ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1170 (and consolidated case)

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the Federal Communications Commission

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BRIEF FOR INTERVENOR NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

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February 6, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Petitioner in 16-1170 is the National Association of Regulatory Utility Commissioners ("NARUC"). Petitioners in consolidated case 16-1219 are the States of Arkansas, Idaho, Indiana, Michigan, Montana, Nebraska, South Dakota, Utah and Wisconsin; the Connecticut Public Utilities Regulatory Authority; the Mississippi Public Service Commission; and the Vermont Public Service Board. The National Association of State Utility Consumer Advocates is the only intervenor.

B. Rulings Under Review

The ruling under review is the FCC's Order in *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Third Report and Order, Further Report and Order, and Order on Reconsideration, FCC 16-38, 31 FCC Rcd. 3962 (rel. April 27, 2016) ("*Broadband Lifeline Order*").

C. Related Cases

The *Broadband Lifeline Order* has not previously been the subject of a petition for review by this Court or any other court. The two petitions for review of the *Broadband Lifeline Order* were consolidated in this Court, and Intervenor is unaware of any other related cases pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENTS

NASUCA is a voluntary association of 44 consumer advocate offices in 41 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates for utility ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority. Some NASUCA member offices advocate in states whose respective state commissions do not have jurisdiction over certain telecommunications issues.

NASUCA has no parent company, subsidiary, or affiliate that has issued securities to the public. No publicly traded company owns any equity interest in NASUCA.

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GLOSSARY

BIAS	Broadband internet access service
Broadband	Broadband internet access service, designated by the FCC as eligible for Lifeline support
Broadband Lifeline Order, or *Order*	*Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Third Report and Order, Further Report and Order, and Order on Reconsideration, FCC 16-38 (rel. April 27, 2016)
ETC	Eligible Telecommunications Carrier
LBP	Lifeline Broadband Provider

I. INTRODUCTION

The *Broadband Lifeline Order* ("*Order*") was, in many respects, eminently reasonable and lawful. In particular, it reaffirmed the FCC's ruling that broadband internet access service ("broadband") is an essential telecommunications service, and adopted a program to provide federal universal service support for broadband service to Lifeline customers.

Yet in very specific and very real ways, the *Broadband Lifeline Order* was unlawful. Petitioners challenge the narrow (yet vital) issue of the FCC's preemption of state authority over designation of Eligible Telecommunications Carriers ("ETCs"), part of the universal service goals of the Telecommunications Act. See 47 U.S.C. § 254. These aspects of the *Broadband Lifeline Order* were not necessary for, nor were made necessary by, the rest of the *Order*. Indeed, they are not specifically set forth in the Order's Executive Summary. *Order*, ¶¶ 6-11.

The FCC's preemption of state authority establishes the interests of Petitioners the States of Arkansas, Idaho, Indiana, Michigan, Montana, Nebraska, South Dakota, Utah and Wisconsin; the Connecticut Public Utilities Regulatory Authority; the Mississippi Public Service Commission; and the Vermont Public Service Board; and the interest of the National Association of Regulatory Utility Commissioners ("NARUC"). Likewise, preemption is the issue for intervenor the National Association of State Utility Consumer Advocates ("NASUCA"). The

FCC lacked authority to preempt state designation authority, and the FCC *Broadband Lifeline Order* should be reversed to eliminate this preemption.

II. SUMMARY OF ARGUMENT

Section 214(e) of the Act reflects Congress' determination that states with jurisdiction shall have primary responsibility for designation of common carriers as ETCs that will be obligated to provide supported services and be eligible for federal universal service support. 47 U.S.C. § 214(e)(1), (2). If the common carrier is not subject to jurisdiction of a state commission, then "the Commission shall upon request" make the ETC designation. 47 U.S.C. § 214(e)(6). No provision of the Act gives the FCC authority to preempt Congress' delegation to state commissions of this primary role in determining whether a common carrier qualifies for ETC designation. Section 214(e) does not give the FCC authority to create a subset of ETCs that, according to the FCC's preemption, can never be subject to state jurisdiction. The question of state jurisdiction is not ambiguous and is not the FCC's decision to make.

