No. 11-9900

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: FCC 11-161

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

UNCITED BRIEF OF
THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

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GLOSSARY

1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§151-276
APA	Administrative Procedures Act, 5 U.S.C. §553
ARC	Access Recovery Charge
CAF	Connect America Fund
Commission or FCC	Federal Communications Commission
ER	Eligible Recovery
ICC	Intercarrier compensation
ILEC	Incumbent Local Exchange Carrier
LEC	Local Exchange Carrier
SLC	Subscriber line charge

I. INTRODUCTION

As discussed in the "Joint Preliminary Brief" and the "Joint Intercarrier Compensation Brief," the FCC's decision to reduce intercarrier compensation ("ICC") rates to the bill-and-keep rate of zero necessarily reduced the ICC revenues of incumbent local exchange carriers ("ILECs"). The *Order* allows them, but not other local carriers, to replace some, but not all, revenues lost due to reductions in ICC rates, through a recovery mechanism consisting of two components: (1) the Access Recovery Charge ("ARC"), which allows the ILEC to impose rate increases on end users and (2) Connect America Fund ("CAF") support, where the ILEC is eligible. *Order* at ¶849. This brief focuses on the ARC.

II. JURISDICTIONAL STATEMENT

(Not required per Amended First Briefing Order [August 7, 2012] at 3.)

III. SUMMARY OF ISSUE PRESENTED

Whether the FCC has the authority to impose an ARC on end users to replace ILECs' lost interstate and intrastate ICC revenues.

IV. STANDING

NASUCA is a voluntary, national association of consumer advocates in more than 40 states and the District of Columbia, organized in 1979. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority. NASUCA participated in the informal rulemaking proceedings before the FCC.

NASUCA and its members are aggrieved by many aspects of the Commission's ruling. This is particularly true for the ARC, which imposes unlawful, unreasonable and unjust charges on the end-use customers whom NASUCA members represent.

V. SUMMARY OF ARGUMENT[1]

The FCC cites no authority that would allow it to directly impose a new charge on end users to recover ILECs' lost revenues

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[1] These arguments are presented as supplemental to the APA arguments on the ARC presented in the Joint USF Brief.

caused by the FCC's decision to move to a bill-and-keep (zero rate) ICC regime. This is particularly true because a significant part of those lost revenues are intrastate revenues — derived from calls that begin and end within a single state.

In 2001, the FCC replaced lost interstate ICC revenues through increases in the interstate subscriber line charge ("SLC") and increased disbursements from the federal USF. This action was within its established authority, but does not stand as precedent to allow the creation of a new, separate ARC to recover intrastate lost revenues.

The ARC is particularly unreasonable because it is imposed on a holding company basis, rather than on a state jurisdictional basis. Thus lost revenues from states that have had high intrastate access charges are to be recovered from other states — served by the same holding company — that have lowered their intrastate charges or, indeed, from jurisdictions like the District of Columbia that do not have "intrastate" access revenues.

V. THE ARC

The FCC's "mechanism allows LECs to recover ICC revenues reduced as part of our intercarrier compensation reforms, ... from alternate revenue sources: incremental, and limited increases in end user rates and, where appropriate, universal service support through the" CAF *Order*, ¶847. The FCC notes that "[t]he recovery mechanism is limited in time" and claims that it "carefully balances the benefits of certainty and a gradual transition with our goal of keeping the federal universal service fund on a budget and minimizing the overall burden on end users." *Id*.

The ARC is the first source for lost access revenue replacement. *Id*., ¶908. As a second recourse, ILECs can seek additional CAF funding. *Id*., ¶918. Although there are many problematic aspects to this use of the CAF for revenue recovery — especially the recovery of lost intrastate access revenues — the CAF at least purports to be established under §254. *See Order*, ¶919. That is not the case for the ARC.

VI. THE FCC CITES NO AUTHORITY FOR ADOPTING THE ARC

The *Order* repeatedly cites the purported benefits — to consumers and the industry — of its access charge restructuring, and the limitations placed on the ARC. *See, e.g., id.*, ¶861. But despite the almost 29,000 words of the *Order* devoted to the Recovery Mechanism,[2] there is no mention of the Commission's legal authority to adopt such a mechanism.

This is in distinct contrast to the rest of the *Order*. For example, in the immediately preceding section of the *Order*, the FCC discusses "The Duty to Negotiate Interconnection Agreements." *Id.*, ¶¶825-846. There the Commission sets forth both its "direct" authority, *id.*, ¶¶834-836 and its "ancillary" authority. *Id.*, ¶¶837-839. The best that the FCC can do for the ARC, however, is discuss its "policy approach to recovery." *Id.*, ¶854.

