

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN**

MICHIGAN BELL TELEPHONE COMPANY,
d/b/a AT&T MICHIGAN,

Plaintiff,

v.

JOHN D. QUACKENBUSH, GREG R. WHITE,
and SALLY A. TALBERG in Their Official
Capacities as Commissioners of the Michigan
Public Service Commission and Not as
Individuals,

and

SPRINT SPECTRUM, L.P.,

Defendants.

Case No. 1:14-cv-00416

Hon. Paul L. Maloney
Chief United States District Judge

***AMICUS CURIAE* BRIEF OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
IN SUPPORT OF THE MICHIGAN PUBLIC SERVICE COMMISSION**

James Bradford Ramsay
GENERAL COUNSEL
National Association of Regulatory Utility Commissioners
1101 Vermont Avenue, NW Suite 200
Washington, D.C. 20005
Tel: 202.898.2207
jramsay@naruc.org

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I. *AMICI CURAIE'S STATEMENT OF INTEREST*

The National Association of Regulatory Utility Commissioners (NARUC) files supporting the Michigan Public Service Commission (MPSC). The MPSC correctly held that §251(c) of the Telecommunications Act of 1996¹ (“1996 Act” or “Act”) requires incumbent local exchange carriers (ILECs) like Michigan Bell Telephone Company d/b/a AT&T Michigan (AT&T) to provide Internet Protocol (IP) interconnection to requesting telecommunications carriers. The alternative legal theory offered by AT&T – that §251(c) does not apply to AT&T’s managed “Voice over Internet Protocol” (VoIP) facilities because fee-based voice services provided using a particular methodology are not *telecommunications services*, eviscerates Congress’s scheme to pry open local markets. *See, e.g.*, AT&T Jun. 26, 2014 Brief (*AT&T Br*”) at 14. Those arguments are inconsistent with both Federal Communications Commission (FCC) and Court precedent as well as the express text of the Act.

NARUC, a nonprofit organization founded in 1889, has members that 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,² energy, and water utilities. Congress and Courts³ have consistently recognized NARUC as a proper entity to represent *the*

¹ *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).

² NARUC member commissions (i) have oversight over intrastate telecommunications services, including voice service supplied by incumbent and competing local exchange carriers (LECs); (ii) are obligated to ensure that incumbent services are provided universally at just and reasonable rates; (iii) encourage unfettered intrastate telecommunications competition as part of responsibilities to implement State law and 1996 Act provisions specifying LEC obligations to interconnect with competitors, *e.g.*, 47 U.S.C. §252 (1996).

³ *See, United States 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). *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).

collective interests of the State public utility commissions. In the 1996 Act, 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.⁴

This case will have national impact.

Section 251(c) assures incumbents with significant market power continue to interconnect with competitors on reasonable terms. Whatever this Court decides, it will unquestionably impact State commissioners’ ability to continue crucial backstop arbitrations assigned by Congress to protect competition. State commissions have open proceedings on IP-to-IP interconnections and the status of VoIP.⁵

Accepting AT&T’s argument that its mass market voice telephony service is an “information service” rather than a “telecommunications service” simply because it is provided using the Internet protocol negates the entire statutory scheme enacted by Congress in 1996 to “accelerate rapidly private sector deployment of *advanced telecommunications and information technologies* and services to all Americans by opening *all telecommunications markets to competition*.”⁶ The TDM technology to which AT&T claims the Congressional scheme is limited was well established at the time the 1996 Act was adopted, and certainly would not qualify as “advanced” telecommunications technology. AT&T cannot claim that there is a substantive difference *to the user* in a voice transmission using TDM as compared to IP -- in

⁴ 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 “...Carriers, 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.”)

⁵ See, e.g., August 8, 2014 filed *Commissioners of the Michigan Public Service Commission’s Response Brief to AT&T Michigan on Appeal (MPSC Br.)* at p. 11.

⁶ *Conference Report to Accompany S. 652*, House Report 104-458 (Jan. 31, 1996) at 1 (emphasis added).

both cases the voice conversation is conveyed in real time without change between the users.⁷ There is nothing in the statute nor the legislative history that suggests that Congress intended a change in transmission technology to result in the evisceration of its legislative requirements to promote competition in local telecommunications markets.

Moreover, if this Court finds merit in AT&T's argument that interconnected VoIP service is not a *telecommunications service*, it could also significantly impact universal service policy. To qualify for federal universal service subsidies, 47 U.S.C. §214(e) requires that a carriers provide a least one *telecommunication service*. As discussed, *infra*, based on a 2011 FCC order (upheld on review), States are relying on carrier provision of VoIP as a telecommunications service to qualify carriers under §214(e).

Because of the broad impact of this Court's ruling, NARUC leadership unanimously voted for NARUC to seek permission to file in this proceeding.

II. INTRODUCTION AND BACKGROUND

NARUC adopts by reference the Statement of Facts in MPSC Br., at pages 1 to 5, with the following amplification:

The heart of the issue presented for decision is a very old problem. For each of the 125 years NARUC has been in existence, assuring interconnections *between actual and potential competitors* has been a source of concern for federal and State policymakers in industries with critical infrastructures. As Peter W. Huber, Michael K. Kellogg & John Thorne note in their treatise "Federal Telecommunications Law":

[T]elephone companies are quite clearly "common carriers." They have long been expected to serve all comers and charge similar rates for similar services...viewed as paradigm "common carriers," so common, so ubiquitous . . . that one could scarcely imagine them operating any other way – except as it turned out, when a would-be "customer" happened to be another carrier. The problem had been faced

⁷ See, 47 U.S.C. §153(50) (1996): "The term telecommunications means the transmission between or among points specified by the user, of information of the users choosing, without change in the form or content of the information as sent and received." The "information" referenced includes voice traffic.

