

ORAL ARGUMENT NOT YET SCHEDULED

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

National Association of Regulatory)	
Utility Commissioners, et al.,)	
Petitioners,)	
)	
v.)	Nos. 16-1170
)	and 16-1219
Federal Communications Commission)	
and United States of America,)	
Respondents.)	

**MOTION OF RESPONDENT THE FEDERAL COMMUNICATIONS
COMMISSION TO PLACE THESE CASES IN ABEYANCE**

Respondent the Federal Communications Commission respectfully requests that the Court place these cases in abeyance because of recent changes in the membership and leadership of the Commission. Holding these cases in abeyance will allow the newly constituted Commission an opportunity to determine how it plans to proceed with respect to these cases. Undersigned counsel is authorized to state that the United States does not oppose this motion. We are also authorized to state that petitioners and their supporting intervenor do not oppose a limited term abeyance of 90 days.

The petitioners in these cases seek review of an FCC order adopted on March 31, 2016: *Lifeline and Link Up Reform and Modernization*, Third Report and Order, 31 FCC Rcd 3962 (2016) (*Order*). Among other actions taken in the

Order with respect to the Commission’s “Lifeline” program—which provides a monthly discount to low-income subscribers of certain communication services, including broadband services—the Commission determined to “preempt” states’ authority to designate which carriers are eligible to receive Federal Lifeline subsidies as broadband-only providers. Commissioners Pai and O’Rielly dissented from the *Order*, including on the ground that Section 214 of the Communications Act, 47 U.S.C. § 214, does not allow the Commission to bypass the states’ role in designating carriers eligible to receive Federal Lifeline subsidies.

The Commission previously moved to place these cases in abeyance pending action by the agency on pending petitions for administrative reconsideration and clarification of the *Order*. *See* September 2016 Motion (Doc. #1638444). At the time, the petitioners opposed the Commission’s motion, arguing in part that “it would only be an exercise in futility to expect the Commission to reconsider issues already raised in dissent.” State Petitioners’ Response 7 (Doc. #1640051) (internal quotation marks omitted). In an order issued on December 20, 2016, the Court denied the Commission’s motion, explaining that “the FCC has not shown sufficient overlap in the designation and preemption issues raised here and in the petitions for reconsideration and/or clarification,” and that “the drawbacks of holding these cases in abeyance outweigh the drawbacks of piecemeal review.”

Order (Doc. #1651981). The Court simultaneously set a schedule for briefing, under which final briefs are due May 17, 2017. *See id.*

Since the Court denied abeyance and set the briefing schedule in these cases, the composition and leadership of the Commission have changed. Commissioner Rosenworcel left the Commission earlier this year because her term expired. Then, on January 20, 2017, the FCC's prior chairman resigned, leaving the agency with three commissioners (Commissioners Clyburn, Pai, and O'Rielly). Most recently, on January 23, 2017, Commissioner Pai was designated FCC chairman. As a result, a majority of the Commission's current members, including the Commission's newly designated chairman, dissented from the *Order* under review here, including on the question of preemption that is central to the parties' dispute. Given that fact, undersigned counsel have been authorized to move this Court to hold these cases in abeyance to allow the Commission to review how to proceed in this matter and to consider whether to revisit the actions taken in the *Order*. Under the current circumstances, the petitioners in these cases do not oppose a limited term abeyance of 90 days.

For the foregoing reasons, the Court should grant this motion and place these cases in abeyance.

Respectfully submitted,

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/s/ Sarah E. Citrin

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February 3, 2017

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**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS,
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CERTIFICATE OF SERVICE

I, Sarah E. Citrin, hereby certify that on February 3, 2017, I electronically filed the foregoing Motion of Respondent The Federal Communications Commission to Place These Cases in Abeyance with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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