

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

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

**FURTHER COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

The National Association of Regulatory Utility Commissioners (“NARUC”) respectfully submits these initial comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) August 3, 2011 released “*Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*” (“*Further Inquiry*”) WC Docket Nos. 10-90, 07-135, 03-109; CC Docket No. 01-92, 96-45; GN Docket No. 09-51 (DA 11-1348).

This notice supplements the February 9, 2011 *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking* (“NPRM”)¹ which proposes modernizing federal universal service fund (“USF”) and intercarrier compensation (“ICC”) policies based on four core principles.² The *Further Inquiry* seeks comment on specific elements of three plans filed in response to the NPRM, the State Members of the Federal-State Universal Service Joint Board Plan (“*State Plan*”),³ a joint rural incumbent local exchange associations plan (“*RLEC Industry Plan*”)⁴ and a plan filed by six Price Cap Companies (“*ABC Industry Plan*”)⁵ and supported by the

¹ See, *In the Matter(s) of the Connect America Fund*, WC Dkt 10-90, *A National Broadband Plan for Our Future*, GN Dkt 09-51, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Dkt 07-135, *High-Cost Universal Service Support*, WC Dkt 05-337, *Developing an Unified Intercarrier Compensation Regime*, CC Dkt 01-92), *Federal-State Joint Board on Universal Service*, CC Dkt 96-45), *Lifeline and Link-Up*, WC Dkt 03-109, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (rel. Feb. 9, 2011) at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-13A1.doc, published at 76 Fed. Reg. 11632 (Mar. 2, 2011) at: <http://www.gpo.gov/fdsys/pkg/FR-2011-03-02/pdf/2011-4399.pdf>; See also the separate FCC March 2, 2011 DA 11-411 notice at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-411A1.doc specifying comment dates. See also, *In the Matter of Universal Service Reform – Mobility Fund*, Notice of Proposed Rulemaking, 25 FCC Rcd 14,716 (rel. October 14, 2010) at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-182A1.pdf

² *NPRM* at ¶ 10, *mimeo* at 7-8. The four principles include modernizing the FCC’s universal service fund and intercarrier compensation system for broadband; exercising fiscal responsibility to control the size of the USF; requiring accountability of companies receiving support, and transitioning to market-driven policies.

³ *Comments by the State Members of the Federal-State Joint Board on Universal Service*, WC Docket No. 10-90 et al. (filed May 2, 2011) (“*State Member Plan*”) at: <http://fjallfoss.fcc.gov/ecfs/document/view.action?id=7021344856> (narrative – 177 pages) and <http://fjallfoss.fcc.gov/ecfs/document/view.action?id=7021344857> (spreadsheet).

⁴ *Comments of the National Exchange Carrier Association, Inc.; National Telecommunications Cooperative Association; Organization for the Promotion and Advancement of Small Telecommunications Companies; Western Telecommunications Alliance; and Concurring Associations*, WC Docket No. 10-90 et al. (Filed April 18, 2011) at: <http://fjallfoss.fcc.gov/ecfs/document/view.action?id=7021238841> (133 Pages).

⁵ *Letter from Robert W. Quinn, Jr., AT&T, Steve Davis, CenturyLink, Michael T. Skrivan, FairPoint, Kathleen Q. Abernathy, Frontier, Kathleen Grillo, Verizon, and Michael D. Rhoda, Windstream, to Marlene H. Dortch, FCC*, WC Docket No. 10-90 et al. (filed July 29, 2011), at: <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021698690> (Transmittal Letter - 2 pages), <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021698691> (Company Advocacy Cover Letter - 5 Pages), <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021698692> (Attachment 1 - Framework of Proposal - 14 Pages), <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021698693> (Attachment 2 - Summary of Model Results - 04 Pages), <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021698694> (Attachment 3 - Model Description - 28 Pages), <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021698695> (Attachment 4 – Purported Consumer Benefits - 34 Pages), <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021698696> (Attachment 5 – “Legal” analysis - 69 Pages).

United States Telecom Association as well as the three major rural associations that filed the earlier *RLEC Industry Plan*.⁶

While NARUC commends the FCC for including specific elements of the State Plan in the *Further Inquiry*, we continue to have considerable skepticism about the deficit of empirical data and legal support for the August 3, 2011 proposed industry plan. Although we already filed a series of comments in this proceeding focused on areas where NARUC's members have already reached consensus,⁷ a critique of the legal elements of the recently filed *ABC Industry Plan*, including some of portions singled out in for comment in the *Further Inquiry*, are worthy of additional comments.

⁶ Letter from Walter B. McCormick, Jr., United States Telecom Association, Robert W. Quinn, Jr., AT&T, Melissa Newman, CenturyLink, Michael T. Skrivan, FairPoint, Kathleen Q. Abernathy, Frontier, Kathleen Grillo, Verizon, Michael D. Rhoda, Windstream, Shirley Bloomfield, NTCA, John Rose, OPASTCO, and Kelly Worthington, WTA, to Chairman Genachowski, Commissioner Copps, Commissioner McDowell, and Commissioner Clyburn, FCC, WC Docket No. 10-90 et al. (filed July 29, 2011) at: <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021699004>.