– and resolved correctly – half a century before the birth of telephony, in legislation for telegraphy. The Post Roads Act of 1866 required telegraph companies to interconnect and accept each other’s traffic. If similar obligations had been imposed on telephone companies [then], local exchanges might have remained competitive.....but legislators, regulators and the courts missed the opportunity and adopted instead a narrow understanding of a common carrier’s obligations to carry its competitors’ traffic ... As a result, the Bell System continued its march toward monopoly unchecked. {emphasis added}.⁸

In 1996, Congress, following the examples set by *State experiments* in local exchange competition in the early 1990s, grasped this missed opportunity and imposed, in 47 U.S.C. §251(1996), a duty on all carriers to “interconnect and accept each other’s traffic.” As even the Supreme Court recognized, subsection (c) of §251, and the conditions it imposes on *incumbent local exchange carriers* (ILECs) like AT&T, was the crowbar Congress provided in the 1996 Act to pry open and maintain competition in the local telecommunications market.⁹ Congress also added new definitions to the Act, including “telecommunications,” “telecommunications service” and “information service.” As discussed *infra* those definitions make clear that VoIP service is a local exchange service subject to section 251.

The FCC was also given specific authority to “forbear from applying...any provision of this chapter to a telecommunications service or provider” if it made three specific findings. 47 U.S.C. §160 (1996). However, Congress considered §251(c)’s *Additional Obligations of Incumbent Local Exchange Carriers*, and the backstop arbitration procedure, so important that it created an express limitation on that authority, in §160(d):

⁸ Reprinted in, Benjamin, Stuart Minor, Lichtman, Douglas Gary & Shelanski, Howard A, *Telecommunications Law and Policy*, Carolina Academic Press (2001), at page 608.

⁹ *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371-73, 119 S.Ct. 721, 142 (1999) (“The 1996 Act “fundamentally restructures local telephone markets. . . incumbent LECs are subject to a host of duties intended to facilitate market entry. Foremost among these duties is the LEC’s obligation under 47 U.S.C. § 251(c) to share its network with competitors . . . a requesting carrier can obtain access to an incumbent’s network . . . [by interconnecting] its own facilities. . . either party can petition the state commission . . . to arbitrate open issues.”)

“[T]he Commission may not forbear from applying the requirements of section 251(c) ...under subsection (a) until it *determines* that those requirements have been fully implemented.” {emphasis added}

Significantly, the FCC has made no such determination.

AT&T recognized the efficiencies of IP-based voice services a while ago. It first rolled out its U-verse VoIP services in Michigan in 2008, and, in November 2012, announced plans to expand its wired IP network “to 75 percent of customer locations in AT&T’s 22-state wireline service area by year-end 2015.”¹⁰ It also asked the FCC to set a deadline after which incumbent LECs will no longer be required to maintain TDM networks. JA68-70. Already, FCC “477 data indicates . . . 30% of all U.S. Voice traffic is being switched using IP-based SIP/IMS systems now, often over highly managed IP networks in order to maintain effective Quality of Service.”¹¹

And yet, according to AT&T, after eight years, “there is no ICA in Michigan – other than the one under review here – that provides for anything but TDM interconnection,” *AT&T Br.* at 5 - or, on information and belief, with AT&T across its entire 22-State service territory. And it’s not as if competitors have not been seeking such access for, quite literally, years.¹²

¹⁰ AT&T Press Releases accessed Aug. 16, 2014: *AT&T U-Verse Availability–MI*: http://www.att-services.net/att-u-verse/availability/uverse-michigan.html#.U_AQC2OHjtg; *AT&T to invest \$14 Billion to Significantly Expand Wireless & Wireline Broadband Networks* at: <http://www.att.com/gen/press-room?pid=23506&cdvn=news&newsarticleid=35661&mapcode=>.

¹¹ See, July 19, 2013 *Reply Comments of Shockey Consulting*, filed in FCC WC Docket No. 13-97 et al., at 4, at: <http://apps.fcc.gov/ecfs/document/view?id=7520931878>. AT&T’s February 25, 2012 *Reply Comments*, filed in FCC Docket GN Docket No. 12-353, at 21 n. 31, say only 21% of residential housing units in States where AT&T is an ILEC will still subscribe to ILEC POTS services by December 2013, at: <http://apps.fcc.gov/ecfs/comment/view?id=6017165188>. The comments fail to specify the number of residential “POTS” lines ILECs will continue to serve though VoIP services.

