

No. 14-____

**In the
Supreme Court of the United States**

ALLBAND COMMUNICATIONS COOPERATIVE,
Petitioner,

v

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where Petitioner during 2005-2010 constructed and deployed a state-of-the-art fiber optic network capable of providing voice and broadband services in a previously unserved rural area, pursuant to regulatory approvals by the Federal Communications Commission (FCC) and state commission, financed by federal loans supported by the then-existing Universal Service Fund program established by Congress, is the 2011 FCC's Order (and Rule) unlawful in drastically reducing the USF support to Petitioner (except for a limited waiver), which will render Petitioner incapable of continuing to provide communications services and to make payments on its federal loan. More specifically,

1. Is the FCC 2011 Order and Rule Amendments, as applied to Petitioner, contrary to the plain language of the 1996 Act, and other statutory provisions, and contrary to the intent, purposes and objectives of Congress in adopting same?
2. Is the FCC's 2011 Order and Rule Amendments, as applied to Allband, contrary to constitutional Due Process principles, and this Court's decisions concerning same?
3. Is the 2011 FCC Order and Rule Amendments, as applied to Allband, unlawful and arbitrary, in violation of the Administrative Procedures Act, and contract and estoppel principles?
4. Does the Tenth Circuit Court decision conflict with decisions of this Court, other Courts of Appeal, and other decisions of the Tenth Circuit?

PARTIES

The following were parties before the Tenth Circuit Court of Appeals:

3 Rivers Telephone Cooperative, Inc.
Adak Eagle Enterprises LLC
Adams Telephone Cooperative
Alenco Communications, Inc.
Allband Communications Cooperative
Alpine Communications, LC
Arizona Corporation Commission
Arlington Telephone Company
AT&T Inc.
Bay Springs Telephone Company, Inc.
Big Bend Telephone Company, Inc.
Blountsville Telephone LLC
Blue Valley Telecommunications, Inc.
Bluffton Telephone Company, Inc.
BPM, Inc., d/b/a Noxapater Telephone Company
Brantley Telephone Company, Inc.
Brazoria Telephone Company
Brindlee Mountain Telephone LLC
Bruce Telephone Company, Inc.
Buggs Island Telephone Cooperative
Cambridge Telephone Company
Cameron Telephone Company, LLC
Cellular Network Partnership, A Limited
Partnership
Cellular South, Inc.
Central Texas Telephone Cooperative, Inc.
Centurylink, Inc.
Chariton Valley Telephone Corporation
Chequamegon Communications Cooperative, Inc.
Chickamauga Telephone Corporation
Chickasaw Telephone Company

Chippewa County Telephone Company
Choctaw Telephone Company
Citizens Telephone Company
City of Ketchikan, Alaska, d/b/a KPU
Telecommunications
Clarks Telecommunications Co.
Clear Lake Independent Telephone Company
Comcast Corporation
Comsouth Telecommunications, Inc.
Connecticut Public Utilities Regulatory Authority
Consolidated Communications Holdings, Inc.
Consolidated Telco, Inc.
Consolidated Telecom, Inc.
Consolidated Telephone Company
Copper Valley Telephone Cooperative
Cordova Telephone Cooperative
Core Communications, Inc.
Cox Communications, Inc.
Crockett Telephone Company, Inc.
Darien Telephone Company
Deerfield Farmers' Telephone Company
Delta Telephone Company, Inc.
Direct Communications Cedar Valley, LLC
Docomo Pacific, Inc.
East Ascension Telephone Company, LLC
Eastern Nebraska Telephone Company
Eastex Telephone Coop., Inc.
Egyptian Telephone Cooperative Association
Elizabeth Telephone Company, LLC
Ellijay Telephone Company
Emery Telcom
Farmers Telephone Cooperative, Inc.
Federal Communications Commission
Flatrock Telephone Coop., Inc.
Franklin Telephone Company, Inc.
Fulton Telephone Company, Inc.

Gila River Indian Community
Gila River Telecommunications, Inc.
Glenwood Telephone Company
Granby Telephone LLC
Great Plains Communications, Inc.
H & B Communications, Inc.
Halo Wireless, Inc.
Hart Telephone Company
Hiawatha Telephone Company
Holway Telephone Company
Home Telephone Company (Moncks Corner, SC)
Home Telephone Company (St. Jacob, Ill.)
Hopper Telecommunications LLC
Horry Telephone Cooperative, Inc.
Hot Springs Telephone Company
Hypercube Telecom, LLC
Independent Telephone & Telecommunications
Alliance
Interior Telephone Company
K. & M. Telephone Company, Inc.
Kansas Corporation Commission
Kaplan Telephone Company, Inc.
KLM Telephone Company
La Harpe Telephone Company, Inc.
Lackawaxen Telecommunications Services, Inc.
Lafourche Telephone Company, LLC
Lakeside Telephone Company
Level 3 Communications, LLC
Lincolnton Telephone Company
Loretto Telephone Company, Inc.
Madison Telephone Company
Matanuska Telephone Association, Inc.
Mcdonough Telephone Cooperative
MGW Telephone Company, Inc.
Mid Century Cooperative
Mid-Maine Telecom LLC

Midway Telephone Company
Montana Public Service Commission
Mound Bayou Telephone & Communications, Inc.
Moundridge Telephone Company of Moundridge
Moundville Telephone Company, Inc.
Mukluk Telephone Company, Inc.
National Association of Regulatory Utility
Commissioners
National Association of State Utility Consumer
Advocates
National Cable & Telecommunications Association
National Exchange Carrier Association, Inc.
National Telecommunications Cooperative
Association
National Telephone of Alabama, Inc.
Nebraska Central Telephone Company
Nex-Tech Wireless, LLC
North County Communications Corporation
Northeast Nebraska Telephone Company
Ontonagon County Telephone Company
Otelco Mid-Missouri LLC
Otelco Telephone LLC
Panhandle Telephone Cooperative, Inc.
Pembroke Telephone Company, Inc.
Peñasco Valley Telephone Cooperative, Inc.
Pennsylvania Public Utility Commission
People's Telephone Company
Peoples Telephone Company
Piedmont Rural Telephone Cooperative, Inc.
Pine Belt Telephone Company, Inc.
Pine Telephone Company, Inc.
Pine Tree Telephone LLC
Pioneer Telephone Association, Inc.
Pioneer Telephone Cooperative, Inc.
Poka Lambro Telephone Cooperative, Inc.
PR Wireless, Inc.

Public Service Telephone Company
Public Utilities Commission Of Ohio
RCA - the Competitive Carriers Association
Ringgold Telephone Company
Roanoke Telephone Company, Inc.
Rock County Telephone Company
Ronan Telephone Company
Rural Independent Competitive Alliance
Rural Telecommunications Group, Inc.
Rural Telephone Service Company, Inc.
Saco River Telephone LLC
Sandhill Telephone Cooperative, Inc.
Shoreham Telephone LLC
Sledge Telephone Company
Smart City Telecom
Smithville Communications, Inc.
South Canaan Telephone Company
South Central Telephone Association
South Slope Cooperative Telephone Co., Inc.
Spring Grove Communications
Sprint Nextel Corporation
Star Telephone Company, Inc.
State Members of the Federal-State Joint Board on
 Universal Service
Stayton Cooperative Telephone Company
The Blair Telephone Company
The Curtis Telephone Company
The North-Eastern Pennsylvania Telephone
 Company
The Siskiyou Telephone Company
The Voice on the Net Coalition, Inc.
Three River Telco
Tidewater Telecom, Inc.
T-Mobile USA, Inc.
Tohono O'Odham Utility Authority
Totah Communications, Inc.

