

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

<i>In the Matter(s) of</i>	)	
	)	
<i>Misuse of Internet Protocol (IP) Captioned Telephone Service</i>	)	<b>CG Docket No. 13-24</b>
	)	
<i>Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities</i>	)	<b>CG Docket No. 03-123</b>
	)	
	)	

**REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

The National Association of Regulatory Utility Commissioners (“NARUC”), respectfully submits these comments to respond to initial comments filed in response to the Federal Communications Commission’s (“FCC” or “Commission”) June 8, 2018 *Further Notice of Proposed Rulemaking* (“FNPRM”)<sup>1</sup> on Internet Protocol Captioned Telephone Service (“IP-CTS”).

In NARUC’s initial comments,<sup>2</sup> we pointed out the following:

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<sup>1</sup> *In the Matters of Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Report and Order, Declaratory Ruling, Further Notice of Proposed Rulemaking, and Notice of Inquiry* (rel June 8, 2018) published at: [83 Federal Register 33899](#) (July 18, 2018).

<sup>2</sup> *Initial Comments of the National Association of Regulatory Utility Commissioners*, CG Docket Nos. 03-123 and 13-24 (September 18, 2018), at: <https://www.fcc.gov/ecfs/filing/10917145892161>. (“NARUC Comments”)

[1] The FCC should continue to cooperate with the States and engage State expertise, skills and experience in the Telecommunications Relay Service (TRS) program decisions including, but not limited to, the option for State IP-CTS administration with funding authority;<sup>3</sup>

[2] The FCC should restructure the IP-CTS Provider compensation rate methodology to align with a cost-based rate for IP-CTS providers to discourage unethical sales practices;<sup>4</sup>

[3] Expanding the contribution base to include a combined inter-and intrastate revenues is premature, as these modifications do nothing to minimize the inefficient and/or inappropriate use of the program. Instead, any necessary contributions restructure for IP-CTS should occur only after measures to minimize inefficient and/or inappropriate use of the program are implemented and appropriate costs are determined and after the FCC engages the Federal-State Joint Board on Separations as required by 47 U.S.C. § 225(d)(3).<sup>5</sup>

[4] The FCC should continue to “refine its rules to further minimize inefficient and/or inappropriate use of the program by adopting additional requirements including, but not limited to, user eligibility assessments that are sufficiently thorough and not biased toward the use of IP-CTS technology and standards of service.”<sup>6</sup>

These reply comments focus on the few comments that addressed expanding the contribution base to include intrastate revenues and the legal requirements/prerequisites for the FCC to make any change in the *status quo*.

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<sup>3</sup> *NARUC Comments* at pp. 3, 8-11.

<sup>4</sup> *Id.* at pp. 3, 17-18.

<sup>5</sup> *Id.* at pp. 3, 11-17.

<sup>6</sup> *Id.* at pp. 4, 18-19.

## DISCUSSION

Between September 12 and September 18, 2018, twenty-eight separate comments, including six from NARUC member commissions,<sup>7</sup> were filed in response to the *FNPRM*. Only twelve specifically addressed the *FNPRM* proposal to expand the fund to include intrastate revenues.<sup>8</sup>

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<sup>7</sup> *Comments of the California Public Utilities Commission*, CG Docket Nos. 03-123 and 13-24 (September 17, 2018) at <https://www.fcc.gov/ecfs/filing/10917141529831> (“California”); *Comments By the Public Service Commission of Utah*, CG Docket Nos. 03-123 and 13-24 (September 17, 2018) at <https://www.fcc.gov/ecfs/filing/10917238611754> (“Utah”); *Comments of the Pennsylvania Public Utility Commission*, CG Docket Nos. 03-123 and 13-24 (September 17, 2018) at <https://www.fcc.gov/ecfs/filing/10917819827852> (“Pennsylvania”); *Comments of the Nebraska Public Service Commission*, CG Docket Nos. 03-123 and 13-24 (September 13, 2018) at <https://www.fcc.gov/ecfs/filing/10913154314209> (“Nebraska”); *Comments By the Kansas Corporation Commission Regarding the IP CTS Portion of the TRS Program*, CG Docket Nos. 03-123 and 13-24 (September 11, 2018) at <https://www.fcc.gov/ecfs/filing/109111423120930> (“Kansas”); and *Comments By the Colorado Public Utilities Commission*, CG Docket Nos. 03-123 and 13-24 (September 17, 2018) at <https://www.fcc.gov/ecfs/filing/10905905212346> (“Colorado”).

