

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

In the Matter of

Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan For Our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link Up)	WC Docket No. 03-109

**REPLY COMMENTS OF
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The Pennsylvania Public Utility Commission (Pa. PUC) files these Reply Comments to the FCC's comprehensive proposals to reform universal service, the federal universal service fund, and intercarrier compensation set out in the Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking on the Connect America Fund (CAF) issued on February 8, 2011 (*2011 Reform NOPR*). The *2011 Reform NOPR* set May 23, 2011 as the deadline for filing Reply Comments.

The Pa. PUC Reply Comments should not be construed as binding on the Pa. PUC in any matter before the Pa. PUC. These Pa. PUC Reply Comments could change in response to subsequent events, including Ex Parte filings or the review of other filed Reply Comments and legal or regulatory developments at the state or federal level.

The Pa. PUC's Reply Comments oppose preemption based on legal, technology, and policy considerations set out in the *2011 Reform NOPR*. The FCC should reject comments supporting preemption.

A. THERE IS NO LEGAL BASIS FOR PREEMPTION OR ITS EQUIVALENT

The Pa. PUC Opposes Preemption or Its Constructive Equivalent. The Pa. PUC supports the Joint Board, NARUC, and other commenters, particularly those opposing legal preemption of state jurisdiction over intrastate communications, networks, or service providers. The Pa. PUC also opposes any constructive equivalent. The FCC must not remove state jurisdiction over intrastate communications through the use of forbearance or similar vehicles. The FCC must preserve the joint governmental structure precisely because that is consistent with the current law and the constitutional structure.

The contrary legal analysis supporting preemption rests on the *CLEC Access Order*, the *ISP Remand Order*, the FCC's Title I authority, the "mixed use" doctrine, or the "impossibility" doctrine. Those interpretations contradict the FCC's own long-standing practice of cooperative federalism with regard to Internet Protocol (IP) communications. That interpretation also ignores clear Supreme Court precedent limiting the FCC's authority over intrastate communications to establishing a pricing model, but not the rates, for intrastate communications.

The comments of AT&T and others suggest that the FCC's Competitive Local Exchange Carrier (CLEC) *CLEC Access Reform Order* and the *ISP Remand Order* reflect the FCC's reliance on market forces alone as opposed to regulations.¹ This approach ignores joint jurisdiction and the current federalist interstate-intrastate structure. Were it

¹ *2011 Reform NOPR*, Docket No. 10-90, AT&T Comments (April 18, 2011), pp. 18-21.

otherwise, there would be no FCC precedent permitting states to impose a universal service charge on Voice over Internet Protocol (VoIP)² or a requirement that the states can address interconnection disputes involving Internet Protocol (IP) services.³

The accompanying claim that the FCC can invoke its Title I ancillary authority, or Section 251(b)(5) and Section 251(g), to set the price for intrastate communications is equally mistaken.⁴ 47 USC § 251(b)(5) and 47 USC § 251(g).

The CLEC Access Reform Order. The *CLEC Access Reform Order* established a cap on interstate access rates while leaving access rates above that level to negotiation. A rate cap in no way constitutes a pure reliance on market forces. Moreover, the *CLEC Access Reform Order* did not address intrastate access rates or intrastate rates. The *CLEC Access Reform Order* does not support preemption of intrastate communications nor does it reflect a pure reliance on market forces alone. The *CLEC Access Reform Order* reflects an evolving use of price regulation and negotiations.

Pennsylvania law is similar. Pennsylvania law limits intrastate access charges in Section 3017(c), 66 Pa. C.S. § 3017(c), to an incumbent local exchange carrier (ILEC) rate. Any rate higher than an ILEC's rate must be cost-justified. This also reflects a combination of price cap and cost-based regulation that also relies on competition.

The FCC and Pennsylvania results reflect the joint governments' experience with service providers and a traditional reliance on forms of rate regulation and negotiation or

² *In re: Universal Service Contribution Methodology, Petitions of the Nebraska Public Service Commission and the Kansas Corporation Commission*, Docket No. 06-122 (November 5, 2010) (hereinafter the *Nebraska-Kansas Order*).

³ *In re: Petition of UTEX Communications Corporation, Inc. for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, Docket No. 09-134 (October 9, 2009) (hereinafter *UTEX Order*).

⁴ *2011 Reform NOPR*, Docket No. 10-90, AT&T Comments (April 18, 2011), pp. 18-21 and 37-53 (hereinafter *2011 Reform NOPR* and *AT&T Comments*).

cost-justification. These results are no more a reliance on “market forces” alone than the *ISP Remand Order* supports preempting state authority over intrastate communications.