Transcom Enhanced Services, Inc.
TW Telecom Inc.
Twin Valley Telephone, Inc.
U.S. Telepacific Corp.
United States Cellular Corporation
United States of America
Unitel, Inc.
Venture Communications Cooperative, Inc.
Verizon
Verizon Wireless
Vermont Public Service Board
Virginia State Corporation Commission
Vonage Holdings Corporation
Walnut Telephone Company, Inc.
War Telephone LLC
West Carolina Rural Telephone Cooperative, Inc.
West River Cooperative Telephone Company, Inc.
West Tennessee Telephone Company, Inc.
West Wisconsin Telcom Cooperative, Inc.
Western Telecommunications Alliance
Wiggins Telephone Association
Windstream Communications, Inc.
Windstream Corporation
Winnebago Cooperative Telecom Association
Yukon Telephone Co., Inc.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Applicant Allband Communications Cooperative (Allband) discloses the following:

Petitioner Allband is incorporated as a non-profit corporation in the State of Michigan under Chapter 11 of Michigan's Non-Profit Corporation Act, 1982 PA 162, Mich. Comp. Laws 450.2101, *et seq.* Allband is a non-stock customer-owned cooperative. No publicly held company or parent company has any ownership interest in Allband.

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Report and Order and Further Notice of Proposed Rulemaking of the Federal Communications Commission, Connect America Fund, 26 F.C.C.R. 17663 (2011) (¶¶ 1-241)	281a

¹Because of the bulk and expense of the Appendix, Allband and the National Association of Regulatory Utility Commissioners (NARUC) placed all their statutes and orders in one appendix. NARUC and Allband counsel confirmed with the Mr. Jeffrey D. Atkins, Deputy Clerk, Supreme Court of the United States that Allband could cite to the appendix being filed by NARUC.

**APPENDIX
VOLUME II**

(See Appendix filed with the January 26, 2015
Petition by NARUC including the same order)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Allband justifiably relied on Congress' 1996 amendments to the Federal Communications Act (Act) establishing the Universal Service Fund (USF) program, among other statutes establishing incentives (and even grant programs) to encourage and facilitate the deployment of broadband-capable networks, facilities, and services to the nation including rural areas.

Allband during 2005-2010 obtained numerous state and Federal Communications Commission (FCC) approvals, including a loan from the Rural Utility Service of the U.S. Department of Agriculture (RUS) to design and construct a broadband capable fiber-optic network, and to implement communications services in an unserved area comprising portions of four rural counties in Michigan that never before had any communications facilities or service of any kind.

Allband's new network was engineered and constructed using the most cost-efficient option, and to provide the most reliable service, taking into account the heavily forested and climatic conditions of its rural area, all with the extensive oversight of state and federal officials, including the rigorous planning and approval process of the RUS. Allband's newly constructed network comprises an up-to-date new central office exchange, and buried fiber optic to each customer. The network provides full capability to provide voice communications and all broadband services, consistent with Congress' intent, as established in the 1996 amendments and related statutes.

Upon completion of its network and commencement of services to its rural service area by 2010, Petitioner Allband was faced with the unforeseen November 2011 FCC Order (and Rule Amendments) imposing a \$250 monthly per-line cap on USF reimbursements, a cap much lower than that which existed when the FCC issued a 2005 order recognizing Allband for the USF program and when the RUS approved Allband's loan.

The FCC's 2011 Order and per-line cap Rule (unless waived or reversed) retroactively nullifies previous state and federal regulatory decisions that Allband (and the RUS) relied upon, and imposes drastically reduces per-line reimbursement caps under the USF program, and without any realistic consideration of Allband's inability to provide service and make payments on its RUS loans absent the previously established USF revenues that Allband (and the RUS) relied on to finance Allband's network and to initiate services in its rural area.

The Tenth Circuit's decision below dealt with an omnibus constellation of parties and issues, smothering Allband's efforts to challenge the FCC Order (given the drastically-reduced briefing page limits allocated to Allband under the Court's procedural Orders). Yet, Allband presented key arguments to the Tenth Circuit on the issues presented here, relying on this Court's precedent the Tenth Circuit ignored. The Tenth Circuit instead deferred to the FCC's order imposing the per-line USF reimbursement caps upon Allband, thereby ignoring the FCC Order's failure to respect Congressional intent in the 1996 Act (and related statutes) that facilitated the deployment of

Petitioner's versatile and reliable "broadband capable" network in its rural area. The Tenth Circuit decision also sidestepped Allband's Due Process arguments, including the nature of the FCC's unforeseen retroactive reversal of regulation upon which Allband (and the RUS) had relied upon to construct and fund Petitioner's network and communications services.

This Petition requests the Court to reverse the Tenth Circuit and FCC decisions below, as applied to Allband.

OPINIONS BELOW

The Tenth Circuit's May 23, 2014 initial opinion, and dissenting opinion (App 1a - 266a) is reported at 753 F.3d 1015 (10th Cir., 2014). The Tenth Circuit's August 27, 2014 denial of Petitioner Allband's (and another party's) Petitions for Rehearing are provided at App 267a and 268a. The Tenth Circuit's November 8, 2013 Order Granting Allband's Motion to Take Judicial Notice, with relevant attachments, is found at App 269a - 280a

The FCC's November 18, 2011 Order (and Rule Amendments) are provided at App 281a-1510a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Court granted Allband's November 12, 2014 Application (No. 14A518) for Extension of Time to File this Petition.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Statutory and Constitutional provisions include the Telecommunications Act of 1996 (1996 Act), Sections 151 (App 1542a), 153 (App 1544a - 1547a), 214(e) (App 1549a - 1553a), 251 (App 1553a - 1562a), 253 (App 1571a - 1572a), 254 (App 1573-1580a) and Section 1302 (App 1587a - 1588a); the Broadband Data Improvement Act (“Broadband Act”), Sections 1301 (App 1586a - 1587a), 1303 (App 1588a - 1591a), 1304 (App 1591a - 1597a); and the American Recovery and Reinvestment Act of 2009 (“Recovery Act”), Section 1305 (App 1592a - 1606a), and Section 706 of the Administrative Procedures Act 5 U.S.C. § 706 (App 1540a - 1541a), and Amendments V and XIV (Section 1) of the U.S. Constitutions (App 1540a).

STATEMENT OF THE CASE

A. Statutory Background

Congress in the 1996 Act, and related statutes, established unmistakable intent to promote the development and deployment of both voice and broadband communications infrastructure on a nationwide basis, to include rural areas, and with service quality and at rates which are comparable as between rural and urban areas.

