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

In the Matter of	)	
	)	CC Docket No. 01-92
Developing a Unified Intercarrier Compensation Regime	)	
	)	

Initial Comments of the National Association of Regulatory Utility Commissioners

The National Association of Regulatory Utility Commissioners ("NARUC")[1] respectfully submits these initial comments in response to the Federal Communications Commission's ("FCC" or "Commission") March 3, 2005 Further Notice of Proposed Rulemaking ("*FNRPM*") released March 3, 2005,[2] concerning the development of a unified intercarrier compensation ("ICC") regime.

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1 NARUC is a quasi-governmental nonprofit organization founded in 1889. NARUC's members include the administrative agencies of all fifty States, the District of Columbia, and U.S. Territories that are engaged in the economic, rate, safety and the reliability regulation of public utilities that provide telecommunications services. NARUC's member commissions must assure that telecommunications services are established and maintained as required by the public convenience and necessity. They must also ensure that these services are provided at rates and conditions that are just, reasonable and non-discriminatory. NARUC has been recognized by Congress and courts as a proper representative of State Commission interests. See 47 U.S.C. §410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of concern to both the Federal Communications Commission and State regulators with respect to universal service, separations, and related concerns; Cf.. 47 U.S.C. §254 (1996) (describing functions of the Federal-State Board on Universal Service). 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.). See also *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).

2 *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 05-33, 70 *Federal Register* 15030 (March 24, 2005).

NARUC commends the FCC for its efforts to date in this critical proceeding. Over a year ago, NARUC created the NARUC Task Force on Intercarrier Compensation ("NTFIC"). On May 5, 2004, NARUC filed the NTIFC-generated intercarrier compensation policy principles in this proceeding.[3] The *NARUC Principles* address the design and functioning of, and prerequisites for, a new intercarrier compensation plan. The Association genuinely appreciates the agency incorporating those principles in the FNPM for comment.[4]

I. BASELINE POLICY OBJECTIVES OUTLINED IN NARUC'S PRINCIPLES.

While NARUC has not taken a specific position on any of the other proposals listed in the *FNRPM*, our principles specify two important baseline policy choices:

- "In limited circumstances, carriers may *voluntarily* enter into a bill and keep arrangement," but policy makers should design intercarrier compensation rates that "reflect underlying economic cost" and ". . .recover an appropriate portion of the requested carrier's applicable network costs." [5]

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[3] The NTFIC did not stop with the principles. Indeed, last week NARUC's counsel filed the latest version of a detailed NTFIC proposal. That May 18, 2005 letter and draft are available on the FCC's website at: http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517610399 and http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517610400. The Task Force proposal draws elements from several plans proposed by industry groups, but also proposes some new ideas. While the Task Force discussions of this proposal continue, it is important to point out that NARUC has not yet fully endorsed it. Because the draft is, in its broad contours, consistent with the May 2004 NARUC Principles, a February 2005 NARUC resolution specifies, however, that "[t] he FCC [should] carefully consider the Task Force proposal as discussions continue on the Task Force proposal in an attempt to reach a still broader consensus on key issues." That resolution also notes: "The intercarrier compensation reform proposal that NARUC might ultimately endorse should adhere to the policy principles adopted on May 5, 2004, to the extent possible, and should seek support among all industry, consumer, and governmental stakeholders."

[4] See, *FNRPM* at ¶¶ 56-57 citing *The National Association of Regulatory Utility Commissioners Study Committee on Intercarrier Compensation – Goals for a New Intercarrier Compensation System* (May 5, 2004) ("*NARUC Principles*"). This document is available on NARUC's website at the following URL: http://www.naruc.org/associations/1773/files/intercarriercompgoals_whitepaper04.pdf.

