

**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)	WC Docket No. 01-92
)	
Federal State Joint Board on Universal Service LifeLine and Link-Up)	WC Docket No. 96-45
)	

**REPLY COMMENTS OF THE
ARIZONA CORPORATION COMMISSION**

The Arizona Corporation Commission (“Arizona Commission” or “ACC”) submits the following reply comments on the Commission’s proposals for comprehensive reform of intercarrier compensation and the federal universal service funding mechanism; and on the comments of other interested parties filed on April 18, 2011.

The Arizona Commission appreciates the opportunity to file these comments on the important issues raised in these proceedings. The Arizona Commission commends the FCC for setting the stage to take action on both Intercarrier Compensation and Federal Universal Service Reform in the near future.

The FCC’s Notice of Proposed Rulemaking (“NOPR”) raises a host of legal issues underlying the various proposals the FCC has set forth in its NOPR which will be one of the primary areas of discussion in these comments.

The FCC states that its proposed reform is designed to achieve four core principles: 1) modernizing and refocusing USF and ICC to ensure all Americans have access to robust, affordable broadband, 2) accelerating the transition to IP networks; 3) achieving fiscal responsibility and accountability; 4) using market-driven and incentive-based policies.

I. INTERCARRIER COMPENSATION REFORM PROPOSALS

The current system of intercarrier compensation consists of: (1) originating and terminating interstate and intrastate access charges, (2) reciprocal compensation and (3) other rules governing intercarrier compensation for wireless traffic, ISP-bound traffic and traffic on Competitive Local Exchange Carrier (“CLEC”) networks.

The NOPR highlights the following four fundamental problems with the current system: “(1) the system is based on outdated concepts and a per-minute rate structure from the 1980s that is no longer matches industry realities; (2) rates vary based on the type of provider and where the call originated, even though the function of originating or terminating a call does not change; (3) because most intercarrier compensation rates are set above incremental cost, they create incentives to retain old voice technologies and engage in regulatory arbitrage for profit; and (4) technological advances, including the rise of new modes of communications such as texting, e-mail, and wireless substitution have caused local exchange carriers’ compensable minutes to decline, resulting in additional pressures on the system and uncertainty for carriers.”¹

The FCC also charts the declines that carriers have been experiencing in switched access minutes of use since 2000. Thus what was once a steady stream of revenue for carriers has become more unreliable due to “(1) the arbitrage of disparate access rates, (2) various forms of access avoidance (e.g. unidentifiable and unbillable ‘phantom traffic’), the refusal of many interconnected VoIP service providers to pay access charges, and (3)

¹ NOPR at para. 495.

the proliferation of broadband connections which has caused a drop in the number of traditional access lines as well as a related decline in minutes that originate and terminate on the PSTN.”

It is clear from the information set forth in the NOPR, and from other proceedings at the federal level and state level in Arizona that the time for discussion has passed, and that reform of the current ICC rules is necessary. In its Notice, the FCC seeks comment on its legal authority to reform intercarrier compensation through the use of one of two different transition paths.² Long-term reform according to the FCC’s NOPR would be a gradual phase out of the current per-minute ICC system and implementation of a recovery mechanisms that would allow some providers to receive additional explicit support from the CAF and reasonable end user surcharges.

The first path would involve the FCC working in partnership with the states to reform intercarrier compensation.³ The transition would be implemented through reliance on the existing roles played by the states and the FCC. Under the first option, the states would continue to be responsible for reforming intrastate access charges.⁴ However, the FCC seeks comment on ways to incentivize states to complete intrastate access charge reform and also suggests a backstop mechanism which after a specified period of time (4 years), the FCC would take action if states have not done so.⁵ The first option would also involve further reductions to interstate access charges and a methodology that states would implement to reduce reciprocal compensation rates.

The second option would be for the FCC to include all intercarrier rates, both interstate and intrastate, under the framework for reciprocal compensation. Under this option the FCC would establish a methodology for intercarrier rates, which states then would implement.

² NOPR at para. 509.