⁷ See, e.g., April 1, 2011 *Initial Comments of the National Association of Regulatory Utility Commissioners* (on Section XV), WC Docket No. 10-90 et al., at <http://fjallfoss.fcc.gov/ecfs/document/view.action?id=7021236757> and the April 18, 2011 *Initial Comments of the National Association of Regulatory Utility Commissioners* (on the rest of the *NPRM*), WC Docket No. 10-90 et al., at <http://fjallfoss.fcc.gov/ecfs/document/view.action?id=7021239293>. **NARUC also has over the last three years made other filings in these dockets relevant to the arguments being presented by the ABC Industry Plan proponents and hereby incorporates them into our comments in response to the *Further Inquiry*: *Initial Comments of the National Association of Regulatory Utility Commissioners*, WC Docket Nos. 05-337, 03-109, 06-122, & 04-36, CC Docket Nos. 96-45, 99-200, 96-98, 01-92 & 99-68 filed November 25, 2008), at: <http://fjallfoss.fcc.gov/ecfs/document/view?id=6520188674>, *Letter from NARUC General Counsel James Bradford Ramsay to FCC Secretary Dortch*, filed in CC Docket 01-92, Dockets CC 01-92, 08-152, & 80-286, WC Docket Nos. 04-36 & 06-122; and WT Docket No. 05-194, (filed October 28, 2008), available online at: <http://fjallfoss.fcc.gov/ecfs/document/view.action?id=6520176237>; *Comments of the National Association of Regulatory Utility Commissioners*, WC Docket No. 04-36 (filed May 5, 2005).**

Any FCC Order Should Incorporate the Key Elements of the State Plan.

NARUC and its members have, for several months now, been very concerned about some model run outputs of the closely held industry plan that leaked prior to its filing on July 29th. The framework underlying the pending industry reform proposal simply cannot achieve the FCC's goals. Those early and apparently conflicting (though, of course, not filed in the record) industry model "runs" seem to back that up. In contrast, the State Members of the Federal State Joint Board on Universal Service, based on a substantial financial investment, worked hard to generate and present an integrated plan that actually DOES accomplish the FCC goals to increase broadband deployment while STILL addressing reformation of the existing intercarrier compensation regime and the federal universal service fund program. It also preserves a redefined concept of universal service. That is one reason why, just last month, the attached "*Resolution Strongly Supporting the Proposals Submitted on Universal Service Reform by the State Members of the Federal State Joint Board on Universal Service*" passed the NARUC Board of Directors unanimously.

The resolution specifically recognizes "*the critical role specifically assigned to States by Congress in the Act, including in part through the mechanism of the Joint Board, and upon review and consideration of the State Members' comments and recommendations, commends the State Members and their staff for the thoughtful and thorough evaluation of the USF/ICC NPRM, and specifically endorses the State Members' plan, subject always to the doctrine of federalism and the privilege of States to take exception to selected provisions thereof.*" Indeed, the FCC already recognized in the NPRM at ¶ 13, mimeo at 8, "USF and ICC are both hybrid state-federal systems, and *that reforms will work best with the Commission and State regulators cooperating to achieve shared goals.*" {emphasis added}

Partnership, not Preemption, Will Facilitate Reform.

Whatever the FCC does will wind up in court. Adoption of key components of the State Plan radically restricts the issues available for appeal. Both the Courts and Congress should recognize the benefits of two separate deliberative bodies, both charged with acting in the public interest, examining the same record and coming to the same legal and factual conclusions.⁸ In contrast, adoption of the *ABC Industry Plan* presents a *target-rich environment of appealable issues*,⁹ including record deficits, due process concerns, and specious legal theories – several requiring the FCC to ignore common sense, actual facts and prior Court/Commission precedent.

⁸ While it is true the Universal Service Joint Board did not act in concert, i.e., with participation of its federal members, the majority of the board members concurred in the *State Member Plan* “recommendation” filed in May 2011. The Courts are likely to be less skeptical of FCC policy choices that conform to that plan given the strong role Congress established for the Joint Board in the Telecommunications Act of 1996 on all aspects of universal service policy, e.g., Congress specifically tasked the Joint Board with the lead role in recommending the regulatory changes necessary to implement Section 254 and a continuing role to recommend, “from time to time,” modification of the definition of supported services. 47 U.S.C. § 254(c)(2); *see also* 47 U.S.C. § 254(c)(1)(C) (“[t]he Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported ... shall consider the extent to which such telecommunications services. . . are being deployed in public telecommunications networks by telecommunications carriers.”) *See, generally, State Member Plan* at pages 17 – 91.

⁹ For example, the *ABC Industry Plan*, *inter alia*, (i) as one basis for preemption, postulates an extreme economic inseparability argument that cannot be squared with either the facts or federal policy, (ii) appears to violate 47 U.S.C. § 254(e) by allowing parties other than ETCs to receive USF funding, (iii) is inconsistent with 47 U.S.C. § 214 because it allows carriers to abandon services/service territories without regulatory approval and fails to result in assure supported services include a “telecommunications service.” Indeed, the broad prescription proposed alone, discussed at more length, *infra*, raises another issue not *immediately* imperiled by the *State Member Plan*. Separations reform is necessary to determine the costs that need to be supported, for only then will the FCC know how much support is needed for local service and how much for broadband and the real impact of any proposed access charge structure. See, e.g., *Letter to Chairman Martin, Commissioner Tate, Commissioner Copps, Commissioner Adelstein, and Commissioner McDowell from the State Members of the Federal-State Joint Board on Separations*, filed in Dockets CC 01-92, 08-152, & 80-286, WC Docket Nos. 04-36 & 06-122; and WT Docket No. 05-194, (Filed October 1, 2008), available online at: <http://fjallfoss.fcc.gov/ecfs/document/view.action?id=6520176237>. See also, *State Members of the Joint Board on Separations Letter to all FCC Commissioners*, filed in CC Docket 08-152, WC Docket 04-36, CC Docket 01-92, WC Docket 06-122, WT Docket 05-194, & CC Docket 80-286, (filed October 18, 2008) at p. 4, noting “As a last point, to the extent the FCC determines it will preempt state access charge rate policies, separations changes must occur to ensure that jurisdictional cost assignments are consistent with rate setting authority. States should not be both preempted in setting rates for a service, yet responsible for the cost recovery for that service.”, available online at: <http://fjallfoss.fcc.gov/ecfs/document/view?id=6520176237>.

If adopted, the bulk of these issues will be litigated and will present a multiplicity of opportunities for uncertainty, delay, and possible reversal of the implementation of any reform proposal.

But, however one views the relative merits of these three proposals, the components of the *State Member Plan*, and to a lesser extent, even the *RLEC Industry Plan*, have at least two crucial advantages over the *ABC Industry Plan*.