The ISP Remand Order. The *ISP Remand Order* established a federal rate of \$.0007, with some caveats, for dial-up internet calls. The FCC dismissed attempts to establish that this *ISP Remand Order* had a broader meaning similar to the one proposed by AT&T in these comments. The FCC’s legal interpretation of the \$.0007 rate and the supporting legal analysis is that it is “of limited and rapidly diminishing practical significance.”⁵

AT&T’s effort to inflate the scope and importance of that *ISP Remand Order* contradicts AT&T’s own defense of the *ISP Remand Order* expressed in October 2010 before the United States Supreme Court. There, AT&T portrays the *ISP Remand Order* as one that “implicates a regulatory response to a discrete and transitory problem. The rules in question apply only to dial-up ISP-bound traffic, and dial-up is being rapidly replaced by various forms of [broadband access] service.”⁶

There is nothing new in law, technology, or policy since October 2010 that justifies this unilateral abandonment of AT&T’s previous view on the *ISP Remand Order*. The *ISP Remand Order* does not transform an FCC solution to a discrete and transitory problem in a market of diminishing significance into a right to preempt state jurisdiction. The *ISP Remand Order* does not support imposition of a mandatory rate of \$.0007 or \$.0004 or any other arbitrary rate a mere six months later.⁷ The only change seems to be some carriers’ view of their business interests.⁸

⁵ *Core Communications v. FCC*, Supreme Court Docket No. 10-185 and *Pa. PUC v. FCC*, Supreme Court Docket No. 10-189, Brief for the Federal Respondents in Opposition (October 2010), p. 12

⁶ *Core Communications v. FCC*, Supreme Court Docket No. 10-185 and *Pa. PUC v. FCC*, Supreme Court Docket No. 10-189, Brief in Opposition for Respondents AT&T, Level 3, MetroPCS, SprintNextel, and Verizon (October 2010), pp. 29-30.

⁷ *Compare 2011 Reform NOPR*, Docket No. 10-90, et. al, AT&T Comments (April 18, 2011), pp. 31 and 52 with *Core Communications v. FCC*, Supreme Court No. 10-185 and *Pa. PUC v. FCC*, Supreme Court No. 10-189, Brief

Section 601 Rules of Construction Limits the FCC. In addition, Section 601 sets out a rule of construction that limits the FCC's authority. *Telecommunications Act of 1996*, Section VI – Effect on Other Laws, § 601. In Section 601, the Congress enunciated a rule for construing the new statutory changes in TA-96 within the overall 1934 framework. Section 601 specifies that the 1996 Act was to have “No implied effect” explaining that 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.” Simply put, the Comments claiming that the FCC has implied or express authority in its Section 201 or Section 251(g) to preempt the states, let alone set intrastate rates, is incorrect.

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” 47 USC § 152(b). Congress has from time to time amended this section to provide specific exceptions giving the FCC additional authority. However, nowhere in the 1996 Telecommunications Act amendments did it include provisions impacting State authority over intrastate access charges or local communications as an exception.

in Opposition for Respondents AT&T, Level 3, MetroPCS, SprintNextel, and Verizon (October 2010), p. 28, Paragraph 2 and pp. 29-30.

^a See *Pa. PUC Writ of Certiorari*, Supreme Court No. 10-185 and 10-189 (August 2008), p. 5. Compare 2011 Reform NOPR, AT&T Comments, pp. 13, 18-21 and 37-53 with *Core Communications v. FCC*, Supreme Court Docket No. 10-185 and *Pa. PUC v. FCC*, Supreme Court Docket No. 10-189, Brief in Opposition for Respondents AT&T, Level 3, MetroPCS, SprintNextel, and Verizon (October 2010), p. 28, Paragraph 2 and pp. 29-30. Compare *MFS I*, 1995 Pa. PUC Lexis 87 at *68-*80 (incumbents oppose bill and keep but favor access charges for local calls) and *In re City Signal*, 1995 Mich. PSC Lexis 31 (1995) (incumbents oppose bill and keep for local calls) with *Bell Atlantic Ex Parte Filing*, Reciprocal Compensation for Internet Traffic, Correspondence of Edward Young, III and Thomas J. Tauke, July 1, 1998, Docket Nos. 96-98; CCB/CPD 97-90; *Developing a Unified Compensation Regime*, Docket No. 01-92, Ex Parte Letter of Verizon (July 28, 2010) (incumbents oppose reciprocal compensation for local calls) and *ISP Remand Order*, ¶ 8 and *Order on Mandamus*, ¶¶ 24 and 25.

The Supreme Court already prohibits the FCC from preempting state regulation of depreciation practices for intrastate communications by concluding that in the absence of express congressional authority, the FCC cannot assume intrastate authority.⁹ The fact that some major carriers, including AT&T, seek FCC ratification of a revised business plan that rests on uniform intercarrier compensation rates in exchange for broadband commitments does not mean that Congress and the Supreme Court agree that the FCC now has authority to usurp the states' authority to regulate intrastate communications.

