N A R U C
National Association of Regulatory Utility Commissioners

September 18, 2018

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: NOTICE OF EX PARTE COMMUNICATION filed *In the Matter(s) of (i) Bridging the Digital Divide for Low-Income Consumers* WC Docket No. 17-287, *Lifeline and Link-Up Reform and Modernization,* WC Docket No. 11-42, *Telecommunications Carriers Eligible for Universal Service Support,* WC Docket No. 09-197 *(ii) Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket No. 17-84, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-79, (iii) *Implementing Kari's Law and Section 506 of RAY BAUM's Act,* PS Docket No. 18-261, *Inquiry Concerning 911 Access, Routing and Location in Enterprise Communications Systems*, PS Docket No. 17-239, and (iv*) Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286.

Dear Ms. Dortch:

In accordance with 47 C.F.R. § 1.1206(b), I am filing this notice of my separate meetings on September 14, 2018 with ***Arielle Roth, Legal Advisor, Wireline, Office of Commissioner Michael O'Rielly,*** *and* ***Travis Litman, Chief of Staff and Senior Legal Advisor, Wireline and Public Safety.*** During the meeting, I reiterated NARUC's views on key issues in the pending Lifeline proceeding,[1] elaborated on NARUC's position on the draft **Declaratory Ruling and Third Report and Order**, in WT Docket nos. 17-79 and 17-84 set for the September agenda meeting,[2] discussed the need for a referral to the Joint Board in the Separations dockets, and supported aspects of the draft 9-1-1-related Notice of Proposed Rulemaking also set for consideration at the September agenda meeting.

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[1] *See* ***Initial Comments of the National Association of Regulatory Utility Commissioner, WC Docket No. 17-297, WC Docket No. 11-42, & WC Docket No. 09-197*** (Feb. 21, 2018); ***Reply Comments of the National Association of Regulatory Utility Commissioners,*** WC Docket No. 17-287, WC Docket No. 11-42, & WC Docket 09-197 (March 24, 2018).

[2] *See* ***Reply Comments of the National Association of Regulatory Utility Commissioners***, WC Docket No. 17-84 (Wireline) (July 17, 2017); ***Reply Comments of the National Association of Regulatory Utility Commissioners***, WTC Docket No 17-79 (Wireless) (July 17, 2017); ***Initial Comments of the National Association of Regulatory Utility Commissioners***, WC Docket No. 17-84 (Wireline) (June 6, 2017); ***Comments of the National Association of Regulatory Utility Commissioners****, WT Docket No. 16-421 (Motilitie)* (March 10, 2017).

[1] THE 911 RULEMAKING PROPOSED FOR THE SEPTEMBER AGENDA:

NARUC generally supports the draft 9-1-1-related Notice of Proposed Rulemaking posted for consideration at the September 26, 2018 Agenda Meeting

The FCC has released draft texts of items for consideration at the upcoming September 26 Agenda meeting. One is a ***Notice of Proposed Rulemaking*** in the proceeding captioned: *In the Matters of Implementing Kari's Law and Section 506 of RAY BAUM's Act*, PS Docket No. 18-261, *Inquiry Concerning 911 Access, Routing and Location in Enterprise Communications Systems*, PS Docket No. 17-239). The NPRM proposes to require multi-line telephone systems to dial 911 directly, without having to dial a prefix to reach an outside line and to consider adopting rules to ensure that "dispatchable location" is conveyed with 911 calls, regardless of the technological platform used, so that 911 call centers will receive the caller's location automatically and can dispatch responders more quickly

