

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

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| <i>In the Matter(s) of</i> |) | |
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| <i>Misuse of Internet Protocol (IP) Captioned Telephone Service</i> |) | CG Docket No. 13-24 |
| |) | |
| <i>Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities</i> |) | CG Docket No. 03-123 |
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**INITIAL COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

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

IP-CTS is a form of telecommunications relay services (“TRS”) that allows individuals with hearing loss to both read captions and use their residual hearing to understand a telephone conversation. From 2000 to 2002, the first private and State authorized trials of analog-based Captioned Telephone Services (“CTS”) took place.

¹ *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).

Wisconsin was the first state to formally offer the program to its residents.² Then, in August of 2003, the FCC recognized CTS as a form of TRS eligible for compensation from the Fund,³ and by late 2005 about thirty-three States had approved CTS for their residents.⁴ These calls were subject to the jurisdictional separation of costs required by Code of Federal Regulations (47 C.F.R § 64.604 (c)(5)), and § 410 of the Communications Act of 1934.

In 2007, the FCC issued a Declaratory Ruling that “*all* IP CTS calls be compensated from the Interstate TRS Fund until such time as the Commission adopts jurisdictional separation of costs for this service.”⁵ This was based in part on the fact that “IP-CTS used the Internet to provide captioned telephone service”⁶ The *2007 Declaratory Ruling* did not

affect the compensation of captioned telephone calls recognized in the *Captioned Telephone Declaratory Ruling*, which are not Internet-based (*i.e.*, are not calls where the connection carrying the captions between the service and the user is via the Internet). *See Captioned Telephone Declaratory Ruling*, 18 FCC Rcd at 16128-29, paras. 19-22 (declining to permit all captioned telephone calls to be compensated from the Fund, noting that for such calls providers can determine if a particular call is interstate or intrastate).⁷

² Strauss, Karen Peltz, *A New Civil Right* (Gallaudet University Press 2006) at page 139.

³ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, **Declaratory Ruling**, CC Docket No. 98-67, 18 FCC Rcd 16121 (2003).

⁴ *See* note 2, *supra*.

⁵ *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities Internet-Based Captioned Telephone Service*, **Declaratory Ruling**, 22 F.C.C. Rcd. 379, 380 (2007) at ¶ 1 (“2007 Declaratory Ruling”).

⁶ *Id.* at page 385 – 386, ¶¶ 13 -15.

⁷ *Id.* at page 389, ¶ 25 Note 78.

The rationale appeared to have been based on the thoroughly discredited notion⁸ that the jurisdictional nature of such calls could not be determined.

However, to establish eligibility for compensation from the FCC’s Interstate TRS Fund, the FCC still specified that “IP-CTS providers must either: (1) seek certification from the Commission pursuant to 47 C.F.R. § 64.605; (2) become part of a certified state program; or (3) subcontract with an entity that is part of a certified state program.”⁹

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,¹⁰ while the FCC oversees the provision of IP-CTS.

Starting in 2012, there was an unusually steep increase in the IP-CTS minutes. And the increase has not abated. As a result, IP-CTS represents almost 80 percent of the total minutes compensated by the TRS Fund—at a cost of nearly one billion dollars. The potential waste in this program poses an ever-increasing threat to the sustainability of IP CTS and all forms of TRS.

⁸ FNPRM at ¶ 104, noting that “that intrastate end-user revenues for the services that support the TRS Fund currently comprise approximately 60% of total end-user revenues, and that intrastate minutes of use of CTS (the most analogous form of TRS) represent approximately 76% of total CTS minutes.” {Footnotes omitted}

⁹ *Consumer & Governmental Affairs Bureau Clarifies the Eligibility Requirement for Compensation from the Interstate Telecommunications Relay Service Fund for Providers of Internet Protocol Captioned Telephone Service*, **Public Notice**, 23 F.C.C. Rcd. 2889, 2889 (2008).

¹⁰ *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 the two forms of TRS currently required for state program certification: 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)

The *FNPRM* seeks comment on, among other things, (i) how to curb provider practices that could be incenting use of IP-CTS by people who may not need it and (ii) how to improve the compensation plan, funding, and structure of the IP CTS program.