The 1996 Act defines a Local Exchange Carrier, Section 153(32), 47 U.S.C. § 153(32), a Rural Telephone Company, Section 153(44), 47 U.S.C. § 153(44), and a Telecommunications Carrier providing telecommunications services and

telephone exchange service, Sections 153(50), (51), (53), and (54), 47 U.S.C. § 153(50), (51), (53), and (54). (App 1544a - 1547a).

Section 253(f), 47 U.S.C. § 253(f) (App 1572a) recognizes a state's authority to designate a carrier as an Eligible Telecommunications Carrier, to receive federal universal service support in accordance with Section 214(e), 47 U.S.C. § 214(e) (App 1549a - 1553a) and Section 254, 47 U.S.C. § 254 (App 1573a - 1580a).

Section 253(b), 47 U.S.C. § 253(b) (App 1571a) also encourages states to impose (consistent with Section 254) "...requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

Section 254, 47 U.S.C. § 254 (App 1573a - 1580a) establishes unmistakable Congressional intent to promote universal service, including in rural areas. Section 254(a)(1) and (2), 47 U.S.C. § 254 (App 1573a - 1574a), provide for a federal-state Joint Board and for FCC action to provide "a definition of the services that are supported by Federal Universal Support mechanisms and a specific time table for implementation." Section 254(b) (App 1574a - 1575 a) provides several clear principles "for the preservation and advancement of universal service", directing that:

- "[q]uality services should be available at just, reasonable, and affordable rates." Section 254(b)(1).

- “Access to advanced telecommunications and information services should be provided in all regions of the Nation”). Section 254(b)(2).
- “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. Section 254(b)(3).
- “All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.” Section 254(b)(4).
- “There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.” Section 254(b)(5).
- “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.” Section 254(b)(6).

- “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.” Section 254(b)(7).

Section 254(c) (App 1575a) states that “[u]niversal 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....”

Section 254(d) (App 1576a) requires contributions by carriers “to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.”

Section 254(e) (App 1576a - 1577a) provides that:

...only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support....

and that:

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.

Section 254(f) (App 1577a) encourages states to “preserve and advance universal service” and to “adopt additional specific, predicable, and sufficient mechanisms to support” universal service.

Section 254(g) (App 1577a) provides that certain rates charged by providers “to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas.”

Section 254(h)(1)(A) and (B), App 1577a - 1578a, provides that a telecommunications carrier shall provide telecommunications services to a health care provider... “that serves persons who reside in rural areas in that State.... as a part of its obligation to participate in the mechanisms to preserve and advance universal service” and that “all telecommunications carriers serving a geographic area shall” provide universal service to schools and libraries. Section 254(h)(2), App 1579a, also requires the FCC to establish rules to enhance access to advanced telecommunications and information services for schools, health care providers, and libraries. Section 254(i) provides that “The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.”

Congress has enacted other statutory provisions establishing its intent to promote the deployment of broadband-capable facilities and services. For example, the Food, Conservation, and

Energy Act of 2008 (“Farm Bill”)² directed the FCC Chairman and Secretary of the U.S. Department of Agriculture (USDA) to submit to Congress a “comprehensive rural broadband strategy” for deploying broadband in rural areas.

Amendments to Section 706, 47 U.S.C. § 1302(a), (App 1587 - 1588a) provide incentives for deployment of “advanced telecommunications capability,” defined in Section 1302(d)(1), 47 U.S.C. § 1302(d)(1), App 1588a, as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications.” Section 706(a) and (b), 47 U.S.C. § 1302(a) and (b) (App 1587a - 1588a) directed the FCC to accelerate deployment of broadband capability by removing barriers to infrastructure investment and promoting competition in the telecommunications market.

Other Section 706 amendments enacted in the Broadband Data Improvement Act (“Broadband Act”),³ directed the FCC and Secretary of Commerce to develop improved data on the extent of broadband deployment (Id, § 1303) 47 U.S.C. § 1303 (App 1588a - 1591a) and authorizing the Commerce Secretary to encourage initiatives to improve broadband access, Section 1304, 47 U.S.C. § 1304 (App 1591a - 1597a).

² Pub. L. No. 110-234, § 6112(a), 122 Stat. 923, 1966 (2008).

³ Pub. L. 110-385, Title I, §§ 101, 103, 122 Stat. 4096, 4096-97 (2008).

Congress also enacted the American Recovery and Reinvestment Act of 2009⁴ (Recovery Act) directing in Section 1305, 47 U.S.C. § 1305 (App 1597a - 1606a) directing the FCC to submit to Congress a national broadband plan, and the Broadband Technology Opportunities Program (Broadband Program) to:

(1) provide access to broadband service to consumers residing in unserved areas of the United States;

(2) provide improved access to broadband service to consumers residing in underserved areas of the United States;

(3) provide broadband education... access, equipment, and support to... (schools, libraries, health providers, colleges, community support organizations or agencies)....

(4) improve access to, and use of, broadband service by public safety agencies; and

(5) stimulate the demand for broadband, economic growth, and job creation.

Section 1304 and 1305, *Id* (App 1591a - 1606a) contains several provisions establishing a grant program to facilitate the construction and

⁴ Pub. L. No. 111-5, 123 Stat. 115 (2009).

deployment of broadband infrastructure and services.

The National Broadband Plan required by Section 1305(k), 47 U.S.C. § 1305(k) (App 1605a - 1606a) “shall seek to ensure that all people of the United States have access to broadband capability” ... [and] shall also include- (among other matters), “a detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public...” to advance numerous listed public interest benefits.

B. Facts and Regulatory Background Concerning Allband

Soon after adoption of the 1996 Act, residents in the contiguous portions of four Michigan counties commenced grass-roots efforts to research the formation of a customer-owned cooperative to provide communications services, due to the inability to obtain services from any carrier in their wholly unserved area. These research efforts were aided by a grant from Michigan State University, and by extensive volunteer effort by local residents.

Allband filed its Articles of Incorporation in late 2003, and then strived over the next several years to obtain state and FCC approvals, and also RUS federal loan approvals, to finance, design, construct, and commence service over a new fiber-optic network capable of providing an array of up-to-date voice and broadband services, facilitated by the RUS loans, which in turn were supported by revenues approved for Allband under the USF program.

In 2004-2005, the Michigan Public Service Commission (MPSC) in various orders granted Petitioner Allband a permanent license to provide services in its proposed unserved/unassigned area comprising 177-square miles, and created the “Robbs Creek” exchange, and granted Eligible Telecommunications Carrier (ETC) status to Petitioner for purposes of Sections 214(e) and 254 of the 1996 Act.

On August 11, 2005, the FCC granted Petitioner Allband’s waiver of certain FCC rules to allow Allband to be treated as an Incumbent Local Exchange Carrier (ILEC) for NECA (National Exchange Carriers Association) pooling and USF purposes.⁵ The FCC’s 2005 Order recognized that Allband’s provision of services to the unserved/unassigned areas would be costly on a per-line basis, but would be consistent with the 1996 Act. The FCC’s 2005 Order, paragraph 19, specifically concluded that “[b]ased on the record . . . these waivers are in the public interest because they will facilitate the ability of Allband to serve previously unserved areas.”