First, while all three plans suggest a migration in intercarrier rates – the State plan in a manner that eliminates any prospect for arbitrage - neither *the State Member Plan* nor the *RLEC Industry Plan* propose preemption. The *ABC Industry Plan*, in contrast, suggests broad and radical preemption of State authority based upon legal theories whose chief characteristics are that they require the FCC to ignore the economics of the business of telecommunications services, crucial Congressional and agency mandates concerning reliability, law enforcement access, and emergency calling services, prior FCC legal determinations, and the clear text of the statute. The *ABC Industry Plan* sponsors may not like a sagacious agency decision to avoid the legal tar pit of unjustifiable preemption, but it is an undisputable fact that if they do *no one* will be able to successfully appeal at least that aspect of a final FCC decision.

Second, both the *State Member Plan* and the *RLEC Industry Plan* do not raise any record or process concerns. The record deficits for adoption of the ABC Industry Plan are clear.¹⁰ Indeed, one is suggested by the *Further Inquiry*, mimeo at 3, when it asks: “ what information would need to be filed in the record regarding the CostQuest Broadband Analysis Tool (CQBAT model) for the Commission to consider adopting

¹⁰ NARUC noted that industry has been briefing the FCC for months on discussions that led to the filing of the *ABC Plan* in an August 5th extension request at: <http://fjallfoss.fcc.gov/ecfs/document/view.action?id=7021700811>. These briefings covered the proper structure of reform and the legal basis for that structure – advocacy in its purist form. However, though apparently, significant detail about the proposal and a range of legal arguments supporting it was presented, little, if any, of that detail was included in the *ex parte* notices. In the June 23, 2011 *ex parte*, at: <http://fjallfoss.fcc.gov/ecfs/document/view.action?id=7021689510>, where the lack of any useful detail – though obvious – is highlighted by the comments inserted in parentheses: “*We discussed several issues relating to comprehensive reform of the current universal service funding and intercarrier compensation systems. In particular, we discussed how to ensure that intercarrier compensation reform properly accounts for the potential to create incentives for behavior that may interfere with the efficient implementation of reform and how that reform can fit into a longer-term vision of an all-IP network.*” (How?) “*We also discussed legal theories underlying the reduction of current intercarrier rates.*” (What were the legal theories?) “*Regarding universal service reform, we discussed how to properly model rate transitions given declining access minutes, transparency of any modeling efforts and how to create efficiency incentives for fund recipients.*” (How?). {emphasis added via non-italicized comments in parentheses} Cf. the April 27, 2011 *ex parte*, at: <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021341228>. Note there is no reference to other filings in the *ex parte*. Such a reference is an FCC- rule-sanctioned-surrogate for including more detailed information. The FCC’s *ex parte* rules, most recently revised in February, are designed specifically to “enable those participating in our proceedings as well as those observing them to better identify and understand the issues being debated before the Commission.” *Amendment of the Commission’s Ex Parte Rules and Other Procedural Rules*, FCC 11-11, GC Docket No. 10-43, Report and Order and Further Notice of Proposed Rulemaking (rel. Feb. 2, 2011), 76 Fed. Reg. 24376 (May 2, 2011) (R&O), 76 Federal Register 24434 (May 2, 2011), at ¶ 1 mimeo at page 2, available online at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-11A1.pdf. It does not seem on its face that anyone reading at least these two, and likely other *ABC Industry Plan* proponent *ex partes*, could identify any details of the issues being debated. At a minimum, at least a few of these filings appear to be significantly out of compliance with revised 47 C.F.R. § 1.1206(b)(1), which specifically requires *ex parte notices* to “summarize[] all data presented and arguments made during the oral *ex parte* presentation.” According to that section, such submissions “must contain a summary of the substance of the *ex parte* presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.” This non-compliance could cause additional problems. In *Home Box Office v. FCC*, 567 F.2d 9, 53-55 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977), the Court described potential problems that *might* be raised by this multiplicity of *ABC Industry Plan* uninformative *ex parte*’s detailing a series of meetings that surely has impacted the FCC’s process:

Although it is impossible to draw any firm conclusions about the effect of *ex parte* presentations upon the [the rules] . . . we are particularly concerned that the final shaping of the rules we are reviewing here may have been by compromise among the contending industry forces, rather than by exercise of the independent discretion in the public interest the Communications Act vests in individual commissioners. . . *Overton Park’s* mandate means that the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts..{citations omitted.}

it, as proposed in the ABC Plan.”¹¹ That potential problem was also presaged by a comment in an earlier NARUC pleading:

Perhaps *the key evidence* filed to support the ABC plan is the model purporting to show its impact. If the FCC finds the ABC proposal compelling, it is clear it must vet the actual USTA model – not just the description of it filed last week - and also make access to it available under an FCC protective order for critique by other directly impacted by the plan purportedly supported by that model.¹²

Necessarily, the *ABC Industry Plan* proponents had the model runs completed BEFORE they filed the plan. However, they’ve yet to file the model itself. Why? It is difficult to come up with any rational excuse for delay. An uncharitable view suggests they are hoping to limit the prospects for any serious critique or examination of the model by filing it at the last possible moment. Certainly, whatever their

¹¹ Among the other gaping evidentiary deficits in the record needed to proceed with this industry plan, are, (i) the absence of any evidence that voice telecommunications service traffic is either economically or practically inseverable – not surprising since it would be difficult for the FCC to make such a finding while it continues to order the industry to sever traffic via emergency calling and CALEA mandates and (ii) no evidence that State COLR obligations have diminished or are diminishing deployment of either universal service or broadband – again, not surprising since most anecdotal evidence suggests the contrary (a bare listing of the minority of states that have chosen to modify or eliminate COLR obligations does not indicate either – the impact of removal of COLR obligations would have in other states – or even – the impact on universal service it has in those States).

