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

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

FURTHER COMMENTS OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION AND ACCOMPANYING LEGAL MEMORANDUM

The Pennsylvania Public Utility Commission (Pa. PUC) hereby submits these Further Comments to the *Further Inquiry into Certain Issues in the Universal Service Intercarrier Compensation Transformation Proceeding* in accordance with Public Notice DA 11-1348 released by the Federal Communications Commission (FCC or Commission) on August 3, 2011. The FCC has established the extremely abbreviated deadlines of August 24, 2011 for the submission of comments and August 31, 2011 for the submission of reply comments. The Pa. PUC incorporates in its Further Comments the following:

- Its April 1, 2011 Comments to Section XV of the *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking* (Pa. PUC Initial Comments to the NPRM);

- Its May 23, 2011 Reply Comments (Pa. PUC Reply Comments to the NPRM); and

- Its July 12, 2010 Initial Comments to the High Cost NPRM initially issued on April 21, 2010 (WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 05-337).

The Pa. PUC appreciates the opportunity to submit these Further Comments along with a separate Legal Memorandum that is attached. As a preliminary matter, these Further Comments should not be construed as binding on the Pa. PUC in any proceeding pending before the Pa. PUC. Moreover, these Further Comments could change in response to subsequent events. This includes a later review of other filed comments and legal and/or regulatory developments at the federal or state level.

I. INTRODUCTION

The FCC's invitation, albeit on the basis of unwarranted and extremely abbreviated deadlines, for further comments is occasioned by the July 29, 2011 ex parte submission of a partial industry consensus proposal under the banner of the United States Telecom Association (USTA) labeled as "America's Broadband Connectivity Plan" or "ABC Plan." Unfortunately, the USTA proposal offers neither "B" for broadband nor "C" for connectivity to American end-user consumers of telecommunications and communications services, and it is not a "plan." Instead, the USTA proposal reflects a partial industry consensus that is primarily designed to serve the business interests of AT&T and Verizon Communications Corporation (Verizon) at the great expense of end-user consumers of telecommunications services, especially those in the rural areas of Pennsylvania and other states.

At the same time, if the USTA proposal is accepted by the Commission, it will implement a far reaching and patently unlawful deregulatory agenda. This deregulatory drive is designed to obviate the regulatory obligations and broadband deployment commitments of the USTA proposal participants and other incumbent local exchange carriers (ILECs), where such obligations exist under independent state law, the direct state enforcement of federal law, and/or other regulatory directives, e.g., various merger commitments at the federal and/or state levels. In short, the USTA proposal will not serve the FCC's own professed goals of universally deployed and available retail broadband access facilities and services expressed in its National Broadband Plan.

The states, inclusive of state utility commissions and statutory consumer advocates, will have no other recourse but to appeal the FCC's adoption of the "ABC" proposal in order to preserve crucial and lawful state jurisdiction over such areas as carrier of last resort (COLR) obligations, intrastate rate authority, consumer protection, broadband deployment, the provision of adequate and reliable telecommunications and communications facilities and services, etc. In short, the FCC's adoption of the USTA proposal will lead to federal appellate litigation prolonging the current lack of needed reforms both in interstate intercarrier compensation and the federal universal service fund (USF).

II. THE USTA PROPOSAL IS LEGALLY AND TECHNICALLY FLAWED

A. The USTA Proposal Does Not Represent Consensus

The numerous ex parte filings made with the FCC shortly before and immediately after the USTA proposal was made patently indicate that the "ABC Plan" does not represent consensus,[1] contrary to the regular and monotonous claims made by its proponents. It is obvious that major segments of the telecommunications and communications industries have not signed on to the USTA proposal. State regulators, state consumer advocates (e.g., NASUCA), and consumer groups at best have been sketchily informed on the substance of the USTA proposal. Furthermore, the consensus that is being advertised as existing among the participating parties in the USTA proposal can best be characterized as a forced accommodation or as a "shotgun marriage" of convenience. For example, USTA's accompanying "Legal Authority White Paper" goes to great lengths to repeatedly explain that the parties to this so-called consensus proposal "have taken different positions whether all VoIP [voice over the Internet Protocol] traffic is currently interstate for jurisdictional purposes."[2] The USTA proposal participating parties have also omitted to state that they continue to have fundamental and materially different positions in such crucial matters as intrastate intercarrier compensation in individual state adjudication proceedings which are not likely to be resolved even if there is an advertised accommodation under the banner of the "ABC Plan" at the federal level.

[1] *See generally* State Members of the Universal Service Joint Board, Notice of Oral Ex Parte, July 14, 2011, WC Docket No. 10-90 *et al.*; Free Press, Notice of Oral Ex Parte, August 2, 2011, WC Docket No. 10-90 *et al.*; National Association of Utility Consumer Advocates (NASUCA), Notice of Oral Ex Parte, August 2, 2011, WC Docket No. 10-90 *et al.*; Rural Cellular Association, Notice of Oral Ex Parte, August 2, 2011, WC Docket No. 10-90 *et al.*
[2] USTA Proposal, Attachment 5, at 21.

At the very least, the "ABC Plan" represents a "partial settlement agreement" confined to a very small number of parties in the context of a major FCC rulemaking that has disproportionate regulatory implications exceeding the scope of the Commission's original NPRM. Legally, it cannot be treated with deference nor can it become the central axis of the Commission's forthcoming decision on interstate intercarrier compensation and federal USF reform. To do otherwise will invite appellate review when even the FCC through its August 3, 2011 Public Notice expressed its numerous concerns and hastily invited further comment on major aspects of the USTA proposal. In summary, the FCC cannot belatedly elevate USTA's July 29, 2011 submission and its proposal above the positions of many other parties that timely submitted comprehensive comments and reply comments in this proceeding within the originally established time schedule.[3]

B. The USTA Proposal Lacks Transparency

The central foundation of the USTA proposal rests upon the presented summary of the results, assumptions, and description of the CostQuest Associates, Inc. (CostQuest) "Broadband Analysis Tool" or CQBAT model.[4] The assumptions, the input parameters and their values, the internal logic and operation of the CQBAT model, and even the output results are opaque, and they have not been independently tested for their robustness and reliability. Nor has the USTA or the FCC made any arrangements for the independent testing and verification of the CQBAT model. Furthermore, the CQBAT model in and of itself and all of its accompanying data sets had not been made part of the actual record in this rulemaking proceeding as of August 23, 2011.

Contrary to past FCC practice, e.g., with the Synthesis cost model and other similar ones, the CQBAT model is not web-accessible, preferably through the FCC's own web site, and interested and participating parties cannot make their own independent tests and model runs through the application of appropriate safeguards, e.g., use of passwords for interested parties that have agreed to use the CQBAT model only for the preparation and submission of comments to the FCC. It is glaringly apparent that this approach has not been followed here. Furthermore, since the CQBAT model is an integral and fundamental part of the USTA proposal, the Commission cannot first adopt even major elements of the "ABC Plan" and then "consider"

[3] FCC Public Notice DA 11-141, March 2, 2011.
[4] USTA Proposal, Attachments 2 and 3.

whether it can adopt the CQBAT model itself.[5] Shaping a decision on the basis of the USTA proposal without testing and verifying the reliability and robustness of the CQBAT model would be akin to licensing a commercial airliner for passenger traffic without knowing whether its flight control computer software is up to the task. From a legal perspective, such action would be arbitrary and capricious, it would not afford due process to interested parties, and would, at the least, constitute very poor public policy.

C. The USTA Proposal Is Not A "Plan" And Its National Impact Is Uncertain

The "partial settlement" accommodation that has produced the USTA proposal does not constitute a "plan" for the comprehensive and genuine reform of interstate intercarrier compensation and the federal USF. Although the USTA proposal may contain both explicit and implicit benefits for its proponents, e.g., potentially increased funding from a redirected federal USF for the price cap ILECs under the Connect America Fund (CAF), dramatically reduced intrastate and interstate carrier access charges to an uneconomic $0.0007 per minute of use (MOU) level for the wireless and long-distance operations of AT&T and Verizon, et al., its national impact on end-user consumers and members of the telecommunications industry (including some of the "ABC Plan" proponents themselves) is uncertain and unquantified. Because of its unlawfully overreaching aspects regarding federal preemption, especially when it comes to COLR obligations for the ILECs and intrastate carrier access rates, the USTA proposal if adopted will also impact the exclusive purview of state utility commissions, including retail service rate regulation and state-specific USFs. These national impacts have also escaped the attention of the "ABC Plan" participants.

The USTA proposal is internally inconsistent and fails its own basic arithmetic. The core USTA proposal for price cap carriers ostensibly purports to keep the proposed reforms within an annual budget of $4.5 billion of support from a redirected federal USF.[6] However, the concurrent Joint Letter from the proponents of the "ABC Plan" that addresses how this proposal will be implemented by the rate of return (ROR) carriers, references an annual support amount of $4.8 billion (the sum of $2.3 billion for ROR carriers by 6th year, $2.2 billion for price cap

[5] FCC Public Notice DA 11-1348, August 3, 2011, Sec. I.C.1, at 3.
[6] USTA Proposal, Attachment 1, at 1-2.

carriers, and $0.3 billion for mobility equals $4.8 billion and not $4.5 billion).[7] By the same token, the USTA proposal does not contain any detail on how much of the $4.5 billion of support for the ROR and price cap ILECs will be utilized as genuine high-cost support rather than as pure replacement for lost interstate and intrastate carrier access revenues because of the uneconomic access rates that the "ABC Plan" espouses.[8]

The USTA proposal puts forward considerable, unjustified, and unnecessary annual increases for the federal subscriber line charge (SLC) which can reach a total of $11.00 per access line per month for certain residential consumers by 2017 (a 9.16% annual compound rate of growth). However, the USTA proposal remains silent on the cumulative monetary impacts for end-user consumers, other than expressing the hope that "input cost reductions from lower intercarrier compensation rates… *would likely* in the future flow through to consumers and result in wireline and wireless price reductions."[9] This assertion is made despite the fact that neither the FCC nor the states exercises any effective price regulation over wireline long-distance and wireless rates, and that AT&T and Verizon are almost exclusively focused on financing their extensive future capital investment requirements for their respective wireless operations.[10]

In a similar fashion, the USTA proposal is silent on the national economic benefit losses that will result by retarding broadband deployment — especially in rural areas — and freeing price cap ILECs from COLR obligations, including those of universal service. The "ABC Plan" proponents may believe that such factors as consumer rates for satellite broadband service of varying quality, access to and quality/reliability of conventional wireline voice services (inclusive of access to 911/E911 emergency services), local retail service increases beyond the unwarranted ones for the federal SLC, and potentially increased requirements on state specific USFs, etc., are "someone else's problems." However, such issues carry national and regional

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[7] USTA Proposal Joint Letter of USTA, AT&T, CenturyLink, FairPoint Communications, Frontier, Verizon, Windstream, National Telecommunications Cooperative Association (NCTA), OPASTCO, and the Western Telecommunications Alliance, July 29, 2011, at 2.

[8] As late as August 18, 2011, the rural ROR carrier proponents had not yet been able to estimate how much of the $2.3 billion in annual support would be absorbed by the access restructure mechanism (ARM). USTA webinar to the States on the "ABC Plan," August 18, 2011.

[9] USTA Proposal, "Professor Hausman Consumer Benefits Paper," Attachment 4, at 2 (emphasis added).

[10] Such capital financing requirements include AT&T's approximate $39 billion cost for executing its proposed acquisition of T-Mobile's wireless operations that is currently under review by both agencies and departments of the federal government and a number of states. Standard and Poor's Stock Reports, August 20, 2011.

costs for end-user consumers and such costs have not been substantively addressed or quantified in the USTA proposal.

The USTA proposal is an "all or nothing partial settlement." Characteristically, the National Telecommunications Cooperative Association (NCTA) that represents ROR rural ILEC cooperatives stated the following in a recent ex parte to the Commission:

> We emphasized the critical need to ensure that material changes are not made to the Consensus Framework: we noted the focused negotiations that produced landmark industry compromise, and the fact that adjustments to any element, including the restructuring mechanism or further constrictions on cost recovery, would undermine the strength of the agreement and the ability of rural rate-of-return carriers to deploy and maintain networks, as well as their ability to meet debt obligations.[11]

If the Commission is explicitly urged to keep the material aspects of the USTA proposal intact, despite the issues that the FCC itself has raised with its August 3, 2011 Public Notice, the proposal in question, with its numerous and adverse implications for the broader national public interest, does not constitute and cannot be characterized as a "plan." In comparison, the State Members of the Federal State Joint Board on Universal Service (State Members) have presented a comprehensive State Plan for interstate intercarrier compensation and federal USF reform that also includes reforms for the contribution base of the federal USF (the large and inescapable but "missing link" in the FCC's NPRM and the USTA proposal).[12]

D. The USTA Proposal Will Retard Broadband Deployment

1. The USTA Proposal And Selective Broadband Deployment

The USTA's proposal regarding broadband deployment by price cap carriers under the "right of first refusal" (ROFR) mechanism will lead to selective broadband deployment, especially in high-cost wire centers in rural areas. This mechanism suffers from a series of serious foundational problems. In addition, the confluence of the various but unlawful federal

[11] NCTA, Notice of Ex Parte, August 19, 2011.
[12] Comments by the State Members of the Federal State Joint Board on Universal Service, WC Docket No. 10-90 *et al.*, May 2, 2011 (State Plan). The National Association of Regulatory Utility Commissioners (NARUC) strongly endorsed the State Plan via its *Resolution Strongly Supporting the Proposals Submitted on Universal Service Reform by the State Members of the Federal State Joint Board on Universal Service*, adopted on July 20, 2011 in Los Angeles, California (NARUC Resolution).

preemption proposals of the "ABC Plan," including state COLR obligations and state designation of eligible telecommunications carriers (ETCs), combined with the ROFR mechanism will essentially leave the price cap ILECs with the regulatory freedom to decide whether retail wireline broadband access facilities and services will be deployed in selected wire centers, especially in higher cost rural areas. This is not only incompatible with the letter and the spirit of applicable federal law and the FCC's own pronouncements on national broadband access, it is also patently antithetical with state initiatives and independent state laws that encourage and promote the universal deployment and availability of retail wireline broadband access facilities and services.

The underlying premise of the proposed ROFR mechanism suffers from a series of foundational problems, including but not limited to definitional issues, reliance on census blocks, and the CQBAT model for ascertaining the needs of broadband deployment and redirected federal USF support. The USTA proposal puts forward the proposition that there will be no "CAF support for census blocks served by an unsupported broadband competitor."[13] However, as the State Plan has already and soundly observed, the use of census blocks and associated mapping is insufficient for calculating federal support levels, assessing broadband deployment needs, and precisely ascertaining broadband availability.[14] For example, the presence of a so-called "unsupported broadband competitor" in a single location at a particular census block may "contaminate" the entire census block and *all* of its service locations thus making a number of end-users ineligible to receive supported broadband services under the USTA proposal from the established price cap ILECs. From the submitted materials it is totally unclear whether the USTA proposal and its foundational CQBAT model have addressed this fundamental issue and to what extent.

