[Oral Argument Not Yet Scheduled]

No. 16-1170
Consolidated with No. 16-1219

In the United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

On Petition For Review Of Final Agency Action Of
The Federal Communications Commission
81 Fed. Reg. 33,026 (May 24, 2016)

STATE PETITIONERS' OPENING BRIEF

BRAD D. SCHIMEL
Wisconsin Attorney General

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE
17 West Main Street
P.O. Box 7857
Madison, WI 53707-7857
tseytlinm@doj.state.wi.us
(608) 267-9323

Counsel for Wisconsin

MISHA TSEYTLIN
Solicitor General
Counsel of Record

RYAN J. WALSH
Chief Deputy Solicitor General

LUKE N. BERG
Deputy Solicitor General

[additional counsel listed inside]

ADDITIONAL COUNSEL

LESLIE RUTLEDGE
Arkansas Attorney General
LEE RUDOFSKY
Arkansas Solicitor General
NICHOLAS J. BRONNI
Deputy Solicitor General
323 Center Street, Suite 200
Little Rock, AR 72201
nicholas.bronni@arkansasag.gov
(501) 682-6302
Counsel for Arkansas

CLARE E. KINDALL
Assistant Attorney General
Department Head - Energy
Office of the Attorney General
10 Franklin Square
New Britain, CT 06051
(860) 827-2683
Clare.Kindall@ct.gov
Counsel for Connecticut Public Utilities Regulatory Authority

LAWRENCE G. WASDEN
Idaho Attorney General
700 West Jefferson Street #210
PO Box 83720
Boise, ID 83720-0010
Counsel for Idaho

CURTIS T. HILL, JR.
Indiana Attorney General
THOMAS M. FISHER
Indiana Solicitor General
302 W. Washington Street
IGC-South, Fifth Floor
Indianapolis, IN 46204
Counsel for Indiana

BILL SCHUETTE
Michigan Attorney General
AARON D. LINDSTROM
Michigan Solicitor General
300 W. Grant Blvd. #10-200
P.O. Box 30202
Lansing, Michigan 48909
Counsel for Michigan

FRANK F. FARMER
Special Assistant Attorney General
Assigned to:
Mississippi Public Service Commission
Brandon Presley, Chairman
Cecil Brown, Vice-Chairman
Samuel F. Britton, Commissioner
501 N. West St.
Suite 201-A
Jackson, MS 39201
Counsel for Mississippi Public Service Commission

TIM FOX
Montana Attorney General
DALE SCHOWENGERDT
Montana Solicitor General
215 North Sanders Street
Helena, MT 59601
DaleS@mt.gov
Counsel for Montana

DOUGLAS J. PETERSON
Nebraska Attorney General
LEONARD JAY BARTEl, #56749
Assistant Attorney General
Nebraska Bar No. 17247
2115 State Capitol
Lincoln, NE 68509-8920
(402) 471-2682
jay.bartel@nebraska.gov
Counsel for Nebraska

MARTY J. JACKLEY
South Dakota Attorney General
CRAIG MARTIN EICHSTADT
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
(605) 773-3215
Counsel for South Dakota

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN
Utah Solicitor General
350 North State Street, #230
P.O. Box 142320
Salt Lake City, UT 84114-2320
(801) 538-9600
Counsel for Utah

KYLE LANDIS-MARINELLO
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609-1001
(802) 828-1361
Counsel for Vermont Public Service Board

CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES

Pursuant to Circuit Rule 28(a)(1), State Petitioners represent as follows:

A. Parties, Intervenors, and *Amici Curiae*

These cases involve the following parties:

Petitioners:

No. 16-1219: Wisconsin, Arkansas, Idaho, Indiana, Michigan, Montana, Nebraska, South Dakota, Utah, Connecticut Public Utilities Regulatory Authority, Mississippi Public Service Commission, and Vermont Public Service Board

No. 16-1170: National Association of Regulatory Utility Commissioners

Respondents:

Respondents are the Federal Communications Commission and the United States of America.

Intervenors and *Amici Curiae*:

The National Association of State Utility Consumer Advocates intervened on behalf of the Petitioners in No. 16-1170.

B. Rulings Under Review

These petitions challenge the Federal Communications Commission's Third Report and Order, Further Report and Order, and Order on Reconsideration, *In re Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support, Connect America Fund* ("*Order*"), released on April 27, 2016, 31 FCC Rcd. 3962 (reproduced in the Joint Appendix at JA__) and published in the Federal Register on May 24, 2016, 81 Fed. Reg. 33,026 (reproduced in the Joint Appendix at JA__).*

C. Related Cases

The *Order* has not previously been reviewed by this Court or any other court. Other than the petitions for review consolidated here, the State petitioners are unaware of any other related cases pending before this Court or any other court.

* Citations to certain paragraphs of the order refer to the version published in the Federal Register, which differs somewhat from the order released on April 27, 2016. Citations to Commissioners' dissenting statements are to pages of the April 27 order.

TABLE OF CONTENTS

TABLE OF AUTHORITIES[†]

Cases

[†] *Authorities upon which we chiefly rely are marked with asterisks*

Statutes

Other Authorities

GLOSSARY

ETC	Eligible Telecommunications Carrier - shorthand for a carrier designated under 47 U.S.C. § 214(e) as eligible to receive subsidies from the Universal Service Fund, including Lifeline
FCC	Federal Communications Commission
Lifeline	A federal program that provides a monthly discount for low-income subscribers of certain communication services

JURISDICTIONAL STATEMENT

State Petitioners seek review of the Federal Communications Commission's ("FCC") *Order,* published in the Federal Register on May 24, 2016. This petition was timely filed within 60 days, on June 30, 2016. 28 U.S.C. § 2344. This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

ISSUE PRESENTED

1. Did FCC violate Section 214(e), 47 U.S.C. § 214(e), by usurping the States' statutory authority to "designate" which telecommunications carriers are eligible to receive Lifeline subsidies?

STATUTES AND REGULATIONS

Relevant provisions are reproduced in the Addendum.

INTRODUCTION

FCC's "Lifeline" program provides a monthly discount to low-income subscribers of certain communication services, including broadband services. Under Section 214(e), Congress provided that this must be a cooperative federalism regime, under which "State commission[s] shall . . . designate" the carriers eligible to receive subsidies. 47 U.S.C. § 214(e)(2). This provision reflects Congress' recognition that the States better understand which carriers within their borders can most effectively provide these vital services.