¹² See, e.g., the Sept. 22, 2009 Letter of William H. Weber, Cbeyond, et al, filed in FCC GN Docket 09-51, p. 1, at: <http://apps.fcc.gov/ecfs/comment/view?id=6015190713a>. Instead of agreeing to interconnect and exchange traffic on an IP-basis, major ILECs (like AT&T) require competing carriers to convert traffic to legacy time division multiplexing (TDM) format prior to delivering it, even where the ILEC has deployed facilities that could transport the traffic in IP

It would be difficult for anyone to construct a valid argument that such access to competitors will not directly benefit both competition and consumers¹³ – *as Congress intended*. Wisely, AT&T does not even try. As the MPSC effectively recognizes in the order on review, this void in interconnection is not the result Congress was targeting when it passed §251. JA1596. AT&T suggests that the Court might wish to defer to “the FCC’s unique expertise in this highly technical area.” *AT&T Br.* at 14. And yet, that’s not what Congress did. Congress sent the problems to the States. In §252, which details the “*Procedures for negotiation, arbitration and approval of agreements*,” States commissions are referenced 55 times.¹⁴ The FCC is referenced only 4 times in §252 in 2 sub-sections that specify it is to do the arbitration only if the State fails to act. As Congress expected, the State commission *has* acted here.

Moreover, divining Congressional intent from the plain text of the Act, a legal determination, requires only the specific expertise already possessed by this Court. The question

form. *The result of this forced conversion is increased cost for unnecessary media gateways, and reduced voice quality for consumers because of unnecessary protocol conversions.*

¹³ Competitive and incumbent carriers both recognize that using IP interconnection to exchange voice calls is much more efficient than interconnection using traditional TDM links. JA50-1, 82-3.

¹⁴ See, Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 Vand. L. Rev. 1, 25-6 (1999). (“Congress also envisioned that the state agencies would have an independent role in implementing a number of the Act’s provisions. Because the Telecom Act charges state agencies . . .with the responsibility of interpreting some of its ambiguous terms and gaps in the first instance, the federal courts should defer to them on those matters...”) See also, *Comcast IP Phone of Mo., LLC v. Mo. Pub. Serv. Comm’n*, 2007 WL 172359, at 4 (W.D. Mo. Jan. 18, 2007) (holding that “unless preempted or faced with a contrary decision from a relevant federal agency, a state agency may interpret a federal statute and apply its dictates”); *S. New Eng. Tel. Co. v. Comcast Phone of Conn.*, 718 F.3d 53, 58 (2d Cir. 2013) (State commissions may apply §251 interconnection provisions as long as such application does “not violate federal law and until the FCC rules otherwise”) (quoting *Iowa Network Servs., Inc. v. Qwest Corp.*, 466 F.3d 1091, 1097 (8th Cir. 2006)).

is: did Congress want to require incumbents that retain significant market power to interconnect with competitors to facilitate competition in Michigan?

The answer, *unless and until the FCC determines to forebear from applying §251(c) to AT&T in Michigan*, is obvious. Indeed, a broad spectrum of policy-makers at both the federal and State level agree - §251(c) interconnection provisions apply regardless of changes in technology underlying the voice services provided.¹⁵ Even though, understandably, the FCC faces a lot of political pressure from well-funded advocates not to act on classification issues like this one, it still stated, in the recent 2011 *CAF Order*:

[E]ven while our F[urther] NPRM is pending, we expect all carriers to negotiate in good faith in response to requests for IP-to-IP interconnection for the exchange of voice traffic. The duty to negotiate in good faith has been a longstanding element of interconnection requirements under the Communications Act and does not depend upon the network technology underlying the interconnection, whether TDM, IP, or otherwise. Moreover, we expect such good faith negotiations to result in interconnection arrangements between IP networks for the purpose of exchanging voice traffic. As we evaluate specific elements of the appropriate interconnection policy framework for voice IP-to-IP interconnection in our FNPRM, we will be monitoring marketplace developments, which will inform the Commission's actions.¹⁶

¹⁵ In 2008, when AT&T rolled out U-verse, NARUC passed a *Resolution Regarding the Interconnection of New Voice Telecommunications Services Networks*, urging carriers to continue to interconnect networks to exchange traffic in a technologically neutral manner, as per §§251-252, at: <http://www.naruc.org/Resolutions/TCInterconnection.pdf>. See also, *Statement of FCC Commissioner Pai*: "When discussing interconnection, [Section 251] neither mentions any particular technology that may be used . . . nor distinguishes between telecommunications carriers using different technologies." *S. Hrg. 112-480, Nominations of Jessica Rosenworcel and Ajit Pai to the FCC*, at 78, (Nov. 30, 2012), at <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg75046/content-detail.html>; *In re Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum and Order, 22 F.C.C.R. 3513, ¶¶ 8-16 (March 1, 2007) (A Bureau-level order finds the "statutory classification of a third party provider's VoIP service as an information service or a telecommunications service is irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under Section 251(a).")

¹⁶ *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, FCC 11-161, 26 FCC Rcd 17663, 18045 at ¶1011 (2011) (rel. Nov. 18, 2011) (*CAF Order*). Compare, past FCC statements: "[S]ections 251(a) and 251(c)(2) apply to incumbents' packet-switched

III. STANDARD OF REVIEW

NARUC adopt the standard of review in the *MPSC Br.* at 5.

IV. ARGUMENT

ILECs must Provide IP Interconnection under § 251(c)(2). (Count III)

A. By confirming VoIP services can be used to qualify for federal universal service subsidies, the FCC has necessarily conceded they are *telecommunications services*.

The MPSC decision recognizes that the plain unambiguous text of §251(c)(2) is technology neutral and requires incumbent LECs to provide IP interconnection. JA1596. In response, AT&T argues that its managed *VoIP service* is not a *telecommunications service* and is therefore not subject to §251(c) procedures. AT&T is wrong.