The FCC's Title I Ancillary Authority. The comments relying on the FCC's Title I Ancillary power to support preemption of state authority are equally unavailing. Federal precedent holds that the FCC may exercise its ancillary authority only if it demonstrates that its action is "reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities. *Comcast v. FCC*, Docket No. 08-1291 (April 6, 2010) (D.C. Cir. April 6, 2010), p. 3 citing *American Library Association v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005). There is simply no ancillary authority authorizing the FCC to set intrastate communication rates. However, there is Supreme Court precedent clearly prohibiting the FCC from regulating intrastate communications, including depreciation.

⁹ See, e.g., the 47 U.S.C. §§ 223-7 and § 332 exceptions listed in § 152; *Louisiana PSC, et al. v. FCC*, 476 U.S. 355, 374-375 (1986) (*Louisiana*), where the Supreme Court rejected 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.

Section 251(g) is Limited to Interstate Matters. Any reliance on Section 251(g) to preempt state authority over intrastate communications is equally unavailing. The comments support preemption and new FCC authority by claiming that the FCC can bring all communications within 251(b) and then, having brought all communications within 251(b), the FCC can proceed to overturn preexisting rules, practices or agreements preserved by Section 251(g) now that the FCC has promulgated successor rules. The proponents claim that the FCC can and must now include the states' authority to regulate intrastate communications, rates, and service providers within Section 251(g). This interpretation of Section 251(g) is basically a rehash of the legal views put forth in support of the *ISP Remand Order*. But, as noted above, the FCC itself considers the *ISP Remand Order* to be of declining significance. And, even if the FCC wanted to take this approach to advance a federal policy, the Supreme Court holds that the FCC has no implied authority to set intrastate rates unless Congress has expressly authorized the preemption, including depreciation. *Louisiana PSC, et al. v. FCC*, 476 U.S. 355, 374-375 (1986).

The language of Section 251(g) preserved 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 in no way constitutes a grant of "implied authority" to bring intrastate communications within the FCC's purview, particularly the power to set rates. *Louisiana* precludes a federal agency from unilaterally preempting a state in pursuit of a federal policy absent clear authority to preempt. Since Section 251(g) is limited to interstate practices and simply has nothing to do with establishing FCC authority to preempt intrastate rules or law, the FCC has no authority under Section 251(g) to alter this long-standing federal-state jurisdictional and rate-making allocation.

The Pa. PUC recognizes that the FCC has always had the authority to establish the terms and conditions and rates for interstate communications, including interstate access. The Pa. PUC does not agree that Section 251(g) now empowers the FCC to impose terms, conditions, and rates on intrastate communications, including intrastate access.

Section 252(e)(5) and Section 253. As explained in detail below, the Pa. PUC does not agree that there is a pressing need to preempt Pennsylvania, or other states, based on the two provisions that do permit the FCC to preempt i.e., cases where a state requirement is not competitively neutral or a state has failed to act. There is simply no credible evidence that the FCC has to preempt under Section 252(e)(5) because a state has refused to act or Section 253 because a state law is not competitively neutral so that the FCC can effectively perform its statutorily mandated responsibility to promote competition, deploy broadband, and ensure that interstate rates are just and reasonable.

The FCC's own precedent addressing these two provisions authorizing preemption at Sections 252(e)(5) and Section 253 do not support preemption. Section 253(e)(5) authorizes the FCC to preempt state interconnection, arbitration, and mediation if the state commission refuses to act. But, the FCC has long held that it does not take an "expansive" view of what constitutes a "failure to act" sufficient to warrant preemption.¹⁰ Moreover, the FCC has rarely preempted a state commission except in narrow circumstances when a state refuses to act.¹¹

¹⁰ *Local Competition Order*, CC Docket No. 96-98, Paragraphs 1285-1286, 11 FCC Rec at 16128 (1996); *In re: MCI Petition for Preemption Missouri Public Service Commission Pursuant to Section 252(e)(5) of TA-96*, CC Docket No. 97-166 (September 26, 1997), paragraph 7; *American Communications Services, Inc. Petition for Declaratory Ruling To Preempt the Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of TA-96*, CC Docket No. 97-100 (December 23, 1999), Paragraphs 12-17, 30-31, and 91 (state law provision is narrowly preempted based on a conflict with federal rules on the evidentiary standard which effectively prohibits an entity to provide local exchange service in competition with a rural carrier).

¹¹ *Starpower Communications Petition for Preemption of Virginia State Corporation Commission Pursuant to Section 252(e)(5) TA-96*, CC Docket No. 00-52 (June 14, 2000), paragraph 5.