It is similarly unclear whether the presented CQBAT model assumptions and runs represent a genuine attempt to address the issue of supported broadband deployment or are simply results-driven and reach a predetermined result. The CQBAT model runs for "Scenario #1" where wireline broadband is deployed to all high-cost areas with an $80 per service location benchmark monthly cost resulted in a required amount of annual CAF support of $9.7 billion for all ILEC areas nationally, and in $5.9 billion of support for the price cap ILECs alone. It is only

[13] USTA Proposal, Attachment 1, at 3.
[14] State Plan, at 44-45.

through the use of the "unsupported broadband competitor" in the census blocks and the "alternative technology cost threshold" (i.e., use of satellite broadband) that the required amount of CAF support declines to the "manageable" annual level of $2.2 billion for the price cap ILECs under the USTA proposal.[15] Correspondingly, there is a complete lack of transparency and clarity on how the benchmark $80 per service location monthly cost was derived for the underlying CQBAT model runs, while it appears that the $256 "alternative technology cost threshold" was established simply so that the $2.2 billion of annual CAF support budget could be met for the price cap carriers.[16]

It is also very unclear how the base assumptions of the USTA proposal and the underlying CQBAT model runs have accommodated potential limitations of satellite broadband services. As the State Plan points out, complaints involving satellite service have included latency (transmission delays through geosynchronous orbit satellites) for voice communications, as well as weather sensitivity that affects both voice and data satellite communications.[17] Furthermore, although it is well known that the cost of satellite equipment is a major factor in the utilization of satellite services and the USTA proposal slates 728,202 service locations (650.554 residential and 77,648 business) for satellite broadband, it is completely silent on how its proposed "Advanced Mobility/Satellite Fund" of $300 million annually will operate in order to provide the necessary levels of operational and equipment support.[18]

A lack of definitional clarity pervades the USTA proposal regarding the ROFR mechanism for price cap ILECs. The proponents of the "ABC Plan" completely fail to state whether the "high-speed Internet service" that has been made "available to more than 35 percent of the service locations" in a particular wire center served by a price cap ILEC does or does not meet USTA's own prescribed 4 Mbps downstream and 768 kbps upstream broadband speed standard. For example, deployed broadband facilities that support a downstream speed standard of 1.544 Mbps can easily and incrementally be upgraded so that they can make retail broadband access available at the 4 Mbps downstream standard. However, it is unknown under the "ABC

[15] USTA Proposal, Attachment 1, at 5, Attachment 2, at 1-2.
[16] USTA Proposal, Attachment 2, at 2: "The $2.2 billion cap is maintained by setting the Alternative Technology Cost Threshold at $256 per service location, which means that the approximately 728 thousand highest-cost service locations will be served by an alternative broadband technology (i.e., satellite)." In contrast, the State Plan relies on a subscriber revenue constraint of $80 per subscriber for a voice, toll, and Internet access bundle, in its proposed mechanism for deriving provider of last resort (POLR) support. State Plan, at 51-52.
[17] State Plan, at 132-133 and n. 217-218.
[18] USTA Proposal, Attachment 1, at 8; USTA Ex Parte, August 16, 2011, Attachment A.

Plan" if wire centers "with substantial existing broadband investment" must or already meet the 4 Mbps / 768 kbps standard or simply their respective physical facilities are classified as "network capable" of doing so.

This uncertainty and lack of information in the USTA proposal creates a number of alternative scenarios with national ramifications and direct implications for the CQBAT cost model assumptions, input data, and output results. For example, it is unclear if the 1,776,699 residential service locations that currently have available retail broadband access receive associated services from the price cap ILECs at the 4 Mbps / 768 kbps standard.[19] If this is not the case, how is the 35% threshold level for the ROFR mechanism going to be computed? If the USTA proposal simply centers on the physical facilities that are considered or classified as "network capable" to deliver 4 Mbps / 768 kbps retail broadband access — and it is unknown whether it does or not — then objective measurements for the threshold 35% deployment level are needed. These objective measurements cannot be accomplished with unverified "back of the envelope" calculations but instead require a complete engineering audit examination for each of the price cap companies that would wish to utilize the ROFR mechanism for any of their wire centers, e.g., engineering audit assessments of central office (CO) switching capabilities inclusive of soft switch deployment, deployment of fiber optic interoffice facilities, deployment of remote terminals, etc. These objective standards would also cover the actual versus the advertised speeds of retail broadband access delivery to end-user consumers. Individual state commissions are experienced in conducting detailed engineering audits that address the deployment of retail broadband access facilities by telecommunications carriers.[20] Not surprisingly, the overarching USTA federal preemption proposals seek to bar any such state auditing and verification role in the potential implementation of the ROFR mechanism.

The 35% deployment threshold for the proposed ROFR mechanism is a very low figure and will result in "gaming" so that price cap carriers can either avoid deploying broadband in high-cost rural wire centers or not extend existing deployment in such locations to a higher percentage level. It is rather easy to perceive situations where a price cap ILEC would voluntarily forego CAF support under the ROFR mechanism in high-cost rural wire centers that

[19] USTA Ex Parte, August 16, 2011, Attachment A.
[20] *See generally* Pa. PUC, *Final Report for the Audit of Verizon Pennsylvania Inc.'s Network Modernization Plan Implementation Progress*, Docket No. D-06SPA022, The Liberty Consulting Group, June 16, 2008.

ostensibly meet the 35% threshold so that it can more profitably deploy retail broadband access facilities and services in wire centers whether or not CAF support is available. This "gaming" will easily retard broadband deployment in high-cost rural wire centers of the price cap carriers and will worsen, not cure, the "digital divide" that currently exists in many areas of the country. Such an outcome will stand in clear violation of both the letter and the spirit of Section 254(b)(3) of the federal Telecommunications Act of 1996 (TA-96), 47 U.S.C. § 254(b)(3). The State Plan, albeit through the initial use of a 768 kbps downstream speed standard, suggested a minimum deployment level of 40% with a full availability level at 90% for year 2012 so that a carrier would be eligible to receive the State Plan's contemplated POLR pro rated support.[21]

2. The USTA Proposal Violates Independent State Law

The USTA proposal regarding the ROFR mechanism, when coupled with its incorporated broad but unlawful federal preemption initiatives, collides head on with broadband deployment requirements under state law. In Pennsylvania, both rural and non-rural ILECs that have selected an alternative form of regulation with incentive intrastate price cap mechanisms have also committed to the uniform and universally available deployment of broadband access facilities and services pursuant to Pennsylvania statutory law.[22] This deployment centers on the 1.544 Mbps downstream and 128 kbps upstream speed standard. A number of smaller rural Pennsylvania ILECs have reported completion of their broadband deployments as of December 31, 2008. The Pennsylvania operations of CenturyLink and Windstream are currently scheduled to complete their deployments by 2013, while Verizon Pennsylvania Inc. (Verizon PA) and Verizon North will complete theirs by 2015. Verizon PA, Verizon North, CenturyLink, and Windstream are federal price cap ILECs. Although their broadband deployments are at a high level, they have not yet been finalized.

The selective broadband deployment scenario that is envisioned through USTA's proposed ROFR mechanism stands in sharp contrast to Pennsylvania's uniform deployment and availability of retail broadband access facilities and services among all the rural, urban, and

[21] State Plan, at 62-63. A carrier operating at the full 90% availability level would receive the full amount of POLR support. A carrier operating below the minimum standard of 40% would receive no support whatsoever. The State Plan's requirements increase to a downstream speed standard of 4 Mbps by 2016, with a minimum availability standard at 60% and a maximum one at 98%.

[22] 66 Pa. C.S. § 3011*et seq.* (Chapter 30 of the Pennsylvania Public Utility Code or Chapter 30 law).

suburban wire centers of rural and non-rural ILECs that have adopted alternative regulation and network modernization plans (NMPs) under Pennsylvania law. Very simply put, selective broadband deployment under USTA's proposed ROFR mechanism is not a choice for the price cap ILECs that operate under their state-specific NMPs and the statutory parameters of Pennsylvania's Chapter 30 law. The Pa. PUC has authorized incentive revenue and rate increases which at a minimum stand at a cumulative annual level of $507.48 million for the Chapter 30 rural and non-rural ILECs operating in Pennsylvania. Under Pennsylvania's Chapter 30 law, failure to timely complete the NMP broadband deployment commitments can result in proportionate rate and revenue refunds inclusive of interest, as well as the imposition of civil or other penalties. 66 Pa. C.S. § 3015(a)(2). Therefore, the potential FCC implementation of the misplaced ROFR proposal in Pennsylvania will automatically cause otherwise avoidable legal conflict in the federal appellate courts, and a great deal of financial uncertainty for the federal price cap ILECs operating in Pennsylvania. In a similar vein, USTA has completely failed to reconcile its proposed ROFR mechanism with the broadband deployment commitments that have been made by certain of the "ABC Plan" proponents in the context of certain mergers that have been approved both by the FCC and the states.

3. The Role of the States And Broadband Under The USTA Proposal

The deregulatory agenda contained in the USTA proposal envisions a very limited role for the states. Conceivably, the oversight and enforcement of the price cap carrier deployments that will be supported by CAF funding will be supervised by the more distant FCC and the Universal Service Administrative Company (USAC). Such supervision will take place without the benefit of the Commission's former but now largely extinct detailed data reporting under the Automated Reporting Management Information System (ARMIS) or other forms of detailed reporting that could address the inherently complex issues of broadband deployment at the mandated speed, quality and reliability standards, CAF support, and the selective utilization of the ROFR mechanism on the granular level of wire centers and census blocks.

It is for these reasons that the states must continue (and are lawfully entitled to exercise) a continuous oversight and enforcement role over redirected USF funding utilization by the carriers and broadband deployment. Absent such a state oversight and enforcement role, uneven deployment of retail broadband access facilities and services in terms of geographic distribution, and applicable quality and reliability standards, especially when the carrier in question receives redirected federal USF support, will not be a mere risk but a virtual certainty. Since the FCC's professed goal is to include retail broadband access as part of a redefined universal service concept (e.g., provision of retail broadband access services for Lifeline customers, and the implementation and enhancement of universal service, traditionally a bi-jurisdictional responsibility), state oversight and enforcement is absolutely necessary under applicable federal and state law. Such state oversight and enforcement not only will protect the interests of end-user consumers but will also ensure that the disbursed monetary amounts from a redirected federal USF are utilized for the intended purposes, namely for the deployment of wireline retail broadband access facilities and services.

It is very unclear whether the price cap proponents of the "ABC Plan" can unilaterally declare that the obligations of CAF support recipients and their corresponding broadband deployment obligations will be extinguished after a period of ten (10) years.[23] This presupposes that wireline broadband deployment, in terms of both technology and necessary capacity in response to customer demand, remains static. This is not likely to occur. The price cap proponents of the "ABC Plan," fixated on their private relief from any and all regulatory obligations, have ignored technological and economic realities and the needs of their end-user consumers who will continue to reside in high-cost rural areas. This unilateral pronouncement also sets a time limit on the operation of the redirected federal USF. The Pa. PUC does not believe that the Commission should entertain such arbitrary operational time limits for even select components of a reformed federal USF system.

E. The Intercarrier Compensation Proposals

1. USTA's Intercarrier Compensation Proposals Lack Technical And Legal Merit

The Pa. PUC arguments against the use of the federal preemption proposals of the "ABC Plan" are extensively addressed in the accompanying Legal Memorandum, and they are not repeated here. The USTA proposal on intercarrier compensation is also technically unsustainable. This proposal is self serving, fails to recognize the economic costs of carrier

[23] USTA Proposal, Attachment 1, at 8.

access services, imposes unreasonable and economically unsustainable costs on end-user consumers, increases the support funding pressures on the federal USF mechanism, creates adverse financial impacts and disincentives for a number of carriers, and undermines the traditional roles of state regulators, especially regarding consumer protection and safeguarding competition at the state level.

The interstate and intrastate intercarrier compensation transition to a nationally unified rate of $0.0007/MOU is arbitrary and lacks evidentiary record support. Just because that particular rate was used in the FCC's *ISP Remand Order* for dial-up information services provider (ISP) traffic or in some voluntarily negotiated interconnection agreements but not in others, does not make that rate economically justified or sustainable. The Pa. PUC has strenuously and repeatedly argued that the $0.0007/MOU rate does not meet the FCC's own long-established total element long-run incremental cost (TELRIC) standard because it fails to account for any portion of joint and common costs of carrier access services on a forward-looking basis.[24] Instead, the $0.0007/MOU rate appears to be solely based on some vague notion of short-run incremental switching costs. However, in the long-run all capital network investments, including joint and common facilities that are utilized for the provision of carrier access services, become variable and thus incremental. TELRIC is able to capture this economic reality but the $0.0007/MOU rate does not since it is not a cost-based rate and not TELRIC compatible. Thus, the $0.0007/MOU rate is by definition non-compensatory, unreasonable, discriminatory, and unlawful since it violates the legal mandates of Sections 251(b)(5) and 252(d) of TA-96. 47 U.S.C. §§ 251(b)(5) and 252(d).

The proposed use of the economically unsustainable $0.0007/MOU rate may serve the pecuniary interests of AT&T's and Verizon's wireline long-distance and wireless operations, but it creates multiple, interrelated, adverse impacts on end-user consumers, other carriers, and the federal USF mechanism. Lost interstate and intrastate access revenues because of the $0.0007/MOU rate will need to be made up by dramatic increases in the federal SLC and redirected federal USF support under the USTA proposal. Certain residential consumers of

[24] *In re High Cost Universal Service Support, et al*, WC Docket No. 05-337, Comments of the Pennsylvania Public Utility Commission, November 26, 2008, at 20-28 (opposing the proposed FCC use of a simple incremental cost standard for intercarrier compensation). *See also,* Dr. Robert Loube and Labros E. Pilalis, *Intercarrier Compensation: A White Paper To The State Members Of The Federal-State Joint Board On Universal Service*, February 7, 2011, at 8.

wireline telecommunications services will see their federal SLC increase from a current limit of $6.50 per access line per month to $11.00 by 2017. These SLC increases are economically unjustifiable. The $6.50 SLC was designed to recover the 25% federal allocation of network access non-traffic sensitive costs, and the FCC has exclusively allocated the recovery of these interstate access costs to end-user consumers. Thus, by definition and by default, end-user consumers will now start picking up considerable portions of interstate traffic sensitive network access costs, when such costs should be borne exclusively by wholesale access users such as AT&T and Verizon. This avails AT&T and Verizon of unique profit opportunities, especially for their unregulated wireless operations. Their access expense will drop dramatically, enabling them to charge usage sensitive pricing for their wireless data services since network and wireless spectrum capacity constraints do not disappear.[25] In short, the $0.0007/MOU rate unjustifiably transfers wholesale network access costs to end-user consumers and creates SLC rate increases that are unreasonable, discriminatory, and thus unlawful under both federal and state law.[26]

There is no doubt that increased SLC rates will create price elasticity of demand incentives for end-user consumers to abandon wireline telecommunications services. Thus, the $0.0007/MOU rate in combination with non-realized SLC revenues will create additional financial pressures on the access restructure mechanism (ARM) and the need for redirected federal USF support. Since the USTA proposal unlawfully and improvidently seeks to federally preempt intrastate intercarrier compensation, it creates an additional pressure point for the redirected USF support and detracts from the intended use of such support for broadband deployment, especially in high-cost rural areas. The increased SLC will create the paradox of ILECs attempting to increase wireline broadband deployment with redirected federal USF support as end-user consumers increasingly abandon wireline telecommunications services.

The State Plan put forward comprehensive and well reasoned intercarrier compensation reform proposals that did not require increases in the federal SLC or increases in USF funding. The State Plan proposals also avoided the thorny issue of federal preemption while suggesting

[25] The $0.0007/MOU rate proposal implicitly assumes that wireline access networks do not suffer from any capacity constraints. This is a false premise since operators of wireline wholesale access facilities will need to continuously expand their physical capacity in order to successfully handle ever increasing quantities of wireless and wireline broadband traffic demand. *See also* State Plan at 151.
[26] The Pa. PUC has a longstanding policy that intrastate access network joint and common costs are shared by all network users including the carriers that utilize intrastate wholesale switched access services.

reasonable incentive proposals for intrastate carrier access charge reforms.[27] The State Plan has also effectively rebutted the false premise that somehow the current intercarrier compensation system "is hindering progress to all IP networks." It observed that:

> Existing networks contain a mix of both legacy and broadband technologies, and they are capable of handling traffic of various protocols. Existing switched networks often rely on packet switching, especially for interoffice trunking, even if they do not specifically use "TCP/IP" software. There is no technical reason to make a black and white distinction between some existing switched architectures that rely on packets and "IP architecture." Indeed, that distinction contravenes current convention and practice. Second, the FCC apparently has only anecdotal evidence about which carriers have the most advanced networks. State Members have observed that many more rural LECs seem to have deployed soft switches than have major incumbent carriers. This tendency is contrary to the trend asserted in the NPRM.[28]

The State Plan also analyzed the detrimental financial effects for various categories of mid-size and smaller rural ILECs and their customers if intercarrier compensation rates were to be reduced at the reciprocal compensation level.[29] These detrimental financial effects will be much larger if the non-compensatory $0.0007/MOU rate is adopted. Naturally, if smaller rural ILECs fail to receive appropriate economic compensation for providing wholesale access services to other wireless and wireline carriers, they will not have the financial incentive to invest in wholesale access capacity, even if they continue to receive redirected federal USF support.

