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

UNITED STATES TELECOM ASSOCIATION Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA, Respondents.	)	No. 00-1428

OPPOSITION OF PETITIONER TO MOTION OF FCC TO HOLD IN ABEYANCE AND TO DEFER FILING OF CERTIFIED INDEX TO THE RECORD

The United States Telecom Association ("USTA"), petitioner, respectfully opposes the motion of the Federal Communications Commission (the "FCC") to hold this case in abeyance and to defer filing of the certified index to the record. To grant the motion would be to delay prompt reversal of a defective declaratory ruling of the FCC (the "Ruling")[1] that misapplies the Communications Act of 1934, as amended (the "Act"). USTA is the national association of local exchange carriers ("LECs"). The Ruling especially harms those USTA members that provide telecommunications service in rural areas of the United States.

USTA should not be denied this Court's review of the Ruling because others with an interest in the Ruling have petitions for reconsideration pending before the FCC. USTA did not

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[1] *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission,* CC Docket No. 96-45, Declaratory Ruling, FCC 00-248 (rel. Aug. 10, 2000).

file such a petition with the FCC. Because of the clear legal infirmities of the Ruling, its negative policy effects, and the FCC's demonstrated slow pace in deciding petitions for reconsideration, the Court should deny the FCC's motion and proceed with this case. Holding this case in abeyance would permit the Ruling to preclude -- for an indefinite period -- the implementation by state public service commissions ("state commissions") of effective policies concerning certification of telecommunications carriers for universal service funding and local competition, to the detriment of USTA's members.

This case presents concrete legal issues that are ripe for review. *See MCI Telecom. Corp. v. FCC*, 143 F.3d 606, 608 (D.C. Cir. 1998). The Ruling holds that state commissions *may not* interpret section 214(e)(1) of the Act to allow them the discretion to require a telecommunications carrier to furnish supported services throughout a service area prior to being designated as an "eligible telecommunication carrier" ("ETC"). The FCC decided that such an interpretation of section 214(e)(1) "prohibits or has the effect of prohibiting the ability of competitive carriers to provide telecommunications service, in violation of section 253(a) of the Act." Ruling, para. 2. Under the Act, state commissions must designate carriers as ETCs in order for such carriers, which may be seeking to compete with incumbent LECs, to receive federal universal service support.

The Ruling's construction of the Act is arbitrary, capricious, and contrary to law. The Ruling contradicts the Act's plain requirement that for a state commission to designate a carrier as an ETC, the carrier *"shall, throughout the service area for which the designation is received...offer* the services that are supported by the Federal universal service support mechanisms...." 47 U.S.C. § 214(e)(1) (emphasis added); *see also id.* § 214(e)(2).

The FCC incorrectly describes the Ruling as mere "guidance" to the state commissions. *See* Motion at 2; Ruling at 1. The Ruling does not simply provide advice to state commissions as they consider requests for ETC status. Instead, the Ruling erroneously declares that certain state actions in interpreting section 214(e) are contrary to the Act, and it does so in a manner inconsistent with the broad authority that section 214(e)(2) confers on state commissions to grant or deny ETC status in rural areas.

A state commission determination of ETC status contrary to the mandatory "guidance" provided by the Ruling faces the express threat of FCC preemption. *See* Ruling, para. 20 (stating that "a requirement that obligates new entrants to provide supported services throughout the service area prior to designation as an ETC is subject to our preemption authority under section 253(d) [of the Act]"). Far from providing "guidance" to the state commissions, the Ruling thus effectively prohibits them from taking actions contrary to its holdings.

The Ruling's invocation of federal preemption authority under section 253 of the Act is itself unlawful. The FCC may preempt state regulations only "to the extent necessary to correct ...a violation or inconsistency [with sections 253(a) and (b)]." 47 U.S.C. § 253(d). Section 253(a), in turn, bars only those state requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C § 253(a). As a declaratory ruling that purports to provide "guidance" to state commissions, the Ruling ignores section 253(d)'s command to preempt only "to the extent necessary" under section 253. At the same time, the Ruling fails to demonstrate how its hypothetical application of section 253(a) is consistent with the plain language of section 214(e).