<sup>8</sup> *NARUC Comments*, at pp. 3, 11-17; *California*, at pp. 5-7 (“The CPUC opposes any FCC effort to attach intrastate revenues where the state is itself managing and funding a TRS program, including IP CTS.”); *Utah* at p. 2 (“[R]ather than increase the funding sources of IP CTS, the FCC should continue directing efforts to thwart the waste and abuse of the service that has caused a strain on the TRS fund.”); *Pennsylvania* at pp. 7-11 (“The Pa. PUC has reservations regarding the Commission’s proposals to expand the IP CTS contribution base or cost allocations and administration to include a percentage of annual intrastate revenues.”); *Nebraska* at p. 5 (“Nebraska urges the FCC to refer this issue to the Federal-State Joint Board on Separations, to determine issues related to separations between interstate and intrastate costs and minutes, and any jurisdictional determinations which necessarily follow from these issues.”); *Kansas* at p. 11 (“If the contribution base for IP CTS is expanded to include a percentage of annual intrastate revenues from telecommunications carriers and VoIP service providers, it should only be done after the actual impact for states (Kansas) has been identified, rules have been established at the federal level for IP CTS, and necessary regulatory changes have been made at the state level to cover the identified revenue needed.”); *Colorado* at p. 4 (“COPUC . . . is opposed at this time to expanding the IP CTS contribution base to include a percentage of annual intrastate revenues from telecommunications carriers and Voice over Internet Providers (VoIP) service providers.”); *Comments of CaptionCall LLC*, CG Docket Nos. 03-123 and 13-24 (filed September 17, 2018), at p. 16 n. 45, at <https://www.fcc.gov/ecfs/filing/10918581407824> (“CaptionCall LLC”) (“[C]onsistent with prior filings, CaptionCall supports the Commission’s proposal to expand the TRS Fund base to include intrastate revenues.”); *Initial Comments of IDT Telecom, Inc.*, CG

Eight of those twelve specifically opposed expansion and explained the obvious legal obstacles to any immediate effort to access intrastate revenues of telecommunications service providers and other unclassified service providers.<sup>9</sup>

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Docket Nos. 03-123 and 13-24 (filed September 17, 2018), at pp. 2-4, at <https://www.fcc.gov/ecfs/filing/1091761422653> (“IDT”) (“The benefits of extending the contribution base to intrastate revenue to support intrastate IP CTS are great and many.”); *Initial Comments of ClearCaptions, LLC*, Docket Nos. 03-123 and 13-24 (filed September 17, 2018), at p. 23, at <https://www.fcc.gov/ecfs/filing/109170667821233> (“ClearCaption”) (“While ClearCaptions supports the Commission’s proposal to expand the TRS Fund base through the inclusion of a percentage of annual intrastate revenues from telecommunications carriers and Voice over Internet Protocol (“VoIP”) providers, the Company adamantly opposes any shift of IP CTS administration to the state level.”); *Comment by the National Association for State Relay Administration*, CG Docket Nos. 03-123 and 13-24 (filed September 14, 2018), at p. 3 <https://www.fcc.gov/ecfs/filing/1091468374040> (“NASRA”) (“While NASRA understands the FCC’s concerns regarding funding IP CTS, it is opposed at this time to expand the IP CTS contribution base to include annual intrastate revenues without first addressing the jurisdictional nature of IP CTS traffic. . . this proposed solution to include intrastate revenues does nothing to address jurisdictional separations or the legal basis to access intrastate revenues for a service provided over the internet which has been declared an information service. The FCC should first address how an information service could be funded by way of intrastate revenues that are not under the jurisdiction of the FCC. . . NASRA agrees with the comments filed by the Colorado [PUC] . . . that emphasizes that the FCC should prioritize curbing the waste and abuse of IP CTS before shifting its focus to state administration or altering the contribution base to fund IP CTS using intrastate revenues.”); and *Comments of Hearing Loss Association of America (HLAA), Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), National Association of the Deaf (NAD), Association of Late-Deafened Adults (ALDA), Cerebral Palsy and Deaf Organization (CPADO), American Association of the Deaf-Blind (AADB), Deaf Seniors of America (DSA), California Coalition of Agencies Serving the Deaf and Hard of Hearing, Inc. (CCASDHH), Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), Deaf/Hard of Hearing Technology Rehabilitation Engineering Research Center (DHH-RERC), Rehabilitation Engineering Research Center on Universal Interface & Information Technology Access (IT-RERC)*, CG Docket Nos. 03-123 and 13-24 (filed September 17, 2018), at p. 23, at <https://www.fcc.gov/ecfs/filing/1091883305258> (“HLAA”) (“The Commission should expand the TRS Fund base as it would allow for continued relay provision and investment into new technology. . . the Commission has the statutory authority to assess intrastate revenue under Section 225(b)(2), which explicitly grants to the FCC authority over carriers engaged in intrastate communications for purposes of administering and enforcing the section.”)