2. The USTA Proposals Undermine State Efforts For Intrastate Carrier Access Reform

The USTA intercarrier compensation proposals that incorporate extensive federal preemption undermine the efforts of individual states to implement intrastate carrier access charge reforms and introduce unlawful federal intrusion into the retail services ratemaking that is the exclusive province of state utility commissions. A number of states, including Pennsylvania, have undertaken considerable intrastate carrier access charge reforms. Such reforms have been accompanied by local service rate increases and have often been supported by state-specific

[27] State Plan, at 153-154.
[28] State Plan, at 152-153 (citations omitted).
[29] State Plan, at 103-104.

USFs. The purely intrastate but interrelated linkages of intrastate access rates, local service rates, and state-specific USFs are obvious.

The USTA proposal seeks to "federalize" and preempt the component of intrastate access while conveniently ignoring the interrelated impacts for local rates and state-specific USFs that will continue to operate under state jurisdiction. This is contrary to state statutory law both in Pennsylvania and elsewhere. For example, the Pa. PUC recently completed a comprehensive intrastate access charge reform proceeding involving a number of rural ILECs.[30] This proceeding was adjudicated under Pennsylvania law directing that the Pa. PUC "may not require a local exchange telecommunications company to reduce access rates except on a revenue-neutral basis." 66 Pa. C.S. § 3017(a). The Pa. PUC was able to evaluate in its totality the interrelationship between rural ILEC intrastate access charges, local rate benchmarks, universal service considerations and effects, and the Pennsylvania-specific USF (Pa. USF). The Pa. PUC directed a 4-year staged rural ILEC access charge reform that will also include a generic rulemaking examination of the Pa. USF.

Such a comprehensive examination of rural ILEC access charges in Pennsylvania would have been virtually impossible if intrastate intercarrier compensation had been federally preempted under the USTA proposal. The USTA proposal and its unbridled federal preemption drive simply creates disincentives for the states to meaningfully and voluntarily participate in intrastate intercarrier compensation reform efforts. For example, if accepted by the FCC, the USTA proposals will cause unnecessary jurisdictional legal conflicts and will throw pre-existing state reforms of intrastate intercarrier compensation such as Pennsylvania's into doubt.

Faced with this type of situation, states will decide how to best extend various protections for their consumers. For example, if the implementation of the USTA proposals leads to the federal preemption of intercarrier compensation reform, states may decide not to implicate their state-specific USFs in intercarrier compensation reforms — or not create their own state-specific USFs — but rather let the federal USF deal with both the interstate and intrastate ARM support requirements. Under this scenario, states that are both early adopters and net contributors to the federal USF (e.g., Pennsylvania) will continue to bear an unequal burden. In sharp contrast, the

[30] *Investigation Regarding Intrastate Access Charges and IntraLATA Toll Rates of Rural Carriers and The Pennsylvania Universal Service Fund, et al.*, Docket Nos. I-00040105, C-2009-2098380 *et al.*, Order entered July 18, 2011 (Pa. PUC Rural ILEC Access Charge Order), Petitions for Reconsideration Pending.

State Plan through its POLR support mechanism provides the states with incentives to actively participate in intercarrier compensation reform and to create their own state-specific USFs.[31]

III. ANCILLARY AREAS

A. Rate Benchmarks For Federal USF Support And Intercarrier Compensation

The Pa. PUC experience with its recent rural ILEC access charge reform proceeding demonstrates that individual states are capable of intrastate intercarrier compensation reform. Based on the available evidence (including universal service effects), the Pa. PUC established a "pure" basic local exchange residential service rate benchmark of $23 per access line per month in its recent Rural ILEC Access Charge Order (this figure excludes the federal SLC, taxes, and fees for 911/E911 and the telecommunications relay service (TRS)). Thus, a corresponding figure under discussion at the federal level would amount to at least $32.93. Individual state benchmark rates for intrastate intercarrier compensation and federal USF reform purposes should not be set at a level below the "revenue benchmark" of $25 per month for voice services consistent with the State Plan for the proposed POLR support mechanism (the $25 "revenue benchmark" includes the federal SLC).[32]

B. Interstate Rate of Return And Total Company Earnings Review

The Pa. PUC disagrees with the Joint Letter proponents that advocate the use of a 10% interstate ROR for purposes of calculating redirected federal USF support for the ROR carriers. The Pa. PUC supports the State Plan use of an 8.5% ROR for the same purpose since, under the State Plan assumptions, the 8.5% ROR already results in a very generous 12% rate of return on common equity capital (ROE).[33] Under the same State Plan assumptions, the Joint Letter 10% ROR contains a much higher and currently unjustifiable 15% ROE figure. Simply put, the Joint Letter proponents cannot voluntarily put themselves at grave financial risk by advocating the adoption of the uneconomic and non-compensatory uniform intercarrier compensation rate of

[31] State Plan, at 60-62 and 66-67. The State Plan POLR support mechanism contemplates credits if a state has its own USF or has engaged in quantifiable intrastate intercarrier compensation reforms.
[32] State Plan, at 52.
[33] The State Plan assumptions for an ROR ILEC call for a capital structure comprised of 50% long-term debt at a 5% cost rate and 50% common equity capital. The overall 8.50% ROR produces an implicit 12% ROE.

$0.0007/MOU and then turn around and demand federal USF support at a 15% ROE because of allegedly "increased financial risk" that will be self-inflicted.

The Pa. PUC is opposed to a waiver of the requirements in Part 65 of the Commission's rules for a rate of return prescription proceeding through the receipt of additional information in the record of this rulemaking "so that the Commission could quickly adopt a particular rate of return."[34] A waiver will lead to another series of unending ex parte submissions and advocacy presentations by the Joint Letter and "ABC Plan" proponents with abbreviated due process opportunities to respond by other interested parties. Instead, a distinct rate of return prescription proceeding, even on an accelerated basis, will afford a better degree of due process to all interested parties.

The Commission can then solicit appropriate cost of capital and rate of return studies using traditional models such as the discounted cash flow (DCF) method, the capital asset pricing model (CAPM), and other risk premium analyses. The Commission can also inquire on such factors as: (1) whether such studies and analyses should be based on the proxy cost of capital derived on the basis of the publicly traded common stock securities of the holding companies for certain rural ROR ILECs; (2) what proxy telecommunications company groups with publicly traded stock should be used for the derivation of the cost of capital for ROR carriers that do not have publicly traded stock; (3) whether hypothetical capital structures should play any role in the cost of capital studies and under what parameters; (4) what historical and projected parameter values should be used in DCF cost of capital studies; (5) what risk-free securities, beta values, and risk premiums (e.g., arithmetic v. geometric mean values) should be used in CAPM studies; (6) and, whether a single cost of capital value or a range of values should be utilized for distinct groupings of the ROR carriers. The established interstate rate of return will need to be updated on a periodic basis, especially if it is to be used for the assessment of potential excess earnings by supported carriers (see below).

The Pa. PUC supports the State Plan concept that a total company earnings review should be used in order to prevent a supported carrier from earning more than a reasonable return. The Pa. PUC also supports the State Plan analysis that the support mechanism, at least initially, should not factor in either the revenues or the marginal costs of video operations in order to

[34] FCC Public Notice DA 11-1348, August 3, 2011, at 6.

avoid the risk of subsidizing video operating losses attributable to unregulated programming costs.[35] The total company rate of return that should be used for this purpose would be equal to the interstate ROR that would be used for the calculation of support, and the earnings review should coincide with the frequency of support payment distributions.

IV. THE FCC CANNOT LAWFULLY PREEMPT STATE COLR OBLIGATIONS

The attached Legal Memorandum describes in detail why the Commission cannot adopt the USTA proposal to preempt the states including state COLR obligations of price cap carriers.[36] It is sufficient to state that the FCC cannot lawfully preempt an area that is clearly not within its jurisdiction; it cannot arbitrarily intrude into a non-jurisdictional area in the absence of explicit and appropriate statutory authority; and it cannot preempt state authority that is based on federal and independent state law where the FCC itself has encouraged the states to exercise such authority (i.e., ETC designation matters).[37] Since the FCC lacks such authority and its reform NPRM only touched on potential federal forbearance of ETC designations (something that is not supported or condoned by the explicit federal statutory authority given to the states under Section 214(e) of TA-96, 47 U.S.C. § 214(e)),[38] one is left to wonder what motivates the sweeping but unlawful deregulatory proposal of the "ABC Plan" proponents. As previously stated, when combined with the ROFR mechanism that would result in selective broadband deployment, the requested preemption of state COLR obligations leads to the inescapable conclusion that the "ABC Plan" price cap ILECs seek total and unsupervised release from their fundamental obligation to even provide core services under their existing ETC designations while continuing to receive, but selectively use, redirected federal USF support. For example, the USTA proposal explicitly states that its envisioned "supported broadband service must provide access to voice service, but voice service is not supported by the CAF and CAF recipients are not required to offer voice service."[39] In short, under the USTA proposal, FCC and state legal requirements and obligations of price cap ETCs that are current and future recipients of federal USF support are to be disregarded at will or should be deemed as totally irrelevant.

[35] State Plan, at 34-35.
[36] USTA Proposal, Attachment 1, at 13.
[37] State Plan, at 135-137.
[38] State Plan, at 86-87.
[39] USTA Proposal, Attachment 1, at 2-3.

The FCC should summarily reject the "ABC Plan." The current FCC rulemaking proceeding does not lend itself to a re-examination of the FCC's core ETC designation rules and their application by the states in conjunction with the states' independent statutory authority under Section 214(e) of TA-96. If the participants to the USTA proposal desire to do otherwise they can start by "A" filing the appropriate petition with the FCC; or "B" voluntarily withdraw from their ETC status, and "C" forego any current and future federal USF support distributions.

V. CONCLUSION

The USTA proposal is legally and substantively deficient and the FCC should summarily reject it. The State Plan offers a far superior alternative framework for the FCC's intended interstate intercarrier compensation and federal USF reforms. The FCC should adopt it.

The Pa. PUC thanks the FCC for providing an opportunity to file these Further Comments and the accompanying Legal Memorandum.

Respectfully Submitted,

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Public Utility Commission

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August 24, 2011

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

LEGAL MEMORANDUM ANALYSIS OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Executive Summary

In summary, the Pa. PUC legal analysis supports the opposition to the ABC Plan and its support based on preemption, forbearance, or any constructive equivalent. No industry plan can effectively terminate the Pa. PUC's authority to regulate intrastate telecommunications. It is our General Assembly, who should determine the Pa. PUC's jurisdiction.

The Pa. PUC comments demonstrate that the Statutory Provisions, the Supremacy Clause jurisprudence, and technological change cited by the proponents to support preemption do not support overturning joint federal-state jurisdiction. The FCC must deny preemption. There are other less drastic means than overturning joint federal-state jurisdiction to facilitate the FCC's important federal policy objective, i.e., promoting broadband to 100% of the nation's exchanges given that 82% of the 100% in the exchanges without broadband are are located in the territories of three proponents of preemption i.e., AT&T, Verizon, and ex-Qwest exchanges.

The Statutory Provisions. Section 201 establishes federal authority over interstate communications not intrastate communications. Section 201 does not include all state commission authority over all intrastate communications.

Section 251 preserves the states' authority to regulate intrastate communications. The precedent cited by the preemption proponents (particularly the recent *ISP Remand Order*) does not stand for the power to completely preempt and regulate intrastate communications. That claim and interpretation is contrary to the proponents' interpretations of the *ISP Remand Order.*

Section 251(g) is a "reservations" clause in the Telecommunications Act of 1996 (TA-96) that preserved preexisting TA-96 precedent, particularly the prior decision of Judge Green, until new rules were promulgated by the FCC. Section 251(g) does not authorize preemption of intrastate communications.

Sections 252(e)(5) and Section 253 authorize preemption in two very narrow instances. Section 252(e)(5) authorizes preemption of intrastate authority based on a state's failure or inability to act. Section 253 allows preemption of a state requirement that is not competitively neutral. There is no evidence showing a collective action or inability to act by a state or all of the states. There is no showing that a requirement of a state or all the states is not competitively neutral.

Section 254 authorizes state commission involvement in universal service. There is no "burden" on federal USF from state regulation of intrastate communications sufficient to sustain wholesale preemption. If anything, the states support federal USF and the federal policy of promoting broadband deployment.

Section 332 addresses a very limited preemption of state regulation of wireless rates. The "preemption of wireless rate regulation" cited in support of preemption is appealing but unavailing. The proponents' evidence indicates that wireless has become a substitute for land-line service for a substantial portion of the population i.e., 96%. That substitution does not support preemption of state authority but, rather, specifically preserves state authority in that event.

The Supremacy Clause. The federal precedent allowing preemption based on impossibility, mixed use, or field and conflict preemption does not support preemption. That precedent actually supports joint federal-state jurisdiction.

There is no "impossibility" in this proceeding. It is not physically impossible for the proponents to comply with federal and state law. Federal law addresses interstate communications; state law addresses intrastate communications. The proponents have been complying with state and federal law for decades under joint federal-state jurisdiction. This includes the years following the emergence of new technology like Internet Protocol (IP) and fiber.

Were it otherwise, the FCC would have been regulating intrastate communications since 1934 or 1996. Impossibility as a constitutional doctrine is distinct from the inconvenience of joint federal-state jurisdiction or the additional compliance costs that may arise under joint federal-state jurisdiction.

Preemption based on the "impossibility" of severing communications into an intrastate and interstate communications is also contrary to precedent. This includes the reliance on PLU and PIU and prior decisions in separations.

The "Mixed Use" doctrine, wherein traffic in excess of 10% interstate come within the FCC's authority, does not support preemption. The FCC's precedent in those instances, as reflected and affirmed in the *ISP Remand Order,* holds that mixed use traffic is subject to joint federal-state jurisdiction.

The "Express" "Field" and "Conflict" precedent does not support preemption. Express preemption arises when Congress expressly preempts state regulation. Field preemption arises when Congress has a clear and manifest intent to occupy the field. Conflict preemption arises when a regulated entity cannot comply with state and federal law or state law creates an obstacle to an important federal policy objective i.e., in this case broadband deployment.

There is no express preemption. No provision in current federal law expressly preempts all state regulation of all intrastate communications.

There is no field preemption. Congress has never expressed a clear and manifest intent to occupy the entire field of intrastate communications. This is particularly evidenced by the multiple provisions of federal law and FCC precedent that preserve state authority over intrastate communications.

There is no conflict preemption. It is not impossible to comply with state and federal law. The inconvenience or additional costs attributed to joint federal-state jurisdiction may be frustrating or even annoying. Such frustration or annoyance does not constitute a constitutional impossibility.

No state law creates an obstacle to the important federal policy objective of broadband deployment. The states have actually supported that federal objective in a complementary manner. Complementary state efforts are not obstacles.

Assuming otherwise, *arguendo,* federal precedent based on conflict preemption is narrowly tailored to very narrow issues, such as the setting of technical standards on radio-frequency emissions in wireless devices. Conflict preemption does not authorize complete preemption of all state authority over all intrastate communications when the result is constructive field preemption. Federal law contains no provision authorizing constructive field preemption as apparently sought by the proponents. The states' efforts under independent state law to promote broadband deployment while preserving universal service are not an obstacle to the important federal policy objective of broadband deployment.