³ *Id.* at para. 534.

⁴ *Id.*

⁵ *Id.*

The Arizona Commission agrees with the National Association of Regulatory Utility Commissioners (“NARUC”), the majority of other state commissions and other parties, that option 1 is the preferable option to achieve ICC reform.⁶ It is critical that the FCC achieve further reform in partnership with the state commissions and not through further preemption of the states’ role in this area. 47 U.S.C. Section 152(b) preserves the states authority over intrastate services. It provides as follows: “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 communications service by wire or radio of any carrier.”

In addition, we believe that the FCC’s authority to accomplish reform under option 2 is legally suspect and would not be upheld if challenged. The FCC has in the past recognized that there are two primary intercarrier compensation regimes in existence today: the access charge regime applicable to long distance traffic and the reciprocal compensation regime applicable to local traffic. The FCC has also correctly interpreted §251(b)(5) to apply only to local traffic in the past. The language of the reciprocal compensation provision itself refers only to the “transport and *termination* of traffic,” which is characteristic of local traffic. Long distance traffic has both origination and termination charges. The fact that origination charges are not referred to in subpart 251(b)(5) is a strong indication that it was meant to apply to local traffic only. The legislative history also supports this viewpoint.⁷

In addition Section 251(g) keeps intact the current access charge regime applicable to interexchange carriers:

“CONTINUED ENFORCEMENT OF EXCHANGE ACCESS
AND INTERCONNECTION REQUIREMENTS—On and after the date
of enactment of the Telecommunications Act of 1996, each local exchange
carrier, to the extent that it provides wireline services, shall provide

⁶ Comments of the California Public Utilities Commission and the People of the State of California on the Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, at p. 20, et. al.

⁷ *Accord*, Comments of the National Association of Regulatory Utility Commissioners (“NARUC”) at p. 10.

exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after the date of enactment. ...”

Thus, it is clear that Congress intended two separate systems of intercarrier compensation through the language of this section, and Section 251(b)(5), one applicable to local traffic and the other applicable to interexchange traffic. The FCC’s prior interpretation of Section 251(b)(5) is the correct interpretation and the FCC should not now try to bring all traffic under the Section 251(b)(5) umbrella because it is not supportable.⁸

It is clear to the Arizona Commission that use of option 2 by the FCC will also result in costly and protracted litigation when the FCC could accomplish the same access charge reductions by working in partnership with the states through the use of option 1 set forth above. Moreover, as the record in this proceeding demonstrates, many state commissions, including the Arizona Commission, have already begun the process of intrastate access charge reform. The Arizona Commission began this process with Qwest many years ago when it required Qwest to reduce its access charges in the context of its Price Cap Plan review. The ultimate objective recognized by the Arizona Commission in that proceeding, was to achieve parity with interstate access rates. The Arizona Commission several months ago completed the evidentiary hearing in phase II of its intrastate access charge reform proceeding. A primary focus of that proceeding was access charge reform for smaller incumbent carriers in Arizona and for competitive local

⁸ It is also premature to consider mandatory bill-and-keep for this traffic under Section 251(b)(5). Industry participants only use bill-and-keep when the traffic exchanged between them is approximately equal.

exchange carriers (CLECs). The recommended opinion and order of the administrative law judge is expected sometime in the second quarter of 2011.

After the initial stage of reform is completed (parity between intrastate and interstate access charges); the ACC agrees with those commenters who advocate a reevaluation at that time to determine what any final transition ICC reform plan should encompass.

In summary, the FCC should resist calls by parties to preempt state authority over intrastate access rates.⁹ First, there is no basis for preemption since many states, (including the Arizona Commission) are in the process of reforming intrastate access rates, with the objective of bringing them down to interstate levels. Second, the FCC should work in partnership with the states to achieve the reforms in this area. As the FCC itself notes at para. 13 “[w]e recognize that USF and ICC are both hybrid state-federal systems and that reform will work best with the Commission and state regulators cooperating to achieve shared goals.”