In response to the *FNPRM*, NARUC passed a [*Resolution Opposing Proposed Expansion of the IP-CTS Contribution Base*](#) at our July 2018 Summer Policy Summit.

The resolution specifically commends the FCC “for recognizing and adopting certain rules for providers whose practices promote the overuse of IP CTS when there may be alternative technologies that could be more practical and cost effective for consumers,” while simultaneously seeking comment on ways to ensure that IP-CTS remains available to individuals that depend on the service.

The resolution also specifically states:

[1] The FCC should continue to cooperate with the States and engage State expertise, skills and experience in the TRS program decisions including, but not limited to, the option for State IP-CTS administration with funding authority;

[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;

[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).

[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.

In support of these positions, NARUC states as follows:

NARUC’S INTEREST

NARUC is a nonprofit organization founded in 1889. Its members include the government agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the activities of telecommunications,¹¹ energy, and water utilities. NARUC is recognized by

¹¹ NARUC’s member commissions have oversight over intrastate telecommunications services and particularly the local service supplied by incumbent and competitive local exchange carriers (LECs). These commissions are obligated to ensure that local phone service is provided universally at just and reasonable rates. They have a further interest to encourage LECs to take the steps necessary to allow unfettered competition in the intrastate telecommunications market as part of their responsibilities in implementing: (1) State law and (2) federal statutory provisions specifying LEC obligations to interconnect and provide nondiscriminatory access to competitors. *See, e.g.*, 47 U.S.C. § 252 (1996).

Congress in several statutes¹² and consistently by the Courts,¹³ as well as a host of federal agencies,¹⁴ as the proper entity to represent the collective interests of State utility commissions. In the Telecommunications Act,¹⁵ Congress references NARUC as “the national organization of the State commissions” responsible for economic and safety regulation of the intrastate operation of carriers and utilities.¹⁶

¹² See 47 U.S.C. §410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of common concern); see also 47 U.S.C. §254 (1996); see also *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (explaining that “[c]arriers, to get the cards, applied to . . . [NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the “bingo card” system”).

¹³ See, e.g., *U.S. v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), *aff’d* 672 F.2d 469 (5th Cir. 1982), *aff’d en banc on reh’g*, 702 F.2d 532 (5th Cir. 1983), *rev’d on other grounds*, 471 U.S. 48 (1985) (noting that “[t]he District Court permitted [NARUC] to intervene as a defendant. Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate.” 471 U.S. 52, n. 10. See also, *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976); compare, *NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007); *NARUC v. DOE*, 851 F.2d 1424, 1425 (D.C. Cir. 1988); *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

¹⁴ NRC Atomic Safety and Licensing Board *Memorandum and Order* (Granting Intervention to Petitioners and Denying Withdrawal Motion), LBP-10-11, *In the Matter of U.S. Department of Energy (High Level Waste Repository)* Docket No. 63-001-HLW; ASLBP No. 09-892-HLW-CABO4, *mimeo* at 31 (June 29, 2010) (“We agree with NARUC that, because state utility commissioners are responsible for protecting ratepayers’ interests and overseeing the operations of regulated electric utilities, these economic harms constitute its members’ injury-in-fact.”)

¹⁵ *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. §151 *et seq.*, Pub. L. No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) (“Act” or “1996 Act”).

¹⁶ See 47 U.S.C. § 410(c) (1971) (NARUC nominates members to FCC Joint Federal-State Boards, which consider universal service, separations, and related concerns and provide formal recommendations that the FCC must act upon; *Cf.* 47 U.S.C. § 254 (1996). *Cf.* *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains “[c]arriers, to get the cards, applied to . . . [NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the “bingo card” system.).