NARUC has generally endorsed some of the proposals in the NPRM through two resolutions. The first, a February 2014 ***Resolution Urging the Federal Communications Commission to Improve Public Safety through Improved Location Accuracy Requirements for Wireless 911 Calls*** was the basis of May 12, 2014 **Comments of NARUC In the Matter of Wireless E9-1-1 Location Accuracy Requirements** which commended the FCC's efforts to assure that Public Safety Answering Points receive accurate information to identify the indoor location of wireless 9-1-1 callers and supported adoption of effective location technologies for indoor and outdoor 9-1-1 calls. Last year, in November of 2017, NARUC passed a ***Resolution on E911 Access and Enterprise Communications Systems***. that specifically supports federal "and State actions to require Enterprise Communications Systems manufacturers, installers, and operators to design and configure" systems to "allow direct dialing of 9-1-1, to route 9-1-1 calls to the proper PSAP regardless of the particular location of the extension used to call 9-1-1, provide the PSAP with location information specific and accurate enough for first responders to locate the caller, and to support on-site notification." Both NARUC resolutions suggest that any federal rules should be written to permit States to impose additional requirements "presuming that such additional requirements do not contradict or conflict with federal requirements." That resolution was the basis for the December 15, 2017 **Reply Comments of the National Association of Regulatory Utility Commissioners.**

[2] THE LIFELINE MODERIZATION NPRM:

The FCC should confirm its tentative conclusion with respect to the Lifeline Broadband Provider category of Eligible Telecommunications Carriers and affirm that States' role in designations cannot, ab initio, be bypassed.

The February 21, 2018 **Initial Comments of the National Association of Regulatory Utility Commissioners** agree with the Lifeline NPRM's recognition of the "important and lawful role of the states" assigned by Congress with respect to federal universal service programs.[3] We support the FCC's determination that the agency cannot create a designation process under 47 U.S.C. § 214 that bypasses *ab initio* State commissions.

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[3] *In the Matter(s) of Bridging the Digital Divide for Low-Income Consumers, WC Docket No. 17-287, Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, *Telecommunications Carriers Eligible for Universal Service Support*, WC Docket No. 09-197, FOURTH REPORT AND ORDER, ORDER ON RECONSIDERATION, MEMORANDUM OPINION AND ORDER, NOTICE OF PROPOSED RULEMAKING, AND NOTICE OF INQUIRY (FCC 17-155) (rel. December 1, 2017), available online at: **https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-155A1.pdf**, at ¶ 54.

The FCC should reject the NPRM's proposal to eliminate non-facilities-based resellers from the Lifeline Program.

The proposal to eliminate non-facilities-based resellers from the federal Lifeline program will severely undermine the current program. Moreover, there is no record evidence that such elimination will increase investment in facilities. Non-facilities-based carriers, currently serving 75 percent of eligible users, should continue to receive Lifeline funds, in part, because, even with a transition period, the potential to disrupt and even eliminate service to literally millions of eligible users is obvious. Indeed, in my review of the initial comments filed, I found only one set of comments directly supporting this limitation on resellers. The Lifeline NPRM suggests, in ¶ 63, that limiting Lifeline subsidies to facilities-based carriers might spur additional investment in infrastructure. However, there is also no credible evidence that eliminating non-facilities-based service will spur <u>additional</u> investment in voice-and broadband-capable networks. After all, it seems unlikely that any network owner would be selling unused airtime in large blocks to Lifeline resellers if that sale was not profitable and thus did not also contribute to the maintenance and improvement of the "resold" facilities. Indeed, this point is confirmed by expert testimony appended to CTIA's initial comments. According to the affidavit of Dr. John May, at 2: " Facilities-based and non-facilities-based carriers . . . operate symbiotically to each provide economic value and enhance consumer welfare in the provisioning of modern communications services. The result of this relationship is enhanced capacity utilization and hence more investment."[4] Also, simple economics suggest it is unlikely that the FCC's revised policy can be calibrated to provide adequate encouragement to current non-facilities-based service providers to either build their own facilities or overbuild other facilities-based providers – particularly in underserved/low population areas. In addition, as NARUC pointed out in its initial comments, at 31, economic concerns have already caused (i) some large wireline facilities-based carriers to relinquish ETC status in many areas, and (ii) the largest two facilities-based wireless carriers – AT&T and Verizon – to only offer Lifeline services in a small minority of States.[5] This is not a surprise these wireline and wireless carriers business plans are obviously not premised or focused on Lifeline programs. In contrast, many non-facilities-based reseller's business plans are premised squarely on the existence of federal (and State) lifeline programs as the basis for operations in multiple jurisdictions.