It is true, as Centurylink states in its *amicus* supporting AT&T, that the FCC *claimed* “in the *CAF Order*, that it has not decided the regulatory classification of Voice-over-Internet Protocol (VoIP) services.”¹⁷ It is not, however, accurate to say that claim is true. The FCC’s statement that it had not decided VoIP’s classification is directly at odds with its simultaneous specification – in the same order - that *VoIP services* can be the sole basis for qualifying for federal universal service subsidies. *CAF Order* at 24, ¶80. The Act is crystal clear that only a provider of *telecommunications services* can qualify for subsidy.

telecommunications networks and the telecommunications services offered over them. We reject BellSouth's argument that Congress intended that section 251(c) not apply to new technology not yet deployed in 1996. Nothing in the statute or legislative history indicates that it was intended to apply only to existing technology. Moreover, Congress was well aware of the Internet and packet-switched services in 1996, and the statutory terms do not include any exemption for those services.” *In the Matters of Deployment of Wireline Servs. Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, 13 F.C.C. Rcd. 24012, 24035 ¶¶48-49 (1998). {emphasis added}

¹⁷ *Centurylink’s Amicus Curiae Brief in Support of AT&T Michigan*, at 5 (July 14, 2014.)

This conflict was one reason NARUC appealed the *CAF Order*. The *CAF Order* claims the FCC has not decided VoIP is a *telecommunications service*, while simultaneously specifying that VoIP can be used to as the *telecommunications service* required by 47 U.S.C. §214(e) for qualification.

Note the Act's functional definition of a telecommunications service either applies to VoIP offered to the public for a fee, or it does not. Carriers are either offering a service that matches the characteristics of the definitions or they are not.

Congress specifies in §214(e) that only *common carriers* designated as *eligible telecommunications carriers* can receive federal universal service support.¹⁸ Congress also specified that States should, in the first instance, make such designations. Classification of the qualifying service – which the FCC specifies in the *CAF Order* can be VoIP – must be a *telecommunications service* – for two reasons. First, qualifying carriers, under §214, are designated eligible *telecommunications carriers*. The term *telecommunications carriers* is defined at 47 U.S.C. §153 (51) as “any provider of *telecommunications services*.” {emphasis added} Second, 47 U.S.C. §153(51) specifies that a carrier “shall be treated as a common carrier under this chapter only to the extent it is engaged in providing telecommunications services.” Section 214(e) is in “this chapter.” Necessarily, therefore, common carriers can only be treated as having that status under §214(e) “to the extent they are engaged in providing telecommunications services.”

Indeed, even AT&T concedes, *AT&T Br. at 15* that:

For all relevant purposes, "telecommunications carrier" is synonymous with "common carrier" and is defined as "any provider of telecommunications

¹⁸ See, 47 U.S.C. §214(e)(1): “A common carrier designated as an eligible telecommunications carrier...shall be eligible to receive universal service support...”

services.” The Act further specifies that any “telecommunications carrier shall be treated as a common carrier under this [Act] *only to the extent that it is engaged in providing telecommunications services.*”¹⁹

In the *CAF Order*, the FCC specifies, in ¶80, *mimeo at 38*, that carriers are only required to provide one service to qualify to be designated to receive federal universal service support:

As a condition of receiving support, we require ETCs to offer voice telephony as a standalone service throughout their designated service area. 117 As indicated above, ETCs may use any technology in the provision of voice telephony service. (Note 117 With respect to “standalone service,” we mean that consumers must not be required to purchase any other services (e.g., broadband) in order to purchase voice service.)” {emphasis added}²⁰

IP/VoIP is “any technology.” The Petitioners, including NARUC, pointed out in our reply in that 10th Circuit appeal of the *CAF Order*:

Petitioners argued that by adding “voice telephony service” to the list of supported services under section 254(c)(1), without limiting the definition of that service to “telecommunications services,” the *Order* violates §254(c)(1). USF Br. 17-18. Respondents denounce this argument as “wrong,” FCC Br. 24, but then concede virtually all its premises. They agree that “only ‘eligible telecommunications carriers’ are eligible for subsidies under section 254,” and that an ETC must be a “common carrier” that offers supported services. FCC Br. 26, *citing* 47 U.S.C. §214(e)(1)(A). They also agree that an entity can be designated as an ETC under the statute only if it “complies with appropriate federal and state requirements” applicable to telecommunications carriers under Title II of the Act. *Id.*, *quoting IP-Enabled Services*, 20 F.C.C.R. 10245, 10268 (2005) (subsequent history omitted). This concession was not apparent on the face of the *Order*, as the FCC specifically included VoIP in the definition of “voice telephony service” without classifying VoIP as a telecommunications service. *Order*, ¶63 (JA at 412); FCC Br. 26.²¹

¹⁹ Indeed, even the Act’s definition of *common carrier*, 47 U.S.C. §153(11) notes it does not apply, “where reference is made to common carriers not subject to this chapter” as per the language quoted by AT&T from the *telecommunications carrier* definition.

²⁰ There is no requirement in the *CAF Order* to provide broadband as a *telecommunications service*, i.e. separate from internet access services (or any other *telecommunications service* to qualify. Indeed, ¶71 of the *CAF Order* concedes that FCC “determinations that broadband services may be offered as *information services* have had the effect of removing such services from the scope of the explicit reference to “universal service” in section 254(c).”