In the *Order* at issue in this case, FCC contravenes Section 214(e)'s plain terms by asserting, for the first time, the authority to determine unilaterally which carriers will receive Lifeline subsidies, as applied to broadband carriers. While the agency dubbed what it sought to do as "preemption" of state law, what it actually attempted to do was *amend* federal law by regulatory fiat to increase its own authority, while taking away the States' statutory rights. This Court should vacate this portion of the *Order* and restore to the States their congressionally-defined role within the Lifeline program.

STATEMENT OF THE CASE

A. FCC's "Lifeline" program provides a monthly discount on certain communication services for low-income subscribers. Lifeline is funded through the Universal Service Fund, to which every telecommunications carrier contributes. 47 U.S.C. § 254(d). Lifeline and the other support programs further the Communications Act of 1934's goal of "universal service" for all Americans. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1098 (D.C. Cir. 2009).

B. When FCC first created Lifeline in 1985, the agency designed the program to be administered "in cooperation with state regulators." *Commission Order on Universal Service* ("*May 1997 Order*"), 12 FCC Rcd. 8776, ¶ 329 (May 7, 1997). Participation was "at the option of the state commissions." *FCC Final Rule*, 50 Fed. Reg. 939-01, ¶ 6 (Jan. 8, 1985). For the States that developed a qualifying assistance program, FCC "match[ed] state assistance for low income households" by "waiv[ing]" a certain "subscriber line charge." *Federal-State Joint Board Recommended Decision and Order*, 59 Rad. Reg. 2d 551, ¶ 35. (Dec. 9, 1985). The States were responsible for "verif[ying] [consumers'] eligibility." *Commission Decision and Order*, 59 Rad. Reg. 2d 634, ¶ 9

(Dec. 27, 1985) (establishing 47 C.F.R. § 69.203(g)(1) (1996)). FCC hoped that State participation would allow Lifeline to "respond appropriately to local conditions." *Id.* ¶ 8.

In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), Congress "codified the commitment to advancing the availability of telecommunications services to low-income consumers," including parts of the Lifeline program. *Unpublished Order*, 31 FCC Rcd. 3962, 3970 (April 27, 2016) (JA__). FCC promptly modified the Lifeline program "to make it consistent with the goals of the 1996 Act." *May 1997 Order*, ¶ 332. Ratifying and strengthening Lifeline's federal-state structure, the Telecommunications Act established that "only" carriers "designated as eligible telecommunications carrier[s]" ("ETCs") are "eligible to receive . . . universal service support," 47 U.S.C. §§ 254(e), 214(e)(1), including under the Lifeline program. An ETC must "offer" and "advertise" the supported services "throughout the service area for which the designation is received." *Id.* § 214(e)(1).

Most relevant to this case, the Telecommunications Act assigns to the States "the primary responsibility for deciding which carriers qualify as ETCs." *WWC Holding Co. v. Sopkin*, 488 F.3d 1262, 1271 (10th Cir.

2007). Specifically, Subsection 214(e)(2)—entitled "Designation of [ETCs]"—provides that "[a] State commission shall . . . designate a common carrier that meets the requirements of paragraph (1) [offering and advertising the supported services throughout the area] as an [ETC] for a service area designated by the State commission." "Upon request," the States "designate more than one common carrier as an [ETC]," as long as the carrier "meets the requirements of paragraph (1)" and designation is "consistent with the public interest, convenience, and necessity." 47 U.S.C. § 214(e)(2). This gives to the States first-line authority over ETC designations.

The only relevant exception to the State's authority to "designate" carriers as ETCs is an exceedingly narrow one, and applying to only "common carrier[s] . . . that [are] not subject to the jurisdiction of a State commission." 47 U.S.C. § 214(e)(6).[1] This exception was not in the Telecommunications Act. Congress added it a year later, Pub. L. No. 105-125, 111 Stat. 2540 (1997), when it realized its "oversight" that certain

[1] The only other exception allows either FCC or a State to *force* an ETC designation on a carrier if "no common carrier will provide the [supported] services . . . to an unserved community." 47 U.S.C. § 214(e)(3).

carriers were not within the jurisdiction of any state commission, "most notably, some carriers owned or controlled by native Americans." *Commission Order on Universal Service* ("*2000 Order*"), 15 FCC Rcd. 12208, ¶ 98 (2000) (quoting statements of Representative Bliley and Senator McCain); *Dissenting Statement of Commissioner Ajit Pai* ("*Pai Dissent*"), 31 FCC Rcd. 3962, 4175 (April 27, 2016) (JA__).

C. In the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009), Congress charged FCC with developing a "National Broadband Plan," "the purpose of which is 'to ensure that all people of the [U]nited [S]tates have access to broadband capability.'" *In re FCC 11-161*, 753 F.3d 1015, 1035 (10th Cir. 2014) (quoting 123 Stat. 115, 516). FCC responded by, as relevant here, proposing to expand Lifeline to cover broadband. FCC, *Connecting America: The National Broadband Plan*, at 172–73 (March, 17, 2010), https://goo.gl/4pQ6RC. Unchallenged aspects of the *Order* carry out that proposal, adding broadband as a Lifeline-supported service. *Order*, ¶ 6 (JA__).

D. Purporting to "streamline the . . . designation process," the *Order* announced a new, entirely separate track for qualifying as a Lifeline-only

provider, *with only FCC, and not the States, designating carriers as broadband ETCs*. *Order*, ¶ 191 (JA__).[2] These FCC-only designated broadband ETCs are eligible to receive Lifeline subsidies for broadband service, but do not have any "voice service obligations." *Order*, ¶ 322 (JA__). The States retain power to designate ETCs for voice services, but no longer have any authority to designate broadband-only ETCs. *Order*, ¶¶ 199, 248–51 (JA__). State-designated ETCs must provide supported voice services, and are eligible, but not required, to provide Lifeline-subsidized broadband service. *Order*, ¶¶ 260, 286 (JA__).