On August 18, 2005, the RUS granted an \$8 Million loan to fund construction of Allband’s network (USDA Rural Development Loan [RUS] Borrower MI-570). Allband commenced design and

⁵ FCC Order *In the Matter of Allband Communications Cooperative Petition for Waiver of Sections 69.2[hh] and 69.601 of the Commission’s Rules in WC Docket No. 05-174*, 20 F.C.C. Rcd. 13566 (2005) (App 1510a - 1523a).

construction of its network in late 2005 and for several years thereafter.

In December 2006, based upon the 2005 waiver orders (*Id*, fn 5), Allband, as an ILEC and ETC, began receiving USF Interim Common Line Support and Local Switching Support, to minimize administrative expenses and maintain reasonable access rates.

In January 2008, Allband began receiving USF High Cost Loop Support to support a substantial portion of the ongoing high cost of its network facilities and service while maintaining reasonable local exchange rates.

Allband's advanced fiber-to-the-home infrastructure provides the capability to provide services such as traditional telephone service, free calling features, long distance, broadband, high-speed internet, and other advanced services. Allband as an ILEC and ETC also undertakes important public interest duties to provide emergency connections including 911 services in an area that lacked traditional telephones and cellular service, as required of ILECs pursuant to Sections 214(e) (App 1549a - 1553a), 251 (App 1553a - 1562a), and 254 (App 1573a - 1580a) of the Act.

In the infancy of its network development in 2007, Allband had 33 customer lines and received USF support revenues of \$267,394.⁶ Allband has

⁶ See Tenth Circuit Court's Order granting Petitioner Allband's Request for Judicial Notice of certain facts and charts attached thereto (App 269a, 277a).

grown to approximately 170 lines, but still requires significant USF support above the per-line cap imposed by the FCC Order (and its Rule Part 54.302, App 1548a - 1449a) due to the largely undepreciated cost of its new network, the cost to make RUS loan payments, and the time necessary to attract additional customers in its rural area.

Allband requires the previously established (pre-2011) and expected “sufficient and predictable” USF revenues to (a) maintain affordable customer rates and services that are comparable to those provided in urban areas, (b) provide and maintain quality service, and (c) to meet its RUS debt obligations associated with its plant investment and network, in accordance with the provisions Congress established in the 1996 Act and related statutes.

Imposition of the FCC Order’s arbitrary \$250 per-line cap to Allband would have a catastrophic and immediate impact upon Allband. As of 2012, the federal USF revenues comprised approximately 55% of Allband’s total revenues. The FCC Order per-line annual cap, unless waived for the duration of Allband’s federal RUS loan, would render Allband unable to provide service and to meet its federal loan obligations to the RUS.

C. The FCC’s 2011 Order and Amended Rules, including limited waiver order applicable to Petitioner

No sooner than Petitioner completed construction of its network in 2010, the FCC issued

its voluminous Notice of Proposed Rulemaking⁷ proposing to implement extensive changes to its regulation of the communications industry, and to the USF established by Congress in the 1996 Act.

On April 18, 2011, Allband filed comments in the Rulemaking,⁸ outlining Allband's unique facts and circumstances, and advocating that the FCC should not limit USF reimbursements under previous FCC Orders and rules relied upon by Allband (and the RUS) to construct its infrastructure and to implement service, and that any changes should apply on a prospective basis to new construction and provision of services. Allband in said comments also advocated that the existing USF budget of approximately \$4.5 billion should be increased "to bridge the urban/rural divide."

The FCC issued its Order and Amended Rules on November 18, 2011.⁹ The FCC order provided a waiver process to permit carriers adversely impacted to apply for a waiver of the rules, but imposing exhaustive filing requirements to seek such a waiver (App 516a - 520a, 688a - 696a).

On February 6, 2012, Allband filed a voluminous and well-supported Petition to seek a waiver of the FCC Order and Rule imposing the per-

⁷ Notice of Proposed Rulemaking, 266 F.C.C. Rcd 4454 (2011) (USF/ICC *Transformation NPRM*).

⁸ <http://apps.fcc.gov/ecfs/document/view?id=7021239698>.

⁹ *Report and Order and Further Notice of Proposed Rulemaking of the Federal Communications Commission, Connect America Fund*, 26 F.C.C.R. 17663 (2011) (App 281a - 1509a).

line USF cap¹⁰ and also an April 17, 2012 errata correction to same,¹¹ and an April 30, 2012 “Request to Expedite Approval of Waiver Petition”¹² and June 27, 2012 Petition for Stay of the Order and Rule¹³ among other “ex parte” filings permitted by FCC Rules to respond to FCC Staff data requests, or to present information related to its Waiver Petition.

On July 25, 2012, the FCC issued its Order granting Allband a limited 3-year waiver, to July 1, 2015, of its Order and Rule capping Allband’s USF reimbursements.¹⁴ The FCC Order confirmed that Allband is a lean and well-run entity, among other findings. This Waiver Order also provided that Allband could file for another waiver 6-months prior to the expiration of the 3-year waiver period ending July 1, 2015.¹⁵

On August 24, 2012, Allband filed with the Commission an Application for Review of the July 25,

¹⁰ Petition of Allband Communications Cooperative for Waiver of Part 54.302 and the Framework to Limit Reimbursable Capital and Operating Costs, <http://apps.fcc.gov/ecfs/document/view?id=7021858642>.

¹¹ <http://apps.fcc.gov/ecfs/document/view?id=702191113>.

¹² <http://apps.fcc.gov/ecfs/document/view?id=7021914701>.

¹³ <http://apps.fcc.gov/ecfs/document/view?id=7021979204>.

¹⁴ Order, *In the Matter of Allband Communications Coop. Petition for Waiver of Certain High-Cost Universal Serv. Rules*, 27 F.C.C. Rcd. 8310 (2012).

¹⁵ Petitioner Allband did file for another waiver, with extensive supporting information, dated December 31, 2014, <http://apps.fcc.gov/ecfs/document/view?id=60001011612>.

2012 Waiver Order,¹⁶ presenting arguments and supporting data and information establishing that no significant events or changes will occur or are possible relative to Allband's service area and financial circumstances (including the RUS loan obligations) to justify only a 3-year period for continued receipt of the previously-established USF revenues. The FCC has not ruled on Allband's Application for Review.

Allband's 2012 and 2014 Waiver Petitions, with exhaustive supporting information, have requested that the USF reimbursement caps imposed by the FCC Order and Amended Rule should be waived until 2026 when Allband's 20 year RUS loan will be paid, and have asserted that absent such waiver, Allband will have to close operations and default on its RUS loan.

The costs and uncertainty associated with the FCC Orders and exhaustive waiver process has degraded Allband's financial resources, and diverted efforts at providing and expanding service in its rural area, and threatens Allband's existence and operations as the unresolved situation approaches July 1, 2015.