[5] See, *NARUC Principles* at page 5: "III. ECONOMICALLY SOUND: . . . B. Intercarrier compensation should be designed to recover an appropriate portion of the requested carrier's applicable network costs. At a minimum, this will require compliance with the jurisdictional separations and cost allocation rules, applicable case law in effect at any point in time, and 47 U.S.C. §254(k). . . . D. Intercarrier compensation charges should be competitively and technologically neutral and reflect underlying economic cost. E. The intercarrier compensation system should encourage competition by ensuring that requested carriers have an economic incentive to interconnect, to carry the traffic, and to provide high-quality service to requesting carriers . . . carriers may voluntarily enter into a bill and keep arrangement. "

- "State commissions should continue to have a significant role in establishing rates and protecting and communicating with consumers. . . . A proposal preserving a significant State role that fits within the confines of existing law is preferable."[6]

II. APPLICATION OF NARUC'S PRINCIPLES TO THE PROPOSALS OUTLINED IN THE *FNRPM*.

While it is difficult to extrapolate from the *NARUC Principles* to comment on every aspect of the proposals outlined in the NPRM, it is clear that NARUC will not endorse any proposal that either eschews any significant State role or *mandates* bill and keep. NARUC has specifically endorsed a unified intercarrier compensation plan that applies the same rate to all traffic regardless of origin. However, as discussed, *infra*, given the express reservations of State authority in the Act, the simple fact remains that the FCC lacks authority to mandate a unified plan.

The easiest proposals to reject based on the *NARUC Principles* are the "ICF" plan (*FNRPM* at ¶¶40–44), the "Western Wireless Proposal" (*FNRPM* at ¶¶54-55), and the "CTIA principles (Id. at ¶59) because none includes a substantial State role and all *mandate* bill and keep. The ICF plan includes some concepts that the NTFIC found had some merit. However, because of its legal frailty/vulnerability on the State preemption issue, this plan is basically a guarantee to the FCC of protracted and likely unsuccessful litigation.

The "Expanded Portland Group" (Id. at ¶¶45–47), "ARIC" (Id. at ¶¶48–50), "CIBICC" (Id. at ¶51), "Home/PBT"(Id. at ¶¶51–53) plans all eschew a bill and keep mandate and are generally consistent with the *NARUC Principles'* requirement for a specific and unified rate.

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[6] See, *NARUC Principles* at page 7: "VI. APPROPRIATE FEDERALISM: . . . B. State commissions should continue to have a significant role in establishing rates and protecting and communicating with consumers. C. To avoid creating harmful economic incentives to de-average toll rates by some interexchange carriers, the FCC should have the authority to pool costs within its defined jurisdiction whenever intercarrier compensation rates are high in some areas. D. State commissions should retain a role in this process reflecting their unique insights, as well as substantial discretion in developing retail rates for services provided by providers of last resort, whether a dual or unified compensation solution is adopted. E. A proposal preserving a significant State role that fits within the confines of existing law is preferable."

Most share with the ICF some element that the NTFIC found had some merit and two specify a significant State role.[7] However, all remain vulnerable to the extent that each requires some preemption of intrastate access rates.

Indeed, *of the proposals listed in the NPRM*, NASUCA's plan (Id. at ¶56) comes closest to the listed NARUC's principles – specifying a target rate on the interstate side and specifying that States would " . . . be encouraged to match the target rate for intrastate rates, but they would retain authority concerning how to reach that rate."

Whatever choice the FCC ultimately makes, it should avoid an approach that clashes with the clear reservation of State authority with respect to intrastate access charges.

III. THE FCC LACKS AUTHORITY TO PREEMPT STATE AUTHORITY OVER INTRASTATE ACCESS

Any attempt to impose a blanket preemption of State authority in the absence of clear statutory authority will only generate additional uncertainty during the pendancy of the legal challenges that will undoubtedly arise as a consequence. As discussed, *infra*, on its face, the Act seems clear that the FCC lacks the needed authority. *It obvious that the public interest will be best served if the solution the Commission selects does not preempt State authority.*

In *FNPRM* ¶63, the FCC specifically seeks comment on the legality of various proposals noting it must "comply with the statutory provisions governing intercarrier compensation, such as sections 251(b)(5) and 252(d)(2) of the Act" and recognizing ". . .any unified regime requires reform of intrastate access charges, which are subject to state jurisdiction." The FCC also specifies, in ¶35, that "[a]ny proposal that contemplates reform of intrastate mechanisms . . . must include an explanation of the Commission's legal authority to implement the proposal."