Seeking to justify this violation of the States' statutory rights, FCC purported to "preempt states from exercising [their] authority" under Subsection 214(e)(2). *Order*, ¶¶ 203, 213 (JA__). For authority to "preempt" the States' regulatory jurisdiction, FCC cited only two other provisions of the Act, neither of which mention preempting or otherwise limiting State authority under the Lifeline program. *Order*, ¶¶ 214–22 (JA__) (citing §§ 254(b) and 706 of the Telecommunications Act (codified at 47 U.S.C. §§ 254(b) and 1302, respectively)).

---

[2] The *Order* refers to this new designation as "Lifeline Broadband Provider," "LBPs," or "LBP ETCs."

Two Commissioners vigorously dissented, explaining that FCC has "no power" to "bypass the statutorily-set state role in designating ETCs, as set forth in section 214." *Pai Dissent*, at 4175 (JA__); *Dissenting Statement of Commissioner Michael O'Rielly* ("*O'Rielly Dissent*"), 31 FCC Rcd. 3962, 4182 (April 27, 2016) (JA__). As for the alleged "preemption," both Commissioners explained that FCC had no authority to "overcome the clear lines of section 214." *Pai Dissent*, at 4175 (JA__); *O'Rielly Dissent*, at 4182 (JA__) ("[M]ake believe [preemption] 'authority' [cannot] be[ ] used to trump a real provision."). The *Order* simply "rewr[ote]" the Act, *Pai Dissent*, at 4175 (JA__), "absolutely mangl[ing] section 214" in the process, *O'Rielly Dissent*, at 4182 (JA__). The dissenting Commissioners also stressed that "cut[ting] state commissions out of the Lifeline designation process" was a "disaster in the making," because the States have "the best track record" at "guard[ing] against waste, fraud, and abuse." *Pai Dissent*, at 4168 (JA__) (listing examples); *accord* Letter of 25 Federal Legislators to FCC ("*Legislators' Letter*"), 1 (June 16, 2016), https://goo.gl/wIsBU3 (JA__); NARUC ex parte letter to FCC, 2–3 (March 21, 2016), https://goo.gl/XrYs72 (JA__).

STANDARD OF REVIEW

This Court must set aside agency rules that are "not in accordance with law" or are "in excess of statutory . . . authority[ ] or limitations." 5 U.S.C. § 706(2)(A), (C). As relevant here, where an FCC order is contrary to a specific provision in the Communications Act, the order must be vacated as unlawful. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986).

SUMMARY OF ARGUMENT

I. Under the plain terms of Subsection 214(e)(2), state commissions "shall . . . designate" ETCs. 47 U.S.C. § 214(e)(2). FCC steps in to designate only those carriers "not subject to the jurisdiction of a State commission." *Id.* § 214(e)(6). That narrow exception applies only to certain tribal carriers, as well as situations where the States themselves have denied to their state commissions the authority to take part in the Subsection 214(e)(2) designation process. Multiple courts, as well as FCC, have repeatedly confirmed this straightforward understanding of Section 214(e) as granting the States the primary role as ETC designators. *See, e.g.*, *WWC Holding Co.*, 488 F.3d at 1271; *In re FCC 11-161*, 753 F.3d at 1066; *Tex. Office of Pub. Util. Counsel v. FCC*

("*TOPUC*"), 183 F.3d 393, 417 (5th Cir. 1999); *2000 Order*, ¶ 7; *Commission Order on Universal Service* ("*2005 Order*"), 20 FCC Rcd. 6371, ¶ 61 (2005). As those precedents explain, Section 214(e) forges a "partnership between the federal and state governments." *Qwest Corp. v. FCC*, 258 F.3d 1191, 1203 (10th Cir. 2001). And in that partnership, the States have proved indispensable: they are the "best cops on the beat" when it comes to identifying "waste, fraud, and abuse" in the Lifeline program. *Pai Dissent*, at 4168 (JA__).

Now that Lifeline supports broadband, the state commissions unambiguously have the right, under Subsection 214(e)(2), to designate broadband ETCs. In Petitioner States, the state commissions have authority to conduct the Subsection 214(e)(2) designation, which is all that Section 214(e) requires. The *Order* claims that authority for FCC, not the States, but that is contrary to Section 214(e)'s plain text.

II. In the Order, FCC sought to justify its violation of the States' authority under Subsection 214(e)(2) by claiming the power to "preempt" the States' designation authority. What the agency sought to do is not preemption at all; rather, FCC attempted to remove from the States their *federally-granted* authority to designate ETCs. But "[a] federal [agency]

cannot preempt federal law." *U.S. ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 n.4 (8th Cir. 1998). Nor can it "override Congress" to "confer power upon itself," since "agenc[ies] literally ha[ve] no power to act . . . until Congress confers power upon [them]." *La. Pub. Serv. Comm'n*, 476 U.S. at 374–75.

The two provisions that FCC cited as support for its "preemption" approach—Section 254(b) and Section 706—do not come close to giving the agency the authority to "preempt" a federal statute. *Order*, ¶¶ 214–22 (JA__) (citing 47 U.S.C. §§ 254 and 1302). Neither provision mentions either preemption or designation of ETCs, under the Lifeline program or otherwise. Both contain little more than broad language about expanding broadband access generally. Such aspirational language does not conflict in any way with Congress' decision, reflected in Section 214(e), that the best way to provide individuals with low-cost services is by state-based designation. But even if there was somehow a conflict between these vague provisions and Section 214(e)'s specific terms, Section 214(e)'s provisions would prevail because the general terms in Section 254(b) and Section 706 cannot overcome the *specific* statutory command found in Section 214(e). *See Verizon v. FCC*, 740 F.3d 623, 649–

50 (D.C. Cir. 2014) (applying this principle to Section 706); *TOPUC*, 183 F.3d at 421 (same as to Section 254(b)).

STANDING

The States have standing to assert the infringement of their authority as part of a cooperative federalism regime. *See West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004). The States also "have a sovereign interest in 'the power to create and enforce a legal code,'" *TOPUC*, 183 F.3d at 449 (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982)), an interest with which the *Order* interferes. Finally, the *Order*'s "preemption" of the States' designation authority also injures their sovereign interest "in ensuring service quality standards for local service." *TOPUC*, 183 F.3d at 418.