¹² See, the August 5, 2011 *Motion of the National Association of Regulatory Utility Commissioners for Extension of Time*, at page 5, available online at: <http://fjallfoss.fcc.gov/ecfs/document/view.action?id=7021700811>. Compare, *Prometheus Radio Project v. FCC*, -- F.3d ----, 2011 WL 2653785, rel. July 7, 2011 (3rd Cir 2011), available online at: <http://www.ca3.uscourts.gov/opinarch/083078p.pdf>, which notes, slip op. at 20 & 25:

“In remanding the Commission's cross-media limits . . . we advised that “any new ‘metric’ for measuring diversity and competition in a market be made subject to public notice and comment before it is incorporated into a final rule.” [] The FCC's “decision to withhold” its previous metric (the Diversity Index) from “public scrutiny was not without prejudice” to the public's ability to discuss and rebut it during comment, as evidenced by its significant flaws, and the Commission thus should have noticed the methodology publicly. *Id.* We noted that our remand would “give[] the Commission an opportunity to cure its questionable notice.” *Id.* at 411” “In sum, “[t]he opportunity for comment must be a meaningful opportunity.” *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C.Cir.2009). That means enough time with enough information to comment and for the agency to consider and respond to the comments.”

intentions, that will be the result. Even if filed this week, there will not be enough time for anyone, including the FCC’s own experts, to conduct an adequate analysis of the model – given the anticipated effort to get an order ready by the October 2011 Agenda meeting. It seems likely that the plan proponents’ decision to delay filing the actual model will prejudice the public’s ability to discuss and rebut it.¹³

The ABC Industry Plan Proponents Proposed Legal Analysis is Flawed.

The legal and factual case for the broad preemption needed for the *ABC Industry Plan* is weak and the plan proponents know it.¹⁴ It is telling that the plan attaches 69 pages of proposed legal justification to cover a plan that can be fully described in just 14. It is also telling that until recently, many of the same companies that now support the framework, violently disagreed with the proposed legal rationale.¹⁵ Indeed, in a footnote on page 1 of the proposed justification, the authors go out of their way to point out that the current parties to the plan don’t necessarily agree on the legal approaches espoused and “. . .do not intend for this filing to alter

¹³ Id.

¹⁴ Proponents instruct the FCC to espouse as many legal theories as possible and hope that the Courts buy at least one of them. Specifically, they tell the FCC it: “has multiple, mutually reinforcing sources of legal authority on which it can rely to adopt these proposed reforms, and the Commission may find that it can put its reform efforts on the most solid footing by articulating *each* of these sources of authority.” {emphasis in the original} Note the authors’ emphasis. *ABC Industry Plan, Attachment 5* at p. 1, at: <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021698696>.

¹⁵ See, e.g., September 30, 2008 *Letter from Daniel Mitchell, Vice President, Legal and Industry for the National Telecommunications Cooperative Association to Marlene Dortch, FCC Secretary*, filed *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; and *IP-Enabled Services*, WC Docket 04-36, at: <http://fjallfoss.fcc.gov/ecfs/document/view.action?id=6520173006>; October 17, 2008 *Letter from Daniel Mitchell, Vice President, Legal and Industry for the National Telecommunications Cooperative Association to Marlene Dortch, FCC Secretary*, filed *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; and *IP-Enabled Services*, WC Docket 04-36, at: <http://fjallfoss.fcc.gov/ecfs/document/view.action?id=6520176055>.

their prior advocacy or constrain their future advocacy on these issues.”¹⁶

This far-from-unified view of what the statute allows only points out the obvious: the financial incentives for industry to join a “consensus deal” may change, but the facts, precedent, and dictates of the statute do not.

Section 251(b)(5) Does Not Provide a Legal Basis to Preempt the Express Reservation of State authority over Access in Section 251(d)(3).

Only the short time allowed for comments constrains the depth of this critique. The flaws in the proffered legal analysis are numerous and obvious. The authors show a penchant for ignoring the explicit text of the statute and existing (and controlling) legal precedent. One of the more obvious examples is found in the discussion in Attachment 5, of the ABC Industry Plan at pages 9 through 17. Here, industry proposes the FCC may, via Section 251(b)(5), ignore the express reservation of State access regulations in Section 251(d)(3) and preempt intrastate access charges by reclassifying them as “reciprocal compensation”

¹⁶ ABC Industry Plan, Attachment 5, p. 1 n.1, at: <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021698696> : “This white paper is a joint filing by the parties to the Framework. The signatories may have differing views on certain issues related to intercarrier compensation and universal service reform, and *do not intend for this filing to alter their prior advocacy or constrain their future advocacy on these issues. Moreover, individual parties have proposed additional, in some cases complementary, theories in their separate filings that may also provide support for the Framework.* This white paper should not be interpreted as a shift in the parties’ individual views regarding the scope of and constraints on the Commission’s statutory authority.” {emphasis added} See also, p. 21 where the authors note: “Parties to the Framework have taken different positions on whether all VoIP traffic is currently interstate for jurisdictional purposes — and, therefore, within the Commission’s authority under section 201 — and no party intends to change its position by joining this filing.”

Proponents frankly concede that the Eight Circuit has specifically endorsed – what they characterize as a “relatively narrow interpretation of the Supreme Court’s decision in *Iowa Utilities Board*”. Specifically, they reference that “narrow” view as:

that the Commission’s role is limited to resolving “general methodological issues” and that “[s]etting specific prices goes beyond the [Commission’s] authority to design a pricing methodology.” *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000) (citation omitted), *aff’d in part, rev’d, in part*, 535 U.S. 467 (2002). *ABC Industry Proposal, Attachment 5* at p. 16

But in the very next sentence they contend that “nothing in the Supreme Court’s decision suggests that “design[ing] a pricing methodology” is at the *outer limit* of the Commission’s authority,” citing 525 U.S. 366 at 385, as the basis for an argument that the FCC indeed has the right to go beyond methodology and set an actual default rate.