Congress granted the FCC the authority to forbear from its regulations, or from the provisions of the Telecommunications Act, as they apply to **carriers**. 47 U.S.C. § 160(a). Congress did not grant the FCC the authority to forbear from the

provisions of the Act as they apply to the **states**. Yet that is what the FCC effectively did here.

The FCC's preemption of state commission authority to advance the universal service goals of the Lifeline program is unlawful. The FCC's interpretation of Section 214(e), singly and in conjunction with other provisions of the Act, should not be accorded deference.

III. STATEMENT OF THE CASE

The federal telecom Lifeline program has, since the Reagan era, provided assistance to consumers otherwise unable to afford their essential telecommunications service.[1] The FCC has now found that broadband is also an essential service. *Order*, ¶¶ 12, 22. *Verizon v. FCC* upheld the FCC's finding that broadband Internet access service ("broadband") is a telecommunications service under Title II of the Telecommunications Act. *Verizon v. FCC*, 740 F3d 623 (D.C. Cir. 2016).[2]

In the *Order*, the FCC allowed Lifeline assistance to be used for stand-alone broadband service. *Order*, ¶¶ 5, 30. NASUCA supported this decision.

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[1] See https://www.fcc.gov/general/lifeline-program-low-income-consumers.

[2] Petitions for rehearing and for rehearing *en banc* are pending.

The Telecommunications Act – in 47 U.S.C. § 214(e) (1) – provides that only eligible telecommunications carriers ("ETCs") may receive federal universal service support. The FCC followed this "statutorily compelled paradigm" in determining that in order to receive federal Lifeline support, a common carrier must be an ETC. *Order*, ¶¶ 223, 227 (JA). NASUCA supported this decision.

The Act directs, however, that a state utility commission "shall upon its own motion or upon request" designate ETCs and provides that the FCC shall "upon request" designate ETCs in the absence of state jurisdiction. 47 U.S.C. § 214(e)(2), (6). Despite this clear delegation to state commissions of authority to designate ETCs, the FCC determined that potential providers of Lifeline broadband should have the option of a streamlined federal ETC designation process. To this end, the FCC created a new subset of Lifeline ETCs – the Lifeline broadband provider ("LBP") – and preempted state authority to designate such ETCs. *Order*, ¶¶ 8, fn. 4, 229, 239 (JA). NASUCA opposes this decision, which was unlawful.

To justify its preemption of state authority, the FCC ignored the clear language of Section 214(e)(2) and its relationship with Section 214(e)(6). See, *Order*, ¶ 252 (JA). The FCC declared state authority preempted by resort to complicated reasoning that had one main component: A claim that state designation of providers of Lifeline broadband would thwart federal universal

service policy goals, broadband competition, and investment in broadband. *Order*, ¶¶ 229, 249-251, 253-258 (JA).

The FCC's preemption of state commission authority to designate ETCs to provide supported services and qualify for federal universal service support is contrary to rules of statutory construction and otherwise legally flawed and unsound. The FCC's error of law should be reversed.

IV. THE FCC LACKS AUTHORITY TO PREEMPT STATES' AUTHORITY TO DESIGNATE ETCS.

A. The FCC Took Unto Itself Sole Authority to Designate LBPs.

After twenty-some years of state commissions and the FCC working in concert to advance and preserve universal service, as directed by Congress,[3] the FCC has determined that no state commission can or should be permitted to determine whether it has jurisdiction over a carrier's request for ETC designation,

[3] See, *In the Matter of Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks*, WC Docket Nos. 14-192, 11-42, 10-90, Memorandum Opinion and Order, FCC 15-166 , 31 FCC Rcd 6157, 6190 (rel. Dec. 28, 2015), ¶ 103 ("2015 USTelecom Forbearance Order") ("As directed by Congress, the Commission has worked in a longstanding partnership with the states to advance and preserve universal service."); *WWC Holding Co. v. Sopkin*, 488 F.3d 1262, 1271 (10th Cir. Colo. 2007)("[S]tates are given the primary responsibility for deciding which carriers qualify as ETCs to be eligible for subsidies from the federal universal service fund.").

if the carrier's goal is to provide broadband to eligible consumers with Lifeline support. Instead, the Commission gave itself the only authority to designate LBPs.[4] The Commission's decision is legal error and contrary to Congressional intent as evidenced in the language and framework of Section 214(e).