Section 253 authorizes the FCC to preempt if a state requirement is not competitively neutral. Section 253 authorizes the FCC to preempt express restrictions on entry, and also restrictions that indirectly produce that result.¹² However, competitively neutral provisions, which are consistent with Section 254 and necessary to achieve a public interest objective under Section 253(b), are excluded from preemption.¹³

In making Section 253 determinations, the FCC first determines whether the challenged state law, regulation, or legal requirement violates the terms of Section 253(a) standing alone. If the FCC finds that it violates Section 253(a) considered in isolation, the FCC next determines whether the requirement nevertheless is permissible under Section 253(b). If a law, regulation, or legal requirement otherwise impermissible under Section 253(a) does not satisfy Section 253(b), the FCC preempts. If the same law, regulation, or legal requirement satisfies Section 253(b), the FCC cannot preempt even if it would otherwise violate Subsection (a) considered in isolation.¹⁴

AT&T's own filings demonstrate that neither Pennsylvania nor other states have violated the competitive neutrality mandate of Section 253 or have failed to implement the competition and broadband deployment objectives of TA-96. In fact, AT&T recognizes that many states have implemented local and intrastate access rate reforms while balancing those reforms with the universal service mandate of Section 254.¹⁵

There is no credible evidence that any individual state law enacted to pursue an independent state objective has not been competitively neutral as required by Section 253. Assuming otherwise, *arguendo*, the existence of one state provision in one

¹² *In re: Texas Public Utility Commission*, CCB Docket Nos. 96-13, 96-14, 96-16, and 96-19 (October 1, 1997), Paragraphs 40-41 (*Texas Preemption*).

¹³ *Texas Preemption Order*, Paragraph 42.

¹⁴ *Texas Preemption Order*, Paragraph 42.

¹⁵ *In re: Intercarrier Compensation Reform*, Docket 01-92, AT&T ExParte (October 25, 2010), Attachments 1 and 2 ("States with Intrastate/Interstate Access Rate Parity").

jurisdiction has never been grounds for the wholesale preemption of all states' authority to address intrastate rates or service providers as suggested by some carriers to the FCC.

Pennsylvania undertook intrastate carrier access rate reforms as early as 1995 by certifying a competitive local exchange carrier¹⁶ well in advance of the federal enactment of similar legal mandates in TA-96. Since then, Pennsylvania implemented a statewide universal service fund that supports local rate rebalancing and intrastate carrier access rate reforms by allocating monies obtained from an assessment on retail revenues of all telecommunications carriers with intrastate operations in Pennsylvania. . The Pennsylvania state-specific USF has maintained affordable local rates for the end-user consumers of rural incumbent local exchange carriers (ILECs). Furthermore, Pennsylvania is currently engaged in the examination of further intrastate carrier access reforms for both rural and non-rural ILECs.

This implementation of intrastate carrier access rate reforms and state-specific efforts to statutorily deploy broadband networks in Pennsylvania, and elsewhere¹⁷ even before 1996, do not support preemption based on some state, or states, failure to act. The same laws and policies are competitively neutral, advance intrastate universal service, and promote broadband deployment.

Pennsylvania efforts reflect compliance with state law mandates regarding universal service, intrastate access rate reform, and broadband deployment. Those policies, and the underlying state laws, are at risk if the FCC preempts states from pursuing intrastate policies based upon the states' authority over intrastate matters.

¹⁶ *In re: Application of MFS, et al.*, 1995 Pa PUC Lexis 87 (1995).

¹⁷ *In re: City Signal, Inc., Case No. U-10555 (Michigan Public Service Commission: 1995)*, p. 21, 159 PUR4th 532 (1995).

Pennsylvania has implemented the difficult task of local and access reform, most particularly in Pennsylvania's intrastate access rates, in the years since the enactment of TA-96. The Pa. PUC has enacted a combination of price caps, local rate and access rate reforms and rebalancing, , and the creation of a state-specific universal service fund.

For these reasons, the Pa. PUC does not support preemption. The Pa. PUC urges the FCC to proceed cautiously when considering preemption of state authority to regulate telecommunications service providers or their intrastate access rates or local retail rates. The FCC should reject the invitation to exercise some implied power to preempt not otherwise expressly set out in TA-96 as required by Supreme Court decisions and the FCC's own precedent. *Louisiana PSC, et al. v. FCC*, 476 U.S. 355, 374-375 (1986); *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).

Also, the Pa. PUC does not discern any facts supporting a legal conclusion that the states' difficult and expensive reform efforts constitute a failure to implement federal law under Section 252(e)(5). There is simply no evidence that state initiatives have not been competitively neutral as required by Section 253.

The Pa. PUC recognizes that AT&T and other carriers may be proposing a laudable business plan to deploy broadband using money saved from reduced access termination payments to non-affiliated carriers. The Pa. PUC realizes that rate uniformity may help AT&T address the fact that AT&T is one of the three nationwide carriers with 82% of the nation's exchanges that are without broadband.¹⁸ However, laudable this plan may be, the result must be consistent with precedent. This includes the Supreme Court limits on the FCC's authority to preempt state regulation of intrastate communications,

¹⁸ *FCC Public Meeting (September 29, 2009)*, Staff Presentation to the FCC, Slide No. 47 (the 82% figure included exchanges then proposed for sale to Frontier, a transaction subsequently approved by the FCC.).

including depreciation, and the authority to set intrastate rates. *Louisiana PSC, et al. v. FCC*, 476 U.S. 355, 374-375 (1986); *AT&T Corporation v. Iowa Utilities Board*, U.S. 366, 384-358 (1999); *Iowa Utilities Board v. FCC*, 219 F.3d 744, 758, aff'd in part and rev'd in part, *Verizon v. FCC*, 535 U.S. 467 (2002), and vacated, in part, *Iowa Utilities Board v. FCC*, 301 F.3d 957 (8th Cir. 2002).