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[7] The ARIC proposal calls for a joint process to establish unified compensation rates and both the ARIC and CBICC proposals would involve a Joint Board. See ARIC Proposal at 37-38; CBICC Proposal at 2. The EPG plan would reduce intrastate access rates to interstate rate levels but does not explain how the Commission could require such reductions.

The ICF and related proposals suggesting the FCC mandate ubiquitous access charge rates, including those for intrastate access, fail to provide the necessary explanation. Indeed, any proposal that requires the FCC to *mandate* intrastate access charges violates the Telecommunications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. In the 1996 amendments that provide grist for ICF and others' arguments that preemption is permissible, Congress also enunciated, in §601[8] *a rule for construing the included statutory changes.* That section specifies that 1996 Act was to have "No implied effect," explaining the 1996 Act ". . .and the amendments made by this Act *shall not be construed* to modify, impair, or supersede Federal, State, or local law *unless expressly so provided in such Act or amendments*." {Emphasis Added} Section 152(b) specifies that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier engaged . . ." [9] Congress has from time to time amended this section to provide specific exceptions giving the FCC additional authority. However, nowhere in the 1996 amendments did it include State authority over intrastate access charges as one such exception.[10]

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8 See, Pub. L. 104-104, Title VI, §601, Feb. 8, 1996, 110 State. 143 (codified in note to §152),

9 47 U.S.C. §152.

10 See, e.g., the 47 U.S.C. §§223–7, §332 exceptions listed in §152. Compare, *Louisiana PSC, et al. v. FCC*, 476 U.S. 355, 374-375 (1986), where the Supreme Court rejects an FCC attempt to preempt intrastate depreciation rates in the absence of express statutory authority, specifically rejecting arguments the FCC should be able to preempt to foster federal policy: "While it is certainly true . . . State regulation will be displaced to the extent that it stands as an obstacle to [Congress' objectives], . . . it is also true that ***a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority***. . . . First, an agency literally has no power to act, let alone pre-empt . . . a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations . . . to displace state law is to examine the nature and scope of the authority granted . . . . Section 152(b) constitutes . . . a congressional *denial* of power to the FCC to require state commissions to follow FCC depreciation practices . . . ***we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy.*** An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do. (Emphasis added)**.**

Indeed, §251(d)(3), captioned "Preservation of State access regulations," compels the opposite conclusion.

Citing *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S.366, 377-86 (1999), the ICF, at pages 28-29 of its Ex Parte, argues that the Supreme Court has recognized that §201(b)11 authority extends not just to jurisdictionally interstate matters, but "encompass[es] matters that, before 1996, fell within the exclusive jurisdiction of the states." This rulemaking authority, in tandem with the allegedly "expansive" language of §251(b)(5), according to the ICF, demonstrates that the FCC can and should, preempt the states for all matters of intercarrier compensation, including those matters that involve intrastate access charges for intrastate interexchange calls. However, the Commission's authority to preempt the States under §201 falls only to those matters to which the 1996 Act applies, and jurisdiction over intrastate access charges was not changed under the 1996 Act. Consequently, "[i]nsofar as Congress has remained silent. . . §152(b) continues to function."[12]

Although the Act on its faces does not confer the necessary authority to allow the FCC to establish intrastate access charges, the *FNRPM* nonetheless seeks specific comment on distorted readings of several statutory provisions or, alternatively, the potential applicability of the "mixed use doctrine" as a basis for preemption. None of the proffered explanations provides an adequate base for FCC action. The first statutory provision addressed *infra* is the allegedly "expansive" interpretation preemption proponents, like the ICF reference, *supra*, try to provide for §251(b)(5).

