

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of)	
)	
<i>Accelerating Wireline Broadband</i>)	WC Docket No. 17-84
<i>Deployment by Removing Barriers</i>)	
<i>To Infrastructure Investment</i>)	
)	

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

Pursuant to Sections 1.415 and 1.419 of the Federal Communications Commission’s (FCC) rules, the National Association of Regulatory Utility Commissioners (NARUC) respectfully submits these comments responding to comments filed by June 15th in response to the Federal Communications Commission’s (FCC) April 21, 2017 Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment on removing regulatory barriers to wireline broadband infrastructure in the above-captioned proceeding.¹

As noted in our initial comments, NARUC opposes “any preemption that supplants State regulation of intrastate telecommunications with FCC mandates,” but has not had an opportunity to take detailed positions on all of the issues raised

¹ *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, WC Docket No. 17-84, FCC 17-37 (Released April 21, 2017), at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-37A1.docx; Published at 82 Federal Register 22453 (May 16, 2017).

by the April 21 release.² Our existing resolutions make clear that the FCC should be careful to respect the clear limits on its authority imposed by the plain text of the federal telecommunications law.

DISCUSSION

The FCC should carefully consider comments filed by NARUC's member Commissions.

NARUC did not take specific positions on many issues raised by the FCC notice.³ However, several of NARUC's member State Commissions filed comments in response to the FCC's notice which all adopted similar themes. NARUC was

² NARUC did explicitly oppose FCC preemptive proposals and included a request for the FCC to carefully consider the impact before allowing "wholesale" service Section 214 discontinuances. See, Comments of the National Association of Regulatory Utility Commissioners, filed June 15, 2017, *In the Matter of Accelerating Wireline Broadband Deployment by removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, online at: <https://ecfsapi.fcc.gov/file/106151758516325/17%200615%20NARUC%20Initial%20Comments%20Wireline%20NPRM.pdf>.

³ The NPRM raises questions about the relationship between Section 214(a) and Section 251(c)(5), the latter of which resulted from the modifications introduced by the 1996 Telecommunications Act. The NPRM requests comment on the question of whether "Congress signal(ed) its intent that incumbent LECs need only provide notice, not obtain approval, when making changes to wholesale inputs relied upon by competing carriers?" Certainly, in the context of wholesale inputs relied upon by competing carriers, AARP is correct when it points out the obvious:

There is no indication that the NPRM's speculation is correct. The plain language of Section 251(c)(5) discusses service- and interoperability-affecting network changes, not the discontinuance of service.

Comments of the AARP, at p. 8, filed June 15, 2017, *In the Matter of Accelerating Wireline Broadband Deployment by removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, online at: https://ecfsapi.fcc.gov/file/10615190338491/AARP_Final_Comments_WC_17-84_6-15-17.pdf.

joined in filing initial comments by the California Public Utilities Commission, the Pennsylvania Public Utility Commission, and the Public Utilities Commission of Ohio.⁴

Preemption

All three, like NARUC, express concerns about the preemptive aspects of the notice.⁵ As one non-state commenter accurately points out: “State maintenance and service quality standards helped ensure that the traditional [network] met the highest standards of availability, reliability and functionality to the benefit of all consumers

⁴ Comments of the California Public Utilities Commission, filed June 15, 2017, (CPUC Comments), *online at*: <https://ecfsapi.fcc.gov/file/10616232699616/Docket%20Nos.%2017-84%2C%2017-79%20Comment.pdf>; Comments of the Pennsylvania Public Utility Commission, filed June 15, 2017, (PA PUC Comments), *online at*: <https://ecfsapi.fcc.gov/file/1061578473575/PaPUC%20Cmt%20re%20Wireline%20Broadband%20Deployment%20NPRM.pdf>; and Comments of the Public Utilities Commission of Ohio, filed June 14, 2017, (PUCO Comments), *online at*: [https://ecfsapi.fcc.gov/file/106140692122944/Comments 061517.docx.pdf](https://ecfsapi.fcc.gov/file/106140692122944/Comments%20061517.docx.pdf).

⁵ See, e.g., CPUC Comments at 9-17 (Section 253(d) only authorizes the FCC to preempt though adjudication, not rulemakings . . . The scope of preemption contemplated . . . would arrogate to the federal government matters that are best regulated at the State and local level.”); PA PUC Comments at p. 3 (“Neither should the Commission preempt independent state laws that require carriers to provide adequate, safe, and reliable services . . . The Pa. PUC particularly opposes any application of the Section 253(a) prohibition on local laws that are alleged to inhibit the provision of any . . . telecommunications services . . . The Pa. PUC respectfully submits that the State agency and legislature are better positioned to oversee service quality, reliability, adequacy, safety and other related issues affecting its citizens than a federal regulatory agency.”); and PUCO Comments at pp 7-8 (The PUCO “applauds the FCC’s timely attention to accelerating wireline broadband deployment, it should not do so in a manner that ignores the important role that states have traditionally played and must continue to occupy in this effort. A policy of collaboration and partnership with the states must effectively and efficiently achieve this important objective. Blanket preemption may prevent states from enacting laws intended to address unique issues or to protect their citizenry.”)