Allowing this unlawful Ruling to remain in effect any longer than necessary to adjudicate USTA's petition for review will unreasonably extend the chilling and frustrating effect that the

Ruling has on ETC determinations by state commissions. In doing so, the Ruling harms rural LECs that receive federal universal service support, many of which belong to USTA, as well as legitimate ETCs.

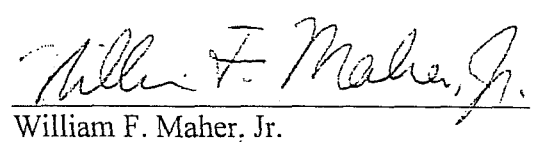
The Ruling leaves the federal universal service support mechanism, of great importance to USTA members, vulnerable to abuse and waste at the hands of carriers that have not adequately demonstrated their ability and commitment to serve rural customers on demand. This risk increases as state commissions attempt to manage entry by competing carriers into rural local exchange markets without the full range of options that the Act provides state commissions in order to avoid the squandering of a limited resource – federal universal service funding for rural areas.

Because of the FCC's dilatory treatment of reconsideration petitions generally, grant of the FCC's motion would again deny to USTA this Court's prompt review of a matter that affects fundamental rights under the Act and that is critically important to USTA members. The Court granted similar FCC motions to hold in abeyance two matters brought before this court earlier this year by USTA and other petitioners concerning implementation of the Act, in which USTA also had not filed a petition for reconsideration with the FCC. *See USTA v. FCC*, nos. 00-1012 & 00-1015 (and consolidated cases) ("the Line Sharing appeal and the UNE Remand appeal"), Order (Apr. 3, 2000) (granting FCC motions but requiring monthly status reports on the progress of the FCC's associated reconsideration proceedings). On November 2, 2000, in the most recent of a series of perfunctory status reports filed with the Court in the Line Sharing appeal and the UNE remand appeal, the FCC again failed to state when it will act on the pending petitions for reconsideration associated with those major interconnection policy proceedings.

In opposing the FCC's motion to hold in abeyance the Line Sharing appeal and the UNE remand appeal, USTA noted that for the thirty previous reconsideration orders issued by the FCC in matters from the Common Carrier Bureau, the average length of time from petition to FCC decision was 29 months. USTA also described long-pending reconsideration petitions that the FCC had not decided. *See USTA et al. v. FCC,* no. 00-1015 (and consolidated case), Opposition of Petitioners to FCC Motion to Hold in Abeyance (filed Feb. 29, 2000) at 6-7. In the motion now before the Court, the FCC offers nothing to give confidence that it will improve its track record with respect to prompt reconsideration of the Ruling.

USTA and its members should not again be penalized and denied timely review of the FCC's Ruling, which is arbitrary, capricious, contrary to law, and harmful to USTA's members. USTA opposes the FCC's motion and urges its denial.

Respectfully submitted,



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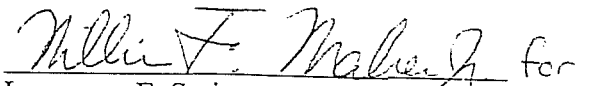

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Dated: November 17, 2000

CERTIFICATE OF SERVICE

I, William F. Maher, Jr., a member of the Bar of this Court, hereby certify that on this 17th day of November, 2000, I have caused copies of the foregoing Opposition of Petitioner to FCC Motion to Hold in Abeyance and to Defer Filing of Certified Index to the Record, dated November 17, 2000, to be served by messenger upon the following indicated by an asterisk, and by first-class mail, postage prepaid, on the others listed below:

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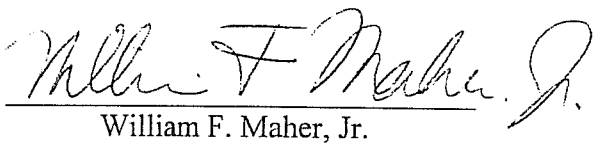

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