A. Section 251(b)(5) does not apply to intrastate interexchange access service.

In the *FNRPM*, at ¶79, the FCC contends that §251(b)(5) "on its face, applies to all telecommunications," then notes that ". . .Congress "carved out" access traffic from the scope of

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11 Section 201(b), 47 U.S.C. § 201(b) authorizes the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."

12 Id. at 381 n. 8.

section 251(b)(5)," before suggesting that §251(g) may provide a way around the "carve out" to support preemption. The ICF, as noted earlier, believes §251(b)(5) can be stretched to encompass access charges. Unfortunately, such distortions are at odds with the clear statutory text and the legislative history.

Section 251(b) sets forth specific interconnection requirements applicable to local exchange carriers ("LECs") in the context of the development of competitive local markets. Section 251(b)(5), captioned "Reciprocal Compensation", specifically addresses LECs' duty to transport and terminate the traffic of other LECs competing *in the same local exchange service area*. This section, on its face*, has nothing to do with the provision of interstate or intrastate exchange access services*.[13] LECs do not have "reciprocal compensation arrangements" with interexchange carriers.[14] Indeed, Congress specifically distinguished exchange access services from the "reciprocal compensation" transport and termination arrangement required pursuant to §251(b)(5).

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13 The ICF's argument that §251(b)(5) applies to intrastate access charges because Congress neglected to include language limiting the term "telecommunications" in that section, is also incorrect. As the FCC has already specified - §251(b)(5) encompasses only compensation arrangements as they apply to LECs carrying local traffic. <u>See</u> *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16008-58 ¶¶ 1027-1118 (1996) (*Local Competition Order)* (adopting reciprocal compensation rules and creating a compensation scheme for the exchange of competitive local traffic). <u>Id.</u> at ¶¶1033-34 ("§251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area," –unlike traffic currently subject to access charges - and the "provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic.") Moreover, the ICF allegation that, the FCC reversed that stated position in the subsequent *ISP Remand Order* is also incorrect. Instead, the FCC again determined that for ISP traffic, §251(b)(5)'s reciprocal compensation provisions excluded traffic that is subject to parallel intrastate access regulations., specifying that "[b]efore Congress enacted the 1996 Act, LECs provided access services to IXCs and to information service providers in order to connect calls that travel to points – both interstate and intrastate - beyond the local exchange. In turn, both the Commission and the states had in place access regimes applicable to this traffic, which they have continued to modify over time. It makes sense that Congress did not intend to disrupt these pre-existing relationships. Accordingly, Congress excluded all such access traffic from the purview of section 251(b)(5)." *ISP Remand Order* at 9168, ¶37 (<u>See</u> <u>also</u> ¶37 n.66 stating that "we again conclude that it is reasonable to interpret section 251(b)(5) to exclude traffic subject to parallel intrastate access regulations, because "it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but had no such concerns about the effects on analogous intrastate mechanisms."

14 Even where a LEC also has an interexchange carrier "affiliate", it does not have the right for that LEC affiliate to seek "reciprocal compensation" on interexchange traffic subject to access charges.