²¹ *Joint Universal Service Fund Reply Brief*, at 11-12, filed July 30, 2013, In Re: FCC11-161, 10th Circuit Case No. 11-9900.

In the resulting decision, the 10th Circuit confirmed that carriers must be designated as an eligible telecommunications carrier and have common carrier status to access funds. See, IN RE: FCC11-161, 753 F.3d 1015, at 1048-1049 (10th Cir. 2014):

The fact remains, however, that in order to obtain USF funds, a provider must be designated by the FCC or a state commission as an “eligible telecommunications carrier” under 47 U.S.C. § 214(e). See 47 U.S.C. § 254(e) (“only an eligible telecommunications carrier designated under section 214(e) . . . shall be eligible to receive specific Federal universal service support.”). And, under the existing statutory framework, only “common carriers,” defined as “any person engaged as a common carrier for hire . . . in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy,” 47 U.S.C. §153(10), are eligible to be designated as “eligible telecommunications carriers,” 47 U.S.C. §214(e). Thus, under the current statutory regime, only ETCs can receive USF funds that could be used for VoIP support. Consequently, there is *no imminent possibility that broadband-only providers will receive USF support under the FCC's Order, since they cannot be designated as “eligible telecommunications carriers.”* {emphasis added}

Here, the 10th Circuit makes clear that there is “no imminent possibility that broadband-only providers” (or to the 10th Circuit – an entity that *ONLY provides an information service*) will receive USF support. This is true, because, according to the statute (and the 10th Circuit) “they CANNOT be designated as eligible *telecommunications carriers*” if they are only providing an information service. They must be providing a *telecommunications service*.

Translation: The FCC has required VoIP service to be classified as a *telecommunications service*. States and carriers have taken the FCC at its word. For example, New Mexico, based on record evidence, approved a VoIP-only provider as an eligible *telecommunications carrier* in February 2013, finding:

Based upon its common carrier regulation as an interconnected-VoIP provider, TransWorld meets the requirement of being a common carrier for purposes of ETC designation.²²

²² *In The Matter of Transworld Network, Corp. Petition For Designation as an Eligible Telecommunications Carrier Pursuant to § 214(E)(2) of the Communications Act of 1934, as*

Similarly, the Georgia Commission, on March 20, 2014, found:

Public Service Wireless asserts that it meets all the requirements of the . . . [FCC] for designation as an ETC. Federal regulations require ETCs to provide the following services. . . minutes of use for local service provided at no additional charge to end users; access to the emergency services provided by local government...such as 911.., and toll limitation services. . . 47 C.F.R Section 54.101(a). Public Service Wireless's basic service offering is wireless Voice over the Internet Protocol, or VoIP service, which includes unlimited local and long-distance, starting at \$10.70, after application of the \$9.25 Lifeline Discount.²³

There is no mention of any other service offering in the Georgia decision.²⁴ If the required voice telephony service in these and related State designations, which is provided using

amended, 47 U.S.C. § 214(E)(2), and 17.11.10.24 NMAC, Before the New Mexico Public Regulation Commission, Case No. 11-00486-UT, FINAL ORDER (issued 20 February 2013) quote is from Exhibit 1, the ALJ's Recommended Decision, (issued 28 December 2012), upon which the Final Order is based, at 16.

²³ *In Re: Application of Public Service Wireless, Inc. for Designation as an Eligible Telecommunications Carrier in the State of Georgia, Docket No. 35999, Document #152453 Order on Application for Designation as an ETC (March 20, 2014) , at 1-3,:* <http://www.psc.state.ga.us/factsv2/Document.aspx?documentNumber=152453>.

²⁴ Compare, In re: Application of Cox California Telcom, LLC (U5684C) for Designation as an ETC, Application 12-09-014, Decision 12-10-002 (10/3/2013), Decision Approving Settlement (rel. 10/07/2013), at 8-9, 11, finding: "Cox does not distinguish between circuit-switched and packet-switched telephone services. The customer is merely ordering telephone service," and (ii) Cox asserts by offering a "service that utilize[s] VoIP to the public on a nondiscriminatory basis, Cox fulfills the role of common carrier," online at: <http://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=78144856> {emphasis added}; See also: Application of Cox Nevada Telcom, LLC For Designation As ETC in the State of Nevada, Docket 12-09907, Order (Nov. 15, 2012.), approving an application, that notes, at 6-7(http://pucweb1.state.nv.us/PDF/AxImages/DOCKETS_2010_THRU_PRESENT/2012-9/19778.pdf),

In the [CAF Order], the FCC adopted a new definition for supported services . . . it modified the definition of services supported by federal universal support as described in 47 C.F.R. §54.101 [which now states]. . . (b) An eligible telecommunications carrier must offer voice telephony service as set forth in paragraph (a) of this section in order to receive federal universal service support." In adopting its revised definition, the FCC noted that the revisions were intended to shift to a technologically neutral approach. Specifically, the FCC stated: "Rather, the modified definition simply shifts to a technologically neutral approach, allowing companies to provision voice service over any platform, including the PSTN and IP networks. This modification will benefit both

IP technology, is not a *telecommunications service*, then the FCC's 2011 ruling can only be viewed as allowing carrier to illegally access funds Congress reserved to *common carriers*, i.e., §214's essential *telecommunications carriers* – which by definition are offering *telecommunications services*, and can be treated as *common carriers* under that section only to the extent they provide *telecommunications services*.