NARUC is the organization Congress charged with nominating State Commissioners to the Separations Joint Board.¹⁷ Indeed, NARUC’s counsel has served as a member of the staff for the Separations Joint Board for more than twenty years. NARUC, and its member commissions, have an obvious and Congressionally-recognized interest in the *FNPRM* proposals involving TRS programs. Indeed, NARUC participated in the 2013 proposed rulemaking that led to this *FNPRM*.¹⁸

DISCUSSION

Section 225 of the Communications Act requires the FCC to ensure that TRS services, like IP-CTS, are provided “to the extent possible and in the most efficient manner.”¹⁹ As the *FNPRM* outlines in great detail,²⁰ it does appear there may well be perverse incentives for providers to market this service to individuals who do not need it or who could derive greater benefit from less costly alternatives. There must be some reason why IP-CTS is continuing to grow while other forms of TRS have exhibited either declining demand or relatively flat usage.²¹ The FCC is to be commended “for recognizing and adopting certain rules for providers whose practices promote the overuse of IP-CTS when there may be alternative technologies that could be more practical and cost effective for consumers,” while simultaneously

¹⁷ 47 U.S.C. §410(c) (1971).

¹⁸ See, e.g., [Initial Comments of the National Association of Regulatory Utility Commissioners](#), filed in CG Docket No. 13-24 & 03-123 (November 4, 2013).

¹⁹ 47 U.S.C. § 225(b)(1).

²⁰ *FNPRM* at ¶¶ 7 -11.

²¹ *Id.* at ¶ 8 -11.

seeking comment on ways to ensure that IP-CTS remains available to those that depend on the service.²²

The FCC should continue to cooperate with the States and engage State expertise, skills and experience in the TRS program decisions including, but not limited to, the option for State IP-CTS administration with funding authority.

The 1996 Act created a structure that requires the FCC to work hand-in-glove with State Commissions.²³ Like the FCC, State commissions are *affirmatively charged* by Congress to “preserve and advance universal service,”²⁴ and to encourage deployment “of advanced telecommunications to all Americans.”²⁵ And, in 47 U.S.C. § 225(f) Congress explicitly provided for State TRS programs which are now ubiquitous across the United States.

²² [Resolution Opposing Proposed Expansion of the IP CTS Contribution Base](#) (NARUC, July 18, 2018).

²³ 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”).

²⁴ See, 47 U.S.C. §254(b)(5)(“should be specific . . . federal and state mechanisms to advance universal service”); §254(f) (authorizing state programs); §251(f)(States can exempt rural carriers from certain requirements.); and §254(i)(FCC and States should insure universal service at reasonable rates.)

²⁵ See, 47 U.S.C. §1302(a)(specifying the FCC and State Commissions “shall” encourage the deployment of advanced telecommunications.”)

The FCC has recognized this crucial need for federal-state cooperation in other contexts.²⁶ And, in this proceeding, the FCC has again conceded that existing State responsibility for, and extensive experience with, administering other forms of TRS (including CTS) as well as States’ programs closer proximity to IP-CTS consumers make them an essential partner in any modifications to IP-CTS.²⁷

This proceeding presents another opportunity for the FCC to leverage the experience of State authorities with TRS program decisions – especially upon the question of whether States could or should administer IP CTS.²⁸

Assuming an adequate funding source and authority from their respective State legislators, given their experience and background with functionally equivalent programs, it is obvious that many States will have *the capacity* to perform the administrative functions of IP CTS and do so more efficiently.

²⁶ *In the Matters of Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support*, Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, 32 F.C.C. Rcd. 10475 (2017) at ¶ 55, (“[P]reemption of state commissions’ designations of such LBPs was inconsistent with the role contemplated for the states in Section 214 of the Act.”), and at ¶ 57 (“States continue to play an important role in ensuring affordability of voice, and also supporting broadband.”) *Compare, In the Matters of Lifeline and Link Up Reform & Modernization, Telecommunications Carriers Eligible for Universal Service Support, **Third Report and Order, Further Report and Order, and Order on Reconsideration***, Dissenting Statement of Commissioner Ajit Pai, 31 F.C.C. Rcd. 3962, 4168 (2016) (“[T]he *Order* cuts state commissions out of the Lifeline designation process, crippling their ability to guard against waste, fraud, and abuse. That’s a disaster in the making. We need more cops on the beat, not fewer. And the state commissions thus far have the best track record.”)