Congress acted to ensure that new competitive local exchange service providers could utilize incumbent LEC facilities " . . .for the transmission and routing of telephone exchange service and exchange access."[15] The legislative history of this section only reinforces the clear text. Leading up to the 1996 Act, both the Senate and the House offered separate bills to promote competition in the *local exchange* market. The Senate's bill established a new Section 251 that required LECs "to negotiate in good faith and to provide interconnection with other telecommunications carriers that have requested interconnection for the purpose of providing telephone exchange service or exchange access service."[16] The legislative history of this section of the Senate bill states:

> "The obligations and procedures prescribed in this section do not apply to interconnection arrangements between local exchange carriers and telecommunications carriers under section 201 of the Communications Act for the purpose of providing interexchange service, *and nothing in this section is intended to affect the Commission's access charge rules*."[17]

The conference report further indicates that the House and Senate agreed on "a new model for interconnection that incorporates provisions from both the Senate bill and House amendment in a new section 251 of the Communications Act."[18] In short, the statutory text,[19] legislative history, and even judicial precedent addressing §251(b)(5)[20] provide absolutely no credible basis for FCC authority to preempt State jurisdiction over intrastate access charges.

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15 Cf. 47 U.S.C. §251(c)(2)(A).

16 H.R. CONF. REP. 104-458 at page 117.

17 Id. {Emphasis added.}

18 Id. at page 123.

19 This view of the statutory text is also is supported by the plain language of §252(d)(2). Section 252 (d)(2) includes the pricing standards applicable to unbundled network elements under §251. Specifically, §252(d)(2)(A) states that for the purpose of compliance with §251(b)(5), a State commission shall not consider a commercial reciprocal compensation agreement as just and reasonable: unless such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier. Because calls neither originate, nor terminate, on an interexchange carrier's facilities, the pricing of such traffic is not governed by §252(d), and, therefore, §251(b)(5) is not applicable.

20 See, e.g., *Texas Office of Public Utility Counsel v. FCC* 183 F.3d 393, 424 (5th Circuit) 1999 where the Court of Appeals distinguishes the applicability of Sec. 254 of the Act from Sec. 251 and 252, stating, "Unlike §§ 251 and 252, which were solely concerned with intrastate issues (i.e., interconnection of new entrants into the local telephone market), §254 applies to both interstate and intrastate services."

B. Section 251(g) does not provide a basis to extend FCC authority to intrastate access.

As noted, *supra*, the *FNRPM* suggests that §251(g) provides the FCC with the needed authority to preempt intrastate access charges,[21] citing its *Local Competition Order* as finding the §251(g) carve-out includes intrastate access services.[22] However, as previously referenced in footnote 14, *supra*, the referenced portion of the *Local Competition Order* does not support a contention that Congress gave the FCC authority to supersede state jurisdiction over intrastate access charges.[23] Indeed, the plain language of §251(b)(5) and §252(d)(2) undermines arguments that §251(g) demonstrates that intrastate access charges are subject to §251(b)(5). Both the text and the legislative history are clear that §251(g) merely preserves certain pre-1996 Act rules applicable to interstate access traffic by court order, consent decree or Commission regulation, order or policy until superseded by Commission regulation. The section has *nothing* to do with establishing Commission authority to change the access charge mechanism. The FCC always had the authority to establish the terms and conditions with respect to interstate access; it has never had the authority to impose terms and conditions on intrastate access. The 1996 addition of §251(g) changed nothing.[24]

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21 Indeed, that decision appears to recognize that the FCC has no basis to disrupt intrastate access charge ratemaking: "Moreover, although section 251(g) does not directly refer to intrastate access charge mechanisms, it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but had no such concerns about the effects on analogous intrastate mechanisms. *FNRPM* at ¶79. Cf. footnote 14, *supra*.

22 Id., citing *Local Competition Order*, 11 FCC Rcd at 15869, ¶732.

23 *Local Competition Order*, at ¶732.

24 To the extent §251(g) addresses continuation of conditions pursuant to which interstate exchange access is provided, this section is entirely consistent with the specific intent of the Senate noted earlier: "*nothing in this section is intended to affect the Commission's access charge rules.*" Id. (Emphasis added,)

Indeed, the legislative history is clear that §251(g) was intended by Congress to clarify that the BOCs and GTE not be permitted to utilize the prospective termination of the AT&T Consent Decree as an excuse to stop providing "equal access and nondiscrimination to interexchange carriers and information service providers."[25]

Section 251(g) was intended to give the FCC authority to continue to enforce certain requirements and obligations imposed on the BOCs and GTE that might otherwise have expired with passage of the 1996 Act. Moreover, notwithstanding arguments to the contrary, logically, if Congress intended to preserve the status quo for *intrastate* access until FCC issued new regulations, as it did with interstate access, it would have directed such a result in §251(g). The section simply provides no reasonable basis for extending the FCC's reach to intrastate access charges.

