IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Citizens Telecommunications Company of Minnesota, LLC, *et al.*,	)	
Petitioners,	)	
v.	)	Nos. 17-2296, 17-2342, 17-2344, and 17-2685
Federal Communications Commission, *et al.*	)	
Respondents.	)	

RESPONSE OF ILEC INTERVENORS
IN SUPPORT OF FCC MOTION TO STAY THE MANDATE

Intervenors USTelecom, AT&T, and CenturyLink ("ILEC Intervenors") support the FCC's motion to stay the mandate pending remand proceedings.[1] A stay is necessary to prevent pointless and costly industry disruption as the FCC moves forward expeditiously on its proposal to re-adopt on remand the same transport rule in effect today.

In the *Order* under review (JA1122-1316), the FCC broadly reformed regulation of business data services ("BDS"). This Court properly denied a stay pending judicial review, and thus these new rules have been in effect since August

[1] Motion of Federal Communications Commission to Stay the Mandate, Nos. 17-2296 *et al.*, Doc. 4713987 (8th Cir. Oct. 10, 2018) ("Mot.").

2017. Since then, carriers have made many changes in reliance on the 2017 rules—for example, by transitioning transport services from intricately regulated tariffed offerings to negotiated contracts that often also include negotiated terms and conditions for other services. *Order* ¶¶ 160-65 (JA1194-96).

Just as the Court denied petitioners' 2017 stay request, it also rejected all of their challenges to the *Order*, with one limited exception: it held that the FCC had provided inadequate notice that it would eliminate all *ex ante* regulation of legacy ("TDM") transport services. *Citizens Telecomms. Co. of Minn. v. FCC*, 901 F.3d 991, 1004-06 (8th Cir. 2018). Although the Court vacated and remanded on the basis of that purely "procedural violation," *id.* at 1006, it questioned neither the substance of the 2017 transport rule nor the FCC's ability to reimpose the same rules on remand. Indeed, it noted that "intervenors may be correct that everything that needed to be said regarding transport services was said during the twelve years preceding the 2017 Order." *Id.* And the Court upheld the FCC's closely related rules governing non-transport data services, which were based on the same kinds of data and FCC judgments that underlie the transport rule. *Id.* at 1006-11.

The FCC has now proposed to re-adopt materially the same transport rule as before, following appropriate notice and opportunity to comment. *See* Mot. at 2 & Ex. A (attaching *Remand Notice*). Thus, the FCC will cure the procedural

violation the Court found and, in all probability, will readopt the same basic transport regime on which carriers have relied since August 2017.

Against that backdrop, it would be wasteful and needlessly disruptive to issue a mandate vacating the 2017 transport rule before the remand proceedings are complete. As the FCC notes (Mot. at 4-7), vacatur would require carriers to file thousands of pages of new federal tariffs (detailed lists of charges and service terms), a process that typically takes six months. Those carriers could not simply refile all the same tariffs in effect before 2017. Instead, by the nature of the regulatory process, the new tariffs would have to account for a wide range of intervening changes in economic conditions and demand for various BDS offerings. Carriers would also have to puzzle through how to apply the resulting regime: a bizarre regulatory hybrid with conflicting geographic units and jumbled service baskets, in which transport is subject to legacy pre-2017 regulations while interrelated, non-transport data services are subject to the new, lighter-touch regime that this Court has upheld. Adapting to this alien regulatory landscape would be resource- and time-intensive and would inevitably spark a new round of intractable regulatory litigation.

Yet all of these unrecoverable costs would be incurred for nothing if, as the FCC proposes, it re-adopts substantially the same transport rule on remand. Congress did not enact the Administrative Procedure Act to inflict such pointless

economic waste on the public whenever an agency commits a process foul that it stands poised to correct. Staying the mandate pending remand will avoid these irreparable harms. Meanwhile, competition, along with Sections 201 and 202 of the Communications Act, will continue protecting purchasers and the public interest by ensuring that transport rates remain "just and reasonable." The FCC's motion should therefore be granted.

ARGUMENT

The FCC's motion seeks only limited relief: a stay of the mandate while the agency considers readopting a rule that was invalidated on procedural and not substantive grounds. In such circumstances, courts consider whether there is a "serious possibility that the Commission will be able to substantiate its decision on remand" and "the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotation marks omitted); *see* Mot. at 2-3 & n.1; *see also Int'l Union v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990) (noting that these factors correspond to those "considered in deciding whether to grant [a] preliminary injunction").[2] The FCC's motion easily satisfies these standards and is in the public interest.