. . . rather than try to preempt State laws, the nation would be better served in the Commission examined ways to ensure that new communications networks meet or exceed the availability, reliability and functionality standards of the” legacy network.⁶ Given the complementary role Congress left to the States in the framework of the 1996 legislation,⁷ and their proximity to and familiarity with local markets, the agency should pay careful attention to the experience-based recommendations from these independent public servants generally charged, like the FCC, with acting in the public interest.

Notice of Copper Retirements

All three of NARUC’s members that filed comments opposed the *NRPM*’s suggestion, at ¶ 61, to reduce or eliminate the expanded notice requirement with respect to copper retirements to customers, State commissions, and competitors using the copper to provide end-user services.

⁶ Comments of the Alarm Industry Communications Committee, filed June 15, 2017 in *WC Docket No. 17-84*, at p. 14 (Alarm Industry Comments), online at <https://ecfsapi.fcc.gov/file/1061589743765/aicc-comments-17-84.pdf>.

⁷ The *Telecommunications Act of 1996*, Pub.L.104-104, 110 Stat. 56., amending the *Communications Act of 1934*, Pub. L. No. 73-416 (1934), created a structure that requires the FCC to work hand-in-glove with State Commissions. See, e.g., *Weiser, Philip, Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U.L.Rev. 1692, 1694 (2001) (describing the 1996 Act as "the most ambitious cooperative federalism regulatory program to date"). Like the FCC, State commissions are *affirmatively charged* by Congress to “preserve and advance universal service,” 47 U.S.C. § 254, § 214, arbitrate interconnection disputes between competing carriers, 47 U.S.C. § 251-2, preserve service quality, 47 U.S.C. § 253, and encourage deployment “of advanced telecommunications to all Americans.” 47 U.S.C. §1302(a).

The CPUC points out that improperly noticed copper retirements could “hamper emergency services” and urges the FCC not to eliminate or reduce the expanded notice requirements to protect vulnerable customers.⁸ Customers and carriers using the copper to provide retail services need some notice. The CPUC also specifically urges, at p. 24, the FCC to retain the requirement for carriers to give notice State commissions, pointing out at p. 26, that in California, absent such notice, “customers being switched from copper might find themselves without free access to 9-1-1 or functionality or coverage, or access to relay services.”

The PA PUC agrees urging the FCC not to eliminate the “copper notice requirements in the *2015 Technology Transitions Order*.” Indeed, Pennsylvania’s comments specifically oppose the FCC’s proposed elimination of the requirement for a carrier to obtain FCC approval before discontinuing, reducing, or impairing a service used as a wholesale input when the carrier’s actions will discontinue, reduce, or impair service to end users, including a carrier-customer’s retail end users.⁹

⁸ See, CPUC Comments at pp. 19 – 33. Compare, Alarm Industry Comments, at p. 8, online at <https://ecfsapi.fcc.gov/file/1061589743765/aicc-comments-17-84.pdf>:

[A] number of companies providing alarm services in the areas in the Northeast and Mid-Atlantic states in which Verizon is retiring copper facilities have experienced a dramatic increase in the number of failed signals and invalid reports in the first and second quarters of 2017 . . . The vast majority of these failures have been traced back to alarm systems using communications services with Verizon ANIs. It is reasonable to conclude that the increase in failures is tied to Verizon's copper retirement program.

⁹ PA PUC Comments at pp. 3, 6.

According to the PA PUC, such action could well be “an impediment to meaningful, vibrant competition or result in a limitation on competitive wholesale access to network facilities and services.”

The PUCO’s comments too focused on the need for “direct notice to retail customers, state public utility commissions and other entities,” agreeing with the FCC’s prior findings that expanded notice requirements, promotes the public interest and correlates with the FCC’s core value of consumer protection.¹⁰

The FCC should respect clear limits on its authority imposed by Congress.

A number of commenters presented constructions of the statutory text that fall under the most cursory scrutiny. The arguments of Charter Communications, (Charter Comments) about the putative scope of 47 U.S.C. § 253 are typical.¹¹

The text of § 253 (a) is not ambiguous. It says, “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”

But the Charter comments posit the illogical contention that “if preemption under 253(a) were limited to literal or effective prohibitions on providing

¹⁰ PUCO Comments at p. 3.

¹¹ Charter Comments, filed June 15, 2017, in WC Docket No. 17-84, at 24-32, online at: <https://ecfsapi.fcc.gov/file/1061538343230/FINAL%20Charter%20Wireless%20and%20Wireline%20Infrastructure%20NPRM%20Comments.pdf>.

telecommunications services, Sections 253(b) and (c) would be largely—if not entirely— superfluous.”