D. Petitioner Allband's Court Appeal

Petitioner Allband timely filed an appeal of the 2011 FCC Order and Amended Rules in the U.S. Court of Appeals for the Sixth Circuit. Scores of other appeals of the FCC Order were filed in various

¹⁶ <http://apps.fcc.gov/ecfs/document/view?id=7022007675>.

Courts of Appeal, and were transferred and consolidated in the Tenth Circuit Court of Appeals.

The Tenth Circuit 2-1 decision (and denial of Petitioner Allband's Rehearing Petition) affirmed the FCC's Order and Amended Rules in their entirety. The dissenting opinion found that the FCC acted arbitrarily in violation of the Administrative Procedures Act in failing to supply a rational basis to support its conclusion that an annual USF budget of \$4.5 billion would be sufficient to fund the FCC's new requirements for broadband capability.

REASONS FOR GRANTING THE PETITION

I. The FCC's Order (and Amended Rules) and Tenth Circuit's Affirmance Thereof, is Contrary to the Unmistakable Intent, Purposes, and Objectives of Congress, as Established by the Plain Language of the 1996 Act and Related Statutes

The FCC Order, and the Tenth Circuit's 2-1 decision affirming same, ignored Allband's assertions to the agency and Tenth Circuit that the FCC Order's application of the per-line cap to Allband, violates Congressional intent as derived from the plain language of the 1996 Act (and related statutes).¹⁷

¹⁷ Statutes must be interpreted in accordance with the goals, objectives, and intent of Congress. *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293; 108 S. Ct. 1145 (1988).

Allband, during the period 2005-2010, justifiably relied upon the statutory mandates, purposes, and objectives of the 1996 Act establishing the USF, and upon various orders or directives of the FCC, the MPSC, and the RUS, among other agencies, in constructing an efficient and reliable network capable of providing all voice and broadband communications services in its previously unserved rural area. Nevertheless, shortly after achieving unquestioned success on this effort, the FCC issued its subject 2011 Order, which in an unnecessary and unforeseen manner punished Allband for this accomplishment. The FCC Order, unless waived or reversed, would limit and restrict the USF funding necessary to support Allband's already incurred investment and RUS-approved loans, undertaken to advance universal service objectives. The FCC Order disregards the reality that all of the purported goals and objectives of the FCC's USF reforms could be fully achieved without destroying Allband and its taxpayer-funded RUS loans¹⁸

The Tenth Circuit accepts the “ground relied on by the agency” replete with “implicitly adopted

¹⁸ The destruction of Allband and its loans has virtually no impact upon the USF and the surcharges collected nationwide to fund the USF. Allband's receipts from the ratepayer supported USF are less than \$1 million annually, much of which goes to paying the taxpayer-supplied RUS loans. This is infinitesimal compared to the total annual \$4.5 billion USF budget. The FCC Order also acknowledges (App 516a - 517a) that fewer than 20 out of 1,442 incumbent LEC study areas received more than \$3,000 per-line annually (more than \$250 per month) in USF support, with an overall USF budget impact of less than \$15 million, and that 99% of incumbent LEC study areas received USF support under the \$250 monthly amount.

rationales” and misuses of *City of Arlington v. FCC*, ___ U.S. ___, 133 S. Ct. 1863; 81 U.S.L.W. 4299 (2013), to accord *Chevron* deference to the FCC’s rulemaking, so as to singularly and arbitrarily create the necessary conditions for Allband’s demise. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837; 104 S.Ct. 2778; 81 L.Ed.2d 694 (1984). *Chevron* deference is premised on a two prong test: first, whether Congress has directly spoken to the precise question at hand and, if not, the courts “defer” to the agency’s construction of the statute so long as it is permissible. A *Chevron* inquiry implies that if a statute is ambiguous, such ambiguity constitutes a delegation from the Congress to “fill in the statutory gap.” But, *City of Arlington* addresses whether the “statutory ambiguity ... concerns the scope of the agency’s statutory authority (that is its jurisdiction).” *City of Arlington*, 133 S. Ct. 1868. Here, the Tenth Circuit did not fully explore how the first prong should (or should not) apply. Regarding the Act, Congress *did* speak directly and unmistakably in several statutory sections (cited *supra*) establishing the USF and mandating rural telecommunications services. Allband, especially, relied on the 1996 Act and FCC’s orders which recognized Allband’s ILEC and ETC status to seek sufficient USF funds to construct its network, to pay its RUS loans, and to provide service in accordance with Congressional intent. With the FCC’s blessing, Allband entered into a USDA/RUS loan, fully premised on the USF, administered by the FCC. The Tenth Circuit thus ignored the Act’s clear and unmistakable intent to promote the rural telecommunications business and FCC’s previous commitment to accomplish its Congressionally mandated mission.

The Tenth Circuit's error continued with a failure to consider the Act in its context, "interpreting the statute to create a symmetrical and coherent regulatory scheme." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569; 115 S.Ct. 1061; 131 L.Ed.2d 1 (1995). Surely, the FCC and the Tenth Circuit were aware that Allband relied on FCC orders, the 1996 Act, among others, which authorized the USDA/RUS to fund Allband's telecommunications business. The unmistakable intent of Congress as stated in the overall statutory scheme bars going beyond the first prong of *Chevron*. FCC's order is not based on authority granted by the Congress, as it pertains to Allband, and is *ultra vires*. *City of Arlington*, 133 S.Ct. 1863, 1869. Thus, it is not necessary to take the second *Chevron* step because there is no gap to fill.

The Tenth Circuit could have avoided such error had it properly applied *F.D.A. v. Brown & Williamson Tobacco*, 529 U.S. 120, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) wherein the Court overturned the agency decision by applying several statutes as a harmonious statutory scheme.

Consistent with *F.D.A. v. Brown & Williamson*, *City of Arlington*, and *Chevron*, FCC Order and rulemaking regarding Allband is not entitled to *Chevron* deference. The Tenth Circuit ignored that Congress expressly amended the 1996 Act to establish the USF, regulated by the FCC, to encourage universal service in rural areas, and enacted subsequent Acts to promote deployment of broadband capable infrastructure on a national (and rural) basis. The FCC's 2005 Waiver Order recognized Allband as an ILEC and ETC carrier to

enable full USF support, consistent with the Act. Under express Congressional authority and budgeting the RUS granted Allband a 20-year \$8 million loan, and Allband successfully constructed its rural service network. The FCC's Order and Rule and per-line cap are contrary to Congressional intent, and undermine the purposes and objectives of Congress in establishing the USF program, part of a national policy to promote and incentivize the deployment of broadband capable infrastructure in rural areas at service quality and rates comparable to urban areas. The arbitrary and unsupported per-line cap rule is counter-productive to Congressional mandates and intent, will impede further deployment of broadband infrastructure and services in rural areas, and *Chevron* deference does not apply.