²⁷ *FNPRM* at ¶ 112.

²⁸ *FNPRM* at ¶¶ 111-116.

However, as the initial comments filed by the Colorado, Kansas, and Nebraska Commissions make clear,²⁹ States cannot provide comprehensive input on the viability of these proposals absent more detail and State specific information.³⁰ States lack specific data on providers' costs, IP CTS minute-usage, and number of users, and growth projections in their respective service areas.

And if the changes in the Report and Order associated with the *FNPRM* have the desired effect, all of those seem likely to change. The potential framework around such an administration is also unclear and questions remain as to whether states would certify IP CTS providers, would be required to contract with multiple IP- CTS providers, or would need to seek State law changes to administer such programs. This information is essential for States to determine the costs and logistics of administering IP CTS.

²⁹ See, e.g., [Comments of the Nebraska Public Service Commission](#), CG Docket Nos. 13-24 and 03-123, at 2 (filed September 13, 2018) (“NPSC discussed the impracticability of Nebraska taking a position on the migration of IP CTS administration to the states, unless and until more data specific to IP CTS usage, costs, and growth projections were released. . . . Nebraska continues to urge the FCC to conduct studies and release data specific to IP CTS usage and growth within each state, so that the states can adequately comment on the FCC’s plans and prepare for any changes which may be made. Until this data is released, Nebraska and other states will not be in a position to comment on many of the changes proposed to the IP CTS model.”); [compare, Comments of the Kansas Corporation Commission Regarding the IPCTS Portion of the TRS Program](#), CG Docket Nos. 13-24 and 03-123, at 2 (filed September 11, 2018) and [Comments of the Colorado Public Utilities Commission](#), CG Docket Nos. 13-24 and 03-123, at 6-7 (filed September 6, 2018).

³⁰ See, e.g., [Comments of the Florida Public Service Commission](#), CG Docket Nos. 13-24 and 03-123, at 3-4 (filed Sept. 27, 2013); [Comments of the Kentucky Public Service Commission](#), CG Docket Nos. 13-24 and 03-123, at 3-4 (filed Sept. 27, 2013), [Comments of the Nebraska Public Service Commission](#), CG Docket Nos. 13-24 and 03-123, at 2 (filed Nov. 1, 2013); [Comments of the California Public Utilities Commission and the People of the State of California](#), CG Docket Nos. 13-24 and 03-123, at 2 (filed Nov. 4, 2013); [Initial Comments of the National Association of Regulatory Utility Commissioners](#), CG Docket Nos. 13-24 and 03-123, at 6-7 (filed Nov. 4, 2013). [Reply Comments of the Public Service Commission of the State of Missouri](#), CG Docket Nos. 13-24 and 03-123, at 4-5 (filed Nov. 14, 2013); [Ex Parte Comments of the Public Utility Commission of Texas](#), CG Docket Nos. 13-24 and 03-123, at 2 (filed Mar. 11, 2014);

Without it, States cannot assess the resources, funding, and other operational issues that must be addressed to assume the functions of administering this aspect of the TRS program.

Moreover, as discussed *infra*, before the FCC can proceed with either these administration questions or expanded funding, it must clarify the current classification of these services and seek input from the Federal-State Joint Board on Separations (“Separations Joint Board” or “Board”).

NARUC respectfully suggests that additional engagement with key State stakeholders is needed before the FCC comes to any final resolution on the administration and the funding issues raised in this proceeding.

Expanding the contribution base to include a combined inter-and intrastate revenues is premature.

The *FNPRM* suggests expanding the funding base to include intrastate revenues.³¹ Later, the FCC points out that “at least some commenters responding to the *2013 IP CTS Reform NPRM* question whether it would be desirable for States to take on IP CTS funding and administration before issues related to user eligibility, uncontrolled growth of IP CTS demand, and standards of service have been addressed at the federal level.”³² For the reasons discussed earlier, it makes no sense to shift administration to the States without stabilizing the program. For the similar reasons, it is premature for the FCC to consider shifting the funding mechanism or any increases in the revenue base.

³¹ *FNPRM* at ¶¶ 102-108.