However, if one goes back one page in the discussion of the cited case, the Eighth Circuit “interpretation” of the Supreme Court’s decision, far from being “relatively narrow”, seems precisely on point with that Court’s exegesis of the clear statutory text. According to the Supreme Court, in *AT&T Corp. et. al. v. Iowa Utilities Board*, 525 U.S. 366, 384, at: <http://supreme.justia.com/us/525/366/>:

Respondents contend that the Commission's TELRIC rule is invalid because [§ 252\(c\)\(2\)](#) entrusts the task of establishing rates to the state commissions. We think this attributes to that task a greater degree of autonomy than the phrase “establish any rates” necessarily implies. The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory “Pricing standards” set forth in § 252(d). ***It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.*** That is enough to constitute the establishment of rates. {emphasis added}

It is difficult to see how *that* Supreme Court view admits of proponents’ theory that the Commission has authority to set default rates for reciprocal compensation under § 251(b)(5).

But as a practical matter, any rational view of the statute and prevailing precedent would never get to this point of the proponents’ analysis. They never present a compelling statutory argument or ANY court precedent that would justify nullifying Congress’ express reservation of State access charge authority by subjecting *intrastate access* to treatment as *reciprocal compensation*. It is true, as proponents suggest, that the FCC discovered a new interpretation of the scope of Section 251(b)(5) - and announced in two rulemakings (which have yet to result in appealable orders) and in also the *ISP Remand Order*, that that section “extends to the exchange of *any* traffic.” However, the only cited court decision – which upheld the *ISP Remand Order*, does not address the question of the applicability of Section

251(b)(5) to intrastate access compensation arrangements. Indeed, the decision points out that:

And, as to a LEC's provision of access for completion of a long-distance call, the parties agree that the link between the LEC and the interexchange carrier is *not* governed by the reciprocal compensation regime of [§ 251\(b\)\(5\)](#). See State Pet'rs Br. 25–26 (citing [Global NAPS, Inc. v. Verizon New England](#), 444 F.3d 59, 62–63 (1st Cir.2006), in turn quoting the FCC's [Local Competition Provisions in the Telecommunications Act of 1996](#), 11 FCC Rcd 15499, 1996 WL 452885 (Aug. 8, 1996)). {emphasis in the original} *Core Communications, Inc. v. Federal Communications Commission*, 592 F.3d 139, 144 (D.C. Cir.), *cert. denied*, 131 S. Ct. 597, 626 (2010), available at: [http://www.cadc.uscourts.gov/internet/opinions.nsf/BB9B63BAE9A8F698852578070059E217/\\$file/08-1365-1225091.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/BB9B63BAE9A8F698852578070059E217/$file/08-1365-1225091.pdf)

And there was, in the Court's view, no necessity to address the express reservation of State authority over intrastate access charges, likely because the Court concluded in the "special" case of dial-up internet access that the call meets the so-called "end-to-end" test and is jurisdictionally interstate, or more accurately, mixed and inseverable inter- and intrastate data traffic. *Id.* at 143 – 144. Indeed, as the Pennsylvania Public Utility Commission pointed out in reply comments, both AT&T and the FCC, in separate briefs defending this same *Core* decision from discretionary Supreme Court review both downplayed the significance of the order. According to the FCC, the *ISP Remand Order* was "of limited and rapidly diminishing practical significance." AT&T's defense portrays the *ISP Remand order* as one that "implicates

a regulatory response to a discrete and transitory problem. The rules in question apply only to dial-up ISP-bound traffic, and dial-up is 'being rapidly replaced by various forms of [broadband access] service.’ {citations omitted}¹⁷

Finally, the voluminous citations to “conflict preemption” and “the supremacy clause” throughout *Attachment 5*, including the citations that the FCC’s § 201 rulemaking authority extends to all “provisions of th[e] [1996] Act,” provide little illumination as to the actual scope of the FCC’s authority. After all, Congress, in federal law, included express reservations of State authority throughout the Telecommunications Act. Congress, in federal law, specified new duties for the States to undertake. Congress, in federal law, imposed limits on the FCC’s authority. It is safe to say – in the abstract – that no lawyer believes anyone is free to ignore what Congress specified. The disagreements are all over what the federal statute actually requires and reserves. What exactly are the federal goals Congress specified and what exactly are the mechanisms Congress provided the FCC (and States) to meet those goals? Abstract discussions of the Supremacy Clause or “conflict” preemption – outside the context of specific statutory provisions are – if not completely irrelevant – at least of very limited utility.¹⁸

¹⁷ See, *Reply Comments of the Pennsylvania Public Utility Commission*, WC Docket No. 10-90 et al., at page 4 (filed May 23, 2011), available online at: <http://fjallfoss.fcc.gov/ecfs/document/view.action?id=7021650520>.

¹⁸ For example, *Whistler Investments, Inc. v. Depository Trust and Clearing Corp.*, 539 F.3d 1159 (9th Cir. 2008), is an SEC case based on a completely different statutory text that does not contain the same Congressional reservations of State authority. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577 (2011) is an FDA case, again based on completely

It was, after all, Congress that included Section 251(d)(3)¹⁹ in the 1996 legislation and labeled it, in all capital letters, the “PRESERVATION OF STATE ACCESS REGULATIONS.” An unbiased reading of that caption standing alone suggests preemption of STATE ACCESS is *not* an option.

Another issue that is likely to arise in any appeal is the proper scope of Section 251(g). The plan proponents have postulated that all traffic can be properly classified as Section 251(b)(5) reciprocal compensation once the FCC “changes” pursuant to its Section 201 rulemaking authority, legacy access charge and interconnection regimes covered by Section 251(g).

Proponents concede that in the *ISP Remand Order*, the FCC has previously specified that services falling within the scope of section 251(g) “remain subject to Commission jurisdiction under section 201 (or, to the extent they are intrastate services, they remain subject to the jurisdiction of State commissions).” *ISP Remand Order* ¶ 39.” They also concede that section 251(g) nowhere references intrastate access charge mechanisms.

different statutory text. Both are distinguishable on both the facts and the law from the context here. Other than covering about a page of text in the proponent’s legal justification with redundant statements about “conflict preemption”, neither adds anything to support or detract from the FCC’s authority or lack thereof.