II. The FCC's Order and Rules, as Applied to Allband, and the Tenth Circuit's Decisions Affirming Same, Violates Due Process Principles and this Court's Recent Decisions

The FCC Order, and Tenth Circuit decision, effects an unlawful and unreasonable regulatory reversal analogous to that rejected by this Court in *United States v. Winstar Corporation*, 518 U.S. 839; 116 S.Ct. 2432; 135 L.Ed.2d 964 (1996). In *Winstar*, the Federal Home Loan Board promulgated rules to encourage investors in good standing to take over ailing banking thrifts by counting goodwill as an asset. However, Congress subsequently forbid such thrifts from using goodwill credits for required reserves -- a retroactive reversal of policy that rendered Appellant *Winstar* insolvent. This Court in *Winstar* ruled such Congressional action constituted

a breach of contract permitting awards of damages to Winstar and other thrifts that had contracted with the FHLB to take over ailing thrifts, and that suffered damages or harm from Congress' regulatory change.

This Court's outcome in *Winstar* is in concert with the Restatement of Contracts and the Restatement (Second) of Contracts, as noted by this Court in a subsequent case. If the "Government ... did break ... an important contractual promise thereby 'substantially impair[ing] the value of the contract' to the companies ... than ... the Government must give the companies their money back." *Mobil Oil Exploration v. U.S.*, 530 U.S. 604; 120 S. Ct. 2423; 147 L.Ed.2d 528 (2000). Similarly, the Tenth Circuit Court has held: "[I]f within ... [a] legislative mandate Congress provides the agency with discretion in enforcement because of Congress' awareness that prior agreements would be abrogated by an abrupt change in the law, the agency may properly be held in breach of any agreements which could have been honored by the exercise of the discretion afforded them by Congress." *Resolution Trust Corp. v. Federal Savings and Loan Ins. Corp.*, 25 F.3d 1493, 1501 (10th Cir., 1994).

With facts similar to those in *Winstar*, Allband entered into loan contracts with the RUS, relying on RUS' express authority to offer the loan, the 1996 Act, existing FCC and state regulatory rules and orders granting Allband's ILEC and ETC status, and USF support. Consistent with express Congressional intent, Allband utilized the RUS loan funding to deploy infrastructure and services in a previously unserved rural area of Michigan. Allband

proceeded to construct a modern, versatile network and continues to operate the same, consistent with this reliance. After Allband installed such infrastructure and began to operate services previously sanctioned and authorized by the FCC, the FCC's 2011 Order arbitrarily imposed an after-the-fact regulatory reversal, to Allband's great detriment. Similar to the *Winstar* facts, Allband amply demonstrated to the FCC and the Tenth Circuit that the impact of the FCC's arbitrary and retroactive rulemaking will force a certain default of the RUS loans and cessation of services. While the FCC granted Allband a three year waiver of the arbitrary \$250 USF line cap, any failure to extend the waiver (after repeated and costly applications and petitions for review) perpetually places Allband in the threat of default of the RUS loan, deprives RUS of its expected return payment on the Allband loan, and threatens elimination of Allband's services to its rural residents. FCC's change in rules will ultimately and unilaterally impact Allband in the same way the Federal Home Loan Board rules threatened *Winstar*.

It is not enough to deflect the analogous *Winstar* situation and precedent on the basis that the government's RUS loan contract with Allband does not include the FCC as a party. The FCC administers the USF which funds Allband's repayment of the RUS loan, and the FCC issued direct orders authorizing Allband's USF funding. *Winstar* contract principles should apply to FCC's arbitrary and retroactive rulemaking deprivation of the capital required for Allband to repay the RUS loan, and to support its broadband capable infrastructure and services. The Court should

review the FCC's Order and rulemaking here when such rulemaking has an integral nexus with the USF and the RUS loan process, and directly undercuts a private party's contract with another federal agency, particularly when the FCC's rulemaking regarding Allband is *ultra vires* under *Chevron*. Such an unnecessary clash between the FCC and RUS, and with Congressional intent, should be scrutinized and then rejected.¹⁹

The Tenth Circuit also rejected Allband's arguments²⁰ that the FCC Order violated constitutional Due Process principles, and venerable precedent of this Court, including but not limited to *Bluefield Waterworks & Improvement Co. v. Public Service Comm'n of West Virginia*, 262 U.S. 679, 692-693; 43 S. Ct. 675; 67 L. Ed. 1176 (1923), and *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591; 64 S.Ct. 281; 88 L.Ed. 333 (1944). The lower Court, without explanation and support (App 125a) dismisses these arguments on the basis that "Allband is not a public utility." However, Allband is heavily regulated as an ILEC and ETC by both state and federal regulatory agencies, with respect to rates and services, financial reporting, accounting, and related matters.

¹⁹ While the FCC will certainly assert the waiver renders Allband's claims as unripe because of the three-year waiver on the arbitrary \$250 USF line cap, such a waiver is temporary, is costly to renew, and may not be extended.

²⁰ Allband's portion of the November 6, 2012, Consolidated Additional Universal Service Fund Issues Principal Brief (pp 33-34, 38).

The lower court also misconstrued Allband's discussion of this Court's recent decision in *Federal Communications Commission et al v Fox Television Stations, Inc*, ___ U.S. ___; 132 S. Ct. 2307; 183 L.Ed. 2d 234 (2012). This Court in *Fox* found that the existence of a waiver (like that which the FCC has utilized here) does not provide "fair notice," and does not satisfy the need for adequate notice of long term regulation ("...due process protection... does not leave [regulated] parties... at the mercy of *noblesse oblige*"). *Fox* holds that clarity in regulation and notice of changed interpretations is essential to Fifth Amendment Due Process protections. The *Fox* Court also found that "reputational injury" provided further reason for granting relief from the FCC Order, a harm that also exists here with Allband. Even more than in *Fox*, Allband could never have foreseen when it relied in good faith upon the 1996 Act, the USF program, and ensuing state and federal approval orders, that its entire efforts and investment would soon be subject to effectively a retroactive regulatory change that would result inevitably in Allband's closure, cessation of services, and default of its RUS loans, leaving a valuable investment in its rural area stranded and abandoned, in complete violence to Congressional intent under the 1996 Act and related statutes.

Further, both the FCC and the Tenth Circuit are assumed to be aware that the *Fox* "fair notice" requirement is generally applied to an agency's retroactive rulemaking or legislative action, i.e., "the presumption against retroactive legislation is deeply rooted in our jurisprudent and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Products*, 511 U.S. 244, 265;

114 S.Ct. 1483; 128 L.Ed.2d 229 (1994). Moreover, it is fundamental that Congress and agencies in the executive branch are constrained by the presumption that all laws will be interpreted to have only future effect without express statutory authority to the contrary. *Landgraf* states that “a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.” *Landgraf*, 511 U.S. at 268.

Landgraf follows the landmark ruling in *Bowen v. Georgetown University Hospital*, 488 U.S. 204; 109 S.Ct. 468; 102 L.Ed.2d 493 (1988) which held agencies could not adopt retroactive rules without explicit congressional authority.²¹ In particular, “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” *Bowen*, 488 U.S. at 79. However, defining “fair notice” or “unfair surprise” in the context of retroactive rulemaking in practice has been somewhat problematic, but is clear on the Allband facts.

Both *Bowen* and *Landgraf* are followed by and consistent with this Court’s holdings in *Christopher v. SmithKline Beecham Corp.*, ___ U.S. ___; 132 S.Ct.