Technology and Business Interest Preemption. The emergence of Internet Protocol (IP) technology and the deployment of fiber networks to provide separate or combined voice, data, or video services does not support preemption. The Packet Sending Transmission Network (PSTN) is still the Public Switched Telecommunications Network (PSTN). Preemption does not turn on technological evolution. The proponents' reliance on short-term business plans to address new technology does not trump statutes, precedent, and joint federal-state jurisdiction under federal law. The resulting concentration of regulatory power runs counter to the very considerations giving rise to joint federal-state jurisdiction.[1]

Detailed Discussion

A. THERE IS NO STATUTORY BASIS IN THE COMMUNICATIONS ACT OF 1934 OR THE TELCOMMUNICATIONS ACT OF 1996 (TA-96) SUPPORTING PREEMPTION OF INDEPENDENT STATE LAW.

The Pa. PUC incorporates and supports the earlier filed Comments and Reply Comments of NECPUC, NARUC, and the New York Public Service Commission. They set out a sound legal argument supporting the denial of preemption of state jurisdiction over intrastate communications, networks, or service providers the last time some of today's proponents sought preemption in the Missoula Plan. The Pa. PUC incorporates and repeats the basis for opposition to preemption set out in earlier filed Comments and Reply Comments of the Pa.

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[1] "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." THE FEDERALIST NO. 51, at __ (James Madison) (Clinton Rossiter ed., 1961).

PUC in this docket. The Pa. PUC incorporates prior filed Comments and Reply Comments including, but not limited to, filings in the Universal Service and Intercarrier Compensation dockets, particularly the earlier Missoula Plan.

The ABC Plan incorrectly concludes that the FCC can abandon cooperative federalism through a preemption of state authority in order to impose a $.0007 interconnection rate on all telecommunications. The FCC cannot abandon law and policy reflecting a joint governmental structure of co-sovereigns, consistent with the 10th Amendment. The FCC has historically and commendably avoided that result precisely because it is contrary to our constitutional structure.

The proponents append a contrary legal analysis supporting the preemption of state authority. That analysis repeats and builds upon earlier filings of some of the same proponents in 2006 and 2008. At that time, the proponents in the Missoula Plan sought preemption and the same $.0007 rate on all telecommunications. That earlier proposal was subsequently abandoned. Today's proponents resurrect a variation on those theories in this proceeding.[2]

The Pa. PUC notes that some proponents of preemption in this proceeding did oppose preemption and the mandatory $.0007 rate when it was proposed in the Missoula Plan. They opposed the Missoula Plan because the rate was not cost-based and, for some, constituted a taking in violation of the Constitution or even

[2] Compare *In re: Developing a Unified Intercarrier Compensation Regime,* Docket Nos. 01-92, 04-36, and 96-45, Ex Parte Filing of Verizon Communications (September 19, 2008), pp. 1-34 (*Verizon 2008 Ex Parte*); *In re: Developing a Unified Intercarrier Compensation Regime*, and In re: *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, *In re: Intercarrier Compensation for ISP-Bound Traffic*, Docket Nos. 01-92, 96-98 and 99-68, Ex Parte Filing of AT&T Communications, Inc. (May 9, 2008) (*AT&T 2008 Ex Parte*), pp. 1-8 with *In re: Connect America Fund,* Docket No. 10-90, Ex Parte Filing of America's Broadband Connectivity Plan (July 29, 2011), Attachment 5, pp. 1-68 (*ABC Legal Analysis); In re: Connect America Fund,* Docket No. 10-90, RLEC Ex Parte Modifying RLEC Reply Comments of May 2, 2011, pp. 1-4 (*RLEC Plan Modification).*

failed to cover billing costs.[3] While this shift in views may be attributed to short-term business interest, the legal standard for preemption or forbearance is not short-term business interest. The FCC must reject preemption based on short-term business interest. The FCC must affirm cooperative federalism and joint federal-state jurisdiction.

The Pa. PUC agrees with the FCC that the FCC has authority to regulate interstate and international rates and issues. The Pa. PUC does not agree with the proponents, including prior opponents to preemption that now support preemption, that the FCC has authority to preempt the states' regulation of intrastate communications and impose a mandatory $.0007 compensation rate.

The Pa. PUC and the FCC have long abided by Supreme Court precedent on TA-96. That precedent gives the FCC authority to establish a pricing model but that the states are responsible for setting rates under that model for intrastate communications. *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). Prior precedent prohibits the FCC from regulating intrastate communications, including depreciation, in the absence

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[3] Compare *In re: Intercarrier Compensation,* Docket No. 01-92, Ex Parte of Consolidated Communications, Windstream, Embarq, CenturyTel, Iowa Communications and Frontier (October 20, 2008) (*Price Cap 2008 Ex Parte*, pp. 2-3 (bill-and-keep or rates near zero undermine carrier deployment of broadband) and ITTA Ex Parte (Embarq, Frontier, Windstream, and TDS) (October 2, 2008) (*ITTA 2008 Ex Parte)* pp. 1-2 ($.0007 is not cost-based nor reflect mid-size price cap carriers' costs); NTCA Ex Parte (September 12, 2008) (*NTCA Ex Parte),* pp. 1-2 ($.0007 is confiscatory and preemption violates federal law); *2008 NECA Ex Parte* ($.0007 does not cover billing costs) and *In re: Connect America Fund,* Docket No. 10-90, RLEC Reply Comments (May 2, 2011) with *ABC Legal Analysis* (Embarq, Frontier, Windstream, AT&T, and Verizon *et al.),* pp. 1-68 and *USTA 2011 Ex Parte* (July 29, 2011) (NECA, NTCA, and OPASTCO), pp. 2-3 (the FCC should expeditiously approve the ABC Plan, preemption, and the $.0007 rate).

of express Congressional authorization. *Louisiana PSC, et al. v. FCC*, 476 U.S. 355, 374-375 (1986). The proposed default rate is a rate not a model.

The FCC has long permitted state commissions to impose additional requirements on matters of joint concern, like compensation, broadband deployment and adoption, or service quality and consumer protections, if those requirements do not burden interstate commerce or unreasonably impede an important federal policy objective. There are no burdens or obstacles today.

The legal standard for preemption is express Congressional authority, implied conflict of law, or field and conflict preemption. The legal standard is not technological change, the cost of operating within a federalist structure, or ratification of short term business plans premised on a seismic shift in an interpretation of precedent that contradicts earlier interpretations.

The last time industry proponents urged the FCC to ratify a short-term business plan, the result triggered eleven years of litigation before the matter was resolved.[4] That case is now the very case that the proponents rely on to preempt

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[4] *ISP Remand Order* upheld in *Core Communications, Inc. v. FCC*, 592 F.3d 139, 143-46 (D.C. Cir.), *cert. denied*, 131 S. Ct. 597, 626 (2010). The case started in 1999 when the FCC issued an Order ratifying some carriers' business interest in replacing reciprocal compensation for local calls, contrary to their earlier support for reciprocal compensation over bill-and-keep, based on cash outflows for local dial-up Internet calls. *See* 14 F.C.C.R. 3689 (1999). The D.C. Circuit vacated, holding that the FCC had not adequately explained why calls to ISPs are not local. *Bell Atl. Tel. Cos.* v. *FCC*, 206 F.3d 1, 9 (D.C. Cir. 2000). On remand, the FCC "modif [ied] [its] analysis" but again concluded that calls to ISPs were not covered by the 1996 Act. 16 F.C.C.R. 9151, ¶ 1 (2001). The D.C. Circuit again rejected the FCC's analysis. *See WorldCom, Inc.* v. *FCC*, 288 F.3d 429 (D.C. Cir. 2002). It held that Section 251(g) could not justify the FCC's order because that provision was only a "transitional device." *Id.* at 434. Two years later, Core petitioned the D.C. Circuit for mandamus which the court denied without prejudice. Two and one-half years after that, in a decision describing the FCC's delay as egregious, the circuit directed the FCC to issue a legal explanation for its action no later than November 5, 2008. *In re Core*, 531 F.3d 849, 850 (D.C. Cir. 2008). On November 5, 2008 at midnight of the last possible day, the FCC issued the *ISP Remand Order* cited by the proponents. 24 F.C.C.R. 6475 (2008). The D.C. Circuit denied the appeals of Core, NARUC, the New York Public Service Commission, and other state commissions including the Pa. PUC. *Core* v. *FCC*, 592 F.3d 139, 143-146 (D.C. Cir. 2010). On

state authority, i.e., the *ISP Remand Order.* The proponents present an expansive interpretation of the *ISP Remand Order* contrary to their interpretation of that same concern in filings made opposing Writs of Certiorari in the Supreme Court.[5] The proponents should be held to that prior interpretation of the *ISP Remand Order.* There, they viewed the decision as not expansive but one as a narrow one affirming the FCC's authority to set compensation between Incumbent Local Exchange Carriers (ILECs) and Competitive Local Exchange Carriers (CLECs) for interconnection when local networks access the Internet using local dial-up telephone calls – a market characterized as of diminishing practical significance.

The Pa. PUC previously pointed out, and repeats today, that the major change between the proponents' interpretation of the *ISP Remand Order* in October 2010 and August 2011 seems to be a change in business plan. The Pa. PUC understands that changes in short-term business interest occur. That change is not the touchstone for preemption or abandonment of a constitutional structure.

The scope and unprecedented nature of the complete preemption as proposed in the ABC Plan is larger and will have far greater impact to federal and state authority. The preemption will extend far beyond unification of rates to include all telecommunications and broadband deployment or adoption policies. The ABC Plan's preemption makes the narrow issue resolved in the *ISP Remand Order* very small compared to this complete preemption.

The proponents' legal theory rests on misinterpretations of the Telecommunications Act of 1996 (TA-96), the *ISP Remand Order,* the *CLEC*

March 26, 2010, the court of appeals denied panel and *en banc* rehearing. On August 8, 2010, Core and the Pa. PUC filed Writs of Certiorari to the United States Supreme Court. The FCC and defenders of the *ISP Remand Order* (AT&T, Verizon, Level 3, and others) filed in opposition on October 12, 2010. The Supreme Court denied review in November 2010, nearly eleven years later.

[5] *In re: Petition of Core and the Pa. PUC,* Supreme Court Docket Nos. 10-185 and 10-189, Brief in Opposition of AT&T, Level 3, MetroPCS, Sprint Nextel, and Verizon (October 12, 2010), p. 2.

Access Order, and precedent. The proponents then fall back on the FCC's Title I authority, the "mixed use" doctrine, the "impossibility" doctrine, and conflict preemption. There is also reliance on the alleged "impossibility" or "impracticality" of dividing Voice over Internet Protocol (VoIP) traffic into interstate or intrastate components for origination and termination purposes. The proponents also rely on the Supremacy Clause and the removal of burdens or obstacles that interfere with federal policy objectives.

1. Section 201 of the Communications Act of 1934 establishing FCC authority over interstate communications does not support preemption.

Section 201. Section 201 of the Communications Act of 1934 established FCC authority over interstate and international communications. Section 251(i) of TA-96 preserved that authority.

The proponents' interpretation of Section 201 and Section 251(i) contradicts the language and precedent interpreting those provisions. The proponents' basic claim is that the FCC can bring all communications traffic within Section 251(b)(5) and, having done that, issue new rules and an accompanying rate under Section 251(g) and Section 201 for all traffic, including intrastate access and reciprocal compensation rates collected for local intrastate calls.[6] The proponents cite Section 2(b), 47 U.S.C. § 201(b), as the basis for allowing the FCC to include rate-setting and all other obligations imposed by state commissions on intrastate communications.

Section 201(b) authority as discussed in the FCC's *ISP Remand Order* and their *CLEC Access Reform Order* addressed interstate services or interstate access. Section 201 does not allow the FCC to preempt all intrastate rates or conditions.

[6] *Verizon 2008 Legal Analysis,* pp. 19-21; *ABC Legal Analysis,* pp. 9-18.

Section 201 does not give the FCC power to oust the Pa. PUC from regulating intrastate communications and broadband deployment under Pennsylvania law.

The ISP Remand Order. The *ISP Remand Order* was limited to the narrow issue of the FCC's authority to set rates for dial-up Internet calls that terminated intrastate but were part of an interstate service. On that issue, the FCC portrayed its authority to set those rates as of limited utility. In fact, the industry and the FCC dismissed the opponents' concern that the *ISP Remand Order* would be used to eliminate all regulatory and jurisdictional distinctions as unwarranted.

The proponents who dismissed concerns with an expansive interpretation of the *ISP Remand Order* in October 2010 before the Supreme Court now use that expansive interpretation to support complete preemption of intrastate communications. They claim that the *ISP Remand Order* allows the FCC to preempt state authority over intrastate communications. That interpretation *volte face* does not make it legal. The proponents should be held to their October 2010 view and that view does not support preemption.

The CLEC Access Reform Order. The *CLEC Access Reform Order* is equally unavailing. The Pa. PUC never questioned the FCC's authority in the *Access Reform Order* to set interstate access rates, including the interstate access rates of CLECs. The Pa. PUC does not agree with the proponents that the interstate authority affirmed in the *CLEC Access Reform Order* and Section 201 to set interstate access rates can include all intrastate rates and conditions of service.

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 preemption or a pure reliance on market forces. 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 any more than it reflects a pure reliance on market forces. 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 reflects 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 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 proponents' justification for preemption under Section 201 rests on the claim that carriers must have incentives to compete.[7] However, a mandatory $.0007 termination rate that does not reflect others carriers' costs will not provide incentives to deploy broadband. Some of today's supporters of that claim disputed that claim in 2008 and as late as May of 2011.[8] The rate does not reflect disparate carrier network costs, does not compensate carriers for providing interconnection, and will effectively drive carriers unable to provide service at that rate from the market regardless of their cost structure.

Section 706. The proponents claim that the FCC can rely on Section 201 to accomplish the Section 706, 47 U.S.C. § 706, mandate to "take action" to deploy advanced telecommunications and information service networks.[9]

Preemption and imposition of a mandatory $.0007 rate abandons the TELRIC model affirmed by the Supreme Court in *Iowa.* The rate recovery mechanisms shift fixed network costs from network users to end-users in the form

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[7] *ABC Legal Analysis,* p. 21.
[8] *In re: Intercarrier Compensation,* Docket No. 01-92, Ex Parte of NECA (August 8, 2008)(*NECA 2008 Ex Parte*)("$.0007 does not even cover some members' billing costs); *In re: Connect America Fund,* Docket No. 10-90, Reply Comments of NECA *et al.* (May 2, 2011).
[9] *ABC Legal Analysis,* pp. 21-22.

of surcharges even before an end-user makes one voice call on the network. The rate imposes a uniform rate on all carriers irrespective of their cost constraints. This is not "action" taken to deploy broadband under Section 706 but is, in fact, action that will not deploy broadband or deliver advanced telecommunications and broadband services throughout the nation on comparable terms.

Section 706(b)'s mandate to "take action" is not accomplished by actions that reduce access revenues or undermine universal service through increased surcharges. That is particularly relevant when revenues are being used to finance obligations to investors or other federal agencies, including Rural Utilities Service loans to rural carriers to finance broadband deployment.

Preemption and the resulting $.0007 rate precludes other carriers from competing if they have other cost structures. Preemption discourages the deployment of advanced networks by those same competitors. Preemption provides no incentive for carriers to invest in networks secure in the knowledge that they will be able to compete and recover their investments upon payment of cost-based rates using a model affirmed by the Supreme Court.

The imposition of costs on consumers before they even use a network as occurs with increased SLCs will increase local rates. Increases in local rates for basic voice service will undermine universal service for basic service. That negative impact is independent of the negative impact that increased SLCs will have on the prices paid by consumers for broadband services if the FCC supports broadband networks and services from the federal fund.

Preemption of state authority to regulate intrastate communications contradicts Section 201(b) and 706. Preemption will produce less investment, create more regulatory uncertainty, incent fewer competitors, and impose higher prices on end-user consumers.