ARGUMENT

I. The Order Is Unlawful Because Section 214(e) Gives To The States—Not To FCC—The Primary Authority To "Designate" Broadband ETCs

A. The States have "the primary responsibility for deciding which carriers qualify as ETCs to be eligible for subsidies from the federal universal service fund." *WWC Holding*, 488 F.3d at 1271. This follows inexorably from Section 214(e)'s plain terms. Section 214(e) specifies

which providers may participate: only "carrier[s] designated as [ETCs] . . . shall be eligible to receive . . . support." 47 U.S.C. §§ 214(e)(1), 254(e). Then, under the heading "[d]esignation of [ETCs]," Section 214(e) provides that "*State commission*[*s*] *shall* . . . *designate*" carriers "that meet[ ] the requirements of paragraph (1) as [ETCs]" for "service area[s] designated by the State commission[s]." *Id.* § 214(e)(2) (emphasis added). Finally, in a paragraph titled "[c]ommon carriers not subject to State commission jurisdiction," Section 214(e) creates a narrow exception allowing for FCC designation of an ETC "[i]n the case of a common carrier . . . that is not subject to the jurisdiction of a State commission." *Id.* § 214(e)(6).

This statutory text is clear: "State commission[s] shall . . . designate" carriers, *id.* § 214(e)(2), except in the very narrow circumstances where the Subsection 214(e)(6) exception—discussed below, *infra* pp. 18–21—applies. This is how these provisions have been understood by courts, *see WWC Holding*, 488 F.3d at 1271; *In re FCC 11-161*, 753 F.3d at 1066 ("[Section] 214(e) authorizes state commissions to decide which entities will be designated as ETCs and, relatedly, to determine the service areas served by those ETCs."); *TOPUC*, 183 F.3d

at 417 ("[Section] 214(e)(2) governs the designation of eligible carriers by state commissions."); and FCC itself, *see, e.g.*, *2005 Order*, ¶ 61 (Subsection 214(e)(2) "gives states the primary responsibility to designate ETCs"); *2000 Order*, ¶ 7; 21 FCC Rcd. 2803, ¶ 7 n.19 (2006); 22 FCC Rcd. 20295, ¶ 69 (2007); 23 FCC Rcd. 12463, ¶ 124 (2008); 24 FCC Rcd. 3381, ¶ 5 (2009); 25 FCC Rcd. 1641, ¶ 3 (2010); 26 FCC Rcd. 2672, ¶ 23 (2011); 27 FCC Rcd. 1706, ¶ 3 (2012); 29 FCC Rcd. 14393, ¶ 3 (2014). Even the Notice of Proposed Rulemaking for the proposed *Order* acknowledged that "[s]ection 214(e)(2) assigns primary responsibility for designating ETCs to the states." *In the Matter of Lifeline & Link Up Reform & Modernization* ("*NPRM*"), 30 FCC Rcd. 7818, ¶ 124 n.254 (2015) (JA__).

The States' role under Subsection 214(e)(2) is essential to the smooth and efficient functioning of the federal subsidy program. As FCC has acknowledged, "section 214(e)(2) demonstrates Congress's intent that state commissions evaluate local factual situations in ETC cases and exercise discretion." *2005 Order*, ¶ 61. "[A]s the entities most familiar with the service area for which ETC designation is sought, [the States] are particularly well-equipped to determine their own ETC eligibility

requirements." *Id.* For similar reasons, FCC has also "decline[d] to mandate that state commissions adopt [FCC's] requirements for ETC designations." *Id.*

This state-driven structure furthers important policy goals. It promotes a productive "partnership between the federal and state governments to support universal service." *Qwest Corp.*, 258 F.3d at 1203. And the arrangement also "makes sense in light of the states' historical role in ensuring service quality standards for local service." *TOPUC*, 183 F.3d at 418. Because the States are "most familiar with the service area for which ETC designation is sought," *2005 Order*, ¶ 61, Congress designed the "ETC designation process [to be] inherently local and fact-specific in nature," *WWC Holding*, 488 F.3d at 1278.

Congress' decision to give the States a robust role in this cooperative regime has proven prescient. The States "thus far have the best track record" at "guard[ing] against waste, fraud, and abuse" in the Lifeline program, *Pai Dissent*, at 4168 (JA__) (listing examples), ably discharging their "historical role" of ensuring quality service and monitoring (up close) provider compliance, *TOPUC*, 183 F.3d at 418. Oklahoma, for example, uncovered an "alarming" number of duplicate or

fake subscriber information in Icon Telecom's Lifeline subscriber lists. *See* Complaint Against Icon Telecom, Corp., Inc., Comm'n of Okla. (filed Aug. 13, 2013), https://goo.gl/5pPN6L. The company and its owner were eventually criminally charged, after collecting $58 million in Lifeline subsidies over three years. *See* FBI Press Release, April 2, 2015, https://goo.gl/v8I7N9. In 2009, Florida created a "special verification procedure[ ]" to "drop[ ] the Lifeline credit when a prepaid wireless phone fails to record any usage over a 60-day period." *Federal-State Joint Board Recommended Decision*, 25 FCC Rcd. 15598, ¶ 82 (2010). This procedure removed "71,000 prepaid wireless customers . . . from the Florida Lifeline rolls," *id.*, and "saved the universal service fund $8,582,760" over "a *six-month* period" "for *one* Florida provider," Comments from the Florida Public Service Commission, FCC Dkt. No. 11-42, 10 n.2 (Aug. 31, 2015) (emphases added), https://goo.gl/jjEK47 (JA__). Eliminating the state oversight that Congress intended will only "increase the risk of waste, fraud, and abuse in the program." *Legislators' Letter* (JA__).

B. The exception to the States' authority to designate ETCs—which allows FCC to designate carriers "not subject" to a state commission's "jurisdiction"—is narrow. 47 U.S.C. § 214(e)(6). Congress added this

exception in 1997, when it realized its "oversight" that certain carriers were not within the jurisdiction of any state commission, "most notably, some carriers owned or controlled by native Americans," *2000 Order*, ¶ 98 (quoting statements of Representative Bliley and Senator McCain); *Pai Dissent*, at 4175 (JA__). The "legislative history" and "statutory framework" make clear "that Congress, in enacting section 214(e)(6), did not intend to alter the basic framework of section 214(e), which gives the state commissions the principal role in designating eligible telecommunications carriers under section 214(e)(2)." *2000 Order*, ¶ 104. Specifically, "[t]he amendment 'does nothing to alter the existing jurisdiction [of] state commissions.'" *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Commc'ns Act* ("*Dec. 1997 Order*"), 12 FCC Rcd. 22947 n.4 (Dec. 29, 1997) (quoting legislative history). Instead of "restrict[ing] or expand[ing] the existing jurisdiction of State commissions," it merely "provide[s] a means for the designation of a carrier over which a state commission lacks jurisdiction." *2000 Order*, ¶ 104.