<sup>9</sup> *Id.*

Only four - *CaptionCall*, *ClearCaption*, *IDT*, and *HLAA* - actually support expansion.<sup>10</sup> And of those, only *IDT*<sup>11</sup> purports to address the Congressional limitations on FCC authority to access intrastate revenues in States with State-certified programs and/or without first consulting with the Federal-State Joint Board on Separations.

The legal barriers to any immediate expansion of the contribution base to include intrastate revenues are clear.

*A Separations Referral is Required.*

As NARUC and others point out in initial comments,<sup>12</sup> at the onset of IP-CTS in 2007, the FCC chose to fund all the costs of the program via the interstate

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<sup>10</sup> *Id.*

<sup>11</sup> *See, ClearCaption* at p. 23. While *ClearCaption* supports immediate expansion to include intrastate revenues, *ClearCaption* nowhere addresses any of the legal barriers that expansion. Rather it, like *CaptionCall*, at pp. 39-40, inconsistently argues that IP CTS is “jurisdictionally interstate” though the intrastate traffic clearly can be identified and severed. This argument is both internally inconsistent and illogical. It also cannot be squared with the express authorization for State relay programs in § 225 and the initial specifications of FCC and State authority in 47 U.S.C. §152(a) and (b). If the FCC has jurisdiction under §152(a) of these “interstate communications by wire or radio”, then States retain jurisdiction over the corresponding “intrastate communication service by wire or radio” “as provided” in § 225; *See also, CaptionCall* at p. 16 n. 45. (“[C]onsistent with prior filings, *CaptionCall* supports the Commission’s proposal to expand the TRS Fund base to include intrastate revenues.”); *See also, HLAA*, at pp. 22-23, providing a single sentence arguing the FCC “has the statutory authority to assess intrastate revenue under Section 225(b)(2), which explicitly grants to the FCC authority over carriers engaged in intrastate communications for purposes of administering and enforcing the section.”

<sup>12</sup> *NARUC Comments* at pp. 11-24; *Colorado* at pp. 4-5 (“The FCC’s proposal that it could separate IP CTS interstate and intrastate costs without referring the issue to the Federal-State Joint Board on Separations is contrary to the plain meaning of the statute.”); *Nebraska* at p. 5 (“Nebraska urges the FCC to refer this issue to the Federal-State Joint Board on Separations, to determine issues related to separations between interstate and intrastate costs and minutes.”); *Pennsylvania* at pp. 10-11 and 19 (“[T]he Commission must first refer the matter to the Federal-State Joint Board on Separations . . . This is a necessary prerequisite under Section 225(d)(3).”).