¹⁹ 47 U.S.C. Section 251(d)(3) states that in “prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State Commission that - (A) Establishes access and interconnection obligations of local exchange carriers; (B) Is consistent with the requirements of this section; and (C) Does not substantially prevent the implementation of the requirements of this section and the purposes of this part.”

But yet they still claim this section is key to the extension of the FCC's authority to prescribe rules under 251(b)(5) that covers intrastate access.

This claim is contrary to the explicit text of the statute,²⁰ the legislative history of that section, and even multiple FCC statements characterizing the section.

Section 251(g) entitled, "Continued enforcement of exchange access and interconnection requirements," states in relevant part:

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that

²⁰ Although the court took no final view of the proper scope of Section 251(g), they did in rejecting a "new" FCC interpretation that section – note in dicta that:

[o]n its face, § 251(g) appears to provide simply for the "continued enforcement" of certain pre-Act regulatory "interconnection restrictions and obligations," including the ones contained in the consent decree that broke up the Bell System, until they are explicitly superseded by Commission action implementing the Act. As the Conference Report explained, "[b]ecause the [Act] completely eliminates the prospective effect of the AT&T Consent Decree, some provision is necessary to keep these requirements in place.... Accordingly, the conference agreement includes a new section 251(g)." H.R. Rep. 104-458, at 122-23 (1996), U.S.Code Cong. & Admin.News 1996, 10, 134. On a prior occasion, the Commission also framed the scope of § 251(g) in similarly narrow terms: "The term "information access" first appears [in the Act] in sections [sic] 251(g). That provision is a *transitional enforcement mechanism* that obligates the incumbent LECs to continue to abide by equal access and nondiscriminatory interconnection requirements of the [AT&T Consent Decree] when such carriers "provide exchange access, information access and exchange services for such access to interexchange carriers and information service providers...." Because the provision incorporates into the Act, on a transitional basis, these [AT&T Consent Decree] requirements, the Act uses [AT&T Consent Decree] terminology in this section. *However, this provision is merely a continuation of the equal access and nondiscrimination provisions of the Consent Decree until superseded by subsequent regulations of the Commission. In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, 407, ¶ 47, 1999 WL 1244007 (1999) (footnote omitted) (emphasis added)." *Worldcom, Inc. v. FCC*, 288 F.3d 429, at 432-3 (D.C. Cir 2002), available at: [http://www.cadc.uscourts.gov/internet/opinions.nsf/8042B8E2980BC99385256F82005D2FB3/\\$file/01-1218a.txt](http://www.cadc.uscourts.gov/internet/opinions.nsf/8042B8E2980BC99385256F82005D2FB3/$file/01-1218a.txt)

apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. 47 U.S.C. § 251(g).

A plain reading strongly suggests that State intrastate access charge authority is not implicated. It isn't mentioned. Nor is the word "reciprocal compensation" or even "section 251." It is also plain from reading this language, if a carrier was not providing service on February 7, 1996, no restrictions or obligations applied to "such carrier" on that date. Accordingly, it is not a surprise that the FCC, until its 2001 discovery of a new interpretation of the section, one that was rejected by the courts, consistently and repeatedly stated this section applies only to "Bell Operating Companies" and is intended to incorporate aspects of the MFJ.²¹

²¹ See e.g., *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding U S West Petitions To Consolidate Latas in Minnesota and Arizona*, Memorandum Opinion and Order, 14 FCC Rcd 14392, ¶ 17 (1999) ("In section 251(g), Congress delegated to the Commission sole authority to administer the 'equal access and nondiscriminatory interconnection restrictions and obligations' that applied under the AT&T Consent Decree."); *AT&T Corporation, et al., Complainants*, Memorandum Opinion and Order, 13 FCC Rcd 21438, ¶ 5 (1998) ("Separately, section 251(g) requires the BOCs, both pre- and post-entry, to treat all interexchange carriers in accordance with their preexisting equal access and nondiscrimination obligations, and thereby neutralize the potential anticompetitive impact they could have on the long distance market until such time as the Commission finds it reasonable to revise or eliminate those obligations.").

Voice Traffic Is Severable.

On pages 18 though 21, the ABC Industry Plan proponents raise the novel suggestion that based upon the current record before it, the FCC is in a position to label ALL traffic as inseverable either economically or practically. There are only two problems with that suggestion: the facts and current federal policy. It is impossible to make the case that the bulk of voice traffic is not economically severable – much less that it will not continue to be so.

The fact is wireless, facilities-based VoIP, and PSTN generated traffic are currently both “severed” and severable. Even nomadic VoIP traffic is constructively severable.²²

²² See, e.g., *In the Matter of IP-Enabled Services and 911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10273, ¶ 50 (2005), available online at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-116A1.pdf; 47 C.F.R. § 9.5(f). On June 3, 2005, the FCC adopted rules imposing a mandate on all providers of VoIP services that connect with the traditional telephone network to supply E911 capabilities to their customers. This posed no problem for facilities-based providers (covering the overwhelming majority of affected VoIP traffic) as they utilize the same solution as traditional carriers. So-called nomadic providers have been working on better methodologies ever since; See also *Vonage Order* at ¶32 n. 113 (rel. Nov. 12, 2004) (“... digital voice clearly enables intrastate communications . . .”) (“this [cable VoIP] network design also permits providers to offer a single, integrated service that includes both local and long distance calling . . .”) (quoting letter from J.G. Harrington, Counsel for Cox Communications, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-21 1,04-36 at 1-2). “In addition, while we acknowledge that there are generally intrastate components to interconnected VoIP service and E911 service, . . .” *In the Matter of IP-Enabled Services*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, ¶29 n. 95 (rel. June 3, 2005). “Alternatively, to the extent that an interconnected VoIP provider develops the capability to track the jurisdictional confines of customer calls, it may calculate its universal service contributions based on its actual percentage of interstate calls. Under this alternative, however, we note that an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the Vonage Order would no longer be applicable to such an interconnected VoIP provider.” *In the Matter of Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 751 8, IT 56 (rel. June 27, 2006).

