *Fox* stating that an *existing* rule or policy must provide fair notice of what it requires supports a completely different proposition – *i.e.*, that due process prohibits the Commission from adopting even an entirely clear and prospective *new* per-line cap rule because Allband did not anticipate such a change years earlier. *See* Rehearing Petition at 13-14. The vagueness analysis in *Fox* has no application to this very different argument. Moreover, although it is of course true that new rules generally must be preceded by Federal Register

[4] Contrary to its apparent assumption (Rehearing Petition at 13-14), Allband also has no substantive due process right to a particular level of subsidy. *Cf. Atkins v. Parker*, 472 U.S. 115, 129 (1985).

[5] The benchmarking rule limited reimbursable capital and operating expenses in the formula used to determine high-cost loop subsidies for rate-of-return carriers. *See Order* ¶214 (JA at 470); 47 C.F.R. § 36.621(a)(5).

notice under the Administrative Procedure Act (*see* 5 U.S.C. § 553(b)), here there is no question that the FCC "issued a NPRM and allowed petitioners to file comments thereto." *In re: FCC 11-161*, 753 F.3d at 1091 (slip op. at 134). Allband does not contend that the NPRM failed to provide adequate notice of the possibility of the $250 per-line cap.[6]

c. Allband asserts, finally, that the $250 per-line cap on USF high-cost support is both arbitrary and contrary to the "sufficiency" principles of 47 U.S.C. § 254. *See* Rehearing Petition at 16-19. These claims also present no issues for en banc rehearing.

The Commission adopted the cap to establish "responsible fiscal limits on universal service support," having determined that greater support levels "drawn from limited public funds … should not be provided without further justification." *Order* ¶274 (JA at 492). As the panel recognized, such measures (among others) were designed to address "systemic inefficiencies" – undisputed by Allband – "in the existing USF funding system that required

[6] The panel correctly rejected Allband's estoppel claim as inadequately briefed; that argument amounted to a single sentence, without citation or analysis, in Allband's opening brief (Br. at 35). *See In re: FCC 11-161*, 753 F.3d at 1092 (slip op. at 136); *see also Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998) ("Arguments inadequately briefed in the opening brief are waived."). In any event, the panel also properly found Allband's estoppel argument to be without merit, because the FCC had made no representation to Allband that could support such a claim. *In re: FCC 11-161*, 753 F.3d at 1092 (slip op. at 136-37).

a complete alteration of that system." *In re: FCC 11-161*, 753 F.3d at 1093 (slip op. at 137-38); *see*, *e.g.*, *Order* ¶287 (JA at 496) (noting that the USF reforms are "targeted at eliminating inefficiencies and closing gaps" in the system). At the same time, the Commission structured its universal service reforms to mitigate the financial impact on small, rate-of-return carriers like Allband. Thus, for example, "rate-of-return carriers will not necessarily be required to build out to and serve the most expensive locations within their service area," *Order* ¶207 (JA at 468), but rather must offer broadband only upon "reasonable request," *id.* ¶¶206-07 (JA at 467-68). The *Order* also "exempted the most remote areas" from new broadband service obligations, *id*. ¶533 (JA at 564-65), and "provide[d] rate-of-return carriers … access to a new explicit recovery mechanism," which guarantees "stable and certain revenues that the current intercarrier system can no longer provide," *id.* ¶291 (JA at 496-97). Finally, the Commission established a waiver process to take into account the special circumstances of carriers for which application of the FCC's general USF rules may be unwarranted. *Id.* ¶¶278-79 (JA at 493), 539-44 (JA at 566-69).

Surveying the FCC's overall package of reforms, including the $250 per-line cap, the panel reasonably rejected claims that the *Order* provides insufficient support to achieve the purposes of the universal service statute.

See In re: FCC 11-161, 753 F.3d at 1054-60 (slip op. at 59-72). With respect to rural carriers, in particular, the panel determined that the Commission's analysis was "both reasoned and reasonable" and "entirely consistent with the overarching universal service principles outlined in 47 U.S.C. § 254(b), including the principle that '[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.'" *Id.* at 1071 (slip op. at 92) (quoting 47 U.S.C. § 254(b)(5)).

Allband's only response to the panel's reasonable holding essentially reduces to the claim that, to be lawful, the FCC's per-line cap must produce sufficient financial support to carriers everywhere and in all circumstances. To the contrary, courts repeatedly have held that it is reasonable for the FCC to rely on a waiver process to address unforeseen shortfalls in USF subsidies that may arise in specific instances.[7] Particularly given that Allband has successfully invoked such a process here, the panel correctly rejected Allband's remaining APA and statutory claims. *In re: FCC 11-161*, 753 F.3d at 1092-93 (slip op. at 137-38).

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[7] *See Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1095 (D.C. Cir. 2012); *Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 65 (D.C. Cir. 2011); *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1104 (D.C. Cir. 2009); *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 622 (5th Cir. 2000).

CONCLUSION

Because Allband has not satisfied the stringent standard for en banc rehearing, its petition should be denied.

Respectfully submitted,

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August 7, 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: FCC 11-161	NO. 11-9900

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7) and this Court's order dated January 15, 2014, I hereby certify that the accompanying Response of the Federal Communications and the United States of America to the Petition for Rehearing En Banc of Allband Communications Cooperative as to Issues Raised in the Additional Universal Service Fund Issues Briefs in the captioned case contains 3,384 words.

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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 submission was scanned for viruses with Symantec Endpoint Protection, version 11.0.7200.1147, updated on August 7, 2014 and according to the program is free of viruses.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: FCC 11-161

CERTIFICATE OF SERVICE

I, Laurence N. Bourne, hereby certify that on August 7, 2014, I electronically filed the foregoing Response of the Federal Communications Commission and the United States of America to the Petition for Rehearing En Banc of Allband Communications Cooperative as to Issues Raised in the Additional Universal Service Fund Issues Brief 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.

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