The Subsection 214(e)(6) exception applies to certain tribal carriers over which state commissions lack jurisdiction[3] and to situations where the State exercised its constitutional right to deny to its commission jurisdiction to implement the designation authority granted to the State under Subsection 214(e)(2).[4] The scope of a state commission's jurisdiction over carriers thus "derive[s] almost exclusively from interpretations of state law." *2000 Order*, ¶ 112; *accord In re Tracfone Wireless, Inc. Petitions for Designation*, 23 FCC Rcd. 6206, ¶ 10 (2008) (dismissing carrier's petition under Subsection 214(e)(6) for designation in Florida because the Florida Public Service Commission gained jurisdiction "due to a change in Florida state law" permitting the Florida PSC to consider Subsection 214(e)(2) applications for designation). State law is significant because even "with a federal grant of authority" to designate ETCs under Subsection 214(e)(2), "a state can deny its own commission the jurisdiction to carry out the ETC designation process."

---

[3] Jurisdictional questions concerning carriers serving tribal lands are "complex" and involve "principles of tribal sovereignty, treaties, federal Indian law, and state law." *2000 Order*, ¶ 8.

[4] A State's constitutional right to decline to participate in the ETC designation program is clear in light of *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997).

Pai Dissent, at 4176 n.116 (JA__). Only where a State denies to its commission jurisdiction to designate ETCs under Subsection 214(e)(2) for non-tribal carriers, can FCC step in to "fill a void" under Subsection 214(e)(6). *2000 Order*, ¶ 105 & n.256 (agreeing with a comment) (citation omitted).

Other considerations relating to the States' regulation of the service providers at issue are irrelevant to the Section 214(e) analysis. For example, whether a State has jurisdiction to designate an ETC does not turn on the particular service offered or "the technology used to provide the [ ] service." *2000 Order*, ¶ 109. After all, "if Congress had intended to exempt particular services from the state commission designation process, it would have expressly done so in section 214(e)." *Id.* Nor does the analysis turn on whether a service is characterized as interstate or intrastate. "Congress knew how to draw a jurisdictional line in section 214, but chose not to do so outside of [section 214(e)(3)]" (the section that allows FCC or a State to *force* an ETC designation if no carrier willingly seeks one, *supra* p. 7 n.1). *Pai Dissent*, at 4175 (JA__).

C. The application of these principles to state authority to designate broadband providers as ETCs under the Lifeline program is

straightforward. Given that FCC has "amend[ed] the definition of Lifeline to include broadband Internet access service (BIAS) as a supported service in the Lifeline program," *Order*, ¶ 30 (JA__), a provider may now qualify for "universal services support" for offering broadband. 47 U.S.C. § 214(e)(1). To participate in Lifeline, the provider first must be designated as an ETC. *Id.* § 254(e). So, the carrier must ask a state commission to discharge its "primary responsibility," *WWC Holding*, 488 F.3d at 1271, of deciding whether to designate the carrier "an [ETC] for a service area designated by the State commission." 47 U.S.C. § 214(e)(2). FCC may designate under Subsection 214(e)(6) only when dealing with certain tribal carriers or if state law prohibits the state commission from designating under Subsection 214(e)(2). *See supra* p. 20.

State commissions in Petitioner States have the full authority to designate broadband providers as ETCs under Subsection 214(e)(2). This means that these commissions have the exclusive authority to do so under the law, and the Subsection 214(e)(6) exception has no application. Wisconsin law, for example, specifically reserves the Wisconsin Public Service Commission's authority to "take any action that . . . is authorized

. . . under [the Telecommunications Act]." Wis. Stat. § 196.016. Likewise, Michigan law gives the Michigan Public Service Commission "jurisdiction . . . to administer . . . all federal telecommunications laws . . . that are delegated to the state." Mich. Comp. Laws § 484.2201. The other Petitioner States similarly empower their commissions to exercise the federally delegated authority under Subsection 214(e)(2). *See, e.g.*, Ark. Code § 23-17-405(b); Ind. Code § 8-1-2.6-13(c)(5); Mont. Code § 69-3-840(1); Miss. Code § 77-3-35(2)(a); S.D. Codified Laws § 49-31-78; Vt. Stat. tit. 30, § 218(c).[5]

Accordingly, FCC's attempt to strip away the States' designation authority—and then to arrogate that authority to itself—must be vacated as violating Section 214(e)'s plain terms.

---

[5] While it is conceivable that some state commissions—in non-Petitioner States—will say that they cannot (under state law) or will not designate broadband ETCs, *see supra* p. 20, it remains the duty of carriers seeking ETC designation, under still-binding (and correct) FCC policy, "first [to] consult with the state commission" to confirm that Section 214's back-up mechanism—paragraph (e)(6)—has in fact been triggered. *2000 Order*, ¶ 7. Specifically, the provider must obtain "an affirmative statement from the state commission or a court of competent jurisdiction that the carrier is not subject to the state commission's jurisdiction." *Id.*

II. FCC Cannot Evade Section 214(e) By Purporting To "Preempt" The States' Statutory Right To Designate ETCs

A. In an effort to sidestep the clear statutory text, FCC engaged in what it described as "preempt[ion]" of the States' authority to designate ETCs. *See Order*, ¶ 202 (JA__). The agency argued that it has the unilateral authority to revoke, wholesale, state commissions' authority to designate ETCs under Subsection 214(e)(2) itself, thus triggering the previously narrow Subsection 214(e)(6) exemption. *Id.* (JA__).