Moreover, many of today's proponents opposed preemption because the resulting rate would not even cover billing costs.[10] The proponents' shift on preemption seems to reflect a change in business interest that generates, in turn, some misinterpretations of precedent.

This includes the *Computer Inquiry* discussed in *California v. FCC,* 39 F.3d 919, 932-933 (9th Cir. 1994) (*California)* as well as the Customer Premises Equipment (CPE) decision in *North Carolina v. FCC,* 537 F.2d 787, 791 (4th Cir. 1976) (*NCUC I).* This also includes the *Vonage Preemption Order* upheld in the 8th Circuit decision in *Minnesota v. FCC,* 483 F.3d 570, 578 (8th Cir. 2007) (*Vonage Decision).* Those decisions actually support the Pa. PUC's opposition to preemption of state authority over intrastate matters.

Computer Inquiry Cases. The *Computer Inquiry* decisions upheld the FCC's attempt to parse the communications network into a "telecommunications" and "other" component before TA-96. The *Computer Inquiry* decision came at a time when regulators were addressing the emergence of analog computing as part and parcel of the Public Switched Telecommunications Network (PSTN).

The TA-96 adopted the reasoning of the *Computer Inquiry* decision by enacting definitions that parsed the PSTN into "information service" which is subject to FCC jurisdiction and "telecommunications" which is subject to the joint jurisdiction of the FCC and the states. Those definitions contain an exception to the exclusion of "information service" from joint jurisdiction whenever changes in protocol, such as from analog to Internet protocol (IP) or IP to TDM and vice versa, or other actions is necessary to manage a network.

In that case, the network or service is excluded from the exception for "information service" and actually becomes "telecommunications" subject to the

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[10] Compare *In re: Intercarrier Compensation,* Docket No. 01-92, *NECA 2008 Ex Parte,* with *USTA Ex Parte of NECA et al.,* (July 29, 2011). *See also* NTCA 2008 Ex Parte with *USTA Ex Parte of NTCA et. al.,* (July 29, 2011).

joint jurisdiction of the FCC and the states. The *Computer Inquiry* case affirms state commission jurisdiction to address network management practices. This includes rates and actions taken to ensure network reliability or address service quality -- not the other way around.

Reliance on the *NCUC I* precedent is superficially appealing but ultimately unconvincing. *NCUC I* addressed the state commissions' efforts to defend jurisdiction over CPE telephone equipment plugged into the PSTN. An equivalent function on today's evolving Internet Protocol (IP) networks is performed by computers. Computers now provide access to the Internet using "last mile" facilities which are 95% controlled by two providers, i.e., cable and telephone.[11]

The Pa. PUC is not asserting regulatory authority over computers or other equipment. Computers provide access to the Internet. The Pa. PUC is not defending a right to regulate CPE attachments to the PSTN let alone the Internet.

The Pa. PUC is not defending any specific state law or state commission action seeking the authority to regulate computer equipment providing access to the Internet. No state law to the Pa. PUC's knowledge is regulating the prices for computer equipment, the protocols in computers that provide access to the Internet, or even the quality of manufactured computers sold to consumers.

Pennsylvania's VoIP Freedom Bill is an example. The VoIP Freedom bill the Pa. PUC is defending has retained Pa. PUC jurisdiction over intrastate networks but not end-user rates for VoIP (with some limited exceptions) or consumer protections (which are now within the Attorney General's power). The Pa. PUC is not defending the VoIP Freedom Bill because it asserts jurisdiction over computer prices, software protocols, or the quality of manufactured computers sold to consumers any more than the Pa. PUC seeks authority to regulate telephone equipment at issue in the *NCUC I* decision.

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[11] *In re: IP-Enabled Services,* Docket 04-36, MCI Comment (May 28, 2004), pp. 13-20.

There is a vast difference between telephone equipment regulation, regulation of computer attachments to the Internet, and regulation which ensures interconnection and network quality or reliability. The VoIP Freedom Bill at risk of preemption addresses interconnection, network quality and reliability, and public policy concerns including TRS, 911, and USF. The *NCUC I* decision affirms Pa. PUC jurisdiction on those issues because, unlike the *NCUC I* decision, the Pa. PUC does not want power to regulate CPE attached to the PSTN.

The Vonage Decision. The *Vonage Decision* is also very limited and inconsistent with the proponents' expansive view of the decision. The *Vonage Decision* upheld the FCC's preemption of state authority to impose certification and 911 mandates on nomadic "over the top" VoIP service provided by carriers like Vonage. The *Vonage Decision* was a narrow jurisdictional issue never classifying VoIP or imposing the comprehensive preemption[12] sought in the Preemption Plans.

The *Vonage Decision* never preempted any state authority over "fixed wireline" VoIP, nor did the *Vonage Decision* uphold preemption over matters other than certification or 911. Preemption did not extend to the states' authority to ensure interconnection, resolve intercarrier compensation disputes, or ensure network quality or reliability whenever a network starts using IP. Were it otherwise, of course, the proponents would not seek, as they do, preemption and rate parity between wireline VoIP and nomadic VoIP based on the limitations of the *Vonage Decision*.[13]

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[12] *Vonage Order*, nn. 47-48.

[13] Compare *In re: IP-Enabled Services,* Docket No. 04-36, *Verizon ExParte* (August 7, 2007), pp. 1-2 (now that the 8th Circuit has affirmed the *Vonage Order* on "over the top" VoIP, the FCC must take the next step and extend that preemption to confirm that all VoIP service, regardless of technology or provider, is interstate in nature) and *ABC Plan* (Attachment 1), p. 10 (all VoIP must be subject to a uniform rate) with *Comcast IP Phone v. Missouri Public Service Commission,* Case No. 06-4233-CV-C-NKLU (U.S.D.C. W.D.Mo 2007) (*Vonage Preemption* does not extend to wireline VoIP).

The *Vonage Decision*'s narrow preemption may also be overtaken by subsequent events. This includes the proponents request to include broadband networks and broadband service (like VoIP) as a Section 254 supported service.

Section 214. Section 214 of TA-96 limits federal support provided under Section 254 to carriers designated as Eligible Telecommunications Carriers (ETCs). The proposal to preempt the states and include broadband networks and services as a supported Section 254 service requires state ETC designation as the prerequisite to obtaining that support. ETC designation contradicts the proponents' claim that the *Vonage Decision* precludes any state regulation of VoIP if VoIP is a supported service under Section 254. ETC designation permits the states to impose supplemental requirements in state law on all carriers seeking ETC designation so long as they are competitively neutral as required by Section 254(b), 47 U.S.C. § 253(b), of TA-96.

The proponents cannot seek preemption based on a misreading of the *Vonage Decision* when that interpretation undermines their own proposal to include broadband networks and services within the purview of Section 254. The only escape is through this misinterpretation of the *Vonage Decision.*

The *Vonage Decision* does not address ETC designation, wireline VoIP, or any of the matters reflected in the General Assembly's VoIP Freedom Bill. Contrary to the proponents' wishful interpretations, preemption of state commission authority over wireline VoIP, the VoIP Freedom Bill, or other VoIP matters occurs only by a preemption that will classify one service, VoIP, differently from other IP services contrary to Section 253.

Title I Ancillary Power. Finally, any reliance on the FCC's Title I ancillary power to support preemption is incorrect. 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).

However, there is simply no ancillary authority authorizing the FCC to address intrastate communications. There is Supreme Court precedent prohibiting the FCC from regulating intrastate communications, including depreciation, in the absence of clear authority. *Louisiana PSC, et al. v. FCC*, 476 U.S. 355, 374-375 (1986) *(Louisiana).*

2. Section 251(b)(5), Section 251(g), Section 251(i) and Section 252(d)(2) do not support preemption.

Section 251(b)(5) requires local exchange carriers to establish reciprocal compensation for the transport and termination of telecommunications. Section 251(g) requires each local exchange carrier providing wireline service to provide exchange access, information access, and exchange services to interexchange carriers and information service providers on the terms in effect prior to the effective date until the FCC promulgates new rules. Section 251(i) preserves the FCC's Section 201 authority. Section 252(d)(2)(A)(1) requires state commissions making determinations that reciprocal compensation rates under Section 251(b)(5) are just and reasonable to make that determination only if rates cover the mutual and reciprocal recovery by each carrier of the costs for transport and termination. Section 252(d)(2)(A)(2) also requires state commissions to ensure that there is a reasonable approximation for the additional costs of terminating calls.

The proponents' basic legal premise regarding these provisions has been, for some time now, that TA-96 gives the FCC authority to bring all traffic within Section 251(b)(5)'s reciprocal compensation provision governing the transport and termination of telecommunications, including the power to impose a mandatory uniform rate or default rate to alleviate some alleged negative impact or burden on the FCC's interstate power caused by disparate intrastate rates for intrastate communications. After the FCC brings all communications within the reciprocal compensation provision of Section 251(b)(5), the FCC should then impose new rules and rates under Section 251(g) as part of the local exchange carrier mandate to provide exchange access, information access, and exchange services. Section 251(g) can reach reciprocal compensation and intrastate access rates for in-state long distance calls based on the FCC's Section 201 authority referred to in Section 251(i).[14]

The proponents now rely on the *ISP Remand Order* as authority for the proposition that this long-held legal view has been upheld by the courts. They claim that this *ISP Remand Order* actually permits the FCC to comprehensively preempt all state authority over intrastate communications. This contorted interpretation of TA-96 arises despite the proponents' participation in the appeal ultimately affirmed by the D.C. Appeals Court. *See ISP Remand Order* in *Core Communications, Inc. v. FCC*, 592 F.3d 139, 143-46 (D.C. Cir.), *cert. denied*, 131 S. Ct. 597, 626 (2010) (*Core*).

They conclude from *Core* that the FCC has court approval to implement the proponents' long-held preemption view brought about by removing all communications within Section 251(b)(5) and then, having done that, establishing rules governing compensation under Section 251(g) which are applicable to telecommunications given the savings clause for Section 201 in Section 251(i).

Preemption would include intrastate communications and network deployment mandate imposed on the Pa. PUC by the General Assembly under independent state law. Preemption would also include intrastate communications subject to Section 252(d)(2) of TA-96, a provision addressing limitations on the state commissions' determinations regarding the justness and reasonableness of reciprocal compensation rates required by Section 251(b)(5).

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[14] *Verizon 2008 Ex Parte,* pp. 1-34, particularly 14-25; *AT&T 2008 Ex Parte,* pp. 1-8; *ABC Legal Analysis,* pp. 1-68, particularly 26-32.

This is untenable for multiple reasons. The primary reason is that the very proponents of preemption who rely on the *ISP Remand Order* and participated in that appeal portrayed the case as a decision of very limited scope addressing a market of declining practical significance.[15] Moreover, the FCC itself never gave the *ISP Remand Order* on appeal the proponents' brand new meaning.[16]

The proponents also ignore prior court precedent limiting the FCC's ability to preempt intrastate communications using the FCC's interstate authority. For example, the legislation adopting TA-96 contained a provision in Section 601 addressing a rule of construction. Section 601 expressly states that the TA-96 amendments were not to be construed to modify, impair, or supersede federal, state, or local law unless expressly provided for by the amendments. Finally, there is no express statutory authority to impair, modify, or supersede Pa. PUC authority over intrastate communications anywhere in TA-96.

The FCC has not been expressly empowered anywhere to preempt the Pa. PUC's authority to regulate intrastate communications, rates, terms and conditions of service. The Section 601 rule expressly prohibits the FCC from preempting the Public Utility Code, 66 Pa.C.S. § 1 *et seq.* and the General Assembly's mandate to promote broadband deployment throughout Pennsylvania set out in Chapter 30, 66 Pa.C.S. § 3010, *et seq.* as it was enacted in 1993 before TA-96 and as it exists today after enactment of TA-96. This also includes the General Assembly's VoIP Freedom Bill, 73 Pa.C.S. § 2251.1 *et seq.* retaining Pa. PUC's authority over IP and VoIP services except for retail rate regulation and consumer protections.

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[15] *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.
[16] *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.

Section 152(b), 47 U.S.C. § 152(b), provides that nothing in the Communications Act of 1934 or TA-96 is to be construed as giving the FCC authority over charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.

In addition, court precedent limits preemption and FCC regulation of intrastate communications. In *NARUC v. FCC,* 533 F.2d 601 (C.A.D.C. 1976), the D.C. District Court recognized that an agency's interpretation of its authority is entitled to deference but that is not a license to re-write statutory language, conjure up powers with no clear antecedents in law or precedent, or to ignore express statutory limits on the FCC's authority.

The proponents' legal theory construes statutory language and precedent so as to conjure up for the FCC power it does not possess over intrastate communications by wire or radio for carriers. They do so to secure FCC ratification of the proponents' latest and transient business plan. The proponents seek preemption to impose a nationwide compensation rate of $.0007 per MOU regardless of market realities, carriers' costs, the impact on consumers, or the demolition of joint federal-state jurisdiction based on state sovereignty.

While the Supreme Court ruled in 1968 that Congress' enactment does give the FCC a mandate that is expansive and not stingy in scope in *U.S. v. Southwestern Cable Company,* 88 S.Ct. 1994 (1968), other decisions provide more clarity on what that expansive authority means when it preempts intrastate communications. Federal courts have held that the FCC's mandate represents a comprehensive scheme for the regulation of *interstate* communications but that it is simply inapplicable to intrastate communications even if the plant in question is used interchangeably to provide *interstate* and *intrastate* communications. The narrow limit on the FCC's authority over intrastate communications is not limited to instances only where intrastate matters do not impact interstate communications. *Benani v. U.S.,* 355 U.S. 96 (1957), and *Louisiana PSC v. FCC,* 476 U.S. 355 (1986).

Preemption is not justified, as the proponents suggest, simply because an evolving network increasingly relies on a new technology to provide interstate and intrastate services. Precedent controls technological change; technological change does not control precedent.

The courts have repeated multiple times that the FCC has expansive authority over interstate communications but that the authority to regulate intrastate communications remains with the several states even when equipment is used interchangeably for interstate and intrastate purposes. The only exception is when the local services cannot be separated from interstate services or they substantially affect interstate communications. *Benanti v. U.S.,* 355 U.S. 96 (1957); *Pine Tree Telephone Company v. Maine Public Utility Commission,* 631 A.2d 57 (ME 1993); *Public Utility Commission of Texas v. FCC,* 886 F.2d 1325 (C.A.D.C. 1989); *Alascom Inc. v. FCC,* 727 F.2d 1213 (C.A.D.C. 1984).

The proponents' major premise is that the traffic cannot be separated, state regulation of intrastate communications is a burden, and that technology renders joint federal-state jurisdiction an obstacle to broadband deployment. However, the *NECPUC Legal Analysis, NARUC Legal Analysis,* and *Pa. PUC Comments and Reply Comments* demonstrate otherwise.

It is not "impossible" to separate traffic into an interstate and intrastate component. As of 2008, by Verizon's admission, 64% of households still rely on circuit-switched networks that do separate traffic. Moreover, the *Vonage Decision* preempting state authority over nomadic VoIP was a narrow remedy for a targeted issue; attempts to expand that decision beyond its narrow confines to include severable traffic is unsustainable. Finally, the claim ignores the increasing reliance on the "header" component in IP traffic to manage traffic, the emergence of "deep packet inspection" to allocate speeds and transmission priorities to IP traffic, and traffic shaping among Internet service providers to deliver speeds based on rates or usage limits imposed on consumers.[17]

As NARUC effectively points out, carriers have long identified intrastate and interstate access services since the inception of access charges.[18] The proponents apparently forget that access reflects the governments' compensation to former monopoly owners for the costs of providing access to competitors after the social contract was amended to require those monopoly owners to provide access to competitors.