The fact is the trend is towards providing subscribers with *more* location-based information (both over fixed and mobile voice platforms), *not less*.

The fact is, whatever the economic or practical case for severing traffic, whatever the emerging commercial incentives for carriers to improve on location-based technology,²³ federal enhanced 911 services²⁴ and CALEA law enforcement access requirements will require the practice to continue. It would be difficult

²³ See, e.g., Smith, Josh, "FCC, FTC To Look Into Cellphone Tracking" May 17, 2011 National Journal Tech Daily Dose, at: <http://techdailydose.nationaljournal.com/2011/05/fcc-ftc-to-look-into-cellphone.php> FCC, Lowenshon, Josh, "FTC to hold mobile location privacy forum" May 17, 2011 (news.cnet.com) http://news.cnet.com/8301-27076_3-20063755-248.html?part=rss&subj=AppleTalk , Cheng Jacqui, [Senate has more questions for Apple, Google, Facebook on privacy](http://arstechnica.com/apple/news/2011/05/senate-has-more-questions-for-apple-google-facebook-on-privacy.ars) (arstechnica.com) <http://arstechnica.com/apple/news/2011/05/senate-has-more-questions-for-apple-google-facebook-on-privacy.ars> What's shaking in location technology? Technology enablers speed information delivery [Wireless Alert](#) By Joanie Wexler, Network World July 29, 2011 06:08 AM ET ("Location-tracking services from mobile operators are no longer limited to the reach of their own cellular network coverage. Cross-carrier location services are available from companies such as AT&T and Vodafone, plugging visibility gaps and opening doors to new enterprise applications.") <http://www.networkworld.com/newsletters/wireless/2011/080111wireless1.html> [Masters of Converged Solutions: Sponsored by Sprint](#)

²⁴ See, e.g. Lazar, Irwin, "Thinking About 911 in a Converged World" 04/11/11Network World One of the strongest trends we've seen in our research . . . is the desire by both IT and end-users to embrace mobility. IT shops are evaluating the potential to reduce infrastructure costs such as desktop phones, and power over Ethernet . . . by moving to software-based phones. Meanwhile, an increasingly mobile workforce looks to shun the archaic desktop phone in favor of software-based telephony and/or UC, or their mobile phones. . . many companies have invested significant resources in building out infrastructure to support user location tracking for calls made to 911. *A large number of our clients, as a result of legal requirements, the desire to avoid lawsuits, or simply because they feel that it is the right thing to do, have deployed technologies such as PS/ALI (Private Switch/Automatic Location Identification) and ELIN (Emergency Location Identification Number) capabilities to provide local emergency centers with detailed location information; not just building addresses but more specific information such as floors, wings, or cubicles. Each of these approaches is based on maintaining a database of user locations typically by associating their hard phone with a known location. . . In the VOIP world most telephony vendors support automated location tracking based on IP address or by an Ethernet switch identifying a phone plugged into a port and mapping the phone to a user's location.* Softphones and cellular phones change the game. A softphone can make calls from anywhere--desktop, conference room, shared workspace, cafeteria, home, or public hotspot. Tracking a softphone user's location presents two challenges: Identifying that their location has changed, and updating location mapping databases with the current location. *Fortunately solutions exist for just about all softphone products, either delivered by the softphone vendor, or via partnership with 911 solutions vendors such as 9-1-1 Enable, 911 ETC, or RedSky. Solutions are based on the softphone, or a shim application recognizing a location change by looking at items such as the IP address or MAC address of the Ethernet or WLAN connection, and then asking the user to validate or enter their current address. A "Master Address List" service can provide a drop-down box with pre-populated known user locations to reduce errors from manual entry. Once the user updates their address, the client then updates the appropriate location-mapping database. While these solutions solve part of the problem, they still present challenges.* <http://www.networkworld.com/community/blog/thinking-about-911-converged-world> .

for the Commission to on the one hand claim traffic was either economically or physically inseverable, and on the other hand acknowledge Congressional and FCC policies that mandate continued severability.

Service providers in all categories currently continue to track interstate, local, and international calls – particularly for enterprise customers. Business and some residential customers are likely to continue to have call detail. But aside from customer desires, carriers are going to continue to *need* call detail and traffic analysis to, *inter alia*, run their networks, i.e., assure service reliability and analyze traffic patterns, investigate/address individual customer complaints.

Moreover, until the federal Universal Service Contribution mechanism is changed, there will continue to be another strong financial incentive for carriers to sever their traffic. Currently, it appears that wireless and facilities-based VoIP providers continue to calculate their interstate revenues (for purposes of contributing to the federal universal service program) rather than relying upon the 64% and 37% safe harbor percentages.

The idea that traffic is not severable both practically and economically is just plain ludicrous and should be rejected.

There is no Evidence to Support Preemption of State COLR Obligations.

Under the ABC Industry Plan, the Commission eliminates “legacy” ETC regulations when support from legacy universal service programs was eliminated by July 1, 2016.²⁵ ETC obligations continue to apply only in geographic areas that receive federal high cost support. ETC obligations include, inter alia, the requirement to provide functional service during emergencies, and satisfying consumer protection and service quality standards.²⁶ The ABC Plan also calls for the FCC to preempt any state that maintains obligations to serve, including COLR obligations.²⁷ The only conditions under which COLR obligations could survive would be in situations where *a state agrees to provide additional funds to “meet the obligation” – i.e., states would pay to build, maintain and operate such lines, and the phone company would pocket the cash for providing service. And, the ILEC must agree to accept the obligations in exchange for funding.*²⁸ If the ILEC does not agree, the obligation cannot be imposed. Key to the ABC Industry Plan’s argument that legacy State COLR obligations have a “detrimental effect” and must be eliminated or conditioned because “such regulations

²⁵ ABC Industry Plan, Attachment 1 “Framework” at page 13.