[2] Whether by staying the mandate or remanding without vacating, the D.C. Circuit and other courts routinely apply this analysis to avoid needless regulatory churn on remand. *See* Mot. at 2-3 & n.1; *Sprint Corp. v. FCC*, No. 01-1266 *et al.*,

I. On Remand, The FCC Will Likely Readopt And Successfully Justify The Same Transport Rule That The Court Found Unlawful.

The FCC will likely issue—and can easily justify—essentially the same transport rule that this Court invalidated on notice grounds. In its *Remand Notice*, set for formal adoption on October 23, the FCC proposes "to eliminate nationwide ex ante pricing regulation of price cap carriers' TDM transport services," just as it did in the *Order*. *Remand Notice* ¶ 153. The *Remand Notice* further proposes to replicate each of the main elements of the 2017 transport rule. First, it proposes to re-adopt verbatim Rule 69.807(a), which eliminated *ex ante* price cap regulation for transport services. *See Remand Notice*, Appendix B, § 69.807; *cf. Order*, Appendix A, § 69.807 (JA1260). Second, the *Remand Notice* proposes to exercise the same forbearance authority as the 2017 *Order*, *see* 47 U.S.C. § 160, and thus eliminate the same statutory tariffing requirements. *See Remand Notice* ¶ 153 & Appendix B, §§ 61.201(a)(3) & 69.807(a); *cf. Order* ¶¶ 160-61 (JA1194-95). The FCC notes that it is well-positioned to act "expeditiously" on remand, given the

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2003 WL 1877308 (D.C. Cir. 2003) (staying mandate after court vacated rule because of notice deficiencies). The CLEC petitioners try to obscure that fact by citing death-penalty cases involving special provisions governing stays when certiorari petitions are filed. *See* Opp. 2-6 (citing Fed. R. App. P. 41(d)(2)). Those decisions have no relevance where, as here, certiorari is *not* sought and a federal agency has unrelated grounds for seeking a stay: the need to avoid irreparable economic waste during a temporary remand period. *See also* Fed. R. App. P. 41(b) ("[t]he court may shorten or extend the time" for issuing the mandate).

parties' and the Commission's familiarity with the issues. *See* Mot. at 2-4; *see also Citizens*, 901 F.3d at 1006.

Once adopted, the new rule is likely be upheld in any subsequent appeal. This Court found no fault with the substance of the 2017 transport rule. Rather, the Court invalidated the rule solely because it held that the FCC had not provided adequate notice of it. *Citizens*, 901 F.3d at 1006. Although the rule's opponents had argued at length against it in response to *other commenters*, the Court held that petitioners had a right to "comment on the *agency's* proposals, not on other interested parties' proposals." *Id.* The Court acknowledged that "the intervenors may be correct that everything that needed to be said regarding transport services was said during the twelve years preceding the 2017 Order," but it concluded that "the law regarding prejudice under the APA ensures procedural integrity." *Id*.

Significantly, the FCC based its 2017 BDS rules, including those for transport, on data showing widespread competitive facilities and on its expert judgment that eliminating *ex ante* price cap regulation would best encourage investment in newer technologies. *Order* ¶¶ 90-93 (JA1163-65); *see also id.* ¶ 90 (JA1163) ("the record demonstrate[d] widespread competition in the market for these services"). The Court has already upheld all of the *non*-transport rules, including those for channel terminations, on the basis of that record and those predictive judgments, which it reviewed on the merits. *See Citizens*, 901 F.3d at

1006-13. Given that ruling, it would now be particularly anomalous to single out transport services for legacy regulation: they are indisputably *even more competitive* than the channel termination services now subject to the judicially affirmed light-touch regime.[3] There is thus, to say the least, a "serious possibility that the Commission will be able to substantiate its [likely] decision on remand" concerning the transport rule. *Allied-Signal, Inc.*, 988 F.2d at 150-51.