jurisdiction. In proposing shifts now to a jurisdictional separation of costs, it is clear that examination of the separations impact is required. The *FNPRM* acknowledges as much – by citing as statutory authority for the ability to assess intrastate revenues, 47 U.S.C. § 225(d)(3).<sup>13</sup> The FCC also subsequently references the “jurisdictional separations issues discussed above.”<sup>14</sup> The FCC concedes, as it must, that jurisdictional separations issues are raised by its proposed expansion of the funding base to include intrastate revenues to cover intrastate costs. And Congress did not mince words in § 225(d)(3)(A):

Consistent with the provisions of section 410 of this title, the Commission shall prescribe regulations governing the jurisdiction separation of costs for the services provided pursuant to this section.<sup>15</sup>

Nor does Congress mince words in § 410(c). The only subsection that references “separations” is limited to a mandate that changes to separations must be referred to the Separations Joint Board for a recommended decision.<sup>16</sup>

The reference in § 225(d)(3)(A) can mean nothing else. The FCC is proposing to change cost allocations between jurisdictions *in both* *FNPRM* expansion proposals. Both proposed funding mechanisms explicitly shift costs to the intrastate jurisdiction.<sup>17</sup> That is by definition separations and a referral to the Separations Joint Board is required.

*IDT*, the only commenter to offer any rebuttal to this argument, contends that “the statute does not compel sending the issue to the Federal State Joint Board,”

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<sup>13</sup> *FNPRM* at ¶ 109.

<sup>14</sup> *Id.* at ¶ 114.

<sup>15</sup> 47 U.S.C. § 225(d)(3)(A).

<sup>16</sup> 47 U.S.C. § 410.

<sup>17</sup> *FNPRM* at ¶¶ 106-107.

rather “it directs the commission to prescribe regulations governing the separations of costs.”<sup>18</sup>

This is illogical on its face. First, while § 225(d)(3)(A) does specify that the Commission has to prescribe regulations governing the separation of costs, IDT omits the fact that that specification must be “*consistent with the provisions of section 410.*” And, as noted above, § 410 is similarly straight forward, mandating that the FCC “shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking.” The *FNPRM* is clearly a “notice of proposed rulemaking” and the *FNPRM* acknowledges it involves separations.

*IDT* notes that “since the TRS fund’s inception the Commission never found it necessary to convene a joint board to address separations of costs and has relied on existing rules.” *IDT* cites<sup>19</sup> to the FCC’s *1993 Third Report and Order*,<sup>20</sup> as support for this claim.

*IDT* is suggesting that because the FCC did not comply with the statutory mandate in 1993 that potential omission somehow supports FCC authority to ignore that mandate again in the current proceeding.

But that agency decision provides no basis or protection for the FCC to bypass Congressional mandates in the current circumstances.<sup>21</sup> Although the requirement

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<sup>18</sup> *IDT* at p. 8.

<sup>19</sup> *IDT* at p. 8 n. 23.

<sup>20</sup> *In the Matter of Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, Third Report and Order, 8 F.C.C. Rcd. 5300 (1993), at ¶ 30 n. 30. (“*1993 Third Report and Order*”).

<sup>21</sup> Indeed, the undersigned was on the Separations Joint Board in 1993 and my recollection is that there was a discussion of the requirement for a referral. However, for a variety of factors not

for a referral was raised in 1993,<sup>22</sup> the FCC's decision not to refer issues was never subject to judicial scrutiny.

Moreover, the precursor and factual predicate for FCC action in that docket are clearly distinct. The FCC has been funding the IP-CTS program solely on interstate revenues for years based on an FCC allegation<sup>23</sup> that the subject traffic and costs cannot reliably be severed into intrastate and interstate components. Clearly, the proposed expansion will burden the funding base for existing State TRS (and State Universal Service) programs authorized by Congress.