In the Act, 47 U.S.C. § 214(e)(6) allows the FCC to act on ETC designations in the absence of state jurisdiction. In the *Order*, the FCC preempted state ETC designation authority for LBPs, leaving itself as the only designator:

> [W]e preempt states from exercising authority to designate Lifeline-only broadband ETCs for the purpose of receiving Lifeline reimbursement for providing BIAS to low-income consumers. Accordingly, section 214(e)(6) grants to the Commission the responsibility to resolve carriers' requests for designation as an ETC for the purposes of receiving such Lifeline broadband support.[5]

The FCC's assertion of exclusive authority to designate carriers as Lifeline broadband providers thus derives from the preemption.

Key to the FCC's conclusion is the following statement:

> The circumstances in which a carrier is "not subject to the jurisdiction of a State commission" under section 214(e)(6) is [sic] ambiguous regarding whether the carrier must be entirely outside the state commission's jurisdiction or only outside the state commission's jurisdiction with respect to a particular service supported by universal

[4] *Order*, ¶ 231 (JA).

[5] *Order*, ¶ 232 (footnotes omitted) (JA); see also id, ¶ 249 (JA).

> service mechanisms, even if subject to state commission jurisdiction in other respects.[6]

The FCC's new-found ambiguity in Section 214(e)(6) does not justify the FCC's preemption determination.

The FCC and courts have long recognized that under Section 214(e)(2), Congress determined that states shall have primary responsibility for designation of carriers that meet the requirements of Section 214(e)(1) to provide services with federal universal service support within the service area designated by the state.[7] In the *Connect America Fund Order*, the Commission relied upon state commissions to fulfill this primary ETC designation role as part of the Commission's plans for distributing Mobility Phase I federal universal service support for voice and broadband infrastructure projects.[8] Or, if the provider was

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[6] *Order*, ¶ 240 (JA).

[7] *2015 USTelecom Forbearance Order*, ¶ 103; *In re Connect Am. Fund*, 26 F.C.C. Rcd. 17663 (FCC 2011)(" *Connect America Fund Order*"), ¶¶ 15, 390, n. 662 ("We recognize the statutory role that Congress created for state commissions with respect to eligible telecommunications carrier designations …." "Generally, the states have primary jurisdiction to designate ETCs…") aff'd sub nom. *In re FCC 11-161* , 753 F.3d 1015 (10th Cir. 2014).

[8] *Connect America Fund Order*, ¶ 15.

"beyond the jurisdiction of the state commission," designation would come from the Commission.[9]

Through Section 214(e)(2) and (6), Congress has directed states and the Commission to work in concert to advance and preserve universal service. In the 2011 *Connect America Fund Order*, the FCC acknowledged that the federal USF is a "hybrid state-federal system[], and it is critical to our reforms' success that states remain key partners even as these programs evolve…."[10] In 2015, the FCC affirmed that "[a]s directed by Congress, the Commission has worked in a longstanding partnership with the states to advance and preserve universal service."[11] Until the *Broadband Lifeline Order*, the FCC had no significant difficulty in determining whether there was an absence of state jurisdiction, such that the FCC should rule on a carrier's request for ETC designation under the backup authority of Section 214(e)(6). Historically, the FCC looked to the states to provide notice if the state did not assert jurisdiction over certain ETCs such as

[9] *Connect America Fund Order*, ¶ 79; see also *In re FCC 11-161*, 753 F.3d at 1066, 1067.

[10] *Connect America Fund Order*, ¶¶ 15, 389, 390 ("By statute, the states, along with the Commission, are empowered to designate common carriers as ETCs.")