As the FCC has conceded that VoIP *eligible telecommunications carriers* are providing *telecommunications services*, even under AT&T's argument, the §§251-2 regime must apply to IP-based voice services.

B. The Act's functional approach requires fee based real time voice services to be classified as *telecommunications services*.

NARUC agrees that MPSC properly applied federal law when it approved IP interconnection language in the agreement. MPSC brief at 11- 17. AT&T's arguments claiming otherwise lack merit.

AT&T's first "argument" is that § 251(c) "does not require the ILEC to provide interconnection in any particular format." AT&T Br. at 14. *Exactly*. Note the discussion and notes, *supra*, at pages 5-7. *That's why Congress established arbitration procedures* – for when carriers cannot agree on the format or other conditions to facilitate interconnection.²⁵

providers (as they may invest in new infrastructure and services) and consumers (who reap the benefits of the new technology and service offerings)." First, while other states have already determined that the service . . . meets the requirements for support, this latest statement by the FCC further clarifies that Cox's VoiP-based, voice telephony service is eligible for support." {emphasis added}

²⁵ Of course, AT&T concedes in note 15 on the same page that the interconnection must be in a manner that is "at least in quality to that provided by the [ILEC] to itself...or any other party to which the [ILEC] provides interconnection." Query whether competitors are given the same interconnection that AT&T and its IP affiliate provide themselves. See also, *S. New England Tel. Co. v. Comcast Phone of Conn, Inc*, 718 F.3d 53, 58 (2nd Cir. 2013). (The 1996 Act "permits state commissions to regulate interconnection obligations so long as they do not violate federal law and until the FCC rules otherwise.")

Second, it devotes four plus pages arguing that VoIP is not a telecommunications service, promoting the novel suggestion that Congress is interested in promoting telecommunication voice competition *only* if a particular protocol is used to provide functionally equivalent and directly competing services. This exegesis of the Congressional intent finds no support in the history or text of the 1996 Act. As noted *supra*, the FCC has effectively conceded the status of VoIP as a *telecommunications service*.

But even without that *CAF Order* concession, whether or not any service is a “telecommunications service” is a factual inquiry based on parameters specified in the clear text of the statute. The FCC²⁶ is not free to choose a different classification if the specified service, in this case VoIP, meets the statutory definitions. And, as the prior discussion makes clear, the FCC has conceded that it does in the *CAF Order*.

However, any further examination of the FCC’s view of VoIP’s classification requires this Court to answer only two questions. Significantly, neither requires any examination of the technology used to provide the service.

First, are the IP-based voice services (VoIP) *telecommunications*?

The answer could not more clear. The statute defines “telecommunications” as the transmission, between or among points specified by the user, of information of the users choosing, without change in form or content of the information as sent and received.” 47 U.S.C. 153(50). VoIP services, like voice services using older “legacy” packet technologies, transmit voice in real time to points specified by the user without change in form or content. Voice traffic

²⁶ “An agency has no power to “tailor” legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always “give effect to the unambiguously expressed intent of Congress.” *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2445 (2014), slip op. at 16, http://www.supremecourt.gov/opinions/13pdf/12-1146_4g18.pdf.

has been multiplexed/packetized for years before the invention of the “IP” protocol. Indeed, VoIP services provided by Vonage, AT&T, Verizon, and others compete directly with and substitute for functionally equivalent “telecommunications services.” A new arrangement of “zeroes and ones” in a packetized programming language does not change the nature of the service being offered to the public.

Second, are IP-based voice services (VoIP) offered to the public for a fee “telecommunications services”?

Again the answer is evident on the face of the statute. VOIP service, exactly like the current voice services it competes with and is replacing, is both “offered for a fee” and offered “directly to the public or to such classes of users as to be effectively available to the public” significantly “regardless of the facilities used.”²⁷

AT&T eschews any in-depth examination of the statute in favor of cites that are irrelevant, distinguishable, dicta, or superseded by other supervisory Court (or FCC) decisions.

For example, AT&T cites to the decision by the District court in *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 999-1001 (D. Minn. 2003), that Vonage’s “over the top” VoIP service was an information service provider. It references, with little discussion, the FCC Declaratory Ruling on the Vonage service. AT&T Br. at 16.

Neither provides support for AT&T’s position.

²⁷ 47 U.S.C. § 153(53): “The term ‘telecommunications service’ means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” Note –that “information services” by contrast, are a catch-all category that only includes “information services” that are not used to provide a telecommunications service. See, 47 U.S.C. § 153(24), excluding from the definition of information services “any use of any such capability for the management, control, or operation of a telecommunication system or the management of a telecommunications service.”