To be clear, Charter is suggesting reading the word “prohibit” to mean “literally prohibit” - and the phrase “have the effect of prohibiting” to mean an “effective prohibition” - cannot possibly be what Congress intended.

Why? According to Charter, giving the plain text of § 253 (a) its obvious meaning would make the provision “largely—if not entirely— superfluous.” *Id.* This is another patently illogical statement. The provision’s plain text permits the FCC to pre-empt certain laws in certain circumstances. And, of courses, there is no explanation in Charter’s comments of why an unambiguous provision specifying preemption in narrow circumstances could be viewed as superfluous. This is not a surprise. If a provision gives the FCC authority to preempt in *any* context, by definition, it cannot be superfluous.

Like the Ninth Circuit,¹² NARUC finds persuasive the Eighth Circuit’s criticism of a broad interpretation of § 253(a):

“Section 253(a) provides that “[n]o State or local statute or regulation ... may prohibit or have the effect of prohibiting ... provi[sion of] ... telecommunications service.” In context, it is clear that Congress’ use of the word “may” works in tandem with the negative modifier “[n]o”

¹² And the First, Fourth and Seventh Circuits, which the NOI correctly points out in ¶ 91, “have imposed a “heavy burden” of proof on applicants to establish a lack of alternative feasible sites, requiring them to show “not just that *this* application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try.”

to convey the meaning that “state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service.” Our previous interpretation of the word “may” as meaning “might possibly” is incorrect. We therefore overrule *Auburn* and join the Eighth Circuit in holding that “a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.” *Level 3 Commc'ns*, 477 F.3d at 532. Although our conclusion rests on the unambiguous text of § 253(a), we note that our interpretation is consistent with the FCC's. See *In re Cal. Payphone Ass'n*, 12 F.C.C.R. 14191, 14209 (1997) (holding that, to be preempted by § 253(a), a regulation “would have to actually prohibit or effectively prohibit” the provision of services)”

Sprint Telephony PCS, L.P. v. City of San Diego, 543 F.3d 571, 577–78 (9th Cir. 2008).

Curiously, Charter also recognizes correctly as a “key structural point” that:

Section 253 contains two broad savings clauses, which preserve, respectively, the states’ right to advance universal service, exercise the police powers, ensure the continued quality of telecommunications services, and safeguard the rights of consumers; and the right of states and local governments to manage public rights-of-way. *Id.*

But again contends the fact that these reservations are broad is a reason why the preemptive text of Section 253(a) cannot be “interpreted” in a narrow fashion. By that, the Company means the FCC should not interpret the plain text literally. Again there is no explanation for why broad reservations of State authority should be the basis for rewriting plain text to infer broad preemption. From a logical perspective, broad reservations of State authority force the opposite conclusion. The

cited the broad reservations of State authority, on their face, limit/narrow the FCC application of § 253(a).

The text of § 253(a) is clear. But even, assuming *arguendo*, the suspect contention that it has some ambiguity is correct, both precedent and explicit Congressional instructions require both the FCC and Congress to construe it narrowly.

In a line of cases that predates the Telecommunications Act of 1996, the Supreme Court has specified that pre-emption clauses be narrowly construed. For example, in 2008, that court noted:

When the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily "accept the reading that disfavors pre-emption." *Bates v. Dow Agocienes LLC*, 544 U.S. 431, 449 (2005).¹³

Moreover, Section 601(c)(1) of the 1996 Act, captioned "NO IMPLIED EFFECT", is, on its face a Congressional mandate on how the Act is to be construed. It provides "[t]he amendments made by this Act *shall not be construed to modify, impair, or supersede . . . State, or local law unless expressly so provided in such Act*

¹³ *Altria Group v. Good* 555 U.S. 70 (2008). The very next year, the Court emphasized that "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' ... we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Lohr*, 518 U.S., at 485, 116 S.Ct. 2240 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947))." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

or amendments.” {emphasis added} Obviously, § 601(c)(1), by its express terms, requires the FCC to “construe” preemptive portions of the Act narrowly and reservations of State authority broadly. As then “Commissioner” Pai noted in a March 12, 2015 dissent, § 601(c) “counsel[s] against any broad construction” of the 1996 Act “that would create an implicit conflict with state [] law.”¹⁴

¹⁴ Dissenting Statement of Commissioner Ajit Pai, *In the Matters of City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq.*, WC Docket No. 14-115, *The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, WC Docket No. 14-116, rel. March 12, 2015, *mimeo at 7*, online at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-25A5.pdf.

CONCLUSION

Sections 224 and 253 place clear limits on the exercise of FCC authority. Moreover, the record thus far does not provide a factual basis for any preemptive action. NARUC requests the FCC recognize these facts and eschew any formal action. Instead, the FCC should focus on Chairman Pai's new broadband deployment task force to come up with non-binding best practices to facilitate specific State consideration of telecommunications carriers' proposals.

Respectfully submitted,

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