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[4] *See Comments of CTIA* (February 21, 2018) at 3 ("[Non-facilities-based resellers] presence in the market increases incentives for network investment, citing the Exhibit A "Declaration of Dr. John May at 2.) at: **https://ecfsapi.fcc.gov/file/1022132549976/180221%20CTIA%20Lifeline%20Comments.pdf.**

[5] Verizon only offers wireless lifeline in parts of four states. *See* Verizon's "*Discounted Wireless Lifeline Program Phone Service*" webpage, online at: **https://www.verizonwireless.com/solutionsand-services/lifeline/** (last accessed 2/21/2018), describing its $15.75 (after application of the federal discount) per month plan as only available "in areas where Verizon Wireless is approved to offer Lifeline service." According to the linked brochure: "Lifeline service through Verizon Wireless is only available: in parts of Iowa [8 counties], North Dakota [all but 4 counties], New York [8 counties] and Wisconsin [4 counties]." (emphasis added) That brochure also specifies that – on top of the required 2 year contract, the requirement to supply your own handset, the $15.75/month fee, and one-time $35 activation charge that additional fees and taxes, as of October 2017 *"can add between 7% and 46% to the standard monthly access and other charges*." AT&T only offers wireless lifeline services in 14 States and Puerto Rico. *See* AT&T's "*Lifeline for Wireless Service*" webpage, at **https://www.att.com/esupport/article.html#!/wireless/KM1008768** (last accessed 2/21/2018), noting "Qualifying States" are Alabama, Alaska, Arkansas, Idaho, Kentucky, Louisiana, Michigan, Mississippi, North Dakota, Oregon, South Dakota–Pine Ridge, Texas, Washington and West Virginia." *Compare,* T-Mobile's "*Lifeline Program*" webpage, online at: **https://www.tmobile.com/offers/lifeline-program** (last accessed 2/21/2018), which notes that T-Mobile also only offers its $10/month (cost after applying the federal subsidy) lifeline plan in nine states and Puerto Rico.

[4] THE SEPARATIONS "FREEZE" PROPOSED RULEMAKING:

***The FCC has recognized what Section 410(c) of the Communications Act requires – changes to the Part 36 rules require as a pre-requisite a recommendation from the Federal State Joint Board on Separations*.**

NARUC filed both initial and reply comments[6] on the FCC's July 18, 2018 *further Notice of Proposed Rulemaking* ("*FNPRM*").[7] Both sets of comments point out that 47 U.S.C. § 410(c) is not ambiguous. It states:

> The Commission 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 . . . to a Federal-State Joint Board.

In February of 2017, to its credit, this Commission acknowledged that if the Part 36 rules "likely would need to be modified," 47 U.S.C. § 410(c) requires a referral to the Separations Joint Board.[8] The *FNPRM* proposes modifications to the Part 36 rules. Both the freeze extension (which was initiated based upon just such a recommendation and continued based on similar recommendations) and the proposed changes to category freezes are modifications that require a referral.

No comment offered a legal rationale for bypassing the statutory requirements nor did the FNPRM articulate a basis for bypassing the statutory mandate.

Not a single commenter addresses the mandatory consultation requirement in 47 U.S.C. § 410(c). None offer advice or a rationale for a legal theory that allows the FCC to extend the freeze permanently or for 15 years without the required referral to the Joint Board. None offer advice or a rationale for the FCC to bypass the § 410(c) referral requirement for the various optional freeze/unfreeze proposals.[9]

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6 *See*, **Initial Comments of the National Association of Regulatory Utility Commissioners**, filed August 27, 2018, and **Reply Comments of the National Association of Regulatory Utility Commissioners**, filed September 10, 2018 *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286.