II. FEDERAL UNIVERSAL SERVICE FUND REFORM PROPOSALS

Equally critical are the reforms to the federal universal service fund. The Arizona Commission, like practically all commenters in this proceeding, supports the rapid and universal deployment of broadband throughout the United States. The issues raised in the FCC’s NOPR concern how best to promote broadband deployment; how to transition the current federal High Cost Fund (focused on telephone service) into a Connect America Fund for broadband; how to ensure fiscal accountability and how to increase the state’s willingness to make commitments in addition to any federal commitments.

⁹ See Comments of Integra; *see also* Comments of PAETEC et al at p.23 (“The Commission should adopt a safe harbor providing LECs with the option of charging a unified tariffed rate for all traffic. This unified rate would be tariffed and would apply regardless of whether the traffic is jurisdictionally interstate access, intrastate access, CMRS, interconnected VoIP, reciprocal compensation, or any other type of traffic”); see also Comments of XO Communications LLC at 15(“XO does not believe the Commission should defer to the states to determine the transition from intrastate access rates in each state.”).

The Arizona Commission supports the four specific priorities for the federal universal service high-cost program which were identified in the NOPR:

- 1) The program must preserve and advance voice service,
- 2) The program must ensure universal deployment of modern networks capable of supporting necessary broadband applications as well as voice service,
- 3) The program must ensure that rates for broadband service are reasonably comparable in all regions of the nation and rates for voice service are reasonably comparable in all regions of the nation,
- 4) The contribution burden on households should be limited.

Today the existing federal High Cost Fund alone includes, (1) high-cost model support, (2) interstate access support, (3) high-cost loop support, (4) local switching support, and (5) interstate common line support. In 2010, the High-Cost Fund disbursed \$4.3 billion through these five separate mechanisms alone.

The FCC proposes to transform the existing high-cost program into a new, more efficient broadband-focused¹⁰ Connect America Fund (“CAF”). During Phase I or the transition phase, there would be the CAF Phase I mechanism, the Mobility Fund and ICC Recovery alongwith a reformed High Cost Fund. Beginning in 2012, the HCL support would be reduced; LSS would be phased out or combined with HCL; reasonable guidelines for reimbursements for capital and operating expenses based on benchmarks would be developed; the support per line any one carrier receives would be limited, absent exceptional circumstances; the study area waiver process would be streamlined, and the rules that limit support when acquiring lines from another provider would be

¹⁰ Most parties appear to support a 4/1 Mbps standard which was the standard articulated by the National Broadband Plan. *But see contra*, Comments of AT&T and CenturyLink which suggest a slightly slower upstream threshold would dramatically reduce the amount of funding necessary without adversely affecting service. Note also that according to AT&T the FCC’s June 2010 Local Telephone Competition report at 6, 2 n.4 shows that 69% of reportable Internet access service connections would not meet this standard.

modified where the acquired lines are substantially unserved by broadband; the Interstate Access Support (“IAS”) would be phased out over a period of a few years; and the “identical support” rule would be eliminated.

In Phase II, everything would apparently be combined into one fund called the CAF. The CAF would ultimately replace all other explicit support provided by the current high-cost fund as well as implicit subsidies from ICC reform.

The FCC also proposes that total disbursements (with remaining high-cost support) be no greater than the high-cost program under the current rules. To spur immediate new broadband investment through the CAF, the FCC proposes to conduct a competitive bidding process (aka a reverse auction of a procurement auction) in which providers seeking a one-time infusion of support to buildout and operate broadband networks in unserved areas across the country compete against one another by bidding for the lowest amount of support they would require to provide service to unserved housing units.¹¹ Recipients could be either fixed or mobile wireless providers and will be subject to enforceable requirements to deploy broadband in a certain timeframe. If the auction winner is not the existing incumbent recipient of USF during this interim transition period, the incumbent carrier of last resort would continue to receive its existing support. If the auction winner is the existing provider, the new funding would supplement its existing support.

Voice service could be provided by any technology, including VoIP, so that USF can be used directly to support modern IP-based networks.