Regardless of whether traffic could or could not be separated, the FCC and the states and carriers have also relied on imputed usage factors, such as Percentage of Interstate Use (PIU) and Percentage of Local Use (PLU) to allocate costs like trunking when it was impractical to separate traffic or trunks served multiple purposes. The carriers did so, in part, given the FCC's recognition of joint federal-state jurisdiction even when facilities have a "mixed use" purpose based on state and federal regulatory interests and administrative simplicity. *In re: MTS and WATS Market Structure,* Docket No. 80-286 (1989), paragraph 6.

In addition, even in those instances where the FCC could completely preempt the states, the courts limit that complete preemption to matters unrelated to the preemption. For example, complete preemption to prevent rate discrimination does not carrier misrepresentations such as recoupment of universal service fund contributions or issues related to contract formation, legality, or unconscionability. The courts have done that because matters unrelated to an alleged issue, such as discrimination in rate, terms, and conditions that supported

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[17] *In re: Connect America Fund,* Docket No. 10-90, Reply Comments of the Pa. PUC (May 23, 2011);
http://oti.america.net/blogposts/2011/m_lab_shaperprobe_reveals_traffic_shaping 6/13/2011.

[18] *In re: Intercarrier Compensation,* Docket No. 01-92, NARUC Legal Analysis (2005), p. 12.

preemption in the first place, do not come within the scope of the complete preemption. *Universal Service Telephone Fund Billing Litigation,* 247 F.Supp.2nd 1215 (Kan. 2002); *Ting v. AT&T,* 182 F.Supp.2nd 902 (N.D.Ca. 2002) aff'd in part, rev'd in part, 319 F.3d 1126, cert denied 540 U.S. 811.

The complete preemption of Pa. PUC authority to regulate intrastate rates, terms and conditions of service, and consumer protections (including those allocated to the Attorney General in the VoIP Freedom Bill) cannot be squared with this precedent. There is no express authority to preempt the Pa. PUC from regulating intrastate communications. Prior administrative practice reconciled the alleged inability to separate traffic with joint federal-state jurisdiction since 1934. Were it otherwise, the FCC would have been regulating Pennsylvania's intrastate communications since 1934 or, at the very least, 1996.

Moreover, the proponents' reliance on other preemption precedent is misplaced. The *Vonage Order* undermines preemption. The *Vonage Order* was limited to nomadic VoIP and did not include all VoIP. That was because fixed line VoIP can be easily separated into interstate and intrastate components. With nomadic VoIP, a user and its equipment can be located anywhere. With fixed line VoIP, the user and its equipment operate close to the wireline center providing that service to a home, office, or business. Moreover, this FCC preemption of nomadic VoIP in the *Vonage Order* upheld the rule that "mixed-use services are generally subject to dual federal/state jurisdiction, except where it is impossible or impractical to separate the service's intrastate and interstate components."

Also, new technology like deep-packet inspection, traffic shaping, and Internet Engineering Task Force protocols show that traffic separation is not impossible. Traffic separation based on technology, imputation by agreement among carriers, and preservation of joint jurisdiction over mixed used facilities like *MTS* and *WATS* undermine the proponents' argument for preemption.

The denial of preemption is also more consistent with the FCC's most recent precedent, particularly the *Nebraska-Kansas VoIP USF Order.* In that order, the FCC ruled that states may extend their universal service contribution requirements to future intrastate revenues of nomadic interconnected Voice over Internet Protocol (VoIP) service providers, so long as a state's particular requirements do not conflict with federal law or policies. The FCC refused to preempt state universal service fund contribution rules for nomadic interconnected VoIP if they are consistent with the Commission's contribution rules for interconnected VoIP providers and the state does not enforce intrastate universal service assessments with respect to revenues associated with nomadic interconnected VoIP services provided in other states.[19]

Pennsylvania legislation opened local markets to competition and initiated broadband deployment programs for high-cost rural areas in advance of similar statutory provisions in federal law. The fact that the proponents now rely on later-enacted provisions to support preemption of state laws and regulations addressing a similar subject supports denial of preemption.

It is worth noting that the proponents' citation to the *ISP Remand Order* is not consistent. On the one hand, the proponents claim that the FCC concluded that Section 251(b)(5) is not limited to "local" traffic, but instead extends to "the transport and termination of *all* telecommunications exchanged with LECs." The D.C. Circuit affirmed the *ISP Remand Order* in *Core Communications, Inc. v. FCC*, 592 F.3d 139, 143-46 (D.C. Cir.), *cert. denied*, 131 S. Ct. 597, 626 (2010).

On the other hand, the proponents concede the FCC's recognition at Paragraph 39 of the same *ISP Remand Order* that service falling within the scope of Section 251(g) "remain subject to Commission jurisdiction under section 201

[19] *In re: Universal Service Contribution Methodology and Petitions of the Nebraska Public Service Commission and the Kansas Corporation Commission,* Docket Nos. 06-122 (November 5, 2010), paragraph 1.

(or, to the extent they are *intra*state services, they remain subject to the jurisdiction of state commissions)."[20]

The reason for this careful parsing of precedent and the resulting inconsistency is easily explained. The *ISP Remand Order* established a federal rate of $.0007, with some caveats, for dial-up Internet calls based on an FCC conclusion that the service was interstate in nature even if some portion of the service included local calls that terminated within a state. The *ISP Remand Order* did not pronounce some comprehensive new legal theory of an omnipotent FCC and mendicant state commissions that brought all communications within Section 251(b)(5), including Section 252(d)(2) communications, using Section 201 and 251(i).

The FCC did state in the *ISP Remand Order* that this was a new and better view but that statement was not controlling. The statement was dicta in a decision that narrowly focused on the regulatory authority to set a compensation rate for a local dial-up Internet call that terminated interstate but was part of an interstate service. The proponents cannot rely on dicta in one sentence of any order to sustain a complete preemption of state authority that substantially undermines federal-state joint jurisdiction. Moreover, the FCC could not have intended to issue such a sweeping rule of comprehensive preemption using dicta in one sentence. That would have been a due process violation of a significant nature. Many parties that would be concerned with such a complete preemption would have been unaware that this rule was being proposed. Absent a meaningful opportunity to be heard, any attempt to give the *ISP Remand Order* such a meaning violates due process and is an arbitrary and capricious result.

Due process may not be the major issue for the proponents compared to a short-term business plan. That is understandable. However, for the FCC and the

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[20] Compare *ABC Legal Plan* at pp. 10 and 12.

states, due process is important because it can overturn decisions. The governments take the prohibition against the arbitrary and capricious seriously.

Finally, the current FCC is not inclined to violations of due process or one that takes arbitrary and capricious action. Even assuming otherwise, *arguendo,* complete preemption would be arbitrary, capricious, and a violation of due process protected by the federal Administrative Procedure Act. No one can rely on a dicta observation in one sentence of a narrow decision to support complete preemption given the lack of notice that such a rule was under consideration.

The complete preemption extrapolated from the *ISP Remand Order* also contradicts the FCC's dismissal of that very concern in the ensuing appeal. There, the FCC dismissed the express concern that others would, as the proponents do here, interpret the *ISP Remand Order* to support a far grander and expansive purpose. The FCC dismissed that very concern in briefs defending the *ISP Remand Order* before the United States Supreme Court about the scope and meaning of its *ISP Remand Order.* The FCC viewed the entire proceeding as one "of limited and rapidly diminishing practical significance."[21]

AT&T and Verizon, in particular, dismissed the Pa. PUC's concern about expansive interpretations of the *ISP Remand Order* in defensive briefs filed with the Supreme Court. There, those defenders of the *ISP Remand Order* dismissed that concern. They portrayed 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."[22] They should be held to that view.

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[21] *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.
[22] *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.

There is nothing new in law, technology, or policy since October 2010 that justifies these particular proponents' reliance on the *ISP Remand Order.* Such a *volte face* cannot be ratified by the FCC in the absence of a Congressional mandate, express preemption, field preemption, or conflict preemption.

Any other result is arbitrary and capricious. The proponents' attempt to subordinate constitutional law and joint federal-state jurisdiction over communications to ratify some transient business interest in a market characterized by rapid technological change is inappropriate. The FCC must deny preemption and thereby preserve the longer-term predictability provided by federal-state joint jurisdiction. That approach would not elevate short-term business interest over long-term constitutional precedent.

The *ISP Remand Order* does not support preemption based on Sections 251(b)(5), (g), and (i) as well as Section 252(d)(2). The proponents' legal theory transforms a solution to a discrete and transitory problem in a market of diminishing significance into a complete preemption of state jurisdiction.

This is not the only time these proponents offered an agency expanded power in exchange for ratification of a new interpretation of law when backpedaling from a prior interpretation because their business interest changed. [23]

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[23] *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.

This is the first time the FCC has been asked to ratify such a comprehensive and possibly irrevocable usurpation of state authority based upon a business interest.

The proponents' understandably crimped view of joint federal-state jurisdiction, federal law, and cooperative federalism is largely rooted in their common, but not controlling, fiduciary duty to maximize shareholder value. The FCC and the states have a different and far longer-term fiduciary duty to constitutional provisions and federal-state joint jurisdiction. In this conflict of fiduciary duties, the denial of preemption preserves federal-state joint jurisdiction over short-term business interests. Preemption does just the opposite.

The FCC must refuse this tainted offer to abandon federal-state joint jurisdiction, cooperative federalism, and the rule of law and regulations.

3. Section 251(g) does not support preemption.

Section 251(g) preserves regulations, precedent, and law in place before the effective date of TA-96 until the FCC adopts new rules addressing those matters. The proponents rely on this Section 251(g) to preempt state authority so long as the FCC adopts new rules under Section 251(g) using their Section 201 authority.

The proponents claim that the FCC can bring all communications within 251(b) and then, having done so, can overturn all other laws, rules, practices or agreements once the FCC promulgates rules under Section 251(g) using its Section 201 authority. This includes the states' power to regulate intrastate communications, rates, and service providers.

This interpretation of Section 251(g) apparently repeats the legal view applied to dial-up Internet calls in the *ISP Remand Order*. But, as noted above, the FCC considers the *ISP Remand Order* to be a decision of little importance addressing a market of declining significance. The proponents defended this view of the *ISP Remand Order*. They should not be permitted to abandon that now.

Assuming otherwise, *arguendo,* the Supreme Court has ruled that the FCC has no implied authority to set intrastate rates unless Congress has expressly authorized the preemption, including intrastate depreciation. *Louisiana PSC, et al. v. FCC*, 476 U.S. 355, 374-375 (1986).

Louisiana precludes a federal agency from unilaterally preempting a state in pursuit of a federal policy absent clear authority. Because Section 251(g) is limited to interstate practices and has nothing to do with establishing FCC. authority to preempt intrastate rules or law, the FCC has no such authority

Given *Louisiana,* the most reasonable interpretation of Section 251(g) is that the provision 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 is no grant of "implied authority" to regulate intrastate communications by the FCC after bringing that subject matter within the FCC's purview under Section 201. This is especially true for rates and matters of intrastate concern.

4. Section 252(e)(5) and Section 253 do not support preemption.

Section 252(e)(5) authorizes the FCC to preempt state review and approval of interconnection agreements and the other duties imposed on the states in Section 252 if a state refuses to act. 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.[24] 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.[25] These provisions limit

[24] *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).*
[25] *Texas Preemption Order,* Paragraph 42.

FCC preemption to situations where a state requirement is not competitively neutral or a state has failed to act.

The FCC's precedent addressing these provisions fails to support preemption. The FCC does not take an "expansive" view of what constitutes a "failure to act" under Section 252(e)(5) sufficient to warrant preemption.[26] The FCC has rarely acted to preempt a state commission based on a refusal to act.[27]

When 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.[28]

The proponents plan points to no refusal to act by the Pa. PUC as required by Section 252(e)(5). The proponents provide no specific provision or provisions of the General Assembly where Pennsylvania violates the competitive neutrality

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[26] *Local Competition Order*, CC Docket No. 96-98, Paragraphs 1285-1286, 11 FCC Rcc 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).

[27] *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.

[28] *Texas Preemption Order*, Paragraph 42.

mandate of Section 253. Simply put, there are no facts warranting preemption of the Pa. PUC's authority over intrastate communications.

The Pa. PUC's recent decision in its *Access Reform Order* undermines any claim that the FCC must act to set intrastate communications rates in Pennsylvania either because the Pa. PUC has failed to act or because the decision is not competitively neutral. Assuming otherwise, *arguendo,* one provision in one enactment or commission decision is no basis for the wholesale preemption of all intrastate authority nationwide to regulate intrastate communications.

In addition, Pennsylvania promoted local competition, supported broadband deployment, preserved universal service, and reformed intrastate carrier access rate reforms as early as 1995. Pennsylvania certified its first Competitive Local Exchange Carrier (CLEC)[29] -- well in advance of the federal enactment of similar mandates in TA-96. Since 1995, Pennsylvania implemented a statewide universal service fund that supports local rate rebalancing, reduced intrastate access rates through a combination of state USF and local rate increases, and is nearly complete on its broadband deployment program throughout Pennsylvania, most particularly in its high-cost rural areas.

The Pennsylvania state-specific USF maintains affordable local rates for the end-user consumers of rural incumbent local exchange carriers (ILECs). Pennsylvania recently completed an examination of rate parity between intrastate carrier access rates and interstate rates on a carrier-by-carrier basis using a reasonable glide path and the TELRIC model.

The Pa. PUC has statutory mandates to promote local competition, preserve universal service, address intrastate access rate reforms, and continue a limited regulation of VoIP based on the VoIP Freedom Bill and Chapter 30. Those laws are at risk if the FCC preempts the Pa. PUC. Pennsylvania implemented the difficult task of promoting competition, deploying broadband, reforming local and

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

intrastate access rates, increasing rates to promote competition and broadband deployment, particularly in Pennsylvania's rural areas, before and after TA-96.

These actions were taken in Pennsylvania and elsewhere[30] before TA-96. Actions taken before TA-96 was enacted do not support preemption in the absence of an express preemption from Congress or factual evidence demonstrating that state regulation burdens federal universal service or is an obstacle to an important federal policy objective, i.e., broadband deployment. Preemption is contradicted by a proponent's admission that states have reformed intrastate access rates.[31]

The FCC must reject the proponents' preemption based on those provisions or any other provision. There is no failure to act. There are no mandates that are not competitively neutral. There is no provision in federal law expressly authorizing the FCC to preempt all state authority over intrastate communications.

The failure to provide any factual evidence sufficient to support preemption under Section 252(e)(5) and Section 253 or identify any other provision of federal law expressly authorizing preemption limits the FCC to these provisions. Barring factual evidence, the FCC can only preempt where Congress expressly preempts based on Supreme Court 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).

5. Section 254's universal service provisions do not support preemption.

Section 254(b)(1) requires that quality service be at just, reasonable, and affordable rates. Section 254(b)(2) mandates access to advanced

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[30] *In re: City Signal, Inc., Case No. U-10555 (Michigan Public Service Commission: 1995)*, p. 21, 159 PUR4th 532 (1995).
[31] *In re: Intercarrier Compensation,* Docket No. 01-92, AT&T Ex Parte (October 25, 2010), Attachments 1 and 2 ("States with Intrastate/Interstate Rate Parity.").

telecommunications and information service. Section 254(b)(3) requires comparable rates for comparable services in rural and urban America. Section 254(f) authorizes the states to promote intrastate universal service so long as it is consistent with FCC requirements and it is explicit, predictable, sufficient, and does not rely on or burden federal universal service.

The proponents' preemption rests on the claim that disparate rates and state universal service mandates related to COLR burden the federal fund. They also claim that state regulation erects obstacles to the federal policy of broadband deployment. There are no burdens or obstacles supporting preemption.

The proponents also claim that preemption and mandated federal surcharges on end-user customers will compensate carriers for lost revenues and make support more explicit. The proponents claim that preemption and imposition of a mandatory $.0007 compensation rate on all intrastate communications following a transition period, in exchange for some promise to deploy broadband in their unserved study areas, is consistent with universal service.