7 *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, **Further Notice of Proposed Rulemaking**, FCC 18-99, CC Docket No. 80-286, 2018 WL 3495121 (Released July 18, 2018), published at: **83 Federal Register 35582** (July 27, 2018).

8 *In the Matter of Comprehensive Review of the Part 32 Uniform System of Accounts*, Report and Order, 32 F.C.C. Rcd. 1735, ¶ 46 (2017).

9 *Pioneer* and *Endeavor* both provide arguments for why their requests for waivers should be granted, but neither reference or address the requirements of 47 U.S.C. § 410(c).

The FCC FNPRM and the record in this proceeding (all the comments filed) indicate that changes to the separations rules are required and necessary in the short term.

NARUC's Initial Comments at pages 8-9, point out the inconsistencies in the *FNPRM's* approach - which suggests an extended freeze because no progress is possible or needed before specifying the opposite – that change is necessary and that the freeze must be partially truncated at the option of individual carriers for at least frozen category relationships. Specifically those comments indicate that:

[1] the FCC's acknowledgements of (i) the continuing utility of the separations process for the FCC, the USAC, and States, as well as (ii) the impact of recent reforms the FCC concedes "will significantly affect" the analysis of separations, undermines any suggestions that comprehensive reform of Part 36 is not warranted.[10]

[2] the fact that the FCC is proposing to extend the freeze is, on its face, an acknowledgement that the separations process remains both relevant and useful.

[3] the *FNPRM* proposes reforms to the process that are easily addressed and clearly within the scope of the current referral to the Joint Board.[11]

<u>All comments filed in this proceeding support these three facts</u>, even though nine of the ten comments reflect the same flawed/internally inconsistent approach evidenced on the face of the *FNPRM*.

USTelecom is typical. First they contend that no changes to the freeze are needed and that it should be extended for fifteen years. Then they spend the majority of their comments pointing out how wildly out of date the current rules are, how the misallocations have a real impact, and how the FCC must allow carriers to opt to "unfreeze" the "category relationship freeze."[12] The *Rural LECs* summed up this inherent contradiction in approach best by noting that:

> upon initial review, a 15-year freeze seemed too long, as it fails to provide the Joint Board with sufficient incentive to work toward consensus on a recommendation for comprehensive reform of the existing outdated separations rules.[13]

But, if the FCC is willing to attempt to bypass the Act's requirement for a recommended decision, then:

> [s]o long as the Commission affords these companies ample flexibility to unfreeze their category relationships, then the Concerned Rural I-LECs support the extension of the broader separations freeze for a period of up to 15 years.[14]

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10 *FNPRM* at ¶¶ 10 – 12 (discussing the declining use of the separations process).

11 *FRNPM* at ¶¶ 23.

12 *USTelecom Comments* at page 3. *Compare*, 47 C.F.R. § 36.3(a). Based on similar facts, some commenters also contend vociferously that carriers with unfrozen category relationships be permitted to freeze them.

13 *Rural LECs Comments* at page 3.

14 *Id.*

Indeed, all but one of the remaining commenters join *USTelecom* and *Rural LECs* in highlighting this one problem (category relationship freezes) that is - without question - within the scope of the existing Joint Board referral. And - they all agree this problem should be addressed. Specifically, they point out accurately that, after 17 years, none of the factors are accurate, the current freeze fails to allocate sufficient costs to the interstate jurisdiction,[15] and the current freeze inhibits the rollout of broadband services. They suggest that one way to temper the impact is to permit one-time, at-will, or periodic opportunities for carriers to either unfreeze or freeze their category relationships. [16]

The filed comments illustrate clearly that the existing separations process is having unanticipated negative impacts on the federal universal service program, the deployment of broadband in rural areas, State rates and universal service programs, and ratepayers. They also indicate that at least a partial solution is well within reach. However, except for the oblique reference in the quoted *Concerned Rural ILEC's* comments, *supra*, like the *FNPRM*, none of the comments acknowledge or address the obvious, *i.e.*, that:

[1] these proposals to modify the Separations Rules to allow one time or periodic freezes of the category relations are squarely within the scope of the existing referral, and that

[2] a recommendation by the Joint Board on this issue, and quite frankly other separations issues as well, is not just probable, but likely in a relatively short time frame.