This is plainly unlawful. To begin with, "preemption" does not describe at all what the *Order* aims to accomplish. "In pre-emption cases, the question is whether *state law* is pre-empted by a federal statute, or in some instances, a federal agency action." *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014) (emphasis added); *La. Pub. Serv. Comm'n*, 476 U.S. at 368–69. But Lifeline is a *federal* program and the States' right to be primary ETC designators is a right granted under federal law; after all, it is Subsection 214(e)(2) itself that gives "State commission[s]" the authority to "designate" ETCs in the first place. 47 U.S.C. § 214(e)(2). While the States have the constitutional right to decline to participate by denying their commissions jurisdiction to issue ETC designations, *see supra* p. 20, the States' right to participate is a

right under *federal law*. And, of course, "[a] federal [agency] cannot preempt federal law." *O'Keefe*, 132 F.3d at 1257 n.4. An agency can only follow or violate federal law. FCC, under the misnomer of "preemption," chose the latter.

Making matters worse, FCC not only unlawfully eliminated the States' congressionally delegated authority to designate ETCs under the mislabeled guise of "preemption," it then "confer[red that] power upon itself." *La. Pub. Serv. Comm'n*, 476 U.S. at 374. "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." *Id.* at 374–75; *see Pai Dissent*, at 4175 (JA__). But, of course, "agenc[ies] literally ha[ve] no power to act . . . until Congress confers power upon [them]." *La. Pub. Serv. Comm'n*, 476 U.S. at 374. Here, the power that FCC has sought has already been explicitly assigned to the States, not to itself.

FCC's power grab overturned Congress' "dual regulatory structure [over] the universal service program." *TOPUC*, 183 F.3d at 424; *see Legislators' Letter* (JA__). "The Telecommunications Act plainly contemplates a partnership between the federal and state governments

to support universal service." *Qwest Corp.*, 258 F.3d at 1203. This partnership affirms the States' "historic[ ] role" of patrolling the front lines. *TOPUC*, 183 F.3d at 418; *see also La. Pub. Serv. Comm'n*, 476 U.S. at 360. By cutting the States out of their central role in the Lifeline program, FCC "confuse[d] the congressionally designed interplay between state and federal regulation for impermissible tension that requires pre-emption." *See Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1300 (2016) (Sotomayor, J., concurring) (citation omitted).

B. FCC cited two provisions of the Telecommunications Act of 1996 that it believed give it authority to "preempt" the States' designation rights under Subsection 214(e)(2): Section 254(b), 47 U.S.C. § 254(b), and Section 706, 47 U.S.C. § 1302. These provisions involve "vague, general" principles for expansion of broadband use throughout the United States. *TOPUC*, 183 F.3d at 421. Neither comes close to giving FCC the far-reaching power it claims in the *Order*: not a "preemption" authority under any traditionally-understood meaning of that concept, but the power to rewrite Section 214(e) by eliminating the States' designation authority under Subsection 214(e)(2), at the agency's option. Whatever the import may be of the general language in Sections 254(b) and 706,

that language cannot overcome "a matter specifically dealt with in another part of the same enactment," *Verizon*, 740 F.3d at 649–50 (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932)); that is, the specific provision in Subsection 214(e)(2) authorizing the States to designate ETCs.

1. FCC first claimed to find authority to "preempt" Subsection 214(e)(2) in the "purposes" and "principles" of Section 254(b). *Order*, ¶¶ 214–15 (JA__). Section 254(b) provides that FCC "shall base policies for the preservation and advancement of universal service on the following principles:" "(1) Quality and rates"; "(2) Access to advanced services"; "(3) Access in rural and high cost areas"; "(4) Equitable and nondiscriminatory contributions"; "(5) Specific and predictable support mechanisms"; "(6) Access to advanced telecommunications services for schools, health care, and libraries"; and "(7) Additional principles." 47 U.S.C. § 254(b). This says nothing about preemption, and certainly does not empower FCC to override other sections of the same federal law, such as Subsection 214(e)(2). Rather, Section 254(b) simply "identifies seven principles [ ] FCC should consider in developing its policies." *TOPUC*, 183 F.3d at 421. Put another way, because Section 214(e) *specifically*

assigns the authority for ETC designation to state commissions and Section 254(b) has nothing to say about that authority, Section 214(e) controls the question of ETC designation. *Verizon*, 740 F.3d at 649–50.

The Fifth Circuit in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), rejected a similar invocation of this same provision—Section 254(b)—to override a specific statutory command. At issue in that case was FCC's "no disconnect rule," "prohibiting carriers receiving universal service support from disconnecting Lifeline services from low-income consumers who have failed to pay toll charges." *Id.* at 421. Several States argued that this rule violated Section 152(b), "which prohibits FCC regulation of *intrastate* telecommunications service." *Id.* at 421 & n.37 (describing 47 U.S.C. § 152(b)) (emphasis added). FCC responded that Section 254(b) "granted [ ] express authority" for the rule, superseding the limitations in Section 152(b). *Id.* at 421. But given that Section 254(b) contains only "aspirational language," the Fifth Circuit "decline[d] to read it as a grant of plenary power overriding other portions of the Act." *Id.* Hence Section 254(b) was insufficient to "override the limits set by [Section 152(b)]." *Id.* In the same way, the same exact "vague, general language" of Section 254(b) does not give FCC "plenary

power [to] overrid[e]" Subsection 214(e)(2)—a *specific* statutory section that allocates to the States the primary responsibility for designating ETCs.

The Supreme Court's decision in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), while not dealing with Section 254(b) in particular, also refutes FCC's approach here. The issue in *Louisiana Public Service Commission* was whether certain FCC orders "respecting the depreciation of telephone plant and equipment pre-empt[ed] inconsistent state regulation." *Id.* at 358. The States argued that Section 152(b), 47 U.S.C. § 152(b), "expressly denied FCC authority to establish depreciation practices . . . for *intrastate* telephone service." *Id.* Section 152(b) provides that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to [ ] charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." *Id.* at 370 (quoting 47 U.S.C. § 152(b)). FCC responded, *inter alia*, that contrary state regulation would "stand[ ] as an obstacle to . . . the full purposes and objectives of Congress" as expressed in Section 151. *Id.* at 369–70. But the Court found that Section 151's purposes were "naturally

reconciled" with the "limitations on FCC power contained in § 152(b)" because Congress "enact[ed] a *dual* regulatory system to achieve [its] goal[s]." *La. Pub. Serv. Comm'n*, 476 U.S. at 370. The Court also explained that, even if it were "to find [Sections 151 and 152(b)] to be in conflict, [it] would be disinclined to favor the provision declaring a general statutory purpose, as opposed to the provision which defines the jurisdictional reach of the agency formed to implement that purpose." *Id.*