[11] *2015 USTelecom Forbearance Order*, ¶ 103.

commercial mobile wireless carriers.[12] As of June 2015, the FCC acknowledged responsibility under Section 214(e)(6) to review Lifeline ETC petitions for wireless carriers in twelve states.[13] There, the FCC described its statutory ETC designation authority as arising "[i]n the limited cases where a common carrier is not subject to the jurisdiction of a state commission."[14] In December 2015, the FCC explained "states have primary authority for designating ETCs and defining their service areas except in cases where they lack jurisdiction over the entity seeking designation."[15]

The Commission's preemption decision and claim of authority to create a third, alternate ETC designation path exclusively for LBPs is in conflict with Congressional intent and the clear language of Section 214(e) as understood and followed by state commissions and the FCC for years. Individual state

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[12] *Lifeline and Link-Up Petitions for Declaratory Order and Waiver*, WC Docket No. 03-109, Order and Declaratory Ruling, FCC 10-25 (rel. February 2, 2010), ¶¶ 9, 10.

[13] *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, FCC 15-71 (rel. June 22, 2015), fn 363.

[14] Id., fn. 250.

[15] *2015 USTelecom Forbearance Order*, ¶ 103, citing *Connect America Fund Order*, ¶ 341.

commissions can and have reached different conclusions as to whether that state commission has jurisdiction to approve a requested ETC designation. Statutory construction rules require the FCC to consider the provisions of both Section 214(e)(2) and (6) *in pari materia*, as Congress has delegated primary ETC designation authority to state commissions and backup delegation authority to the FCC. Congress could have -- but did not -- diminish the primary role of states to designate ETCs when Congress added Section 214(e)(6) in 1997.[16] The FCC's claim of preemption to produce the result that all 50 states "lack jurisdiction" and so trigger the FCC's backup ETC designation authority is legally unsound.

Nor does the supposed ambiguity discerned by the FCC in the language of Section 214(e)(6) support the FCC's preemption claim or require deference to the Commission's statutory interpretation. By statutory definition, to be eligible for designation as an ETC, the entity must be a common carrier.[17] The Tenth Circuit

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[16] Congress established the authority of states to designate common carriers as ETCs eligible for federal universal service support through the Telecommunications Act of 1996, which added Section 214(e)(1), (2), (3), (4), and (5). See P.L. 104-104. Congress amended Section 214(e) in 1997, to add the FCC's designation authority, in the absence of state jurisdiction, with the addition of Subpart (e)(6) and corresponding amendments to Section 214(e). See P.L. 105-102.

[17] 47 U.S.C. § 214(a), (e)(2), (3), (6).

affirmed this relationship between Section 153(11) and Section 214.[18] The provision of services which cross state lines does not divest a state commission of its authority under Section 214(e)(2).[19]

The plain language of Section 214(e)(2) allows a state commission to make the primary determination as to whether the provider meets the Section 214(a) requirements for ETC designation within the state-designated study area. When a state commission exercises this Congressional delegation of authority, the state commission is applying federal law and appellate review is available.[20]

Contrary to the *Order*, the fact that a common carrier requesting ETC designation provides services that are not confined to the boundaries of a single state is not evidence of an "ambiguity" in Section 214(e)(6). Neither the Commission's preemption determination nor statutory interpretation is supported.

The *Order* reviews Section 214(e)(3)'s division of ETC designation authority between states and the Commission along the lines of intrastate and

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[18] *In re FCC 11-161,* 753 F.3d at 1048-49. See 47 U.S.C. § 153(11) (definition of common carrier).

[19] *WWC Holding Co*., 488 F.2d at 1278 ("We hold that the PUC's authority to make an ETC designation under Section 214(e)(2) under the Telecommunications Act is not curtailed merely on a showing that the exercise of such authority affects the interstate components of a carrier's services.")

[20] *Id.* at 1269.

interstate service.[21] The Commission concludes that Section 214(e)(3) provides support for the Commission's current interpretation of "the relevant scope of state jurisdiction under section 214(e)(6)" and creation of a strictly federal LBP designation pursuant to Section 254(c).[22] This statutory interpretation is incorrect.