An apparent commitment to using any savings in the access termination rates paid to non-affiliated carriers to deploy broadband and comply with prior promises made in support of price cap regulation does not constitute a state barrier to competitive entry nor a failure to act under TA-96. While the savings these carriers will realize in the termination rate they pay to non-affiliated carriers to \$.0007 or \$.0004 per minute of use (MOU) or another fiat rate may support a business plan or federal policy, it does not support preemption absent express Congressional authority to preempt the states.

This is especially true if the major carriers' increased payments to non-affiliated carriers for access termination at existing rates has arisen because of the carriers' own business plan. For example, the recent proliferation of buffet "all you can call" flat-rate calling plans by major carriers is an interstate form of Extended Area Service (EAS), an intrastate solution implemented by many state commissions when the customers' calling area did not reflect a community of interest. In those cases, state commissions substituted an extended local calling area to replace what were formerly in-state long distance calls. Typically, the two or three intrastate carriers implementing EAS experienced increased calling frequency and duration.

First, major interstate carriers make more frequent and far larger payments to multiple non-affiliated carriers compared to two or three carriers involved with intrastate EAS. Second, state commissions have authorized flat-rate trunking to reconcile the increase in calling with a carrier's increased cost in cases of intrastate EAS.

Seen in this light, the problem is not that state commissions or technology are creating intrastate impediments to interstate commerce or refusal to act. The problem is a self-created one caused by major interstate carriers' business plans related to "all you can call" buffet pricing. The solution, of necessity, should be a carrier's own solution or a possible modification of current business plans. The solution is not preemption of state authority to regulate intrastate communications, i.e., the authority to set rates for intrastate communications.

The Impossibility Doctrine. The impossibility doctrine permits the FCC to preclude state laws or action when necessary to fulfill a federal law when the state law or action conflicts with federal law. Consequently, the alleged impossibility of separating packet transmission into interstate and intrastate components ostensibly warrants preemption. The proponents cite earlier FCC decisions in *Vonage* or *pulver.com* to support the FCC's recognition that either it is impossible to parse Voice over Internet Protocol (VoIP) packets on an interstate-intrastate basis or that "peer to peer" services are all "information service" beyond the states' purview.

This interpretation ignores the fact that these earlier FCC decisions have undergone a much needed transformation. For one thing, the *pulver.com* decision was limited to information services that were not offered to the public for a fee and did not touch the public switched telephone network (PSTN). For another thing, the *Vonage Preemption Order*¹⁹, wherein the FCC preempted state certification and 911 emergency mandates for Voice over Internet Protocol (VoIP) services, reflected a view that packet separation was impossible.

¹⁹ *In Re: Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, CC Docket No. 03-211 (November 12, 2004); *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45 (February 19, 2004).

Since then, however, the FCC established an interstate-intrastate “safe harbor” rule for determining VoIP providers’ obligation to support federal and state-specific USFs in the 2006 USF Order consistent with the FCC’s determination that VoIP is a “successor technology” to traditional circuit-switched voice service.²⁰ In the *Nebraska-Kansas Order*, the FCC determined that states can impose state-specific USF obligations on nomadic VoIP providers so long as the mandate is competitively neutral and not burdensome. Moreover, the FCC expects the state commissions to address interconnection and compensation disputes for IP services in the current federalist and bi-jurisdictional regulatory structure.²¹ Finally, the emergence of technological innovations such as Deep Packet Inspection (DPI)²², basically an enhanced ability to identify the nature of an IP packet transmission, can and does facilitate jurisdictional packet separation.

These subsequent developments in technology and FCC policy show that it is neither impossible nor burdensome for carriers to separate the interstate and intrastate usage of interstate interexchange interconnection services. Service providers have historically 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 have been applied on a mutually agreeable basis and the FCC has never found fault with that approach. Moreover, that approach is competitively neutral as required by Section 253(b) because an imputed usage factor is

²⁰ *In re: Universal Service Contribution Methodology*, Docket No. 06-122 (June 21, 2006); *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, RM-10865, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, 14991-92, para. 8 (2005) (*CALEA First Report and Order*), *aff’d*, *American Council on Education v. FCC*, No. 05-1404 (D.C. Cir. June 9, 2006). Based on the independent language of the CALEA statute, the Commission found in the *CALEA First Report and Order* that providers of these services satisfy CALEA’s definition of “telecommunications carrier” because these services replace significant functions of traditional telephone service, including circuit-switched voice service. *See id.* at 15001, 15003-04, 15009-10, paras. 23, 27-31, 42.