FCC's reasoning here is similar to its rationale in *Louisiana Public Service Commission*, and this Court should reject it for many of the same reasons. FCC has argued here that state designation of ETCs "conflicts with . . . the universal service goals of Section 254(b)." *Order*, ¶ 215 (JA__). But state designation of ETCs is also one of Congress' objectives—as demonstrated by the plain terms of Subsection 214(e)(2)—and those objectives can clearly be achieved at the same time. Congress specifically made the *States* the default designators "to achieve [its] goal[s]." *La. Pub. Serv. Comm'n*, 476 U.S. at 370; *see Legislators' Letter* (JA__). That FCC believes various congressional *objectives* are in conflict with one another does not license it to override a clear statutory directive. *See La. Pub. Serv. Comm'n*, 476 U.S. at 374. But even if Section 254(b)

and Subsection 214(e)(2) were somehow in conflict, the specific provisions marking the boundaries between the States' and FCC's designating authority under Section 214(e) would take precedence over the "vague, general language" of Section 254(b). *TOPUC*, 183 F.3d at 421; *accord La. Pub. Serv. Comm'n*, 476 U.S. at 374; *Pai Dissent*, at 4175 (JA__).

2. FCC next purported to find authority to "preempt" Subsection 214(e)(2) in Section 706, 47 U.S.C. § 1302. *See Order*, ¶ 217 (JA__). But Section 706 merely exhorts FCC to "encourage the deployment . . . of advanced telecommunications capability" with various regulatory tools (not including preemption), 47 U.S.C. § 1302(a), and to "accelerate deployment . . . by removing barriers to infrastructure investment and by promoting competition," *id.* § 1302(b). FCC's attempt to use Section 706's general terms to override a specific provision of federal law—Subsection 214(e)(2)—is contrary to controlling caselaw.

This Court in *Verizon* held that, while Section 706 can be interpreted to confer on FCC "substantive authority," that provision does not give FCC power to act in a "manner that contravenes any specific prohibition contained in the Communications Act." *Verizon*, 740 F.3d at 639–40, 649–50. In *Verizon*, FCC imposed certain "disclosure, anti-

blocking, and anti-discrimination requirements on broadband providers." *Id.* at 628. Verizon challenged FCC's authority to adopt the regulations under Section 706, but this Court held that "section 706(a) constitutes an affirmative grant of regulatory authority." *Id.* at 637. That authority, however, was not without "limit[s]." *Id.* 639–40. In particular, "[t]he [Communications] Act subjects telecommunications carriers, but not information-service providers, to Title II common carrier regulation." *Id.* at 630, 650 (citing 47 U.S.C. § 153(51)). Because FCC was bound by its classification of broadband as an "information service" rather than a "telecommunications service," it was "obvious that [FCC] would violate the Communications Act were it to regulate broadband providers as common carriers" using Section 706. *Id.* at 650.[6]

Verizon's holding refutes FCC's reliance on Section 706 here. As explained above, Subsection 214(e)(2) is a specific provision that provides the States with authority to designate ETCs. *Supra*, pp. 14–18. Regardless of what authority Section 706 gives FCC, that authority

[6] FCC subsequently re-classified broadband as a telecommunications service under Title II. *See generally United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

cannot be used "to trump [a] specific mandate[ ] of the Communications Act," in this case, Subsection 214(e)(2). *Verizon*, 740 F.3d at 650 (citation omitted); *accord La. Pub. Serv. Comm'n*, 476 U.S. at 370.

Notably, FCC's reliance on Section 706(a) is significantly weaker than its failed argument in *Verizon* because, to the extent Section 706 speaks meaningfully on the subject of "broadband deployment," it "expressly contemplates a joint federal-state role." *In re Wilson, N.C. Petition for Preemption of N.C. Gen. Statute Sections 160a-340 et Seq.* ("*City of Wilson Order*"), 30 FCC Rcd. 2408, 2520 (2015) (dissenting statement of Commissioner Michael O'Rielly). Section 706(a)'s charge to "encourage [ ] deployment" is directed at both FCC *and* "each State commission with regulatory jurisdiction over telecommunications services." 47 U.S.C. § 1302(a). It would be passing strange if that same provision empowered FCC to cut out the state commissions altogether.

FCC's argument that Section 706(a) includes a "preemption" authority that permits the agency to designate all broadband ETCs is further refuted by Subsection 601(c)(1) of the Telecommunications Act. Subsection 601(c)(1) creates "a specific rule of statutory construction" for the Act, *TOPUC*, 183 F.3d at 431: "This Act and the amendments made

by this Act shall not be construed to modify, impair or supersede Federal, State or local law unless *expressly* so provided in such Act or Amendments." Pub. L. No. 104-104, 110 Stat. 56 (1997), § 601(c)(1) (emphasis added); *see generally City of Dallas v. FCC*, 165 F.3d 341, 348 (5th Cir. 1999); *City of Wilson Order*, at 2512 (dissenting statement of Commissioner Ajit Pai). This specific, anti-preemption provision further refutes FCC's novel effort to expand the concept of "preemption" to justify this *Order*.[7]

Finally, in attempting to justify a contrary holding, FCC relied in part on its "previous[ ] f[inding] that Section 706 . . . authorizes preemption." *Order*, ¶ 217 (JA__) (quoting *City of Wilson Order*, ¶ 142). But, as explained, FCC has not "preempt[ed]" anything here; it has simply red-penciled a federal statute. Even so, the Sixth Circuit in

[7] The statutory history of Section 706 further rebuts FCC's effort to find preemptive authority within that Section. In the original Senate Bill that eventually became the Telecommunications Act, the section corresponding to Section 706(b) gave FCC explicit authority to "preempt State commissions that fail to act to ensure [the] availability [of broadband]." S. 652, 104th Cong. § 304(b) (March 30, 1995), https://goo.gl/rFGMCr. But Congress deleted that language from the final bill. *Compare* Pub. L. No. 104-104 § 706(b); *see City of Wilson Order*, at 2513 (dissenting statement of Commissioner Ajit Pai).