In the second stage of its comprehensive universal service reform, the FCC would transition all remaining high-cost programs to the CAF. The FCC states that the CAF would provide ongoing support to maintain and advance broadband across the country in areas that are uneconomic to serve absent such support, with voice service ultimately

¹¹ See NOPR at para. 24.

provided as an application over broadband networks. Under Phase II, the FCC would award all ongoing support through a competitive, technology-neutral bidding mechanism. Under another option, in each part of the country requiring ongoing support, the FCC could offer the current voice carrier of last resort (likely an incumbent telephone company) a right of first refusal to serve the area as the broadband provider of last resort for an ongoing amount of annual support based on a cost model. If the provider refuses this offer, the Commission could implement a competitive, technology-neutral process to select a provider to serve the area and take on all service obligations. In the alternative, the FCC seeks comment on limiting right-of-first refusal or auction-based support to a subset of geographic areas, such as those served by price cap companies while continuing to provide ongoing support based on reasonable actual investment to smaller, rate-of-return companies.

The FCC proposes other changes to the ETC designation process administered by state commissions and changes to increase accountability and better track performance of the fund as a whole.

The FCC also seeks comment on its legal authority to implement these various changes. The major issue here involves the inclusion of broadband as a supported service, when it is classified as an information service. The ACC believes that the FCC has legal avenues to include broadband as a supported service, some of which are identified in the NOPR. The Arizona Commission discusses the legal issues raised below; as well as other facets of the FCC's proposal.

The transitioning of the existing high cost funds beginning in 2012 must be approached with caution. From the record in this proceeding it is apparent that many carriers, large and small alike, still rely upon these funds for their existing service obligations and to deploy advanced infrastructure.¹² The strong desire for deployment of

¹² *Accord*, Comments of the Indiana Utility Regulatory Commission at 3, et. al.

an advanced network should not be done at the expense of carriers that are COLRs and ETCs in their respective areas and need to rely upon the funds to provide quality service and upgrade their networks.¹³ Any transition period must carefully consider the comments of the providers who continue to rely upon these funds in this proceeding.

The FCC has listed the Mobility Fund under its Phase I CAF reform. We support the adoption of a Mobility Fund consistent with the State Members of the Federal-State Joint Board on Universal Service's recommendation applicable to wireless providers. The FCC has already stated its intent to phase out the identical support rule which the Arizona Commission supports. Since the competitive ETCs that received this support were largely wireless providers, the FCC should consider redirecting some of these funds to the Mobility Fund. The other high cost support mechanisms being transitioned into the CAF should be directed toward a Wireline Broadband Fund. Thus there would be two funds supporting a wireline and a wireless provider in any given area.¹⁴

The FCC's proposed use of auctions is problematic in several ways. First, it would appear to dramatically impact the federal-state partnership with regard to the state's role in designating ETCs and COLRs. The Federal Act does not contemplate the use of auctions in choosing providers that are deemed eligible for support from the federal universal service fund, whatever form it ultimately takes. Instead, the Federal Act provides that state commission designate carriers that are eligible to receive federal high cost support in their states. If the FCC goes ahead with its auction process, it should provide for significant state involvement in the process.¹⁵ Further the way the process is set up, it is geared toward selecting the lowest cost provider (wireline or wireless) per

¹³ See Comments of CenturyLink and Frontier regarding the elimination of the IAS portion of the Fund.

¹⁴ However, because of historically low penetration rates for voice service, the FCC should consider the adoption of a separate Native American Broadband Fund. See Comments of Gila River Telecommunications.

¹⁵ This is the only instance where auctions may be appropriate, i.e., to enable the Commission to more appropriately determine wireless broadband deployment costs. However, we would prefer the State Members of the Federal State Joint Board on Universal Service approach outlined in their Comments on pps. 68-69.

service area. This approach may not be in the consumers or states best interest. Finally, we agree with many of the comments of the State Members of the Universal Service Joint Board in this regard. The State Members do not favor the use of auctions and for many of the same reasons the Arizona Commission advises against their use.