³² *FNPRM* at ¶ 112.

According to the *FNPRM*, the program is in jeopardy because of suspected waste and possible abuse, a reimbursement mechanism that is well above the actual costs of providing services and/or other inefficiencies in administration or operation of the program.³³ Changing the funding mechanism does 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.

Both Chairman Pai and Commissioner O'Reilly have, in similar circumstances, found instead of increasing funding or expanding the funding base, that limiting FCC social service programs to a budget is a useful tool to insure greater oversight and slow abuse. According to then-Commissioner Pai, in 2016:

“placing a cap on . . . spending will prevent any future explosion in spending without direct Commission accountability.” . . . With a budget, the government has greater incentives to crack down on waste, fraud, and abuse. . . . There's another benefit to a real budget . . . It would deter carriers from abusing the program. That's because carriers are more likely to exploit the program, or turn a blind eye to fraud, when the profits from abuse are high and the costs are low. As spending nears a real budget, the FCC is likely to increase its oversight of the program, raising the risk of detection. And once spending hits the budget, the reduction in carrier payments will automatically reduce the profits from continued fraud. Faced with higher costs and lower profits . . . carriers will [have] incentives to cut down on abuse before it becomes a systemic problem.³⁴

³³ See *FNPRM* at ¶¶ 1 & 9 (“potential waste in this program poses an ever-increasing threat to the sustainability of IP CTS.”); at ¶ 10 (“We are further concerned that a large portion of the recent growth in IP CTS may be attributable to perverse incentives for providers to market this service to individuals who do not need it and the consequent wasteful use of IP CTS by individuals who could derive equal or greater benefit from less costly alternatives.”); and at ¶ 20 (“In light of our conclusion that the MARS method is now ineffective in aligning rates with costs, and that the gap between the two is widening, we find it important to act without delay to bring provider compensation more in line with reported provider cost.”)

³⁴ *In the Matters of Lifeline and Link Up Reform & Modernization, Telecommunications Carriers Eligible for Universal Service Support*, **Third Report and Order, Futher Report and**

The exponential growth in the costs for the federal program has already resulted in additional “incentives” for the FCC to crack down on waste fraud and abuse. In the *FNPRM* at ¶ 1, the FCC notes that:

IP CTS usage continues to grow and the contribution base supporting the TRS Fund shrinks, potential waste in this program poses an ever-increasing threat to the sustainability of IP CTS and all forms of TRS. We therefore take steps and explore others to reduce waste of the TRS Fund and expand the Fund's contribution base.

{Emphasis added}

Given the acknowledged dwindling funding base, there is no question that the existing funding mechanism is currently providing the same incentives/benefits to the IP-CTS program that Chairman Pai highlighted in his 2016 dissent.

Commission action on expanding the base is premature for other reasons also. At the onset of IP-CTS in 2007, the FCC chose to fund all the costs of the program via the interstate jurisdiction. In proposing shifts now to a jurisdictional separation of costs, it is clear that examination of the separations impact is required. The *FRNPM* acknowledges as much – by citing as statutory authority for the ability to assess intrastate revenues, 47 U.S.C. § 225(3). Specifically, the FCC notes:

[S]ection 225(d)(3) of the Act requires the Commission 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.³⁵

The FCC also subsequently references the “jurisdiction separations issues discussed above.”³⁶ The FCC concedes, as it must, that jurisdictional separations

Order, and Order on Reconsideration, Dissenting Statement of Commissioner Ajit Pai, 31 F.C.C. Rcd. 3962, 4165-4166 (2016).

³⁵ *FNPRM* at ¶ 109.

³⁶ *Id.* at ¶ 114.

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(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.³⁷

Section 410 only discusses Joint Boards and includes a mandatory instruction that changes to separations must be referred to the Board for a recommended decision. The reference in § 225(3)(A) can mean nothing else. The FCC is proposing to change cost allocations between jurisdictions *in both FNPRM* proposals. Both proposed funding mechanisms explicitly shift costs to the intrastate jurisdiction.³⁸ That is by definition separations and a referral to the Separations Joint Board is required. Such a referral could likely be addressed in a relatively short time frame provided the agency devotes adequate resources to the Board's deliberations.