The FCC agreed "with commenters who maintain that the Commission has no legal obligation to ensure that carriers recover access revenues lost as a result of reform, absent a showing of a taking." *Id.*, ¶924. It was thus all the more important for the FCC to have identified a source of legal authority for its voluntary

[2] *Order*, ¶¶847-932.

adoption of the ARC. But it did not do so. The rationalizations of the FCC in its briefs here cannot substitute for the lack of discussion in the *Order*. *SEC v. Chenery*, 318 U.S. 80, 94 (1943).

The FCC's attempts to minimize the impacts of the ARC, *Order* ¶¶852, 909, cannot obscure the lack of authority for it to order this novel charge on customers. An unlawful charge is no more lawful because it is limited; the ARC amounts, in total, to multiple millions of dollars each year.

VII. THE ARC IS NOT "REASONABLY ANCILLARY" TO THE FCC'S AUTHORITY.

As noted, the FCC cites no direct authority for the adoption of the ARC. It may argue, however, that the adoption falls within its "ancillary" authority. That subject was extensively discussed in *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010), where the D.C. Circuit quoted the "two-part test" it had adopted in *American Library Ass'n v. FCC,* 406 F.3d 689, 691-692 (D.C. Cir. 2005): "The Commission ... may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdictional grant ... covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." The first condition is met only if the FCC's assertion that it has jurisdiction over intrastate access charges and rate setting for reciprocal compensation is accepted. The "Joint ICC Brief" shows the error in this assertion.

To meet the conjunctive test, the FCC's claim of ancillary jurisdiction would also have to be "independently justified," *Comcast*, 600 F.3d at 651, quoting *National Ass'n of Regulatory Utility Comm'rs v. FCC,* 533 F.2d 601, 612 (D.C.Cir.1976). The Commission cannot point to mere "policy statements." *Comcast*, 600 F.3d at 654.

As discussed, in the *Order*, the FCC has cited neither direct authority nor ancillary authority for the creation of the ARC. In this regard, the conclusion of the *Comcast* court is compelling:

> It is true that "Congress gave the [Commission] broad and adaptable jurisdiction so that it can keep pace with rapidly evolving communications technologies." Resp't's Br. 19. It is also true that "[t]he Internet is such a technology," id., indeed, "arguably the most important innovation in communications in a generation," id. at 30. Yet notwithstanding the "difficult regulatory problem of rapid technological change" posed by the communications industry, "the allowance of wide latitude

> in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer … Commission authority." *NARUC II*, 533 F.2d at 618 (internal quotation marks and footnote omitted).

Comcast, 600 F.3d at 661. As in *Comcast*, "[B]ecause the Commission has failed to tie its assertion of ancillary authority … to any 'statutorily mandated responsibility,'" *id*. (citation omitted), to adopt the ARC, the *Order* should be reversed.

VIII. THE ARC IS READILY DISTINGUISHABLE FROM THE PREVIOUS LOST-ACCESS REVENUE RECOVERY MECHANISM THAT WAS WITHIN FCC JURISDICTION.

The FCC misleadingly states, "Consistent with past ICC reforms, we permit carriers to recover a limited portion of their Eligible Recovery from their end users through a monthly fixed charge called an ARC." *Order*, ¶852. There is no such consistency, because the ARC is an entirely new charge. In the previous iteration, the "monthly fixed charge" through which carriers recovered a limited portion of their lost access interstate revenues was the SLC. Here, the FCC emphasizes that the ARC "is calculated independently from, and has no bearing on, existing SLCs…." *Id*.

As the FCC states,

> SLCs today are designed to recover common line revenues as defined by Commission regulation. We are not formally recategorizing any costs or revenues to be included in that regulatory category, and the calculation of Eligible Recovery for purposes of the reforms we adopt today is completely independent of SLC rate calculations.

Id., ¶912.

The scope and purpose of the ARC is distinctly different from the last time the FCC reduced access charges, in 2000. Then, in the *CALLS Order*, it reduced *interstate* access charges, and allowed revenue recovery though increased SLCs and additional USF support.[3]

The increased USF support was implemented as a means of reducing implicit support in interstate access charges. *CALLS Order*, ¶30. (As this court recognized, Congress' directive in the 1996 Act dealt with removing implicit support in *interstate* access charges, not *intrastate* charges. *Qwest Comm's Int'l v. FCC*, 398

[3] *CALLS Order*, ¶30. The *CALLS Order* covered price-cap ILECs. Similar provisions were adopted for rate-of-return ILECs in the subsequent *MAG Order*.