²¹ The Tenth Circuit (App 123a) also erroneously stated that Allband’s due process argument referred only to the *Fox TV* decision, when in fact Allband discussed and cited in its brief several decisions including this Court’s *Winstar*, *Fox TV*, *Landgraf*, and *Bowen* decisions, and several decisions supporting its Fifth Amendment Due Process arguments.

2156, 2167; 183 L.Ed.2d 153 (2012) which held an agency is obliged to give “fair notice” and “provide regulated parties fair warning of the conduct [a regulation] prohibits or requires.” The agency is prohibited from “unfair surprise.” Cited by *Comcast Cable Communications, LLC v. FCC*, No. 12-1337 (D.C. Cir., 2013). More recently rulemaking retroactivity has been overturned by the Ninth Circuit in *Cort v. Crabtree*, 113 F.3d 1081 (9th Cir., 1997), by the Second Circuit in *Rock of Ages v. Secretary of Labor*, 170 F.3d 148 (2nd Cir., 1999), and by the D.C. Circuit in *National Mining Association v. Department of Labor*, 292 F.3d 849 (D.C. Cir., 2002). Most analogous to the Allband facts, in *National Mining Association*, the Court held the Department of Labor could not apply certain new rules affecting claims under the Black Lung Benefits Act to claims filed before the new rules were adopted.

Allband is entitled to fair notice of the FCC’s dramatic substitution of existing statutes and orders that the RUS, FCC, MPSC, and Allband clearly understood and applied. The FCC engaged in a dramatic reversal of policy and rules in imposing the new and arbitrary \$250 USF line cap, without notice or reasoned opinion, in place of the per-line USF reimbursement upon which Allband and the RUS relied. The FCC did not “merely interpret” its existing rules permitting a retroactive impact on Allband. Rather, like the *National Mining Association* case, the FCC reversed prior regulation and to apply a new line cap restriction to Allband so as to detrimentally impact Allband, contrary to

express and unmistakable Congressional mandates.²²

The Tenth Circuit decisions (App 121a - 127a) repeatedly refers to the limited 3-year waiver of the per-line cap that the FCC granted Allband in considering Allband's various arguments to that Court (as presented here). However, the limited 3-year waiver does not address the per-line USF reimbursements planned on and needed by Allband to provide service and make payments on its 20-year RUS loan, and that the cost factors related to Allband's recently constructed network, loans, and rural service area will not change in only three years. The FCC also delayed action on Allband's 2012 application for Review of the Waiver Order, nor is there any indication that the FCC will grant Allband's further waiver request dated and filed December 31, 2014.²³

To be certain, Allband's Petition is neither subject to denial by the mootness or by ripeness doctrines which would arise under Article III of the United States Constitution, which requires the courts to only consider "cases and controversies."

²² As noted in the statutory summary, the 1996 Act places several public interest duties upon ILECs and ETCs such as Allband; also, Section 254(b)(5) and 254(d) requires "specific, predictable and sufficient... mechanisms to preserve and advance universal service"; while Section 254(e) requires that universal service support provided to ETC Providers "should be explicit and sufficient to achieve the purposes of this section."

²³ Petition of Allband Communications Cooperative (Allband) for further Waiver of Rule 54.302, <http://apps.fcc.gov/ecfs/document/view?id=60001011612>

The doctrine of mootness does not apply because the FCC has never disclaimed the rules or orders which Allband contests and has not ordered a permanent reinstatement of the *status quo ante* USF line subsidy for Allband. The Allband facts and claims require review because such are of continuing public interest, capable of repetition, and yet are capable of evading review. *Southern Pacific Terminal Co. v. Interstate Commerce Comm.*, 219 U.S. 498, 31 S. Ct. 279, 55 L.Ed. 310 (1911), *Alton & S. R. Co v. International Ass'n of Machinists & Aerospace Workers*, 463 F.2d 872, 879 (D.C. Cir., 1972). Neither does ripeness apply because there is an “injury in fact,” i.e. Allband has already been denied a permanent waiver to the arbitrary \$250 USF line cap, and the FCC respective waiver process requires continued expenditure of scarce time and money, not to mention future business uncertainty, all of which adversely impact Allband. When any final agency regulation is at issue, there is a presumption such issue is fit for judicial resolution even in the face of a pre-enforcement challenge. *Abbott Laboratories, et al. v. Gardner*, 387 U.S. 136; 87 S. Ct. 1507; 18 L.Ed.2d 681 (1967). An overriding reality is that, if the FCC denies Allband the needed longer term waiver, Allband’s continued survival will be so short that no time would remain for challenging the FCC action.

III. The FCC’s Order and Rulemaking, as Applied to Allband, Also Violates the Administrative Procedures Act as Being Arbitrary and Irrational, and Contrary to Contractual and Estoppel Principles.

The lower court also rejected the arguments of Allband and others that the FCC order is arbitrary and capricious, in violation of the Administrative Procedures Act, 5 U.S.C. § 706(2)(A) (App 1540a - 1541a) by freezing without rationale the existing annual USF budget, as articulated by the lower Court’s dissenting opinion;²⁴ and by failing to assert any rational basis for determining and mandating an across-the-board per-line per-month cap for USF reimbursement, without considering differences in costs or circumstances of carriers.

The FCC Order also fails to recognize that, unlike many other carriers, Allband is an ILEC and ETC assigned important public service responsibilities not assigned to any other carriers, as noted earlier.

The FCC Order also is unlawful and arbitrary in retroactively reversing its previous orders, and in effectively reversing and disabling several orders of

²⁴ The dissenting opinion found that “the FCC failed to supply a rational basis for its conclusion that an annual budget of \$4.5 billion would suffice with the new requirements for broadband capability” (p 163). Allband’s April 18, 2011, Comments in the NPRM (p 24) had also advocated to the FCC that “the Universal Service Fund needs to be increased to bridge the urban/rural divide, and not reduced or made subject to uneconomic short-term requirements.”

the FCC, MPSC and the RUS, upon which Allband and its customer/members, and the public itself, relied upon in committing to the financial obligations of Allband's RUS loans, and in expending the resources necessary to provide broadband capable network services in the previously unserved area now served by Allband. The FCC Order failed to provide adequate rational reasoning for this regulatory reversal applied to Allband, contrary to the standards of *Motor Vehicle Mfrs. Ass'n. of the United States, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29; 103 S.Ct. 2856; 77 L.Ed.2d 443 (1983).

The FCC's order also appears to be strangely punitive to Allband (and perhaps the RUS), without any rationale. Allband's customer-owners and local resources assisting Allband have been punished for undertaking a prodigious good-faith effort to pursue the opportunities Congress provided in the 1996 Act and related statutes, and in deploying broadband capable infrastructure in its rural area. That itself supports Petitioner Allband's statutory and constitutional assertions presented herein.