Finally, *IDT* proffers an unusual alternative reading of § 225(d)(3). According to *IDT*, § 225(d)(3)'s requirements for a separations referral can only apply if the FCC is dealing with the

recovery of costs by the Commission from end-use common carrier contributors to the Fund(s) and not to the recovery of costs by the Commission from common carrier contributors to the fund – that latter of which is the issue presented in the FNPRM.<sup>24</sup>

*IDT* suggests that since subsection (B) refers to cost recovery "from subscribers" and common carrier contributors to the existing and/or newly proposed Fund *are not* "subscribers," that the subsection (A) requirement for separations does not apply to cost recovery by the Commission from "common carrier contributors to the Fund(s)."

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present in the current circumstance, e.g., this was "pre-freeze" and no one questioned either severability or State commission jurisdiction to act, the State members (and NARUC) chose not to appeal given the FCC's establishment of an advisory committee on implementation.

<sup>22</sup> *1993 Third Report and Order*, 8 F.C.C. Rcd. at 5304-5, ¶ 27 ("NARUC disagrees with other commenters and urges the Commission to establish a Joint Board, pursuant to Section 410(c) of the Act, or alternatively, establish an advisory committee pursuant to Section 410(b), to monitor the implementation of the ADA.")

<sup>23</sup> Albeit, an allegation that factually is difficult to justify.

<sup>24</sup> *IDT* at p. 9, 9 n. 25.



The illogic of this contention is obvious. An examination of § 225(d) (1) (E) and (3) (B) make clear the costs being recovered in via subsection (B) are “the costs incurred in providing” relay services. Those intrastate and interstate costs “shall be recovered” from the corresponding jurisdiction. Those are plainly the costs the FCC TRS funds reimburse, *i.e.*, the funds recovered by the FCC “from common carrier contributors to the fund.”

*IDT* immediately concedes, with significant understatement, that this novel interpretation “may strike some as contrary to positions we have previously taken and possibly even to positions and concerns previously expressed by the Commission.”<sup>25</sup> This *IDT* analysis is not just inconsistent with prior FCC positions, and the way current State programs are run, it is also inconsistent with plain text of § 225(d)(3) and the concept and use of separations procedures.

*The FCC may not independently assess intrastate revenues for the same intrastate program Congress authorized and the State administers and funds.*

In responding to ¶ 109 in the *FNPRM, California* cited to additional legal barriers that make immediate expansion of the funding base to include intrastate revenues impractical.<sup>26</sup>

Since 2007, TRS programs in all fifty States and the District of Columbia administer and oversee the provision of TTY-Voice and Speech-to-Speech TRS as well as a non-IP version of CTS,<sup>27</sup> while the FCC oversees the provision of IP-CTS.

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<sup>25</sup> *Id.*

<sup>26</sup> *California*, at pp. 5-7.

<sup>27</sup> *CapTel Captioned Telephone “State Programs,”* online at <https://www.captel.com/states> (last accessed September 18, 2018). *FNPRM* at ¶ 111 (“Currently, all 50 states plus six U.S. territories have TRS programs certified by the Commission that offer . . . TTY-voice and speech-to-speech TRS. Additionally, all TRS state programs offer, oversee, and support a non-IP version of CTS on a voluntary basis.”) (Footnotes omitted)

*California* points out<sup>28</sup> that while § 225(d)(3) does require the FCC to “prescribe regulations that ‘generally’ provide that TRS costs caused by interstate and intrastate jurisdictions are each recoverable from the subscribers of their respective jurisdictions,” it also specifies that:

In a State that has a certified program . . . a State commission shall permit a common carrier to recover the costs incurred in providing intrastate *telecommunications relay services* by a method consistent with the requirements of this section.”

(Emphasis added.)

*California* goes on to argue that this section indicates that Congress recognized that states oversee their own programs and manage funding for them. According to *California*, an obvious corollary to that is a recognition of state authority to attach intrastate revenues to fund intrastate programs. Moreover:

The “general” authority to which the FCC refers does not confer any *specific* express delegation of authority to the FCC to *independently* dip into intrastate revenues and attach them for purposes of funding the very same intrastate program the state administers and funds.