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15 ***Comments of USTelecom*** at pages 1 and 3: ***Comments of Pioneer Telephone Cooperative, Inc. (Pioneer)*** at pages 6-7.

16 *NECA Comments* support, at page 8, allowing rural local exchange carriers the opportunity to unfreeze category relationships "in any year such changes are permitted to occur." *Terral Comments*, at page 6, point out that with the ability "to unfreeze its category relationships, *Terral* could appropriately allocate its costs to the interstate jurisdiction." It also notes on page 8, that "The freeze on category relationships is . . . in fact, the primary obstacle to *Terral's* deployment of broadband throughout its service area." *WTA Comments* at 1 supports a one-time option for carriers with frozen category relationships to unfreeze them and a one-time option for carriers without frozen category relationships to freeze them. At page 6, WTA acknowledges that "unfreezing of 2001 category relationships will result in a shifting of costs in most affected study areas from intrastate to interstate." The *Rural LECs Comments* explain the problem this way, at pages 3 and 4:

> For most companies this means that their cost separations are now incorrectly skewed to voice services, which results in a significant amount of costs being incorrectly assigned to the intrastate jurisdiction. This is due to the fact that a large portion of network facilities are jointly used in the provision of voice and broadband services and RoR carriers that participate in the National Exchange Carrier Association ("NECA") pools are required by NECA to allocate costs based on customer counts rather than bandwidth. In addition, NECA has interpreted the FCC's 2001 Separations Freeze Order to not allow companies with frozen category relationships to directly assign the growing costs of broadband to the interstate jurisdiction. . . The result is typically a significant allocation of costs to voice services and the intrastate jurisdiction, when actual utilization of the network continues to shift to broadband, which is an interstate service.

For similar reasons, *ITTA* Comments support, at page 6, a "process of an optional unfreezing followed by an optional refreezing occur every five years." *NTCA Comments* support, at page 6, "a one-time opportunity" for certain RLECs to "unfreeze" their existing categories.

[5] WIRELESS INFRASTRUCTURE THIRD REPORT AND ORDER ON SEPT. AGENDA:

The tentative agenda for the September 26 FCC agenda meeting includes a **Declaratory Ruling and Third Report and Order**, in WT Docket nos. 17-79 and 17-84 ("Draft").

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

The texts of 47 U.S.C. §§ 253, 332, and 224 are clear and unambiguous. None support broad FCC preemptive power vis-à-vis pole rights-of-way or city owned structures.[17]

The FCC's legal analysis is deficient insofar as it appears to fail to specify that the services at issue are telecommunications services that both provisions target.

Section 253 is only authority for FCC action if the 5G services at issue are in fact "telecommunications services." A necessary part of any legal analysis underlying the assertion of authority under that section – is a declaration that the services at issue are in fact "telecommunications services." Indeed as a pre-requisite to its application in the *California Payphone Case*,[18] cited in the Draft at ¶17 as the analysis of § 253 the FCC finds compelling, the FCC specified:

> We have already ruled that payphone service is a "telecommunications service" within the meaning of sections 3(46) and 253(a). Consequently, "state and local regulations regarding the payphone market are subject to scrutiny under section 253 on the basis of a claim that they 'prohibit or have the effect of prohibiting' the ability of potential competitors to provide payphone services.

Application of § 332(c)(7) to any circumstance necessarily involves a similar baseline classification – that the services at issue are "telecommunications services." See 332(c)(7)(c) dealing with "common carrier wireless exchange access services," "unlicensed wireless services" defined as the "offering of telecommunications services" personal wireless services – which are "which covers commercial mobile services and "commercial mobile services." It does not apply to private mobile services.

It appears the fundamental finding for application of either section is missing from the draft.