During the appeal of the cited district court decision finding Vonage’s nomadic VoIP product to be an information service, the FCC issued a declaratory ruling preempting the State Commission, but on the basis of the alleged “inseverability” of the traffic – *not because the underlying service was in fact “an information service.”* The 8th Circuit upheld the District Court’s decision, but explicitly based on the FCC’s Order, finding:

Because we conclude that the FCC Order is binding on this Court and may not be challenged in this litigation, we now affirm the judgment of the district court on the basis of the FCC Order.²⁸

AT&T cites to that FCC Declaratory Order without much discussion. In the Declaratory Order, the FCC never classified either “nomadic” interconnected VoIP services (like Vonage) or “fixed” VoIP services (like AT&T’s). Indeed, in the subsequent appeal of the declaratory order, in which NARUC participated, we argued *unsuccessfully* that the FCC was *required* to decide the regulatory classification of Vonage before it could preempt general State oversight of the service. Since the decision does not decide on any classification for VoIP, it provides *no support* for AT&T’s position. Moreover, dicta in the case undermines another AT&T argument. The basis for preemption – inseverability - that was ultimately upheld by the 8th Circuit had nothing to do with the traffic’s classification – and zero applicability to fixed VoIP services like AT&T’s managed service, which can be severed and does not touch the Internet.²⁹

However, those discussions of “inseverability” are important. Why? Because AT&T continues to advance the idea that a VoIP offering that includes call management features is

²⁸ *Vonage Holdings Corp. v. Minnesota PUC*, 394 F.3d 568 (8th Cir. 2004).

²⁹ “AT&T U-verse Voice service is provided over AT&T’s world-class managed network and not the public Internet. Using one network to provide U-verse services enables AT&T to provide high quality service. Voice over IP providers who utilize the public Internet are less able to control the traffic and ensure voice quality.”{emphasis added}-http://www.att.com/media/en_US/swf/uverse_center/uverse/downloads/att_home_alarm.pdf. (Accessed Aug. 14, 2014).

somehow inseverable and that such inseverability justifies a finding that the service is an “information service.” AT&T has advanced the same argument before the FCC (with a notable lack of success) urging the FCC to find that such inseverability requires classification of VoIP as both exclusively interstate and an “information service.” This argument is not consistent with the 8th Circuit decision. The 8th Circuit, points out that “the FCC has indicated (that) VOIP providers who *can track the geographic endpoints of their calls* do not qualify for the preemptive effects of the Vonage order.”³⁰ Logically, that means the fact that VoIP service provides what AT&T characterizes as “a suite of integrated capabilities” is arguably irrelevant. *AT&T Br.* 16. Why? Assume that the geographic endpoints of a VoIP call provided by AT&T can be determined today³¹ as the 8th Circuit suggests. If AT&T’s theory about the “integrated suite of,” services holds any validity at all, States should still be preempted. Instead, the reasoning presented by the 8th Circuit confirms the relevant service definition under the statute focuses on only the voice service. Just as before the network evolved to accommodate VoIP, ancillary services provided with a voice product are not relevant to a determination of its status as either a telecommunications or information service.

³⁰ *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007). Citing the FCC clarification that a 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.” {emphasis added} See, *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, FCC 06-94, 21 FCC Rcd 7518, 7546, ¶ 56 (rel. June 27, 2006), aff’d in part, vacated in part, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007).

³¹ Actually we don’t have to assume, the FCC’s order, *Universal Serv. Contribution Methodology*, 21 F.C.C.R. 7518 at 7546 ¶ 56 n 189, make clear that at least “some” fixed VoIP providers already do just that. Carrier Form 499 filings, carrier provision to business of both call detail and functioning 911 service also indicate the traffic is severed. However, whether or not they actually do sever the traffic is not relevant to the issue before this court.

The second District Court case AT&T cites, at 16, is also focused on issues subsequently resolved by the FCC in the *CAF Order* in a manner that undermines that District Court's decision and rationale, i.e., whether access charges or reciprocal compensation should apply to "IP-PSTN" traffic.³² But that decision does raise another problem for AT&T's case-in-chief. In this *Southwestern* case, while, the District Court in dicta, inter alia, specifies that the FCC "has not yet ruled on whether IP-PSTN is [an information service,]" the holding affirms a *State arbitration order* setting the compensation terms for the putative "information" service.³³ Curiously, the ILEC that sought arbitration under §252 in this case, went through several name changes before it basically "became" AT&T in 2005.³⁴ Apparently, arbitration under Section 252 over an admittedly unclassified service in the context of an interconnection agreement – a service that Court speculated in dicta might qualify as an information service – is ok if the case is brought by the incumbent LEC, but not if the issue is raised by a competitor seeking interconnection.

From a regulatory perspective, and to end-users, fixed VoIP traffic is indistinguishable in every way from competing voice services. Such traffic is never a part of the so-called public Internet. Such traffic is severable. Fixed VoIP providers interface with and ride over the very same network facilities as TDM calls. Moreover, a focus on the functional nature of particular

³² The *CAF Order* applies access charges to VoIP calls. The third District Court case cited by AT&T contains no analysis and merely relies on the faulty analyses of the two cases already discussed - finding "[t]heir reasoning is persuasive." *PAETEC Commc'ns, Inc. v. CommPartners, LLC*, CIV.A.08-0397(JR), 2010 WL 1767193 (D.D.C. Feb. 18, 2010). This case also addresses the same issue resolved in the *CAF Order* – whether to apply access charges to VoIP calls.

³³ See, *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, (Southwestern), 461 F. Supp. 2d 1055, 1079, 1084 (E.D. Mo. 2006) aff'd, 530 F.3d 676 (8th Cir. 2008). ("The Court concludes that the *Arbitration Order* neither violates federal law nor constitutes an arbitrary and capricious determination of the facts with respect to the issue of reciprocal compensation for IP-PSTN traffic. Accordingly, the *Arbitration Order* should be affirmed.")