The Pa. PUC disagrees that the ostensible benefits to broadband deployment, i.e., the end of state burdens imposed on universal service and the removal of state obstacles to the federal policy of broadband deployment, sustain preemption. The Pa. PUC notes that 82% of the nation's exchanges in study areas without broadband are located in the study areas of three of the major proponents of preemption, i.e., AT&T, Verizon and Qwest/Century Link.[32] The price-cap proponents seeking preemption ignore the fact that they have 82% of the nation's exchanges without broadband in their own study areas, a rate far higher than broadband unavailability in other exchanges served by other rural carriers.

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[32] *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.).

This demonstrates that there is simply no connection between intrastate communication rates, burdens on universal service, and the carriers' failure to deploy broadband under their federal price-cap regime in their rural areas. That is because rural carriers with Rural Utility Service (RUS) obligations who are net recipients of federal support have similar cost and territorial challenges as price-cap carriers serving rural areas. The difference is that those carriers have more broadband compared to AT&T, Qwest, and Verizon.

RUS-supported carriers and recipients of federal support have deployed more broadband compared to price-cap carriers although they have similar exchanges in higher-cost rural areas. The fact that NECA carriers receive federal support is not dispositive because the major price-cap carriers without broadband who support preemption receive federal support.[33]

For example, Pennsylvania is a net contributor to the federal fund in excess of $158M as of October 2010 even though Pennsylvania carriers did receive $57M from the high-cost fund for Interstate Access Support (IAS).[34] Verizon is the largest incumbent provider of basic service in Pennsylvania. Verizon is a price-cap carrier at the federal level and received support from the federal IAS component of the federal fund. Verizon received $15M of the $23M in IAS support distributed to Pennsylvania carriers. This includes support for Verizon's Business Global LLC operation, which received $437,350.[35]

Verizon supports preemption, limiting COLR to recipients of federal support, and is one of the three price-cap carriers with 82% of the exchanges without broadband. In fairness, however, this 82% figure does not reflect the fact that Verizon is on course to complete its broadband deployment commitment in

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[33] *See* Federal-State Joint Board Monitoring Report, Docket No. 98-202 (October 2010), Table 1.12 and Table 2.28 (*October 2010 USF Report).*
[34] *See October 2010 USF Report*, Table 1.12.
[35] *October 2010 USF Report,* Table 3.28, p. 3-95.

Pennsylvania by 2015 using, in part, rate increase opportunities provided to Verizon by the Pa. PUC under Chapter 30.

This supports denial of preemption. State law and policy, far from being a burden on universal service or an obstacle to the federal policy of broadband deployment, is supporting an important federal policy.

AT&T is similar. In Ohio, for example, AT&T is a major incumbent provider of basic service. Ohio is a net contributor in excess of $124M to the current federal fund as of October 2010. But, Ohio carriers received $13.6M from the high-cost fund.[36] AT&T gets support from the Interstate Access Support (IAS) part of the fund. It received $7.3M of the $13.6M in IAS support distributed to Ohio carriers.[37]

AT&T supports preemption of state law as a burden on broadband deployments, limiting COLR only to recipients of federal support, and is the second of the three price-cap carriers with 82% of the exchanges without broadband. AT&T fails to explain why it failed to use IAS support and other support provided under independent state law to promote broadband deployment, particularly in areas where AT&T serves high-cost rural areas. AT&T is silent on what happens to any state support for broadband deployment if AT&T convinces the FCC that preemption of state broadband deployment policies is needed to remove an obstacle to the important federal policy of broadband deployment.

Qwest is only slightly different. For example, in Nebraska, where carriers receive approximately $87M more in support than they pay (reflecting Nebraska's very rural study areas noted by the Nebraska Public Service Commission), Qwest received $2.9M of the $6.8M in IAS support distributed within Nebraska. Like AT&T and Verizon, Qwest supports preemption, limiting COLR to recipients of

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[36] *See* Federal-State Joint Board Monitoring Report, Docket No. 98-202 (October 2010), Table 1.12 (*October 2010 USF Report).*
[37] *October 2010 USF Report,* Table 3.28, p. 3-95.

federal support, and is the last of the three price-cap carriers in the nation with 82% of the exchanges without broadband. Qwest fails to explain why the IAS support it received was not used to promote broadband deployment. Qwest does not address what happens to the support for broadband deployment Qwest has received or will receive under independent state laws promoting broadband deployment in high-cost areas like rural Nebraska. There is no apparent commitment to returning that money to the independent states. Qwest is likely silent on that issue because the existence of state laws reflecting the important federal policy objective of broadband deployment are very difficult to preempt based on claims that Nebraska policies supporting universal service and broadband deployment should be preempted because they burden federal universal service or are an obstacle to broadband deployment.

The same thing is true for those NECA carriers who once opposed preemption and the mandatory $.0007 rate but now support preemption. The Pa. PUC notes that their about face from opposition to preemption in 2008 to support for preemption in 2011 does not diminish the fact that NECA carriers under more traditional regulation deployed broadband far better than price cap carriers.

All the carriers who support preemption receive support. Some of the proponents receive state support for broadband deployment. The proponents agree that preemption is needed because the states burden federal universal service and are obstacles to the important federal policy objective of broadband deployment.

The one major difference appears to be their federal regulatory regime. NECA carriers subject to rate-base rate of return regulation deployed broadband better than price-cap regulated carriers. This difference reinforces the observation that it is the failure in the federal regulatory paradigm, not the states burdening universal service or creating obstacles to an important federal policy objective, that explains this considerable variation in who deployed broadband and who did not. Preemption of state law and state broadband deployment efforts will not remedy any failure in the federal regulatory paradigm.

As noted earlier, the last time the threat of preemption erupted, NECA carriers opposed preemption as a violation of federal law and an unconstitutional taking.[38] As noted noted elsewhere, the major change seems to be a change in the short-term business interest of NECA carriers. They now share the price-cap carriers' view that preemption should apparently elevate short-term business interest over the longer-term preservation of federal-state joint jurisdiction.

The FCC cannot solve the apparent failure of its price-cap regulatory paradigm through preemption. The FCC should not be distracted from the major carriers' failure to deploy broadband just because rate-of-return carriers now support the preemption those carriers seek. The fact remains that rate-of-return rural carriers have deployed more broadband compared to the rural exchanges in the study areas of the price-cap carriers. Preemption based on some alleged state failure to act, mandates that are not competitively neutral, burdening federal universal service, or erecting obstacles to broadband deployment whenever a state promotes broadband deployment are not sustainable based on the facts. State efforts actually further an important federal policy objective.

Any FCC solution to the apparent failure of its regulatory paradigm must be premised on joint federal-state jurisdiction. One solution could be imposition of a more traditional paradigm like NECA's and continuation of COLR on every carrier that received, or will receive, federal support. This includes IAS.

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[38] Compare *In Re: intercarrier Compensation,* Docket No. 01-92, Ex Parte of NECA (September 11, 2008) ($.0007 does not even cover billing costs); *In re: Intercarrier Compensation,* Docket No. 01-92, Ex Parte of NTCA (September 12, 2008) (preemption violates law and $.0007 is confiscatory) and *In re: Connect America Fund,* Docket No. 10-90 (May 2, 2011)(the FCC lacks power to bring all traffic within Section 251(b)(5) and rates at or near zero are not compensatory) with *In re: Connect America Fund* (July 29, 2011) *(USTA Letter of NECA,* et al.) (Preemption, a $.0007 rate, and surcharges in the proponents plan is supported by rural rate-of-return carriers).

The Pa.PUC also suggests that remedying an apparent failure of price-cap regulation through expansion of more traditional regulation and preservation of federal-state joint jurisdiction is better for Pennsylvania than jettisoning federal-state joint regulation and a preemption that abandons long-standing Carrier of Last Resort (COLR) obligations. The FCC and the states have legal authority to impose COLR as part of their Section 214 ETC designation. If the FCC adopts a restrictive rule in which COLR is applicable only to carriers who received or will receive federal support, all the proponents of preemption must shoulder that COLR obligation because all the proponents receive some sort of federal support. That solution is entirely consistent with the proponents' own condition.

The best solution is to deny preemption given the states' positive support for the important federal policy objective of broadband deployment. Denial of preemption is also warranted given the states' reliance on state support to promote broadband deployment and preserve universal service. Denial of preemption is far more consistent with Supreme Court limits on the FCC's authority to preempt state regulation of intrastate communications, including depreciation, compared to the proponents' comprehensive preemption premised on superficial claims that do not withstand focused scrutiny. *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).

The FCC should not be distracted by vague promises from some of the carriers' to use the savings from the substantial reduction in the payments they make to non-affiliated carriers for call termination through intrastate preemption and a mandatory $.0007 rate. That commitment may be commendable but that does not make preemption constitutional or legal. This promise of savings reallocations based on preemption contradicts the facts, particularly when there is no enforcement or oversight role and the FCC abandons federal-state joint jurisdiction to correct some apparent failure of its federal regulatory paradigm.

6. Section 332's limited preemption of state regulation of commercial mobile wireless service does not support preemption.

Section 332, 47 U.S.C. § 332, addresses the federal regulation of commercial mobile radio service (CMRS). Section 332(c) classifies CMRS as a common carrier service subject to Title II unless the FCC determines otherwise but only after determining that the requirement is not necessary for just and reasonable rates, the protection of consumers, or in the public interest. Section 332(c)(1)(A) requires the FCC to review competitive market conditions and expressly addresses state preemption in Section 332(c)(3).

Section 332(c)(3)(A) prohibits state regulation of entry or rates although the states are not preempted from regulating other terms and conditions.
Section 332(c)(3)(A) expressly prohibits preemption of the states for requirements imposed by a state as necessary to ensure the universal availability of telecommunications at affordable rates when wireless is a substitute for land line telephone service for a substantial portion of communications within a state.

Section 332(c)(3)(A) also authorizes the states to petition the FCC for authority to regulate rates and the FCC must grant that petition if the state demonstrates that market conditions do not protect consumers or that market conditions exist and wireless is a substitute for land line exchange service for a substantial portion of the population. A decision must be made within 9 months.

The proponents of preemption allege that wireless traffic and VoIP cannot be separated into an interstate and intrastate component. They further allege that Congress has expressly preempted all state regulation of wireless rates and that this preemption extends to intrastate communications. The proponents support preemption by noting that consumers are flocking to wireless services.

They claim, for example, that as of December 2010, 96 percent of U.S. consumers had a wireless phone, and more than 29 percent of households had completely "cut the cord." Consumers now spend 2.2 trillion minutes per year on their wireless phones, which far exceeds the number of wireline minutes. Finally, the proponents note that the flip side of this massive growth in intermodal services is a comparably large decline in traditional wireline services. Between 2000 and 2008, the number of ILEC end-user switched access lines fell by 34 percent, and total ILEC interstate switched access minutes declined by a staggering 44 percent.[39]

They note that traditional wireline carriers responded to competition from wireless and VoIP providers by offering their own geography-independent services, including any-distance, unlimited calling plans. Wireline carriers are introducing facilities-based VoIP services, which will offer customers an integrated, any-distance communications service.

The proponents do not discuss the fact that 95% of the doubling in the high-cost fund over the past 8 to 10 years went exclusively to wireless carriers as competitive ETCs under federal law.[40] Regulated wireline universal service subsidized the deployment of unregulated wireless networks through the federal fund. If there was a burden, it was not on the carriers but on those state consumers of wireline service that were forced to indirectly subsidize unregulated wireless deployment programs from a federal fund.

The proponents also fail to discuss the fact that 95% of the nation's wholesale wireless minutes are provided by three providers, all of whom are

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[39] *ABC Legal Plan,* particularly pp. 21-23.
[40] Pennsylvania Public Utility Commission, *Missoula Plan Workshop Public Hearing*, Docket No. M-00061972, Presentation of Gary Zingaretti, Rural Telephone Company Coalition, September 11, 2006 Transcript, p. 187.

unregulated affiliates of a land-line carrier.[41] This raises questions about whether the current state of the competitive market, cited in support of preemption, actually supports a more expanded role for the states given the proponents' claim that wireless has effectively become a substitute for land-line service. This also raises questions about whether the states should act as authorized by Congress and proceed to regulate wireless rates now that wireless service is, by the proponents' own evidence, a substitute for traditional land-line service as authorized by Section 332(c)(3)(A)(i). This raises the further question whether it was subsidies from the federal fund or the allure of competitive markets which explain the proponents' successful deployment of wireless service.

Whatever the answers to those questions, the proponents' blanket statement that Section 332(c)(3) preempts all state regulation of wireless rates is misleading. There are two very important exceptions that preserve state power over wireless.

Preemption does not apply to state requirements imposed under state law on wireless carriers to advance universal telecommunications availability at affordable rates if wireless service is a substitute for land-line service. The proponents' recitation of the wireless success story compared to wireline suggests that wireless is a substitute for land-line service and comes within this limit to Congressional preemption.

Preemption also does not apply if the states demonstrate that market conditions exist and that wireless service is a substitute for land-line service to a substantial part of the population. The proponents' recitation about the increase in wireless minutes and the decline of wireline minutes suggests petitions and not preemption are more appropriate given this Congressional limit on preemption.

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[41] *Applications to Transfer of Control from Nextel Communications, Inc. to Sprint,* WT Docket No. 05-63, Joint Declaration of Stanley M. Besen, et al. (February 8, 2005), Paragraph 51, p. 9.

The proponents' are making the case against preemption because the states have more authority than they are exercising when it comes to regulating wireless service because wireless has become the substitute for land line service for a substantial part of the population, i.e., 96% according to the proponents.

The proponents cite no precedent authorizing preemption based on state burdens on universal service or obstacles to broadband deployment arising from the states' refraining from exercising authority granted them by Congress. While that may be inaction under Section 252(e)(5), the proponents are not seeking preemption because the states have failed to act to regulate the rates of their unregulated wireless affiliates now that wireless is a substitute for land-line service for a substantial part of the population.

Assuming otherwise, *arguendo,* the proponents' claim that state regulations impose burdens on federal universal service actually undermines preemption. Preemption based on burdens to universal service ignores Congressional limits on wireless preemption allowing the states to regulate wireless rates to preserve the universal availability of telecommunications at affordable rates if wireless is the substitute for land-line service to a substantial part of the population.

The express limits on the power to preempt state regulation of wireless service flatly contradicts the carriers' claims that federal law precludes the states from regulating wireless rates or that the states are burdening universal service. Section 332 preserves a state role in regulating wireless service. Those caveats support the denial of preemption. They do not support preemption.

E. The Supremacy Clause and Precedent Do Not Support Preemption Based on Inseverability, The Mixed Use Doctrine, and Field or Conflict Preemption.

1. The Inseverability Claim does not support preemption.

The FCC's own long-standing practice of cooperative federalism with regard to Internet Protocol (IP) communications undermines the proponents' reliance on Section 201. The FCC's own *2006 USF Order* imposing a federal and state obligation on VoIP providers to support universal service contained an express "safe harbor" rule under which intrastate communications would not be assessed to support interstate universal service. The FCC recognized an intrastate component in VoIP service.

The *2006 USF Order* does not support the proposition that all VoIP traffic cannot be separated, particularly since 2006. The "safe harbor" rule adopted in the *2006 USF Order* does not support preemption of any Pa. PUC role for VoIP or IP traffic, especially if VoIP is severable as the *2006 USF Order* suggests.

The "safe harbor" rule stands for the proposition that a Pa. PUC role for VoIP as set out in Pennsylvania's VoIP Freedom Bill is practical. The "safe harbor" rule reflected in the *2006 USF Order* supports the General Assembly's retention of Pa. PUC regulation over VoIP and IP service except for retail end-user rates and consumer protections. The Pa. PUC has authority to ensure that VoIP providers support TRS, 911, universal services, interconnection with other providers, and maintainance of network reliability in Pennsylvania.

2. The "Mixed Use" Doctrine Does Not Support Preemption.

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 access circuits and facilities. Neither the facts nor FCC precedent supports preemption on this basis.