²¹ *In re: Petition of UTEX Communications Corporation, Inc. for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, Docket No. 09-134 (October 9, 2009)

²² http://en.wikipedia.org/wiki/Deep_packet_inspection; <http://www.deeppacketinspection.ca/>

imposed on competitors and incumbents alike. The fact that business costs related to some carriers reformed business plans now makes it more costly to apply actual, imputed, or safe harbor measurements does not constitute impossibility. However inconvenient, the law is that inconvenience does not support preemption without express congressional authority. *Louisiana PSC, et al. v. FCC*, 476 U.S. 355, 374-375 (1986).

Finally, and importantly, those carriers supporting preemption fail to distinguish between “impossibility” and “inconvenience” or “impracticality” as it operates in a constitutional structure. It is one thing for an administrative structure to be inconvenient or difficult from a business perspective. It is quite another thing for that same structure to be constitutionally infirm.

The need to parse the impossible from the inconvenient is especially relevant when, as here, the states and the FCC are trying to mesh a complex web of universal service and intercarrier compensation in a manner that is consistent with the constitutional and congressional mandate of joint jurisdiction. The Pa. PUC, and others, have consistently attempted to mesh federal and state law with federal and state concerns.²³ A division of power between joint governments may cause “inconveniences” because of additional expenses or accountability to another regulatory authority. This is a small price to pay to preserve a regulatory structure premised on the joint governments’ separate authority.

The Mixed Use Doctrine. The mixed use doctrine permits the FCC to treat certain facilities as jurisdictionally interstate if the traffic handled by such facilities exceeds an interstate threshold classification, typically 10%, i.e., point-to-point dedicated special

²³ See, *In re: USF and Joint Board*, Docket Nos. 96-45 and 03-109 (July 30, 2010) (*Pa. PUC 2010 Joint Board Comments*); *Framework for Broadband Internet Service*, Docket Nos. 10-127 and 09-51 (July 15, 2010) (July 2010 Pa. PUC Comments); *In re: Section 706 Inquiry*, Docket No. 09-137 (December 21, 2009)(December 2009 Pa. PUC Comments); *In re: High-Cost Universal Service Support and Federal-State Joint Board*, Docket Nos. 05-337 and 96-45 (Pa. PUC Comments: April 17, 2008) (Pa. PUC April 2008 Comments).

access circuits and facilities. Current circumstances nor the FCC's own decisions on the "mixed use" doctrine support preemption on this basis.

The FCC precedent has affirmed that the comingling of interstate and intrastate communications does not warrant federal preemption. That occurred in 1989 following the Separations Joint Board convening to make a recommendation on the separations procedures appropriate for *mixed use* special access lines. The FCC adopted the Joint Board's recommendation at that time. 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 *1989 Depreciation Decision*).

The FCC determined in 1989 that "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."

There is nothing in the comments supporting preemption and abandonment of this historic approach of the "mixed use" doctrine. The only discernible difference is the emergence of an IP technology that facilitates communications even faster than the more

traditional time division multiplexing (TDM) transmission protocol that was more widely used in 1989 when the FCC affirmed a joint jurisdictional approach premised on a constitutional allocation of powers. For example, a fiber optic facility or a central office switch is “protocol indifferent” when it handles both multijurisdictional IP and TDM protocol based traffic.

Some carriers’ narrow and transient view of what is inconvenient must give way when the alternative is a preemption that effectively transforms joint regulatory responsibilities into an omnipotent central regulatory authority while other regulatory agencies are reduced to mendicants that implement central directives. Simply put, there is nothing in technological change sufficient to alter the social condition such that regulators or legislators need to no longer concern themselves with the consequences of concentrated power which gave rise to joint jurisdiction in the first place.²⁴

Section 251(b) and Section 252 limit the FCC’s power. The Supreme Court holds that Section 251(B)(5) and Section 252(d) of TA-96 limits the FCC’s authority to establishing a pricing model for intrastate telecommunications subject to the reciprocal compensation under Sections 251(b)(5) and Section 252(d). The Supreme Court affirms the states’ authority to set intrastate reciprocal compensation rates based on that FCC pricing model, currently the Total Element Long Run Incremental Cost (TELRIC) model. Current law does not allow the FCC to set intrastate rates even if there were no historic concern like that driving the creation of joint governments in the first place. *AT&T*

²⁴ James Madison, *Federalist Papers, No. 51* (The Same Subject Continued: The Union as a Safeguard Against Domestic Faction and Insurrection: New York Packet (November 23, 1787). If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Corporation v. Iowa Utilities Board, U.S. 366, 384-358 (1999); *Iowa Utilities Board v. FCC*, 219 F.3d 744, 758, aff'd in part and rev'd in part, *Verizon v. FCC*, 535 U.S. 467 (2002), and vacated, in part, *Iowa Utilities Board v. FCC*, 301 F.3d 957 (8th Cir. 2002).