Section 214(e)(3) relates solely to identification of one or more common carriers for designation to provide federal supported universal services in an otherwise unserved area or community.[23] In contrast, the *Order* is focused on ways to increase the number of providers eligible and offering broadband services to Lifeline consumers, citing the "[m]any providers that may be interested in competing for Lifeline broadband funds," including "particular large providers with infrastructure and market offerings that span multiple states …."[24] State commissions have explicit authority under Section 214(e)(2) to designate more than one ETC as eligible to offer services with federal universal service support. States have an interest in assuring that their eligible low-income consumers have multiple options for service with Lifeline support, whether voice, broadband, or some combination. The Commission's preemption analysis with its focus on

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[21] *Order*, ¶ 247(JA).

[22] *Order*, ¶¶ 243, 246-248 (JA). *See* 47 U.S.C. §§ 214(e)(3), 254(c).

[23] 47 U.S.C. § 214(e)(3).

[24] *Order*, ¶ 250 (JA).

Section 214(e)(3) and (e)(6) is grounded in avoidance of the plain language of Section 214(e)(2) and so is arbitrary and capricious.[25]

The FCC determined it should not "preempt state ETC designation authority for providers seeking Lifeline only ETC-designation for voice service, nor for providers seeking broader ETC designation" including eligibility for high cost support. [26] The basis for this "non-preemption" is one sentence: "Today, multiple providers already serve the Lifeline voice market, and the states' traditional role in designating voice ETCs argues in favor of preserving the existing de-centralized structure for designating ETCs other than LBPs."[27] The "multiple providers" of Lifeline in a particular area are typically the incumbent local exchange carrier and a variety of wireless carriers. Yet state designated ETCs may include carriers obligated by the acceptance of Connect America Fund support to offer broadband services and supported services with the Lifeline discount.[28] Nor are there separate "Lifeline voice markets" and "Lifeline broadband markets." Eligible low income

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[25] The Commission acknowledges that "section 214(e)(2) authorizes states to perform ETC designations" only as the prelude to deciding that state commissions should be precluded from "the imposition of substantive obligations on broadband Internet access service." *Order*, ¶¶ 255, 256 (JA).

[26] *Order*, ¶ 252 (JA).

[27] Id. (footnote omitted).

[28] *Order*, ¶ 257 (JA). See, *In re FCC 11-161,* 753 F.3d at 1047-48, 1065-66.

consumers are eligible for only one Lifeline discount or supported service. The Commission's premise that a bright line can and should be drawn, built on preemption of state commission's authority under Section 214(e)(6), to create a federal Lifeline broadband market is not rational. Here again, the lack of support for the FCC's decision renders it arbitrary and capricious.

B. Section 706 Does Not Give the FCC the Power to Preempt State ETC Designation Authority.

The FCC also cites § 706 of the Act –47 U.S.C. § 1302 – as authority for preemption.[29] 47 U.S.C. § 1302(b) directs the FCC to

> 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.

The FCC states,

> Here, we find that requiring prospective Lifeline Broadband Providers to seek separate designations before many states and the Commission constitutes a barrier to investment and competition in the Lifeline market. The greater carrier participation in Lifeline that would be fostered by preemption of state conditions unrelated to compliance with the Lifeline rules on relevant ETC designations would encourage

[29] *Order*, ¶ 253 (JA).

> the deployment of advanced telecommunications capability, such as BIAS.[30]

But the actions must be otherwise within the FCC's purview: Congress did not intend, for example, to allow the FCC to eliminate the state jurisdiction that Congress had granted. Notably, the single FCC decision the *Order* cites in support was overturned by the Sixth Circuit,[31] which the FCC fails to mention in the *Order*. Indeed, *State of Tennessee* noted "absent a clear statement from Congress in the Telecommunications Act, the FCC lacks preemptive authority to 'trench' on the 'core sovereignty' of a state…."[32]

This is just as much of a circularity as the FCC's decision that, because it was preempting state designation authority for LBPs, the states have no jurisdiction and therefore the FCC does.

The FCC may have determined that broadband is an interstate service (*Order*, ¶ 255 (JA)), but that does not mean that states have no designation authority. Even under the FCC reading, states still have authority over other ETCs that offer intrastate and interstate services. *Order,* footnote 685 (JA).