The FCC's own precedent holds that the mere 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 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) (footnote omitted) (the *1989 Depreciation Decision).*

In 1989, the FCC determined 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 proponents' reliance on mixed use that supports preemption and abandonment of this historic approach to the "mixed use" doctrine. The major difference is the emergence of an IP technology that facilitates communications faster than time division multiplexing (TDM) transmission protocol given that TDM is less prevalent than earlier.

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. The proponents' 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 with state commissions reduced to minions implementing directives.

3. Field and Conflict Preemption does not support preemption.

The proponents' preemption also relies on misreading of preemption precedent. They seek the comprehensive preemption of state rate and non-rate regulation, imposition of a mandatory $.0007 mandatory rate on intrastate communication, and removing any state COLR obligations.

Federal court precedent prohibits preemption of an entire field that the states have generally occupied. The federal courts limit preemption to three distinct circumstances. *Farina v. Nokia, Inc.*, 625 F.3d 97 (3rd Cir. 2010). Those are (a) express preemption; (b) field preemption; and (3) conflict preemption. None of those supports preemption.

Express preemption applies where a statute explicitly states that it is the intent of Congress to displace state law. *Farina,* 625 F.3d at 97. As noted above, there is no express provision in TA-96 or even Section 332 addressing wireless regulation that preempts all state laws regulating intrastate communications.

TA-96 permits preemption only where a state has failed to act or imposes a mandate that is not competitively neutral. The proponents provide no facts supporting a claim that any state, let alone all the states, has failed to act under federal law. The proponents point to no state requirement imposed under independent state law that is not competitively neutral. A claim that service quality and carrier-of-last-resort mandates undertaken in exchange for federal support are somehow burdening interstate commerce or prohibiting the deployment of broadband networks is contrary to the facts. Such a claim also contradicts express Congressional retention of state power over intrastate communications.

Section 332 preserves state commission authority over intrastate communications, including state regulation of rates, when necessary to ensure the universal availability of telecommunications at affordable rates. Moreover, Section 332 authorizes the states to seek rate regulation based on market conditions or when wireless service is a substitute for land-line service for a substantial portion of the population. These demonstrate that there is no express preemption of the comprehensive nature sought by the proponents.

Field preemption applies only where the federal interest is so dominant that the federal system will be assumed to preclude enforcement of both laws on the same subject. *Farina,* 625 F.3d at 115. There is no federal interest so dominant over intrastate communications that the FCC may preempt the entire field. Were it otherwise, the FCC would have been regulating rates since the Communications Act was enacted in 1934.

In addition, there are not two laws on the same subject. Federal law addresses interstate and international communications with a very limited role for the FCC in regulating intrastate communications. *Iowa Utilities Board v. FCC,* 219 F.3d 744, 758 (8^{th} Cir. 2000), *aff'd in part, rev'd in part*, 535 U.S. 467 (2002). State law addresses intrastate communications with virtually no role at all for interstate communications.

The same logic applies to TA-96. Even under TA-96, the FCC's ability to regulate intrastate communications is very limited. The FCC can only preempt a state law or provision if it is not competitively neutral or the state refuses to act.

Any action taken under Section 706 to promote broadband deployment and services must be consistent with these limits on the FCC's power. The FCC cannot rely on Section 706 to render these limits on preemption a legal nullity.

Sections 251(b)(5) and Section 252(d)(2) also expressly preserve state commission authority. Supreme Court precedent limits the FCC's authority over intrastate communications to establishing a model that the states must use in setting rates for intrastate communications. *Iowa Utilities Board v. FCC,* 219 F.3d 744, 758 (8th Cir. 2000), *aff'd in part, rev'd in part*, 535 U.S. 467 (2002). This is not field preemption by any stretch of the legal imagination. This precedent does not support the comprehensive preemption sought by the proponents.

> Most importantly, field preemption does not occur in fields that have historically been occupied by the states. In that respect, the *LeFaivre v. KV Pharmaceutial Co.,* 630 F.3d 733 (8th Cir. 2011) rule is instructive:In all pre-emption cases, and particularly those which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

LeFaivre, 630 F.3d at 736.

The Third Circuit in *Bruesewitz v. Wyeth, Inc.,* 561 F.3d 233, 240 (3rd Cir. 2009) *(Bruesewitz),* the circuit followed a similar logic. There, the court stated that a "congressional intent to supersede state laws must be clear and manifest." Here, the proponents' field preemption claim is supported by no clear and manifest purpose of Congress declaring that a federal agency (the FCC) has clear and manifest authority to occupy a field traditionally regulated by the states, i.e., intrastate communications. If anything, this precedent and FCC practice eschew field preemption in favor of joint federal-state jurisdiction.

Moreover, every provision of Congress cited by the proponents to support preemption actually undermines preemption. Section 201 is limited to interstate matters. Section 251 establishes reciprocal compensation. Section 252 gives the states a role in interconnection approval but does allow preemption if the states refuse to act. Section 253 permits preemption if a state imposes a requirement that is not competitively neutral, but the proponents make no such claim. Section 254 advances universal service; there is no evidence that state programs aimed at the important federal policy objective of broadband deployment are undermining federal universal service.

There is no express Congressional preemption of the states' historic police power right to regulate intrastate communications. Field preemption of intrastate communications does not occur when a statute imposes responsibilities on state commissions. Field preemption does not occur when the statute preempting state wireless regulations contains several exceptions from that preemption.

In addition, *conflict preemption* is also not sustainable. *LeFaivre* divides "conflict preemption" into two categories, neither of which is applicable here. There are two types of conflict preemption: impossibility and obstruction. *LeFaivre,* 630 F.3d at 736.

Impossibility conflict preemption arises only when compliance with both federal and state regulations is a physical impossibility. Physical impossibility does not arise merely because carriers must pay other carriers disparate origination or termination rates that are cost-based rates. Impossibility does not arise whenever a carrier incurs supplemental compliance costs to meet legitimate state requirements that are competitively neutral, advance universal service, or promote broadband deployment. Physical impossibility is much narrower and more difficult to meet compared to the "inconvenience" or "impracticality" claim the proponents put forth to support preemption because it is "impractical" to comply with state and federal laws. Corporate inconvenience, like a short-term business plan or interest, does not establish impossibility any more than impracticability is the touchstone for conflict preemption. That is true when preemption proponents seek to elevate short-term business interest over joint federal-state jurisdiction.

Obstruction preemption arises when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *LeFaivre,* 630 F.3d at 737. The full purpose and objective of Congress was not to preempt all state regulation of intrastate communications merely because compliance costs were an impractical burden or inconvenience to the proponents.

The proponents of preemption point to no specific act or regulation of any state, let alone the states, to support their conflict preemption position. State regulation may be inconvenient, frustrating, or even annoying but it is no burden, obstacle, or impediment to the full purpose and objective of Congress to promote local competition and deploy broadband so that urban and rural Americans have advanced telecommunications and information services at comparable rates.

The absence of any meaningful obstruction is particularly evident in those states, like Pennsylvania, that enacted state laws covering the same subjects before TA-96 was enacted. Were it otherwise, Congress would have made a clear and manifest declaration in TA-96 that preexisting state regimes that promoted local competition and broadband deployment were preempted based on Congress' clear and manifest purpose. That did not occur then; it cannot occur now.

The proponents manufacture obstacles to support ratification of a business consortium's short-term interest. Those artificial obstacles are unsustainable when factual evidence shows that state laws promoted local competition and broadband deployment, particularly when the obstacles are self-created.

Any reliance on possible conflict with state law to support preemption is equally unsustainable. Any conflict that exists is a self-created one traceable to decisions carriers made in markets characterized by rapid technological change.

Self-created obstacles may exist but they do not exist because of some state law or regulation addressing intrastate communications that needs to be preempted because it might conflict with broadband deployment. While the number of self-created obstacles may be legion, several spring immediately to mind.

The first one is the price-cap carriers' unwillingness to use revenues arising from the flexibility provided to them under price-cap regulation to build broadband networks compared to rate-of-return carriers and others who did invest in broadband networks. Any infirmity in a federal regulatory paradigm is no basis for preemption of independent state law.

Another is the carriers' focus on deploying wireless networks to deliver unregulated service using subsidies from the federal universal service fund from their regulated wireline operations. Deployment of wireless networks using federal subsidies from the federal service fund to deliver services that have become a substitute for landline communications, and triggering the broader state role as a clear and manifest mandate of Congress when that occurs, does not support the preemption of state law.

An additional one is the refusal to support wireline network investment with revenues from unregulated services like information service although those services are being provided over the same wireline network. State actions allowing flexibility in capital investment decisions to avoid micromanagement does not translate into support for preemption because that approach is burdening the federal fund or erecting obstacles to an important federal policy.

A further one is creating incentives for others to invest in alternative "middle mile" facilities due to special access rates that extract ever-higher rents from other providers who need special access to provide service. This fiduciary duty to maximize shareholder value in the short-term may explain those results based on business interest. But, that fiduciary duty is no basis for preemption of joint federal-state jurisdiction and the governments' fiduciary duties.

An additional one one is the proliferation of "all you can call" wireline packages that stimulate calling demand and termination payments to non-affiliated carriers for a flat-rate consumer fee. The carriers' offerings are largely their own decisions. Bad decisions which trigger increased local calling and more termination payments to nonaffiliated carriers may require a reexamination of a business plan but it does not trigger preemption of independent state law.

A final one is using expert testimony in an attempt to establish that termination rates of $.0007/MOU for wireless calls are justified even though FCC decisions apply reciprocal compensation to intra-MTA calls and access rates apply to inter-MTA calls. The reliance on questionable statements on wireless compensation schemes does not establish a failure to act or lack of competitive neutrality in the states sufficient to warrant preemption.

State utility commissions have relied on joint jurisdiction and state laws consistent with applicable federal law to promote local competition, broadband deployment, and to comply with legislative determinations about broadband deployment, intercarrier compensation, and the delivery of reasonable service. There is no reason to preempt those decisions based on the proponents' unsustainable claims about inseverability, mixed use, or field and conflict preemption.

The claims made in this proceeding in support of preemption reflect transient business interests, including the consortium of business interests supporting preemption. Preemption that ratifies a transient business interest is unwarranted when it unnecessarily upends federal-state joint jurisdiction and regulations which create the long-term stability giving rise to markets. This includes the market for communications in networks and networks of networks.

F. Technological Change Does Not Support Preemption.

The proponents also claim that technological and market change support preemption.[42] Preemption based on this claim is unsupportable.

The Pa. PUC does not agree that technological changes like 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.[43] The copper-analog technology was characterized by joint jurisdiction between the FCC and the states. The current fiber-digital technology and IP transmission sharemany of the same characteristics of the copper-analog network. While the technology differs, the underlying principle of joint jurisdiction is still relevant.

Citizens communicate with each other using both technologies. 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 allow 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

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[42] *ABC Legal Analysis,* particularly pp. 21-29.

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

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 owners, i.e., the cable and telecommunications companies.[44] Moreover, approximately 95% of the nation's wireless wholesale minutes are provided by three carriers all of whom are substantially unregulated affiliates of incumbent local exchange carrier[45] (ILEC) holding companies.

The ILEC holding companies with wireline operations supported by federal universal service or providing support to federal universal service, as well as cable franchise operators who have substantial investment and varying cost constraints in their "last mile" facilities supported by federal universal service, rely on wireline interconnection. That reliance continues regardless of their use of IP technology or new technology like Docsys 3.0.

Above these "last mile" physical facilities controlled by cable and telecommunications owners, IP networks use "peering" between Tier 1 network owners and Tier 2 providers.[46] There, Tier 1 network owners exchange traffic on

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[44] *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).

[45] *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.

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

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.

IP technology is used to provide voice, data, and video service but all IP-packets are not alike.[47] Voice packets require "real time" priority to prevent jitter, latency, and dropped conversations. Data packets can be dissembled and rearranged without a noticeable decline in service quality. Video relies on "buffer" memory to store, and resend, transmission without a decline in quality.

These different packet needs warrant 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 through preemption ignores technological change like DPI and 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.

Preemption does not recognize the varying network technologies compared to the intrastate regulations and rates set by state commissions based on the development of competitive markets and the deployment of broadband.

Preemption divorces the state commissions from intrastate concerns even though state commissions are the first agency to hear from disgruntled consumers regardless of whether the state commission regulates the service. That is because

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[47] 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.

consumers, and state legislatures, often look to the state commission, not the FCC, to address intrastate communications. Preemption makes resolution less probable but it will not make the tradition less likely. Preemption also creates perverse incentives to stall capital investments because of the reduced ability to ensure there are revenues sufficient to finance network deployment or deliver broadband services. That will become the sole responsibility of five individuals in one location compared to multiple regulators spread over a nation of 350 million citizens that spans a continent.

This will be particularly evident in those rural areas that, by the proponents and the FCC's admission, do not fit the competition and choice paradigm.[48] Preemption does not differentiate between urban areas with lower costs and redundant networks and rural areas with higher costs and fewer, if only two, networks at best.

Given these considerations, the Pa. PUC does not support a view that technological change like the emergence of IP transmission and fiber-digital technology supports preemption. This is particularly true because state commissions are the first regulators to hear about consumer unhappiness with telephone or broadband services regardless of whether the state commission does, or does not, regulate the service. State commissions are also the first agencies charged with implementing legislative determinations that more must be done to promote broadband deployment or expand broadband adoption rates.

Preemption must not overturn the state commissions' separate regulatory authority in a joint federal-state jurisdictional framework. This includes the ability to address intrastate communications related to network management practices for public safety, interconnection, and public policy endeavors like Telecommunications Relay Service (TRS) and universal service.

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[48] *2011 Reform NOPR,* paragraphs 1 and 9, *inter alia.*

Preemption fails to recognize that 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. Five individuals in one city along the coast are harder pressed, and more likely to make greater errors with larger impact, addressing interstate and intrastate communications in a nation of 350 million citizens that spans a continent compared to intrastate regulators in fifty states over smaller territory with fewer regulatory mandates and less impact.

Preemption also fails to recognize that federal-state joint jurisdiction gives a network owner and service provider both immediate and distant forums for dispute resolution. Some matters are more local while others are more national in nature. A single forum – namely the FCC – focused on doing all disputes for all parties at all times on every issue in all locations is a prescription for chaos.

The denial of preemption is better. Denial continues the state role in addressing intrastate matters given their legal, technical, territorial expertise, and better knowledge of local conditions. The states are simply better poised to focus on intrastate communications for end-user or wholesale consumers.

Preemption denigrates that expertise while denying all consumers access to any immediate forum for local matters. Preemption concentrates all necessary regulatory authority and enforcement in a single body – the FCC – while ignoring or delegating implementation to state commissions with no resources or authority.

Preemption with or without delegation, bereft as it likely will be of any authorization to impose an assessment on all revenues up to a reasonable cap to support that work, transforms a robust joint federal-state jurisdictional structure into an omniscient center imposing mandates on minions with no resources.

The better solution is to deny preemption. That preserves joint federal-state jurisdiction and avoids the recipe for chaos that preemption will create.

The Pa. PUC continues to view the PSTN to be the PSTN whether it is a Public Switched Transportation Network or a Packet Sending Transmission Network.[49] The Pa. PUC urges the FCC to recognize that technological change does not warrant preemption but retention of an important role for the states in a joint governmental structure.

Conclusion

Preemption is premised on erroneous constitutional, legal, factual, and technological allegations. Preemption favors short-term business interests over the long-term goal of preserving a joint federal-state jurisdiction rooted in experience and practical considerations but capable of delivering reliable service at just and reasonable rates. Preemption is an invitation in clearly visible, but poisonous, ink that promises broadband but will only generate chaos and litigation.

Preemption abandons the practical and marks the nation's infrastructure as one written in the crimped printed style of short-term business interest compared to the broader cursive style that created, and preserved, joint federal-state jurisdiction and the predictability it engenders.

Variations on that long-term cursive are being written in other nations or regions as part of their narrative on robust, and competitive, broadband networks that deliver broadband at increasingly higher speeds and generally lower rates.

That is not preemption.

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