C. Section 254(g) does not provide a basis to extend FCC authority to intrastate access.

The *FNRPM* also invites comment with the impact of §254(g) on the FCC's ability to preempt intrastate access charge regimes.[26] The ICF argues the FCC can preempt intrastate access charges because such are "inconsistent" with the Commission's duty to "rationalize universal service support."

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25 H.R. CONF. REP. 104-458, at pp. 122-123: "The approach of both the Senate bill and the House amendment assumed that Bell Operating Companies . . .would be required to continue to provide equal access and nondiscrimination to interexchange carriers and information service providers under those parts of the AT&T Consent Decree that would have remained in effect under either approach. Because the new approach completely eliminates the prospective effect of the AT&T Consent Decree, some provision is necessary to keep these requirements in place. By the same token, although not specifically addressed in either the Senate bill or the House amendment, some provision is also needed to ensure that the GTE Operating Companies that provide local exchange services continue to provide equal access and nondiscrimination to interexchange carriers and information service providers. . . . Accordingly, the conference agreement includes a new section 251(g). . . .*When the Commission promulgates its new regulations, the conferees expect that the Commission will explicitly identify those parts of the interim restrictions and obligations that it is superseding so that there is no confusion as to what restrictions and obligations remain in effect.* These interim restrictions and obligations shall be enforceable in the same manner as Commission regulations." {Emphasis Added}

26 *FNRPM* at ¶¶63 & 83-89.

The legislative history of §254(g) indicates that “the conferees do not intend that this subsection would require the renegotiation of existing contracts for the provision of telecommunications services.”[27] It is clear Congress did not intend the enactment of this provision to require changes in existing arrangements.

Like the provisions discussed, *supra*, §254(g) simply fails to provide an independent statutory basis for preemption of state jurisdiction over intrastate access charges. The ICF argument that the FCC can preempt to “rationalize’ universal service policy, ignores existing jurisprudence, the clear text of §254, and the express reservations of State authority in §253.

Even if one chooses to ignore the statutory text, there is a series of cases interpreting this provision that are on point rejecting arguments that this section provides a basis to preempt intrastate access charges. For example, in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 423-24 (5th Cir. 1999), the Fifth Circuit held that the universal service provisions of §254, as applied to intrastate access charges, were not sufficiently unambiguous or straightforward enough to override the reservation of state authority under §152(b).[28] Similarly, in *Qwest Communications International, Inc. v. FCC*, 398 F.3d 1222, 1232-33 (10th Cir 2005), the Tenth Circuit rejected, as the FCC should reject here, arguments that the general provisions of §254 require the Commission to order States to terminate implicit subsides in favor of explicit universal service programs and held that §254 does not provide "a backdoor to federal manipulation of state support mechanisms."

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[27] H.R. CONF. REP. 104-458, p. 132.

[28] Cf. *Qwest Corporation. v. FCC*, 258 F.3d 1191, 1203 (10th Cir 2001) (stating that the court "recognize[s] that the FCC may not be able to implement universal service by itself, since it lacks jurisdiction over intrastate service.")

D. The "Mixed-Use" doctrine does not provide a basis to extend FCC authority to intrastate access.

The *FNRPM at ¶80* also seeks comment regarding whether the Commission could reform intrastate access charges by invoking the "mixed use" doctrine. This doctrine allows the FCC to treat certain traffic as jurisdictionally interstate if it is impossible or impractical to separate the interstate and intrastate components.