Whatever method adopted, however, with respect to the Wireline Broadband Fund, the existing wireline ETC in the area with COLR responsibilities, should be given a right of first refusal. If the FCC does go ahead with an auction process (which we do not recommend) it should not include Native American lands or small rural telephone company service areas.¹⁶

In the second phase of the process, the FCC proposes to award all ongoing support through a competitive bidding mechanism. In addition to the same concerns identified above, it is very unclear how this would work. The FCC states that if the existing carrier refuses to serve the area as the broadband provider of last resort for the support determined to be reasonable by a cost model, the Commission would hold the competitive bidding to select a provider to take on all service obligations. First, it appears unlikely that the FCC in this scenario would have many bidders. Second, again the federal/state role would be altered since typically it is the state commission that designates carriers of last resort. This would also appear to be a function that is uniquely within the state's purview and expertise. In the end, there are just too many unanswered questions surrounding use of the competitive bidding process proposed for phase two. There would appear to be better ways to ensure that the fund is being managed in a fiscally responsible manner than a competitive bidding process.

The FCC also seeks comment on means to encourage states to advance universal service. Specifically, the FCC inquires about a 2007 Federal-State Joint Board on

¹⁶ *Accord*, Comments of Gila River Telecommunications at p. 20 (“Reverse auctions will result in subpar and unacceptable service levels on tribal lands.”) We believe the better approach is to cap the amount of support per line while allowing the company to come forward with a demonstration of higher costs if it seeks support above the cap.

Universal Service recommendation that the FCC adopt policies that encourage states to provide matching funds for a proposed Broadband Fund and Mobility Fund. As the FCC notes, Arizona is one of at least 21 states that have state universal service funds. At present, the Arizona Universal Service Fund is aimed at providing ongoing support to ensure affordable voice services in Arizona.¹⁷ The Arizona Commission is considering revisions to its state universal service fund now to allow providers to receive support when necessary in conjunction with switched access charge reductions. The recommended opinion and order of the administrative law judge in this proceeding is expected in the second quarter of 2011. Any further revisions as a result of changes at the federal level would be contemplated at that time.

There are several ways to encourage greater state commitments to support universal service in partnership with the federal government.¹⁸ Naturally, states have a vital interest in ensuring that their citizens have access to the most modern, efficient and cost-effective network available. Continuing to provide the states a meaningful role in the selection and oversight process will likely lead to greater commitments on their part. It is critical that states continue to determine providers of last resort in their state. The FCC correctly states at para. 91 that incumbent carrier ETCs also typically are in many instances the state-mandated carrier of last resort.¹⁹

Several parties raise the prospect of giving the USF monies in the form of a block grant to the states to determine where the funds should be directed.²⁰ The Arizona

¹⁷ See also FCC NOPR at para. 86 (“We seek comment on what level of financial commitment should be expected from the states and territories to advance broadband. How should we address states that are disproportionately rural and generally lack a sizeable population to support service in rural areas? How should we address the various efforts of states and territories to contribute to preserving and advancing universal service – both in deployment and adoption?”).

¹⁸ The Federal Fund should remain directed at the interstate revenues of providers; while state funds should only encompass the intrastate revenues of providers. If the FCC targets both intrastate and interstate revenues as a source of funding; there may be a detrimental effect (and the FCC may be actually discouraging) the number of states with state universal service funds.

¹⁹ Support should be directed to carriers which are willing to assume COLR obligations.

²⁰ See Comments of the Massachusetts Department of Telecommunications and Cable at 17-18. (“The MDTC reiterates its position that ‘states are better suited than the Commission to effectively administer

Commission would not oppose this type of paradigm for fund distribution; although this could stress the resources of smaller state commissions. If this type of distribution paradigm were adopted, states should not be required to undertake this unless they elect to do so.

Matching funds over and above a base amount of support determined to be necessary, may also encourage greater commitments on the part of the states. The states could also assist with fiscal responsibility and accountability conditions or obligations.