II. Issuing The Mandate During The Remand Would Be Highly Disruptive And Cause Intervenors Irreparable Harm.

Issuing a mandate that vacates the transport rule more than a year after it went into effect, during what is likely to be a short remand period, would cause extreme industry disruption and inflict major unrecoverable costs on the ILEC Intervenors, while diverting substantial FCC resources to the implementation of a strange hybrid regime that no one sought or expected. Those harms would arise in three discrete contexts: (1) carriers that took down their tariffs would have to go

[3] *See, e.g.*, Order on Remand, *Unbundled Access to Network Elements*, 20 FCC Rcd. 2533, ¶ 71 (2005) ("Compared to loops [*i.e.*, channel terminations], which serve individual customers, dedicated transport carries much more traffic and has much greater potential for added future traffic, as competitive LECs continue to aggregate traffic on a route."), *aff'd sub nom. Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006); *see also Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009) (Kavanaugh, J.) (upholding nationwide deregulation of Ethernet BDS); *WorldCom, Inc. v. FCC*, 238 F.3d 449, 457 (D.C. Cir. 2001) (upholding FCC rules granting greater deregulation for transport than channel terminations).

through the costly, months-long process of re-establishing tariffed offers; (2) carriers that maintained their tariffs would still have to go through a months-long process of revising their tariffs and support systems; and (3) vacatur would invite wasteful collateral litigation. Again, all of these costs and disruption would be for naught if and when the FCC follows through on its proposal to reinstate the 2017 transport rule.

Carriers That Detariffed Transport. Traditionally, incumbent carriers have had to set forth the terms and conditions of transport services in voluminous tariffs filed with the FCC under 47 U.S.C. § 203. The *Order* relieved carriers of that obligation: it permitted them to remove these services from tariffs immediately and required them to do so within 36 months. *Order* ¶¶ 166-170. Many carriers have already begun this transition by taking down their tariffs for transport services. If the mandate issues, those tariffs do not automatically spring back to life; carriers would have to undertake months of work to refile new ones. As discussed below, the likely result would be regulatory chaos.

As the FCC notes, carriers must calculate their tariffed rates based on a wealth of data concerning demand, inflation, the productivity offset (*i.e.*, the "X-Factor"), and other factors that have changed since the *Order* was issued. Mot. at 5 (citing 47 C.F.R. § 61.45). Filing new tariffs, the FCC adds, typically requires preparation of Tariff Review Plans, which are "complex and voluminous

spreadsheets used to demonstrate compliance with price cap regulation." Mot. at 6. Carriers develop these Tariff Review Plans in consultation with Commission staff. *Id*. Even under normal circumstances, this process takes six months. *See id*. In addition, these carriers would have to undertake massive changes to their billing and other support systems.

Although tariff filings are always time-consuming and burdensome, they would be particularly disruptive in this context because issuance of the mandate would create profound uncertainty—and thus likely litigation—about how to apply the resulting hodgepodge of incompatible BDS rules. Because this Court upheld the 2017 rules for all business data services other than TDM transport, the *old* price cap rules would apply to transport if the mandate issued, and the *new* rules would apply to channel terminations. What a price cap constrains, however, is not the rate for any individual service, but the weighted average of rates for multiple services in a regulatory "basket"—which in this case includes *both* transport *and* channel terminations as well as certain other services. *See* 47 C.F.R. § 61.42(e)(3). Rates for any particular service thus depend on what a carrier is charging for the other services within the basket; rate increases for one may require a decrease for others to keep the entire "basket" of services under the price cap. Issuance of the mandate would thus incite substantial controversy about how to account for the relationship between the old and new regulatory schemes.

Even apart from that complication, other factors would keep carriers from simply reverting to all the same tariffs and transport rates as before and would spawn controversies of their own. The FCC oversees complex rules governing annual price cap adjustments, including the proper application of the X-factor and various one-time adjustments ("exogenous costs"). *See* 47 C.F.R. § 61.45(c), (d). To set rates complying with these annual caps, carriers must re-compute the "weights" applied to the rate for each service (a "rate element") in the price cap basket. Computation of these weights is governed by FCC rules and requires complex statistical analyses of expected demand for each service in the basket, which varies year by year. *See*, *e.g.*, *id.* § 61.46. Carriers would have to recalculate new price cap indices and demand factors—all of which are subject to potential dispute—to establish what would likely be new rates for thousands of transport rate elements. And any attempt to "refile potentially outdated tariffs," which "may not fairly reflect current demands and costs," would likely be challenged, as the FCC notes. Mot. at 5.