Those circumstances do not exist here. The record and history conclusively demonstrates that it is neither impossible nor impractical to separate the interstate and intrastate usage of interstate interexchange interconnection services. Carriers have separately identified intrastate and interstate access services since the inception of access charges. Where administrative or economic factors have dissuaded carriers from separating traffic, imputed usage factors are applied on a mutually agreeable basis. The fact that administrative and economic considerations may render it difficult for carriers to apply actual measurement has not led to preemption of the State jurisdiction.[29] Interconnection agreements between CMRS providers and LECs regularly establish traffic factors by mutual agreement.

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[29] See, The *FNRPM* cites an early application of the "mixed use doctrine" that illustrates the point. The Separations Joint Board was convened to make a recommendation on the separations procedures appropriate for *mixed use* special access lines. Adopting the Joint Board's recommendation, the FCC stated, "We believe that the separations procedures recommended by the Joint Board for mixed use special access lines resolve existing concerns in a manner that reasonably recognizes state and federal regulatory interests and fosters administrative simplicity (footnote omitted) and economic efficiency." *In the Matter of MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Decision and Order, 4 FCC Rcd 5660, ¶ 6 (1989). The decision emphasized that the result reflected the dual jurisdictional regulatory structure of the Act: "Based on the record in this proceeding, we agree with the Joint Board's conclusion that the new separations procedures for mixed use special access lines are consistent with Smith v. Illinois Bell Telephone Co., 282 U.S. 133 (1930), and the subsequent court decisions. . . . We also believe that the tariffing implications of the new separations rules (i.e., that some interstate traffic will be carried over state tariffed lines and vice versa) is in these circumstances consistent with the system of federal and state regulation established in the Communications Act, which provides a central role for the separations process in determining the scope of state and federal ratemaking authority."

The “mixed use doctrine” cannot justify any basis for the Commission to preempt State jurisdiction over intrastate access charges. Instead, the Commission’s prior application of the “mixed use doctrine” demonstrates the prudence of referring matters “regarding the relationship between rate structures, accounts, charges, practices, classifications, and regulations of carriers subject to the jurisdiction of such State commission and of the Commission.”[30] The ARIC Proposal, the NARUC Principles and the NTFIC draft all urge that the Commission avail itself of the benefits of the collaborative Federal-State Joint Board process and refer the issues related to intrastate access charges and universal service to a Joint Board.

E. Section 160 does not provide a basis to extend FCC authority to intrastate access.

Section 160(e) specifies that “a state commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section.” 47 U.S.C. §160. This section, on its face, applies only to prevent States from enforcing affirmative duties assigned to the FCC in the statute. Congress clearly did not intend to preempt state economic oversight of dominate LECs and rate design elements associated with intrastate retail rates. Intrastate access charges are an integral part of intrastate retail rate design, and are thus simply not subject to preemption under §160. If this novel interpretation were permitted by the courts, the FCC could effectively obviate any state economic regulation and effectively write 47 U.S.C. § 152(b) out of Act.

30 47 USC Sec. 410(b)

As the language makes clear, Section 160 only allows the FCC to forbear from applying a specific section of the statute that requires it to act.[31] The FCC may not "forbear" from applying provisions of the statute that it does not have authority to "apply in the first instance.

CONCLUSION

NARUC respectfully requests the FCC carefully consider the foregoing comments and the comments filed by each of its member commissions as it continues to move towards a resolution of this docket. We look forward to working closely on these issues with our federal colleagues.

Respectfully submitted,

National Association of Regulatory Utility Commissioners

James Bradford Ramsay
GENERAL COUNSEL

Grace Soderberg
ASSISTANT GENERAL COUNSEL

1101 Vermont Avenue, NW
Suite 200
Washington, D.C. 20005
(202) 898-1207

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[31] Section 160 states: "[T]he commission *shall forbear from applying* any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the commission determines that…" {Emphasis Added}