

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

AMERICAN PUBLIC POWER)	
ASSOCIATION,)	
)	
Petitioner,)	Case No. 18-1305
)	(Consolidated with Nos. 18-1294,
v.)	18-1326, and 18-1330)
)	
THE FEDERAL)	
COMMUNICATIONS COMMISSION)	
and)	
)	
THE UNITED STATES OF)	
AMERICA)	
)	
Respondents.		

STATEMENT OF ISSUES TO BE RAISED

In accordance with this Court’s order of December 20, 2018, Petitioner, the American Public Power Association (“APPA”), on behalf of the nation’s not-for-profit, public power electric utilities, submits this nonbinding statement of issues to be raised in this case.

In the *Order*¹ under review, the Federal Communications Commission (“FCC”) adopted expansive interpretations of its authority under Section 253 and

¹ *Declaratory Ruling and Third Report and Order, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79 and WC Docket No. 17-84, FCC 18-133 (“*Order*”).

332 of the federal Communications Act, as amended,² to, in effect, regulate rates, terms, and conditions of access to property, including utility poles, owned by state and local governments, in order to remove or reduce supposed impediments to wireless network infrastructure investment and deployment. In doing so, the FCC failed to give effect to the explicit statutory exemption from federal pole attachment regulation that public power utilities have under 47 U.S.C. § 224.

Instead, the FCC concluded for the first time that its authority under Section 253 applies not just to state and local management of, and compensation for, access to public rights-of-way, but also extends to rates, terms, and conditions of access to governmental property and facilities located within the public rights-of-way, such as public power utility poles, even when the governmental owner of such facilities is acting in a proprietary capacity. The FCC's conclusion was inconsistent with several prior FCC's prior rulings and federal court decisions.

APPA believes that the FCC has improperly asserted regulatory authority and jurisdiction over the control and use of public power utility facilities. The *Order* exceeds the Commission's statutory authority; poses significant risks to safe, secure, and reliable electric utility operations; and interferes with the proprietary rights of

² 47 U.S.C. § 253 and 47 U.S.C. § 332.

public power utilities to determine the terms and compensation for use of their utility assets by private wireless carriers.

The issue to be raised is:

Whether the FCC's decision to regulate access to public power utility poles exceeds the FCC's authority and is contrary to law, including, but not limited to, the Constitution of the United States and the Communications Act, and is also arbitrary, capricious, and an abuse of discretion.

Respectfully submitted,

/s/James Baller

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December 20, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on December 20, 2018, I filed the foregoing in the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that all parties are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system, except for the following party who will be served via U.S. Mail.

By First Class Mail

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