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[30] *Order*, ¶ 254 (JA).

[31] *State of Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016).

[32] *State of Tennessee*, 832 F.3d at 611.

To totally eliminate, as the FCC does in ¶ 255, state designation authority over LBPs, because some state commission may impose a condition – with no citation to any egregious state condition, is the height of arbitrary and capricious reasoning. This is especially true because the FCC boasts of its ability to impose reasonable conditions. *Order*, ¶¶ 256, 258 (JA).

The FCC further asserts, "[T]he interrelationship between section 214(e) and section 254—*i.e.*, the purpose of a section 214(e) ETC designation is to implement universal service support mechanisms under section 254—supports our present preemption of state designations of LBPs as conflicting with the goals of section 254…." This is another circularity. The simple statement does not make it so.

C. The Federal ETC designation order undermines the Congressional scheme.

Congress hoped that state and federal universal service programs could work in tandem. And, with respect to lifeline programs, a number of states currently provide additional funds to increase the Lifeline subsidy available to qualified low income consumers.[33] Typically those subsidies come with conditions and additional oversight.

[33] Akyea, Kafui, Bernt, Phyllis, & Lichtenberg, Sherry, *Survey of State Universal Service Funds 2012*, Report No 12-10 (NRRI July 2012) at iv.

The federal program, structured as it is by the *Order*, will undermine such state programs. For instance, if the federal subsidy is profitable on its own, carriers may well ignore additional incremental State subsidies for a state customer to avoid additional state oversight.

In any case, this new federal designation procedure leads to a perverse outcome. An FCC designated carrier – by deciding whether or not it will undergo a State specific designation – will necessarily simultaneously decide the level of subsidy a customer in that State will receive.

It also will undermine oversight of the program and consumer protection. If you reduce the number of enforcers, you necessarily reduce the amount of enforcement.

D. The FCC's Decision Does Not Deserve Deference.

Under the *Chevron*[34] two-step test, this case should stop at Step 1: The statute (47 U.S.C. § 214(e)) is not ambiguous. The FCC's single thrust at ambiguity is mis-aimed, as discussed above.

[34] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

Even if the second step is reached, the FCC's basis for its preemption does not nearly meet the standard set in *State of Tennessee*.[35] This small ambiguity cannot be boot-strapped for preemption.

V. THE FCC LACKS AUTHORITY TO FORBEAR FROM THE STATUTORY ASSIGNMENT TO STATES OF ETC DESIGNATION.

A. The FCC cannot ignore or forbear from limits/restrictions Congress placed on its authority to act under §214(e)(6).

In §214(e)(6), Congress limited the FCC's authority to designate to a single circumstance: The designated carrier must be providing "telephone exchange service and exchange access."[36] The *Order* ignores this limitation.

There are two obvious problems with the FCC's reasoning, both described accurately by FCC Commissioner – now Chairman – Pai, in his dissent:

> The *Order* says a carrier can qualify for federal designation so long as it considers reselling telephone service to someone, somewhere while its application for federal ETC designation is pending. But even this Commission cannot transmogrify "providing" into "possibly considering to someday think about providing." That renders the statutory language utterly meaningless, a total nullity—and violates the canon that we should be "reluctant to treat statutory terms as surplusage in any setting." Recognizing this legal vulnerability, the *Order* then pivots to forbear from the requirement entirely. But the statute limits our forbearance authority to applying provisions of the

[35] *State of Tennessee*, 832 F.3d at 611.

[36] 47 U.S.C. § 214(e)(6).

> Act to *carriers*, not to the FCC itself. And for good reason. If the FCC could override limits on its own authority using forbearance, all the constraints Congress placed on the FCC in the Act would be meaningless. Despite much searching, I cannot find a single decision where the Commission has exercised forbearance to expand its own authority rather than to relieve a carrier from an obligation. The reason is obvious: The statute does not permit it.

Order (JA ___), 31 FCC Rcd. at 4177-78.