Finally, the FCC needs to handle a few additional legal issues before proceeding to any final order in this proceeding. In ¶ 110, the *FNPRM* poses a question – that is easily resolved by reference to the plain text of the federal statute. There the FCC seeks comment on its “belief” that § 225 “authorizes the classification of some IP CTS calls as jurisdictionally intrastate.” The *FNPRM* goes on to state the agency’s “belief” that “when both parties to an IP CTS call are located within

³⁷ 47 U.S.C. § 225(3)(A); *compare* 47 C.F.R.64.604(c)(5) (“[C]osts of providing TRS shall be separated in accordance with the jurisdictional separation procedures and standards set forth in the Commission's regulations adopted pursuant to section 410 of the Communications Act of 1934, as amended.”)

³⁸ *FNPRM* at ¶¶ 106 – 107 (“Under one possible approach, the TRS Fund administrator could compute a single contribution factor for IP CTS, which would be applied in the same manner to all end-user revenues, both interstate and intrastate, in effect treating the IP-CTS revenue requirement as a single pool to which all TRS Fund contributors would pay the same percentage of their total end-user revenues. . . . Under an alternative plan, the IP-CTS revenue requirement would be divided into interstate and intrastate portions, based on an estimate of the proportion of IP CTS costs and minutes that are interstate and intrastate, respectively.”)

the same state, the call should be classified as an intrastate call” under § 225. The statute could not be more explicit. In 47 U.S.C. § 152, Congress specified that *nothing* in Chapter 5 “shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . intrastate communications service by wire or radio of any carrier” except as provided in § 225 (and a few other listed sections). The FCC concedes that the majority of IP-CTS traffic is intrastate and severable. It is obviously an “intrastate communications service” that is provided by wire or radio.

Section 152 specifies that, as a matter of federal law, States have jurisdiction over these services “except as provided by” § 225 and a few other sections. And § 225 does not eliminate State jurisdiction. Rather, that section gives the FCC additional and specific authority with respect to intrastate TRS and the intrastate operations of common carriers in § 225. However, nothing in that section ousts State jurisdiction to provide the service – as is confirmed by the specific authority for State programs outlined in § 225(f).

As for “communications services by wire or radio” that begin and end in the same State, the statute has always specified that interstate communications do not include communications by wire or radio communication “in the same State, Territory or possession of the United States, or the District of Columbia, through any place outside thereof.”³⁹ Those communications have always been treated as intrastate. The statute is very clear that States retain jurisdiction with respect to such communications services.

However, the FCC refusal to use the classification scheme authored by Congress to classify IP-based point-to-point voice (or equivalent) communications as either a “telecommunications service” or an “information service” is problematic.

³⁹ See 47 U.S.C. § 153(28).

The FCC continues to make statements, with no real statutory support, suggesting that the States lack jurisdiction over “exclusively interstate” IP-based services.

To anyone that reads the *FNPRM*, and can read the statute - it is not logical to suggest IP-CTS services (much less facilities-based VoIP services) are exclusively interstate services - at least not as long as IP-CTS (and VoIP providers) both clearly offer intrastate transactions that are both identifiable and identified as such, and that are used as the basis for payments into various federal and State subsidy program.

Indeed, the FCC has already explicitly permitted State USF mechanisms to assess contributions based on the intrastate revenues of fixed and nomadic VoIP services, and specifies in that order that if the traffic is severable – as it most certainly is both with IP-CTS services (and facilities-based VoIP phone service), that States have jurisdiction regardless of the classification of the service.⁴⁰

⁴⁰ See, *In the Matter of Universal Service Contribution Methodology, Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms Telecommunications Services . for Individuals with Hearing & Speech Disabilities, Report and Order and Further Notice of Proposed Rulemaking*, FCC Rcd 7518, 7456 at ¶ 56 (June 27, 2006), *granted in part, vacated in part, Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007) (Specifying that “to the extent that an interconnected VoIP provider develops the capability to track the jurisdictional confines of customer calls, it may calculate its universal service contributions based on its actual percentage of interstate calls. Under this alternative, however, we note that an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the *Vonage Order* would no longer be applicable to such an interconnected VoIP provider.” The R&O also concedes in note 189 that many carriers already do so (and are thus subject to state oversight.)) See also *In the Matter of Universal Service Contribution Methodology; Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues, Declaratory Ruling*, 25 FCC Rcd 15651. (rel. November 5, 2010).