Finally, the Arizona Commission agrees with other commenters including the State Members of the Federal State Joint Board on Universal Service that the base if contributors should include should also include DSL, cable modem and wireless broadband providers.

Finally, the Arizona Commission offers the following comments with respect to the FCC's authority to revamp the federal fund to support broadband deployment in the future. There is no question that the FCC has the express statutory authority to extend universal service support to broadband services that providers offer as telecommunications services.

Section 254(2)(c)(1) provides:

“Universal service is an evolving level of *telecommunications services* that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services.”

Only an *eligible telecommunications carrier* designated under section 214(e) can be eligible to receive specific Federal universal service support. Contributions to the fund are to be made by “*telecommunications carriers*.” Section 254(2)(d) provides that “[e]very *telecommunications carrier* that provides interstate *telecommunications services* shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable,

funding’ and urges the Commission to first consider allocating any funding directly to the states to determine and oversee funding recipients.”)

and sufficient mechanisms established by the Commission to preserve and advance universal service. According to the FCC more than 800 incumbent local telephone companies offer broadband transmission as a telecommunications service. It is the ACC's understanding that these are largely small rural providers. There is no doubt that all of these carriers would be eligible for universal service support under federal law for broadband since they have elected to have their broadband services classified as a *telecommunications service*.

The FCC's authority to include broadband in the list of supported services under the CAF of course becomes much more questionable when the broadband service is classified as an "information service." The NOPR recognizes this fact.

Still there are ways that the FCC could achieve its goal of inclusion of broadband in the list of supported services in one of two ways. In this respect our comments echo those filed by the National Association of Regulatory Utility Commissioners ("NARUC"). First, where the broadband service is being offered in tandem with a real-time point-to-point fee based voice service which is classified as a *telecommunications service*, certainly this would appear to meet the requirements of Section 254 and 214 of the Act. This is consistent with the FCC's proposal to recognize VoIP as a voice service eligible for support. Second, carriers that provide standalone broadband, could still receive support, if they offer the standalone broadband as a *telecommunications service*. Of course, a final option also exists where the carrier can elect to have its broadband service classified as a "telecommunications service."

The FCC also inquires whether section 254 (construed as a whole), section 706 of the Act, or the Commission's ancillary authority could be used to make an argument for including broadband as a supported service. Given the express language of the Communications Act itself, there is nothing in section 254, section 706 or the FCC's ancillary authority that is likely to change this result.

The Arizona Commission believes that the need for a service to be a *telecommunications service* to be supported is most consistent with a reading of § 254 as a whole. While it is true that several of the USF principles contained in § 254(b) of the Federal Act refer to advanced telecommunications and information services; at the time the law was drafted, information services consisted only of applications riding on top of the broadband circuit. So the reference to “advanced telecommunications and information services” in the USF principles was likely to broadband (as an advanced telecommunications service) and to information services as they were defined by the FCC and the Act at that time.

Nor does section 706 appear to be an independent grant of authority to the FCC to include broadband, when defined as an information service, within the definition of supported services. The references throughout section 706 are to deployment of “advanced *telecommunications* capability.” While § 706 may have contemplated the addition of broadband to the list of supported services, it was as a *telecommunications service*. It is important that at the time that § 706 was added to the Communications Act, broadband had not yet been classified as an “information service.” Section 706 also gives the FCC and state commissions very explicit direction as to the particular regulatory tools to be used: “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to investment.” There is no reference to including the service(s) within the list of services subject to support from the federal universal service fund.²¹

The FCC’s authority to include broadband as an information service within the supported services pursuant to its Title I ancillary authority is also suspect. The FCC states that when the Commission created the high-cost universal service program in 1984,

²¹ This was one of the advantages the ACC noted with Chairman Genachowski’s Third Way proposal; there would not be continued litigation over what the FCC could or could not do with respect to broadband when classified as an information service. Chairman Genachowski’s proposal also included a significant degree of forbearance from Title II obligations.

it relied upon those provisions in Title I and its decision was affirmed by the D.C. Circuit. But the Court's later decision is instructive in this regard, and the FCC recognizes this in its NOPR. The Court in *Comcast Corp. v. FCC*²², stated that its earlier decision did not rest on Title I alone but additionally on the fact that creation of the federal universal service fund at that time was ancillary to the Commission's Title II responsibility to set reasonable interstate rates. Congress has since set out expressly the parameters of the federal universal fund and it is questionable whether the FCC can use its Title I authority to deviate from what are now express Congressional mandates.