The FCC must reject comments claiming that technological change has given the FCC a unicameral mandate to impose uniform access charge rates for all intrastate and interstate communications. These comments overlook the fact that any FCC effort to regulate local or intrastate charges would violate the Telecommunications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Moreover, as explained above, any reliance on the *FCC v. Core Communications, Inc.*, 592 F.3d 139 (D.C. Cir. 210) is unavailing given the FCC and AT&T view of the very narrow limits of that decision. The fact that joint governments may be inconvenient is a consideration of historic significance that has been addressed with a constitutional solution. The solution supersedes transient technology or business plans for constructing horse paths, turnpikes, canals, railroads, telegraphs, analog networks or IP services.

B. TECHNOLOGICAL CHANGE DOES NOT SUSTAIN PREEMPTION

The Pa. PUC does not believe that the introduction of IP “packet technology” over fiber or available spectrum has so dramatically altered “telecommunications” or “communications” compared to earlier copper networks and analog technology that a new regulatory order is necessary.²⁵ The copper-analog technology was characterized by joint jurisdiction between the FCC and the states. The current fiber-digital technology and IP transmission shares many of the same characteristics of the copper-analog network. While the technology differs, the underlying principle of joint jurisdiction is still relevant.

²⁵ *In re: A National Broadband Plan for Our Future*, Docket No. 09-51, Comments of the Pa. PUC, p. 4 (October 12, 2010).

With both technologies, citizens communicate with each other. The only major difference is that with fiber-digital technology and IP transmission there are more applications, more providers, and more platforms that travel far faster and are capable of generating more revenues from IP-based communications. The new applications and technology allows citizens to separate, or combine, their voice communication (including texting) with data or video. Previously, there was little integration and no texting on copper-analog networks confined to voice.

IP technology continues to rely on “packets” with three components. These are headers (which identify the origin, nature, destination, and speed of a communication), load (the communication), and footers (information at the end of a load). IP relies on standard protocols and bursts of light to send packets at the speed of light through routers and services on networks. Invariably, the transmission of IP-based traffic with and through the traditional public switched telephone network (PSTN) still relies on conversions and re-conversions of IP-based traffic to Time Division Multiplexing (TDM) protocols. Importantly, the development of Deep Packet Inspection (DPI), a technology that permits network operators to perform complex analysis of IP transmissions, is fully consonant with joint jurisdiction even if packets eventually replace copper and TDM.

Importantly, however, the wireline or wireless physical facilities used to deliver this IP “packet technology” in an interconnected manner are mainly within the province of two groups of facilities, i.e., the cable and telecommunications companies.²⁶ Moreover, approximately 95% of the nation’s wireless wholesale minutes are provided

²⁶ *In re: IP-Enabled Services*, Docket 04-36, MCI Comment, (May 28, 2004), pp. 13-20; *In re: IP-Enabled Services*, Covad Comments (May 28, 2004), pp. 7-17. Their comments endorsed “information service” for services and “telecommunications” for the facilities consistent with Pennsylvania and federal law. *Fiber Technologies v. DQE*, Docket EB-05-MD-014 (February 27, 2007); *In re: Time Warner*, WC Docket 06-55 (March 1, 2007).

by three carriers all of whom are substantially unregulated affiliates of incumbent local exchange carrier²⁷ (ILEC) holding companies.

These ILEC holding companies and cable franchise operators have substantial investment and varying cost constraints in their “last mile” facilities. A uniform rate may not necessarily reflect their network costs. A mandatory rate devoid of any connection to the providers’ market cost and realities creates a perverse incentive to stall capital investments because the revenue streams are insufficient to finance network deployment or the delivery of broadband services. This is a particularly acute problem in those rural areas that, by the FCC’s own admission, may not fit within the competition and choice paradigm given their substantially different cost structures.²⁸

Above these “last mile” physical facilities, IP networks use “peering” between Tier 1 network owners and Tier 2 providers.²⁹ There, Tier 1 network owners exchange traffic on a “settlement” basis without intercarrier compensation whereas Tier 2 providers and others below that Tier 2 pay proprietary rates set in confidential agreements that typically contain non-disclosure provisions. Importantly, the majority of the current Tier 1 backbone connection providers are themselves associated with large incumbent carriers, either nationally or internationally.

Given these considerations, the Pa. PUC does not support a view that the emergence of IP transmission warrants preemption. As pointed out previously, telecommunications facilities are “protocol agnostic” when it comes to the transmission, switching and termination of multijurisdictional traffic of various communication protocols. This is particularly a concern because state commissions are typically the first

²⁷ *In re: Applications for Consent to the Transfer of Control from Nextel Communications, Inc. to Sprint Corporation*, WT Docket No. 05-63, Joint Declaration of Stanley M. Besen, et al. (February 8, 2005), para. 51, p. 9.