B. Forbearance is not otherwise available to the FCC to preempt here.

As a follow-on to the preemption, the FCC uses 47 U.S.C. §160 to forbear from the provision of 47 U.S.C. § 214(e)(6) requiring carriers seeking designation as an LBP to provide a service or services already classified by the FCC as telephone exchange service and exchange access. *Order*, ¶ 267 (JA). This provision would not itself be objectionable; it is similar to the conditional forbearance that allowed wireless resellers to become Lifeline voice ETCs.[37]

But this does highlight another point against the FCC's preemption: The FCC could not have forborne from the § 214(e)(2) assignment of ETC designation authority to the states. The forbearance statute – 47 U.S.C. § 160(a) – directs the FCC to forbear from applying "any regulation or any provision of this chapter [which includes § 214] to a telecommunications carrier or telecommunications

[37] See *2012 Lifeline Reform Order*, 27 FCC Rcd. at 6813-4, ¶ 369.

service" if three criteria are met.[38] This does not give the FCC authority to not apply § 214(e)(2) to **states**.

The inability to forbear puts even more focus on the weakness of the basis for the FCC preemption. Again, the speculative harm presumed by the FCC cannot be bootstrapped to allow removal of the authority specifically granted by Congress to the states.

VI. THE NEW FEDERAL DESIGNATION PROCEDURE IS INCONSISTENT WITH THE "COMPETITIVE NEUTRALITY" PRINCIPLE.

Section 254(b) requires the FCC to base policies for the preservation and advancement of universal service on six listed principles. The *Order*, at ¶¶38-42 (JA), discussed those principles. However, there is no discussion of the additional universal service principle the FCC adopted in 1997, pursuant to §254(b)(7): competitive neutrality. This "competitive neutrality" principle requires that "universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another."[39]

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[38] 47 U.S.C. § 160(a)(1)-(3).

[39] *In the Matter of Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776, 8801 ¶¶46-47 (1997).

There is no way to square the FCC's new designation procedure with this principle. The new federal designation procedure, by the FCC's own description, is the very definition of differential treatment that unfairly advantages one provider over another (and one technology over another).

What's worse is, as now-Chairman Pai's dissent accurately points out, cutting state commissions "out of the Lifeline designation process, cripple[es] their ability to guard against waste, fraud, and abuse. That's a disaster in the making. We need more cops on the beat, not fewer. And the State commissions thus far have the best track record." *Order* (J.A. __), 31 FCC Rcd. at 4177-78 (footnote omitted). Even the majority, at *Order* ¶227 (JA), notes that "States that retain the relevant designating authority also ensure that carriers have the financial and technical means to offer service, including 911 and E911, and have committed to consumer protection and service quality standards."

The record, and common sense, indicate that the state-by-state designation process, as Congress obviously intended, and the Order recognizes, [40] keeps

[40] *Order*, ¶227 (JA), noting that requiring participating Lifeline providers to be ETCs "facilitates Commission and state-level efforts to prevent waste, fraud, and abuse" and "serves the public interest by helping . . . ensure that consumers are protected as providers enter and leave the program." Obviously, more cops – more protection.

additional State "cops" on the local beat, necessarily increasing exposure of fraud and abuse and providing additional protections to the lifeline program and protecting service quality for lifeline consumers. Bypassing State designation procedures decreases potential enforcement – and potential enforcement liability.

It is difficult to make the argument that the new procedure does not provide a substantial and unreasonable advantage to new entrants – and those that choose to offer broadband only.

VII. CONCLUSION

The FCC's preemption of state authority to designate Lifeline broadband providers should be reversed.

/s/ David C. Bergmann

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) in that this brief contains 4530 words. In making this certification, Intervenor's counsel has relied on the word count function of Microsoft Word 2010, the word processing system used to prepare this brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 pt. font Times New Roman type style.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 2017, I caused true and correct copies of the foregoing Brief for Intervenor National Association of State Utility Consumer Advocates in Support of the FCC to be filed electronically with the Clerk of the Court using the Case Management and Electronic Case Files ("CM/ECF") system for the D.C. Circuit. Participants in the case will be served by the CM/ECF system or by U.S. Mail.

Sincerely,

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