The FCC also seeks comment on its ability to modify the ETC designation process contained in Section 214 of the 1996 Act, which is implemented by State commissions, to include broadband. Specifically, the FCC inquires whether it could provide support to information services providers consistent with section 254(3), which states that "only an eligible *telecommunications carrier* designated under section 214(e) shall be eligible to receive specific Federal universal service support." There is no need for modification if one of the two circumstances discussed above is met. First, the broadband is classified as a telecommunications service whether by the FCC or by the carrier's election. Second, the FCC classifies interconnected VoIP as a telecommunications service and it is provided over the carrier's broadband network. The Arizona Commission believes that the state commissions are and should continue to be the responsible agency to make ETC designations whether for voice or broadband service.

The FCC inquires whether it could simply condition a provider's receipt of support on its agreement to offer broadband service.²³ The Arizona Commission believes that this approach is once again suspect because the relevant statutory provisions are clear that only telecommunications services are eligible for support from the fund. The FCC

²² *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C.Cir. 2010).

²³ NOPR at para. 71

may legally condition a provider's support in various ways. But, the FCC's proposal goes well beyond this. The FCC would in reality be directing support to a non-telecommunications or information service in contravention of the statute, despite the fact that it was not expressly listed as a supported service.

Finally, the FCC inquires whether it could use its forbearance authority under Section 10 of the Communications Act to support broadband *information services*, despite the language in Section 254 of the Act which defines universal services as "an evolving level of *telecommunications services*". Section 10 states that the Commission can forbear from applying any regulation or provision of the Act to a telecommunications carrier or telecommunications services, or class of telecommunications carriers or telecommunications services, when certain criteria are met. The use of Section 10 proposed by the FCC here is different than that contemplated by the express language of that section. The language of Section 10 refers to forbearance from applying the regulation to a telecommunications service or carrier. The use of Section 10 proposed by the FCC in the NOPR would be to waive specific requirements of Section 254 with respect to the criteria set forth by Congress to define universal service. The ACC believes that it is unlikely that use of Section 10 in this manner would sustain legal challenge.

In summary, the Arizona Commission supports the FCC's objectives with respect to broadband and believes they can be accomplished with the least amount of challenge and litigation in the manner and ways discussed above. Like the FCC, the Arizona Commission supports the widespread and ubiquitous deployment of broadband and favors its inclusion as a supported service under the CAF.

III. THE IP BASED NETWORK OF THE FUTURE

Much of the reform contemplated by the FCC in its NOPR is with an eye toward the IP based network of the future. In other words, the FCC and most commenters in this proceeding acknowledge that the PSTN is on its way to becoming IP based in the future,

and the ICC regime and the federal universal service fund must be transitioned to reflect this new world.

During the transition period, the FCC inquires both on the classification of voice over internet protocol (“VoIP”) and the ultimate compensation rates that should apply; specifically elimination of per minute rates in favor of fixed rates or bill-and-keep. The FCC inquires whether it should consider classifying interconnected VoIP as a telecommunications service or an information service in this proceeding. The Arizona Commission would urge the FCC to classify VoIP in this proceeding, or in the *IP-Enabled Service proceeding* simultaneously with a decision in this proceeding.

In reading the comments of others, we are aware that some providers encourage the FCC to once again take no action to classify VoIP as either a “telecommunications service” or an “information service.” However, this would be the worst of all worlds for everyone involved, including the FCC, state commissions and carriers.

First, it is likely that classification of this service as a “telecommunications service” would enable the FCC to support networks used to provide interconnected VoIP. By not acting, the FCC may be eliminating one of the best arguments it has to include broadband within the list of services eligible for federal universal service support.