The Draft adopts an overbroad reading of Section 253(a).

In ¶ 51, the Draft finds that a state or local legal requirement would violate Section 253(a) if it "materially limits or inhibits" an entity's ability to compete in a "balanced" legal environment for a covered service. The FCC is effectively suggesting that 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. The Ninth Circuit, resting its conclusion on "the unambiguous text of § 253"[19] takes a different approach. It agrees with the Eighth Circuit's criticism of a broad interpretation of § 253(a):

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17 *See*, note 2, *supra*.

18 *In the Matter of California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and Order, 12 F.C.C. Rcd. 14191 , 14204 at ¶ 26 (1997) (*California Payphone Case*).

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

> 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" 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.

In ¶ 51, the FCC characterizes the preemption as a "broad" limitation and the savings clauses as "narrowly tailored." The text of the § 253(b) & (c) is not narrow. And whatever their scope, they necessarily, on their face, limit/narrow the FCC application of § 253(a). Both precedent and explicit Congressional instructions require both the FCC and Congress to construe § 253(a) preemption 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).[20]

Moreover, § 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 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."[21]

There are other flaws evident on the face of the Draft. For example:

Section 332(c)(7) applies only to zoning decisions and does not mention cost. It cannot be the basis for FCC preemptive regulation in the context of the City's permission to use its property – the rights-of-way.

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[20] *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).

[21] 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.**

The Draft takes a view of § 253(c)'s "compensation" that is inconsistent with the uses of the both the words "compensation" and "cost" throughout the rest of Title 47. Congress knows how to specify reasonable recovery of "costs." And it seems illogical on its face that Congress would describe a "fair and reasonable" compensation, if what they really meant was, as the Draft suggests, a reasonable recovery of costs.

Also, it appears from the structure of § 253, that the FCC does not have § 253(d) authority to act via a general rule on § 253(c)'s compensation provision.

Pursuing distorted constructions of clear statutory text is a bad idea. In this docket, imposing a complex top-down regulatory regime found nowhere in the statute will require significant distortions. Indeed, the FCC's past successes with strained and sometime contradictory readings of its statutory authority have done nothing but provide useful legal precedent for future FCC's that 1996 Act does not place serious limits on the agency's authority to either deregulate or regulate.[22] Every time any agency successfully expands its authority beyond the plain text of the statute, it necessarily results in less long term certainty for the legal rules and regulations that will be applied by a future FCC. Each successful expansion necessarily increases the FCC's ability to act in the future in areas and in ways that Congress never intended.

I am providing a copy of this ex parte to Ms. Roth and Mr. Litman. I have attempted to fairly cover the arguments I presented. If either Ms. Roth or Mr. Litman inform me that this notice fails to cover an additional advocacy point raised during this meeting, I will immediately revise and refile this notice to cover the cited deficit. If you have any questions, please do not hesitate to contact me at 202.898.2207 or jramsay@naruc.org.

Sincerely,

James Bradford Ramsay
NARUC General Counsel

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22 *Compare*, Judge Edward's dissent in *American Council on Education v. F.C.C.*, 451 F.3d 226 at 236–37 (D.C. Cir. 2006). That case involved an appeal of the FCC's application of the Communications Assistance for Law Enforcement Act (CALEA) to "information services." Even Congress specified in 47 U.S.C. § 1002(b)(2)(a) (2000), that CALEA's assistance capability requirements "do not apply to [ ] information services," the FCC won on appeal. Judge Edward dissented:

> The FCC apparently believes that law enforcement will be better served if broadband Internet providers are subject to CALEA's assistance capability requirements. Although the agency may be correct, it is not congressionally authorized to implement this view. In fact, the "information services" exemption prohibits the FCC from subjecting broadband service providers to CALEA's assistance capability requirements. If the FCC wants the additional authority that Congress withheld, it must lobby for a new statute. Until Congress decides that the "information services" exemption is ill-advised, the agency is bound to respect the legislature's will and we are bound to enforce it.