²⁸ *2011 Reform NOPR*, paragraphs 1 and 9, *inter alia*.

²⁹ See generally http://en.wikipedia.org/wiki/Tier_1_network and <http://www.bing.com/search?q=peering&src=IE-Address>.

entities to bear the brunt of consumers disgruntled with their services and of interconnection and intercarrier compensation disputes. State commissions are also the first charged with a legislative determination that more must be done to promote broadband deployment or expand broadband adoption rates.

State utility commissions have relied on joint jurisdiction and state laws consistent with applicable federal law to address consumer or legislative determinations about broadband deployment, intercarrier compensation, or the delivery of reasonable service. There is no reason to accept some carriers' argument that either technological change or their own business plans warrants upending the joint jurisdiction which created the current network, and network of networks, in the first place.

C. PUBLIC POLICY DOES NOT SUPPORT PREEMPTION.

While IP technology is used to provide voice, data, and video service, all IP-packets are not alike.³⁰ Voice packets require "real time" priority to prevent jitter, latency, and dropped conversations. Data packets can be disassembled and rearranged without a noticeable decline in service quality. Video relies on "buffer" memory to store, and resend, transmission without a noticeable decline in quality.

These packet differences will necessitate network management practices, particularly for the owners of "last mile" facilities. The differing technological needs of voice, data, or video packets for interstate and intrastate purposes require diversity in regulatory structure and network practice. A mandatory "one size fits all" approach imposed by the FCC on the states has two negative consequences. First, the likelihood of mistakes increases because there is only one regulator making all the decisions as opposed to several. Second, the scope and impact of any mistaken action or inaction will increase because one regulator is making all the decisions.

³⁰ Edward W. Felton, "Nuts and Bolts of Network Neutrality," 24th Annual Institute on Telecommunications Policy and Regulation, 223-334 (Practicing Law Institute: 2006), pp. 223-334.

For these reasons, state commissions must continue their separate regulatory authority in a joint governmental framework. This includes the initial ability to address network management practices for public safety, interconnection, and public policy endeavors like Telecommunications Relay Service (TRS), and universal service. The FCC is simply unable and ill-equipped to address the network management practices and needs of smaller geographic states with sparse population centers on equal terms as large geographic states with concentrated populations.

Equally important, a critical state role is needed not least because the resulting joint allocation of jurisdiction between the FCC and the states will give network owners and service providers multiple forums for dispute resolution. Some matters are far more local or national than others. A single forum – namely the FCC - focused on doing all disputes for all parties at all times on every issue in any location is a formula for failure.

On the other hand, states continue to possess and develop the required legal and technical expertise to address intrastate issues given their better knowledge of local market conditions. The states are better poised to focus on market development and service concerns whether the consumer is an end-user or wholesale customer of interconnection and access services.

In sharp contrast, preemption will concentrate the requisite regulatory authority and enforcement in a single body – the FCC – while either ignoring or delegating the necessary implementation to state commissions. The delegation, bereft as it likely will be of resource support absent authority to assess all revenues for state efforts, will transform a robust joint governmental structure into one wherein an omnipotent or omniscient FCC imposes unicameral mandates on administrative mendicants.

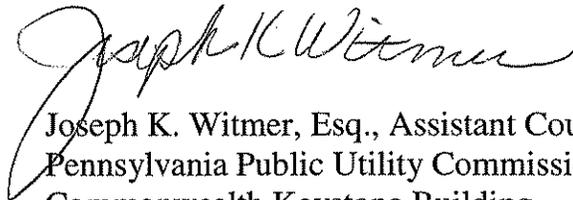
A joint jurisdictional approach avoids the regulatory problems created by the *Vonage Order* with its limited preemption, interpreted by some courts to apply only to “nomadic” VoIP and not “fixed” VoIP. This approach also avoids the *pulver.com* exclusion of “information service” if that service is a voice product – a concern with clear consequences set out in NARUC’s Comments.³¹

As noted earlier, the Pa. PUC comments view the PSTN to be the PSTN whether it is a Public Switched Transportation Network or a Packet Sending Transmission Network.³² The Pa. PUC urges the FCC to retain an important role for the states in a joint governmental approach notwithstanding technological change.

The Pa. PUC appreciates the opportunity to file these Reply Comments.

Respectfully Submitted On Behalf Of,

The Pennsylvania Public Utility Commission



Joseph K. Witmer, Esq., Assistant Counsel,
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
(717) 787-3663
Email: joswitmer@state.pa.us

Dated: May 23, 2011

³¹ *2011Reform NOPR*, NARUC Comments (April 18, 2011), pp. 3-5.

³² *In re: A National Broadband Plan for Our Future*, Docket No. 09-51, Comments of the Pa. PUC (October 12, 2010), p. 16.