F.2d 1222, 1231 (10th Cir. 2005).) Similarly, the FCC found that the SLC increases were "within the Commission's statutory authority to order proper recovery of the portion of common line costs that has been allocated to the interstate jurisdiction through charges imposed on telephone subscribers." *CALLS Order*, ¶76; *see also id.*, ¶93.[4]

In the *Order*, however, the FCC made no pretense at the recovery of only interstate revenues or costs. *See Order,* ¶851. Indeed, there is no pretense of a connection with cost recovery at all. *Id.* Yet the FCC itself cites to evidence that a very substantial portion of the recovery will come from the intrastate access charge reduction. *Id.*, ¶791.[5]

Thus what the FCC did with SLCs in the *CALLS Order* cannot be used as precedent to support the adoption of even a limited ARC

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[4] This use of the SLC for interstate cost recovery was upheld in *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 372 F.3d 454 (D.C. Cir. 2004).

[5] The *Order* cites a Letter from Joe A. Douglas, Vice President, Government Relations, NECA, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 96-45, 80-286, Attach. (filed Dec. 29, 2010) (NECA Dec. 29, 2010 *Ex Parte* Letter) showing relative interstate and intrastate access charge and revenue levels.

here. And it underscores the FCC's lack of authority to adopt the ARC.

IX. THE FCC'S ARC IS OTHERWISE ARBITRARY AND CAPRICIOUS, ESPECIALLY BECAUSE IT IS IMPOSED ON A HOLDING COMPANY BASIS.

Intrastate access charges and reciprocal compensation rates are calculated on a state-by-state basis, and vary, often considerably, between states. Thus the impact of the reduction to a zero bill-and-keep rate will also vary considerably between states. Despite this, the FCC has permitted the ARC to be calculated at the holding company level. *Order,* ¶910.

Telephone holding companies serve numerous different states. For example, Verizon provides access and wholesale services in 27 states across the country and the District of Columbia.[6] This includes states where Verizon does not provide local service[7] and

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[6] *See* Reply Comments of the Wyoming Public Service Commission (September 6, 2011) ("WyPSC Reply Comments") at 12.

[7] *E.g.*, Maine, New Hampshire and Vermont. *In the Matter of Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and its Subsidiaries to FairPoint*

the District of Columbia, where there are no "intrastate" access charges.[8] Likewise, AT&T serves 22 different states across the country.[9]

This means that consumers in states that have previously reduced their intrastate access charges[10] as well as jurisdictions that have no such charges will be required to pick up the burden from states that have not done so. Prior to the *Order*, rates for intrastate access charges — and methods by which intrastate access charge revenue changes were addressed — were set by the states. Now the FCC — as part of its usurpation of state authority over ICC[11] — has made customers in one state responsible for the ratemaking decisions of other states. The FCC's justification, that

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Communications, Inc., WC Docket No. 07-22, Memorandum Opinion and Order, rel. January 9, 2008.

[8] See Petition for Reconsideration of the Public Service Commission of the District of Columbia (December 29, 2011) at 3. The FCC has not ruled on the D.C. PSC's Petition for Reconsideration. The presentation of an issue in one party's (the D.C. PSC's) Petition for Reconsideration does not bar appellate review of the issue when raised by another party. *City of Arlington v.* FCC, 668 F.3d 229, 238 (5th Cir. 2012), *cert. granted on separate issue*, Sup. Ct. Docket 11-1545 (October 5, 2012).

[9] *See* footnote 7, supra.

[10] *Id.*

[11] *See, generally*, Joint ICC Brief.

"[b]y providing this flexibility, carriers will be able to spread the recovery of Eligible Recovery among a broader set of customers, minimizing the increase experienced by any one customer," *Order*, ¶910, actually highlights the arbitrariness of its decision.

This (mis)allocation of lost ICC revenue also violates 47 U.S.C. §202(a), which prohibits "unjust or unreasonable discrimination in charges" and, specifically "subject[ing] any ... locality to any undue or unreasonable prejudice or disadvantage." In *Connecticut Office of Consumer Counsel v. FCC*, 915 F.2d 75 (2nd Cir. 1990), the Court upheld the FCC's preventing the pass-through of a Connecticut tax to customers in other states. The holding-company-wide ARC here allows state-specific costs to be passed on to customers in other states.

In this context, the lack of record support for the holding-company-based ARC is notable. The FCC cites only to the ABC Plan's proposal to have lost ICC revenue calculated at the holding company level, linked to recovery through increased SLCs and USF support. *Order*, ¶910, n.1801. This issue was also not addressed in the comments or reply comments of the ABC Plan proponents.

X. CONCLUSION

The FCC cites no authority for adopting a revenue-replacing ARC. Although previous increases to the SLC as a means of recovering interstate costs may have been lawful, the creation of the ARC as a means to recover intrastate revenues — with no link to costs — has no basis in the statutes and must be reversed.

Respectfully submitted,

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