Other factors would further complicate the process. Under the new rules this Court has upheld for channel terminations, price caps apply on a county-by-county basis, whereas the pre-2017 transport rules that would be revived by vacatur would apply on the basis of substantially broader geographic units: metropolitan statistical areas ("MSAs"). *See Citizens*, 901 F.3d at 998-99. That geographical

mismatch would create additional complexities in harmonizing approaches and programming billing systems. It would produce the regulatory anomaly noted above: in many areas, transport would be subject to more regulation (*i.e.*, subject to price caps) than channel terminations (*i.e.*, not subject to price caps) even though, in any given area, transport is generally even more competitive than channel terminations. *See* note 3, *supra.*

It is also not even certain which X-Factor would apply to transport: the old one (which exactly offset increases from inflation, effectively freezing the caps) or the new one (2.0 percent). *See Citizens*, 901 F.3d at 1013-14 (upholding the change to a 2.0 percent X-Factor). The FCC never expressly stated that the new X-Factor would apply to transport because the *Order* eliminated *all* price cap regulation of transport. *See, e.g. Order* ¶ 197 (JA1206-07). On the other hand, the FCC has never applied two X-Factors simultaneously to the same basket of services, and the FCC (or carriers) may have to design a method to apply two X-Factors simultaneously, and apportion the effects of different X-Factors to different services subject to the same cap. Here again, whichever way the FCC resolves this issue is likely to provoke litigation.

In short, because vacating the transport rule would raise many novel issues, interested parties would likely try to suspend the carriers' new tariffs or otherwise seek to litigate the FCC's implementation of the vacatur. Any such litigation

would require the FCC and potentially the courts to determine how to implement an unprecedented hybrid system that no party asked for or expected and that would apply only for the short duration of the remand.

Again, all of this massive effort and expense would achieve no legitimate purpose. It would result only in senseless economic waste. Mot. at 4-7. If and when the FCC follows through on its proposal to reinstate the vacated rule on remand, the industry would have to *undo the undoing* of the 2017 regime. Carriers would have to spend thousands of labor hours again to change or take down their tariffs, revise their service guides, modify billing and other IT systems, and work with their customers to manage the changes all over again. The industry would revert to the same regulatory regime that governs today, but would incur substantial and needless costs in the process.

Carriers That Kept Their Tariffs. After the *Order* took effect, some carriers elected to maintain their tariffed offerings for an interim period, subject to the new pricing flexibility afforded by the *Order*. These carriers would incur most of the same costs that would be incurred by the carriers that elected to detariff. They would still have to recalculate their price caps and transport demand for 2017 and 2018 to determine what transport rates they could now charge under price caps. These determinations would be subject to the same legal uncertainties concerning the hybrid of old and new rules. These carriers would then have to *revise* hundreds

of pages of their tariffs (rather than re-file), subject to the Tariff Filing Plan process and other potential FCC directions described above. These carriers would also have to reprogram billing and other systems to accommodate hundreds of rate changes.

As with the carriers that detariffed, these processes would take thousands of labor hours and several months to complete. These carriers' tariff modifications, when filed, could provoke the same types of challenges and litigation from customers. And the process to *redo* the changes once the FCC issues the order on remand would take thousands of labor hours and several months all over again.

***Retroactive Effects*.** Allowing the mandate to issue now would also trigger disputes about whether BDS customers are entitled to damages for transport rates that may have exceeded levels that would be permitted by whatever price caps hypothetically would have applied during the relevant period. Although carriers would have solid defenses to such claims, BDS customers have a strong incentive to file complaints and seek refunds. Such suits would be complex, with arguments over how to compute the newly resurrected price caps properly and how to resolve the various issues concerning how the hybrid "old-and-new" system should work. Such suits would be disruptive and expensive and could last years.

III. The Equities And The Public Interest Also Favor A Stay.

Finally, the balance of equities and public interest also favor a stay. As noted, the FCC has found that there is "widespread competition" for transport, imposing competitive discipline on rates. *Order* ¶ 90 (JA1163-64). And as before, the substantive standards of Sections 201 and 202 continue to protect transport customers against unreasonable rates. *See Order* ¶¶ 93, 102 (JA1165, JA1168-69). The fast-track Section 208 complaint process remains available to any customer that believes it is being overcharged under those standards.

The public interest also strongly favors a stay. The FCC eliminated price cap regulation from legacy TDM transport services because it found that nationwide deregulation struck the right balance in encouraging investment in the next-generation IP-based technologies. *Order* ¶¶ 90-93 (JA1163-65). Since the issuance of the *Order*, business data services providers have continued to invest heavily in new technologies, and the migration from legacy TDM technology to more modern Ethernet and cable services has continued. *Remand Notice* ¶ 155. The sudden re-imposition of price cap regulation now, with all the attendant controversies that would incite, would needlessly complicate that transition and discourage competition and investment.

CONCLUSION

The mandate should be stayed pending remand.

Dated: October 22, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2018, I will cause the foregoing document to be electronically filed through this Court's CM/ECF system. I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I further certify that I will cause one copy of the foregoing to be served by first-class U.S. mail on the following *amici*:

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