The FCC’s second reason for suggesting it can attach intrastate revenues is that the FCC itself has consistently “ruled that by use of the term ‘generally’, Congress intended for the Commission to have broad authority to determine how TRS costs will be recovered.”[] Again, that “general” authority cannot be read to allow the FCC to step over a state Commission that is managing its intrastate program to surcharge the same revenues for purposes of funding the very program the state administers. The FCC is proposing to rely on its own previous statutory interpretation which permitted recovery of intrastate IP CTS costs as well as intrastate VRS and intrastate IP Relay calls. But that previous FCC action is not dispositive. States have not established IP CTS programs, nor do they oversee and fund VRS and IP Relay, largely because of jurisdictional concerns. FCC action to attach intrastate funds in the absence of a state program is one thing; for the FCC to attach

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<sup>28</sup> *California* at pp. 5-7.

intrastate revenues when the state is administering and funding its own state program is another.

Third, the FCC notes that section 225(c)(1) provides where a state does not “establish a Commission-certified TRS program, the provision of intrastate TRS must be directly supervised by the Commission.”[] California does not dispute that reading of § 225(c)(1). But making the leap from that premise to the conclusion that the FCC can supervise intrastate funding even where the state *has* established an FCC-certified TRS program is untenable.

*Id.* (footnotes omitted)

*California* provides a cogent analysis that is consistent with this FCC exposition<sup>29</sup> of § 225 from 2004:

The interstate/intrastate distinction is first reflected in the oversight of the provision of TRS by common carriers. Congress structured section 225 in such a way that although the Commission has jurisdiction over both *intrastate* and *interstate* TRS, the states have the option to exercise primary jurisdiction over the provision of *intrastate* TRS, via a mechanism whereby the Commission would review and certify individual state TRS programs.[] Congress explained that once a state has a TRS program certified by the Commission, the state is responsible for regulating the provision of *intrastate* TRS within the parameters of its certified program.[] The House Report on the ADA states that “[t]he FCC's authority over the provision of intrastate telecommunications relay services ... is expressly limited by certification procedures ... whereby a state retains jurisdiction over the intrastate provision of telecommunications relay services.

*The FCC must address additional legal issues before expanding the contribution base to include intrastate revenues.*

NARUC noted in its initial comments<sup>30</sup> that the FCC needs to address a number of other legal issues before it reaches any final conclusions on expanding

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<sup>29</sup> *In the Matter of Telecommunications Relay Services*, 19 F.C.C. Rcd. 12475, 12481 (2004). (footnotes omitted).

<sup>30</sup> *NARUC Comments* at pp. 14-17.

the contribution base. *Pennsylvania's* comment<sup>31</sup> added a nuance to one classification issue raised in NARUC's comments that the FCC should address:

[T]he issue of determining what cost allocation mechanism should be adopted to determine which IP Relay calls are interstate, and therefore compensable from the Interstate TRS Fund, and which calls are intrastate, impacts the Commission's proposal to expand the TRS Fund's contribution base for all TRS to include intrastate revenues. Such recovery must be consistent with the parallel jurisdictional classification of these services.

The FCC needs to clarify the legal basis for its rules, which necessary includes a classification of IP-CTS services and a discussion of the provisions of Section 225, before proceeding further.

#### CONCLUSION

Expanding the contribution base to include a combined inter-and intrastate revenues is premature, as these modifications do nothing to minimize the inefficient and/or inappropriate use of the program. Instead, any necessary contributions restructure for IP CTS should occur only after measures to minimize inefficient and/or inappropriate use of the program are implemented, appropriate costs are determined and after the FCC engages the Separations Joint Board as required by 47 U.S.C. Section 225(d)(3).

**Respectfully submitted,**

**James Bradford Ramsay**  
**GENERAL COUNSEL**  
**National Association of Regulatory**  
**Utility Commissioners**  
**1101 Vermont Avenue, Suite 200**  
**Washington, DC 20005**  
**PH: 202.898.2207**  
**E-MAIL: [jramsay@naruc.org](mailto:jramsay@naruc.org)**

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<sup>31</sup> *Pennsylvania* at p. 8.