Tennessee v. FCC, 832 F.3d 597 (6th Cir. 2016), recently reversed that very order, holding that Section 706 *did not* authorize the claimed preemption in a situation where preemption was the appropriate doctrine. In that case, certain municipalities wanted to provide broadband service to nearby underserved areas, but state law prevented them from doing so. *Id.* at 599–600. FCC issued an order preempting those state laws, relying on Section 706's mandates to "encourage [ ] deployment" and "remov[e] barriers to" broadband competition. 47 U.S.C. § 1302(a), (b). Because FCC's order attempted to "re-allocate decision-making power between the states and their municipalities," the Sixth Circuit held that FCC needed a "clear directive from Congress." *Tennessee*, 832 F.3d at 600, 610. Yet "nowhere in [Section 706's] general charge to promote competition . . . is a directive to do so by preempting a state's allocation of powers between itself and its subdivisions." *Id.* at 613. Hence "[Section] 706 [could not] be read to authorize such preemption." *Id.*

CONCLUSION

This Court should vacate the *Order*, in part; that is, to the extent that the *Order* seeks to withdraw from the States their authority to designate ETCs under Subsection 214(e)(2).

Dated, January 30, 2017

Respectfully Submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

/s/ Misha Tseytlin
MISHA TSEYTLIN
Solicitor General
Counsel of Record

RYAN J. WALSH
Chief Deputy Solicitor General

LUKE N. BERG
Deputy Solicitor General

Attorneys for Wisconsin
Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857
(608) 267-9323
tseytlinm@doj.state.wi.us

[additional counsel listed on next page]

ADDITIONAL COUNSEL

LESLIE RUTLEDGE
Arkansas Attorney General
s/Lee Rudofsky
LEE RUDOFSKY
Arkansas Solicitor General
s/Nicholas J. Bronni
NICHOLAS J. BRONNI
Deputy Solicitor General
323 Center Street, Suite 200
Little Rock, AR 72201
nicholas.bronni@arkansasag.gov
(501) 682-6302
Counsel for Arkansas

s/ Clare E. Kindall
CLARE E. KINDALL
Assistant Attorney General
Department Head - Energy
Office of the Attorney General
10 Franklin Square
New Britain, CT 06051
(860) 827-2683
Clare.Kindall@ct.gov
Counsel for Connecticut Public Utilities Regulatory Authority

s/ Lawrence G. Wasden
LAWRENCE G. WASDEN
Idaho Attorney General
700 West Jefferson Street #210
PO Box 83720
Boise, ID 83720-0010
Counsel for Idaho

CURTIS T. HILL, JR.
Indiana Attorney General
s/ Thomas M. Fisher
THOMAS M. FISHER
Indiana Solicitor General
302 W. Washington Street
IGC-South, Fifth Floor
Indianapolis, IN 46204
Counsel for Indiana

BILL SCHUETTE
Michigan Attorney General
s/Aaron D. Lindstrom
AARON D. LINDSTROM
Michigan Solicitor General
300 W. Grant Blvd. #10-200
P.O. Box 30202
Lansing, Michigan 48909
Counsel for Michigan

s/ Frank F. Farmer
FRANK F. FARMER
Special Assistant Attorney General
Assigned to:
Mississippi Public Service Commission
Brandon Presley, Chairman
Cecil Brown, Vice-Chairman
Samuel F. Britton, Commissioner
501 N. West St.
Suite 201-A
Jackson, MS 39201
Counsel for Mississippi Public Service Commission

TIM FOX
Montana Attorney General
s/ Dale Schowengerdt
DALE SCHOWENGERDT
Montana Solicitor General
215 North Sanders Street
Helena, MT 59601
DaleS@mt.gov
Counsel for Montana

DOUGLAS J. PETERSON
Nebraska Attorney General
s/ Leonard Jay Bartel
LEONARD JAY BARTEl, #56749
Assistant Attorney General
Nebraska Bar No. 17247
2115 State Capitol
Lincoln, NE 68509-8920
(402) 471-2682
jay.bartel@nebraska.gov
Counsel for Nebraska

MARTY J. JACKLEY
South Dakota Attorney General
s/ Craig Martin Eichstadt
CRAIG MARTIN EICHSTADT
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
(605) 773-3215
Counsel for South Dakota

SEAN D. REYES
Utah Attorney General
s/ Tyler R. Green
TYLER R. GREEN
Utah Solicitor General
350 North State Street, #230
P.O. Box 142320
Salt Lake City, UT 84114-2320
(801) 538-9600
Counsel for Utah

s/ Kyle Landis-Marinello
KYLE LANDIS-MARINELLO
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609-1001
(802) 828-1361
Counsel for Vermont Public Service Board

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and this Court's order on December 20, 2016, because this brief contains 6,452 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 14-point Century Schoolbook font.

Dated: January 30, 2017

/s/ Misha Tseytlin

MISHA TSEYTLIN

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2017, I filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: January 30, 2017

/s/ Misha Tseytlin

MISHA TSEYTLIN

Addendum

INDEX TO ADDENDUM

47 U.S.C. § 214

§ 214. Extension of lines or discontinuance of service; certificate of public convenience and necessity

* * * * *

(e) Provision of universal service

(1) Eligible telecommunications carriers

A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received--

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(2) Designation of eligible telecommunications carriers

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by

a rural telephone company, the State commission shall find that the designation is in the public interest.

(3) Designation of eligible telecommunications carriers for unserved areas

If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) of this title to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services or an area served by a common carrier to which paragraph (6) applies, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof. Any carrier or carriers ordered to provide such service under this paragraph shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

* * * * *

(6) Common carriers not subject to State commission jurisdiction

In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law. Upon request and consistent with the public interest, convenience and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated under this paragraph, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for

an area served by a rural telephone company, the Commission shall find that the designation is in the public interest.

47 U.S.C. § 254

§ 254. Universal service

* * * * *

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) Quality and rates

Quality services should be available at just, reasonable, and affordable rates.

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h) of this section.

(7) Additional principles

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

(c) Definition

(1) In general

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services--

(A) are essential to education, public health, or public safety;

(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

(C) are being deployed in public telecommunications networks by telecommunications carriers; and

(D) are consistent with the public interest, convenience, and necessity.

(2) Alterations and modifications

The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.

(3) Special services

In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h) of this section.

* * * * *

(e) Universal service support

After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

* * * * *

47 U.S.C. § 1302

§ 1302. Advanced telecommunications incentives

(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry

The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all

Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

* * * * *