³⁴ AT&T.COM, *Evolution of the SBC and AT&T Brands: A Pictorial Timeline*, http://www.att.com/Common/files/pdf/logo_evolution_factsheet.pdf (Accessed 8/17/14).

VoIP services *from the end user's standpoint* - which compels classification of such services as "telecommunications services" - is consistent with the FCC's April 1998 *Report to Congress*.³⁵ There, the FCC correctly observed, "Congress' direct[ed] that the classification of a provider should not depend on the type of facilities used ... Its classification depends rather on the nature of the service being offered to customers." They also noted: "... a telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable satellite, or some other infrastructure." *Report* at ¶59. The nature of the service in turn "depends on the functional nature of the end-user offering." *Id.* at ¶86. "Congress intended the categories of 'telecommunications service' and 'information service' to parallel the [pre-1996] definitions of 'basic service' and 'enhanced service'" in the 1996 Act. 290 F. Supp. 2d at 999, note 7.³⁶ Like traditional voice communication service, "VoIP" services do not provide

³⁵ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report to Congress, 13 F.C.C.R. 11501 (rel. April 10, 1998). (*Report*)

³⁶ The ubiquitous protocol conversions that characterize voice traffic do not change the form or content of the input to the service (e.g., real time voice communications). Protocol conversions are the "management, control or operations of a telecommunications system or the management of a telecommunications service" Congress explicitly excludes in the definition of "information services." 47 U.S.C. §153(24). To begin a phone call, a sound wave is converted to an electronic wave. In most calls, the analog electronic waves are converted to digital signals (and packetized) as well as multiplexed with other traffic. Sometimes, the digital signals are converted to light signals and back to electronic signals. *These protocol conversions cannot change a telecommunications service into an information service.* The use of a newer protocol - IP - does not change that fact. The logic behind the AT&T IP-to-TDM "net protocol conversion" argument (a phrase nowhere in the 1996 Act) fractures with any cursory review. What happens when AT&T gets the FCC to phase out TDM by a date certain? Presumably shortly after that date - no one, except perhaps some wireless carriers, will be using anything but IP protocol. Of course, that means, there will be no "net protocol" conversion of voice. Does that mean suddenly all the VoIP calls that, according to AT&T are *information services*, must now be considered *telecommunications services*? The 1996 Act defines *information services* based on the FCC's pre-act definition of *enhanced services*, which were: "services offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber addition, different or restructured information, or involved subscriber interaction with stored information." *In re Independent Data*

subscribers with additional, different, or restructured information. Nor does the real-time voice service they provide involve subscriber interaction with stored information, which is a characteristic of an “enhanced” or information service. The information transmitted—i.e., the voice communication – is of the subscriber’s own design and choosing. The IP technology used to transmit the voice transmission is completely transparent to the calling and called parties and functionally equivalent to existing phone service. It is – in short – a telecommunications service.

Communications Manufacturers Ass’n, Inc., Memorandum Opinion and Order, 10 FCC Rcd 13717, ¶16 (1995), the FCC said (i) communications between the subscriber and the network for call setup or call routing, and (ii) protocol conversions necessitated by the introduction of new technology are not enhanced services. *Id.* at ¶¶14-15. The FCC classified frame relay service, a high-speed packet switching service, as a basic *telecommunications service* under Title II. *Id.* at ¶22. *There – exactly as it does in this proceeding –* AT&T argued that because protocol conversion was an integral part of its frame relay service offering, the entire offering should be classified as an enhanced service. The FCC disagreed. *Focusing on the data transmitted by the customer, the FCC said that regardless of changes made to the frame header, the customer’s data contained within the frame are not modified as they travel through the network and arrive intact.* *Id.* at ¶30 Changes to the header information were responsible for the carriage of the customer’s data to the proper termination point, and hence part of a basic transmission service. *Id.* Most critically, the FCC found that, to the extent protocol conversion was performed, such conversion did not change the essential character of the frame relay service as a basic common carrier service. *Id.* at ¶41 In particular, the FCC emphasized that the LECs treated functionally equivalent frame relay service as a basic transmission service, *Id.* at ¶40, rejecting the notion that the mere bundling of a protocol conversion service that might be classified as enhanced altered the fundamental character of the basic frame relay service as a telecommunications transmission service. *Id.* at ¶40. As the definition of *enhanced services* provided the basis for the 1996 Act’s *information service* definition, the FCC’s reasoning is applicable here. If a carrier’s protocol conversion service used in conjunction with a basic transmission service is “enhanced”, that is irrelevant. The enhanced protocol conversion service does not change the basic character of the voice service as a telecommunications service. Like AT&T’s protocol conversion service, such a service simply facilitates “the overall transparency and efficiency” of the basic voice service. That is in fact WHY the definition of “information services” is a residual category. That is why the 1996 Act clearly specifies the definition simply “does not apply not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. §153(24) (1996) The capability referenced is “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing...” *Id.*

CONCLUSION

For the foregoing reasons, NARUC respectfully requests that the Court reject AT&T's claims with respect to IP interconnection and affirm the MPSC's finding that Section 251(c)(2) requires incumbent LECs to provide IP interconnection.

Respectfully submitted,

/s/ James Bradford Ramsay

James Bradford Ramsay

GENERAL COUNSEL

National Association of Regulatory Utility Commissioners

1101 Vermont Avenue, NW Suite 200

Washington, D.C. 20005

Tel: 202.898.2207

jramsay@naruc.org

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