The FCC Order and per-line cap rule is arbitrary and unsupported both legally and factually for several reasons: (i) the Order provides no adequate rationale for adopting the \$250 per-line monthly cap, on a nation-wide basis, without consideration of important factors such as the rural or urban nature of the area served by a carrier, or when the facilities and services were first deployed, and the amount of USF support needed to provide services at comparable quality and rates, or any other logical factors that may justify differing per-line USF support; the Order did not consider that

Allband was a new entity, serving a previously unserved rural area, with wholly new infrastructure wholly capable of providing broadband services, and at rates and service quality comparable to urban areas, all as mandated by Congress; (ii) the Order's per-line cap is not supported by any facts or "record" compiled in the rulemaking proceeding, and has all of the hallmarks of a predetermined unstated agenda driven approach, without any disclosure of the basis or source of the policy; (iii) the per-line cap is not supported by any directive or authorization of Congress, nor does the cap fill a "regulatory gap" left by Congress; (iv) the per-line cap defies the economic reality that the provision of broadband capable infrastructure in a previously unserved rural area, will be most expensive on a per-line basis in the early years, as the new investment will start out as undepreciated plant, and that a period of time is necessary to expand facilities and add new customers; (v) the Order's per-line cap on USF reimbursements also serves to hinder the accomplishment of Congress' intent to support and incentivize the deployment of broadband infrastructure nationwide, and particularly in rural areas; a start up ETC/ILEC such as Petitioner Allband could never provide broadband infrastructure and services in a rural area with USF support limited to only \$250 per-line, particularly for the earlier years after deployment for the reasons noted. This means that the Order actually undercuts, and is contrary to, Congressional intent because the Order fails to align with the Congress' unmistakable mandates to encourage and incentivize the deployment of broadband in rural areas, and with service quality and at rates that are comparable to urban areas; (vi) the Order without explanation

applied the per-line cap to Allband, after Allband had deployed its broadband capable broadband infrastructure, despite the fact that such a cap effectively nullified previous orders, and federal loan contracts premised upon the then existing USF support levels, and when Allband (and the RUS) could not retroactively alter their infrastructure and financial decisions, all of which were completed by the time of the 2011 Order. The Order also ignored the comments of Allband and others that a per-line cap should be applied only to prospective investment decisions, not those already made on an irretrievable basis; (vii) the FCC Order also ignored the fact that all of its purported purposes for implementing the USF “reforms” could readily be accomplished without imposing the per-line cap to Allband and its unique circumstances as a wholly new ETC/ILEC providing broadband capable infrastructure in a rural area that never had communications services; (viii) the Order ignores the comments of Allband and others that the existing levels of USF support (4.5 billion nationally) was not adequate to close the “digital divide” as between rural and urban areas; the dissenting opinion in the Tenth Circuit decision below also found that the FCC Order did not provide an adequate rational and was not based upon an adequate record to justify this premise for the FCC’s decision; there also was no rational basis for the FCC’s presumption that the very modest surcharge applied by carriers nationally on customer bills for the customer funded USF was unreasonable; (ix) the FCC Order imposing the \$250 per-line cap appears to be a thinly disguised effort to focus upon and punish Allband specifically, which has successfully followed and carried out the purposes and objectives of Congress in the 1996 Act and related statutes; (x)

the FCC should also not justifiably rely on a repetitive waiver process; Allband has well-documented in FCC filings that nothing related to Allband's circumstances or rural area will change measurably over a short 3-year period, although Allband is exerting effort to add lines, cut its lean expenses, and to pay down its RUS loan; at the same time, the exhaustive waiver filings that the FCC has required are very costly and time consuming, and divert scarce resources that could otherwise be focused upon customer services.

Another Petitioner challenging the FCC Order (and adopted Rules) is United States Cellular Corporation in this Court's Docket No. 14-610, which presents the question "whether Congress authorized the FCC to adopt rules requiring the recipients of universal service support to provide broadband Internet access service subject to common-carrier regulation under Title II of the Act." Allband's Petition herein poses in some respects an opposite situation wherein Allband is challenging the FCC's Order (and Rules) which retroactively punishes Allband for constructing and deployment of an up-to-date, efficient, and reliable infrastructure network (in reliance upon and with previously-approved USF support), that is capable of providing full broadband services in its rural area.

IV. The Tenth Circuit's Decisions Conflict with Decisions of this Court, Other Courts of Appeal, and With Other Decisions of the Tenth Circuit

The FCC Order and Rule, as applied to Allband, also conflicts with decisions of this Court

and of various Court of Appeals and within panels of the Tenth Circuit itself.

The Order and Rule imposes the kind of regulatory reversal, causing severe detriment to regulated entities, that this Court rejected in the analogous *Winstar* case. In fact, this case is even more compelling. In *Winstar*, Congress itself attempted to retroactively reverse regulations upon which *Winstar* had relied upon to its detriment. Here, it was NOT Congress, but a misguided FCC Order and rule, that retroactively nullifies several orders or actions of the state regulatory agency (acting pursuant to the FCC Act) and of the FCC itself, and Congressional intent in establishing the USF and RUS loans to deploy the provision of broadband capable infrastructure in rural service areas.

The FCC Order also does not comport with this Court's decision in *Fox, supra*, wherein this Court found in some analogous circumstances that the FCC did not comply with due process, and that the inclusion of a "waiver option" does NOT satisfy Due Process given the reputational, business, and other detriments resulting from the FCC action, and also because of the resulting injury that can result from the finding when the regulated entity faces additional accusations or proceedings, among other factors. The same situation exists here, as Petitioner Allband is facing the incredible pressure of responding to exhaustive filings with the FCC, and the Courts, after acting in good faith to pursue and comply with the goals and purposes of Congress establishing the USF program, and other programs, to deploy universal and broadband services in its

rural area. The impact of the FCC Order is to created great uncertainty in the continued viability of Allband to pay on its RUS loan, to continue to provide service, to retain its vendors, employees, and financial relationships, and to retain or expand its customer-members, and to expand and maintain communications services.

The Tenth Circuit decision below also conflicts with other decisions where the Court refused to affirm a retroactive application of regulatory changes such as the *Landgraf, supra*, and *Bowen, supra* cases, among others.

The Tenth Circuit decision has misapplied the *Chevron, supra*, *City of Arlington, supra*, and *Brown & Williamson, supra*, cases concerning the degree of judicial deference to be accorded the FCC Order in the circumstances presented, as discussed *supra*, and wholly ignored the precedent that *de novo* Court review is to be applied to review of constitutional issues, as is presented here. The Tenth Circuit itself (App 20a) stated that the Court reviews “*de novo* whether agency action violated a claimant’s constitutional rights.” *Copar Pumice Co. v. Tidwell*, 603 F.3d 780, 802 (10th Cir. 2010).

This Court should also consider that the avenue for conflicting decisions on the legality of the FCC Order and Rules in this case is also tempered or removed by the consolidation process authorized by the Appellate Court Rules, which greatly truncated the review process in one Circuit, thereby removing the possibility of conflicting result among Circuits, with respect to review of the subject FCC Order. No possibility of “conflict’ could occur in this context, and

so this criteria for accepting certiorari review may be inapplicable to Allband's petition and issues in this case.

CONCLUSION

Allband Communications Cooperative respectfully requests this Honorable Court to grant this Petition.

Respectfully submitted,

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