But the FCC’s decade long refusal to classify IP based voice and voice related services has implications for the Congressional scheme outlined in the federal law – including implementation of Section 225.

Again, the statute is quite clear. In the context of TRS, States can only permit a “common carrier” to recover the costs incurred in providing intrastate telecommunications relay services.⁴¹ Congress does not sanction providing such subsidies to carriers that do not provide a telecommunications service. Presumably that excludes entities that provide only information services. Similarly, §§ 225 (b)(2) and (d)((1)(E) specify respectively that (i) the FCC “general authority to administer this section and the regulations prescribed thereunder” is over “common carriers” and that the FCC must “prohibit relay operators from failing to fulfill the obligations of common carriers.” Section 225 is in Title II and elsewhere Congress specifies that carriers “shall be treated as common carriers under this chapter only to the extent they are providing telecommunications services.⁴²

In short, 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.

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.

According to the FNPRM, current compensation rates for IP-CTS are a problem.⁴³ Fortunately, in every year since 2013, the TRS Fund administrator has

⁴¹ 47 U.S.C. § 225(3)(B);

⁴² 47 U.S.C. § 153(51).

⁴³ FNPRM at ¶ 20-22.

gathered IP-CTS cost data from providers and has submitted its calculations of average provider costs based on this information to the Commission. From 2013 through 2017, the FCC sought public comment on these submissions, including whether costs are correctly calculated, while specifically noting that such cost calculations may be used by the Commission to set a new compensation rate.⁴⁴ That data provides an excellent base for the interim rate reductions in the Report and Order setting the federal program on a glide path to cost-based rates.⁴⁵

The FCC should assure that IP-CTS rates move towards cost-based compensation. This will simultaneously assure all consumers pay the lowest possible TRS surcharge rate and that IP-CTS providers are reimbursed for reasonable costs incurred in providing the service. NARUC has not taken a position on the series of questions raised in the *FNPRM* on how to move rates closer to costs. But, the association does endorse the FCC's actions to align compensation with costs as one way to discourage unethical sales practices.

The FCC should continue to “refine its rules to further minimize inefficient and/or inappropriate use of the program.”

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, (i) user eligibility assessments that are sufficiently thorough and not biased toward the use of IP CTS technology and (ii) standards of service.

Current user eligibility assessments for IP CTS appear to be perpetuating unnecessary growth of the service and provision of services to users who may not

⁴⁴ *FNPRM* at ¶ 21.

⁴⁵ *FNPRM* at ¶ 86.

need them. NARUC's resolution generally supports user eligibility assessments. The need for improvements in screening is obvious. Certainly using State-administered assessments might be one effective means for improving screenings. However, it is not clear that States can handle this function without additional resources, including funding to establish additional equipment centers throughout any State and more trained professionals to assess potential IP CTS users. States – and specifically State Telephone Equipment Distribution Programs – will need more data, particularly on the number of IP CTS users added each month, to provide a reasonable estimate as to a timeframe for implementation of state-conducted user eligibility assessments.

CONCLUSION

The FCC should extend the outreach in this and the 2013 rulemaking to engage State expertise, skills and experience in the TRS program decisions. The agency needs to take care of many of the identified problems with the plan - including continuing to move towards a cost-based rate – before suggesting any expansion of the funding base. 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. Section 225(d)(3).