Second, while classification of VoIP is likely to engender some litigation initially, not classifying VoIP will surely result in prolonged and protracted litigation which will be very costly and unproductive to the industry as a whole. One of the benefits of the reform proposals in this proceeding acknowledged by the FCC itself is that the much needed reform should eliminate the need for costly and time-consuming litigation. This is also an important reason for classifying VoIP at this juncture. If the FCC does not finally classify VoIP, there will be endless proceedings at the state level, endless filings at the FCC seeking action, and endless lawsuits in the federal courts. This is not in anyone’s best interest.

In that regard, we believe that interconnected VoIP should be classified as a telecommunications service. First, the Supreme Court's decision in *Brand X*²⁴ supports this classification. Second, this classification is supported by the Commission's own decisions. Finally, there is little doubt that this service is the functional equivalent of telecommunications service. Cox, the predominant cable provider in Arizona, does not distinguish its digital phone service by the underlying technology used to serve the end user and therefore complies with all applicable state regulation at this time.

Classification of interconnected VoIP will have other benefits as well including solving some problems which now exist. According to some commenters, the transition to an IP network is well underway.²⁵ Resolving the ambiguity surrounding the provision of VoIP in as many ways as possible is critical to wide-scale advancement of the IP network of the future. In this regard, we agree with those commenters that advocate that the Commission should immediately clarify in this proceeding that IP-to-IP interconnection is an obligation under section 251(c)(2) of the Act and subject to arbitration by state commissions.²⁶ Once VoIP is classified as a telecommunications service, we believe that the resolution of issues between providers would best be resolved through the Section 251 and 252 processes. In addition, we agree with the comment of others that rather than mandating at this time the specific terms for interconnection, the FCC should allow carriers to freely negotiate what those terms should be which may ultimately be instructive to the FCC, and any policies it eventually adopts.²⁷

²⁴ *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

²⁵ See Comments of Paetec Holding Corp., MPower Communications Corp., U.S. TelePacific Corp., RCN Telecom Services, LLC and TDS Metrocom LLC. at p. 4. ("...IP technology is already widely deployed within the industry. Finally all newly deployed switches either use IP technology natively, or accept IP interfaces; and carriers using older switches can install media gateways that convert between TDM and IP formats.")

²⁶ See Comments of Paetec Holding Corp. MPower Communications Corp., U.S. TelePacific Corp., RCN Telecom Services, LLC, and TDS Metrocom, LLC.

²⁷ *Id.*; see also Comments of Cox Communications.

Finally, the FCC should carefully consider the comments of many parties that adoption of a VoIP specific rate or bill-and-keep may “perpetuate arbitrage because carriers cannot distinguish interconnected from TDM traffic and a lower rate for VoIP provides a heightened incentive for arbitrage...”²⁸ Several parties point out that the cost to a carrier to terminate a call (whether IP or circuit-switched) is the same. For this reason, many facilities based CLECs and ILECs advocate that FCC adopt “equal payment rules for IP- and TDM-based traffic, both for access services and local termination,” during this transition period.²⁹

IV. CONCLUSION

The Arizona Commission appreciates the opportunity to submit comment on the very important issues raised in the FCC’s NOPR. We believe the best approach with respect to the reform contemplated is for state and federal regulators to approach the issues as partners to achieve the desired results. The Arizona Commission looks forward to further participation on these issues.

RESPECTFULLY submitted this 23rd day of May, 2011.

/s/ Maureen A. Scott

Maureen A. Scott, Senior Staff Counsel
Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007
(602) 542-6022

²⁸ *Id.*

²⁹ See Comments of Cox Communications; see also Comments of CenturyLink (“It should confirm ‘that IP-on-the-PSTN traffic is subject to the same intercarrier compensation charges – intrastate access, interstate access, and reciprocal compensation charges – as other voice telephone service traffic both today, and during any intercarrier compensation reform transition.’”); see also Comments of Frontier, NECA, NTCA, Paetec et al.