Respectfully submitted,

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Appendix A

Resolution Opposing Proposed Expansion of the IP CTS Contribution Base

Whereas in 2004, Congress directed the Federal Communications Commission (“FCC”) to regulate Telecommunications Relay Service (“TRS”) by jurisdictional separation of the associated costs, which shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction;

Whereas in 2007, the FCC approved Internet Protocol Captioned Telephone Service (“IP CTS”) as a type of TRS eligible for compensation on an interim basis from the federal TRS Fund through contributions from carriers’ based on annually reported interstate revenues, consistent with the treatment of VRS and IP relay calls;

Whereas from 2011 to 2017, annual IP CTS minutes of use have grown from approximately 29 million minutes to 363 million minutes while most other forms of TRS (TTY-based, TRS, state-based CTS, IP Relay) have either declined in demand or demand is relatively flat;

Whereas the dramatic growth in IP CTS call volume appears to result, in part, from provider practices that promote over-use of IP CTS, including by people with hearing loss who may be able to achieve functionally equivalent telephone service using other forms of technologies;

Whereas on June 8, 2018, the FCC released a “Report and Order, Declaratory Ruling, Further Notice of Proposed Rulemaking (“NPRM”), and Notice of Inquiry” addressing sustainability of IP CTS wherein the FCC adopted per-minute compensation rates for two years to correlate to actual reasonable costs for the service and prohibits providing service to users who do not need it;

Whereas in the NPRM, the FCC proposes to expand the contribution base to support IP CTS by including a percentage of annual intrastate revenues from telecommunications carriers, including VoIP service providers;

Whereas the FCC suggests that expanding the TRS funding base can be implemented in multiple ways, including a single contributor factor for IP CTS on all interstate and intrastate end-user revenues or an alternative plan that would establish jurisdictional allocation factors between the separate jurisdictions;

Whereas the FCC is seeking comment to update the records on whether States would have an interest in voluntarily administering IP CTS operations and “opt-out” of having intrastate revenues contribute to the federal TRS fund, or if States continue to have concerns with user eligibility, IP CTS growth from misuse, standards of service that should be addressed at the federal level before assuming administrative functions with respect to IP CTS; *and*

Whereas pursuant to 47 U.S.C. § 410(c) the FCC is directed to refer any proceeding regarding jurisdictional separations of common carrier property and expenses between interstate and intrastate operations to the Federal-State Board on Jurisdictional Separations; *now, therefore be it*

Resolved that the Board of Directors of the National Association of Regulatory Utility Commissioners (“NARUC”) convened at its 2018 Summer Policy Summit in Scottsdale, Arizona, commends the FCC for seeking comments in its June 8, 2018 “Report and Order, Declaratory Ruling, Further Notice of Proposed Rulemaking and Notice of Inquiry,” FCC 18-79A1, on ways to ensure that IP CTS remains sustainable for Each of our states’ vulnerable individuals who rely on these services to communicate effectively in our society; *and be it further*

Resolved that NARUC urges the FCC to continue to cooperate with the states and engage state expertise, skills and experience in the TRS program decisions including, but not limited to, the option for state IP-CTS administration with funding authority; *and be it further*

Resolved that NARUC does not support redirecting more money into the current federal TRS fund at this time through a single combined interstate and intrastate contributions factor for IP-CTS, as these modifications do nothing to minimize the inefficient and/or inappropriate use of the program, and would therefore be premature; *and be it further*

Resolved that NARUC commends the FCC for recognizing and adopting certain rules for providers whose practices promote the overuse of IP CTS when there may be alternative technologies that could be more practical and cost effective for consumers; *and be it further*

Resolved that the FCC 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; *and be it further*

Resolved that NARUC supports the FCC in restructuring the IP CTS Provider compensation rate methodology to align with a cost-based rate for IP CTS providers to discourage unethical sales practices; *and be it further*

Resolved that any necessary contributions restructure for IP CTS occur only after measures to minimize inefficient and/or inappropriate use of the program are implemented and appropriate costs are determined; *and be it further*

Resolved that the FCC must engage the Federal-State Board on Jurisdictional Separations in any TRS contributions restructure for IP CTS because the interstate and intrastate costs and minutes are severable, and the current separations rules do not accurately separate costs between the interstate and intrastate jurisdictions.

Sponsored by the Committee on Telecommunications.

Adopted by the NARUC Board of Directors on July 18, 2018.