²⁶ See, 47 C.F.R. § 54.201 et seq., Subpart C, available online at: <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=afde418b70dfb6b359b504cbfd4e32cf&rgn=div6&view=text&node=47:3.0.1.1.7.3&idno=47>

²⁷ ABC Industry Plan, Attachment 1 “Framework” at page 13.

²⁸ Id.

have the “practical effect” of making it infeasible to deploy jurisdictionally interstate broadband facilities in many high-cost areas.”

Do State legacy COLR regulations have a detrimental effect? Have such regulations been the cause that people do not deploy broadband “in many high cost areas?” You will look in vain at *Attachment 5* for answers to these two questions. Other than self serving statements by the carriers subject to those obligations (not exactly an unbiased source of information or opinion), there is NO evidence in the record that they are either detrimental or have the practical effect of making it infeasible to deploy broadband in “many” high cost areas.²⁹

There is no question that the United States has seen substantial broadband deployment already with these obligations intact. Any unbiased examination of COLR requirements would have to admit that in the majority of the country, the opposite is true, i.e., many people who never would have gotten at least voice service – have that service solely BECAUSE of State COLR obligations – often in tandem with other State high cost universal service/ broadband/ lifeline programs.

²⁹ Where there are unserved high cost areas, there is no evidence linking State COLR obligations to the fact that there is not adequate service. Indeed, one could make a much better argument (and the *State Member Plan* does) that it is the current structure and targeting of the federal program, not State COLR obligations, that are cause such problems.

In support of this idea, the plan proponents offer no evidence at all. They merely cite to the fact that some States have chosen to modify or eliminate COLR obligations. They do not provide any evidence that suggests the elimination has had either a positive or a negative impact on universal service. There is no basis in the record to do so. They do not offer any evidence to support the counter-intuitive notion that FCC elimination of COLR obligations (obligations to provide service to where carriers may not find it economically practical to do so) in States that retain them will increase broadband deployment (to areas by definition no one wants to serve).

There is no basis in the record for them to do so. The current FCC Chairman has frequently and correctly stated that the FCC should engage in data-driven processes and decision-making. There simply is no data that justifies this aspect of the industry plan and it should be rejected.

Conclusion

The express terms of the Act does not permit, and an appropriate policy approach would not countenance either the intrusion into retail intrastate rate design inherent in any preemption of State access charges or COLR obligations. The State Member Plan, or some variation of it, offers the best prospects to actually achieve the results the Commission desires.

Respectfully Submitted,

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August 23, 2011

Resolution Strongly Supporting the Proposals Submitted on Universal Service Reform by the State Members of the Federal State Joint Board on Universal Service

WHEREAS, Congress, in enacting the Telecommunications Act of 1996 (the Act), specifically created and tasked the Federal-State Joint Board on Universal Service (the Joint Board), with a key role in recommending the regulatory changes necessary to implement the central universal service provisions of the Act by, *inter alia*, in Section 254, tasking the Joint Board with explicit authority to recommend, “from time to time,” modifications of the definition of supported services, and among other duties, the responsibility to ensure that federal universal service policies are based on a list of articulated principles; *and*

WHEREAS, In early 2009, at section 6001(k) of the American Recovery and Reinvestment Act, Congress directed the Federal Communications Commission (FCC) to develop a National Broadband Plan (NBP or Plan) to ensure every American has “access to broadband capability,” in response to which the FCC created and released the *Connecting America: The National Broadband Plan*, March 16, 2010; *and*

WHEREAS, In building on the NBP, the FCC issued a Notice of Inquiry (NOI) and Notice of Proposed Rulemaking (NPRM) Regarding the Connect America Fund (CAF) – A National Broadband Plan for our Future (the CAF NPRM), through which the FCC sought comment on the use of a model to determine universal service support levels, on the best way to accelerate targeting of funding toward unserved areas, and on specific reforms to cap growth and cut inefficient funding in the legacy high-cost support mechanisms; *and*

WHEREAS, The FCC issued a NPRM (the Mobility Fund NPRM) on October 14, 2010, concerning the development of a Mobility Fund, and sought comment on using Universal Service Fund (USF) “reserves” to improve mobile voice coverage and wireless broadband access to the Internet in un- and underserved areas, and to do so by supporting private investment through a reverse auction process; *and*

WHEREAS, The FCC adopted on February 8, 2011 (the 15th Anniversary of the Act), and released February 9, 2011, an NPRM with proposed reforms of both the Federal Universal Service Fund and Intercarrier Compensation (the USF/ICC NPRM), through which the FCC sought comment on the overhaul of intercarrier compensation schemes, the transition of the USF in a manner to “accelerate the transition from circuit-switched to IP networks, with voice ultimately one of many applications running over fixed and mobile networks” to the CAF, on reducing fraud and waste in the USF, and the use of market-driven policies to maximize use of scarce resources; *and*

WHEREAS, The Joint Board’s *2007 Recommended Decision* laid the groundwork for much of what is contained in the USF/ICC NPRM, as well as in the NBP, including and certainly not limited to adding “mobility” to the list of supported services; *and*

WHEREAS, On February 10, 2011, President Obama announced his plan to “Win the Future Through Wireless Innovation and Infrastructure Initiative” (the WIN Initiative, subsequently found in OMB Budget for Fiscal Year 2012, pp. 39-40), to double the spectrum available for mobile broadband, to provide access to 4-G mobile broadband to 98% of Americans, to develop a Wireless Innovation Fund with specified purposes, and to develop and deploy a nationwide, interoperable wireless network for public safety; *and*

WHEREAS, At the invitation of the FCC, the State Members of the Federal State Joint Board on Universal Service – which constitute a majority of the Joint Board - expended significant resources developing a comprehensive USF/ICC reform proposal (State Members’ Comments) filed with the FCC; *and*

WHEREAS, The State Members, upon establishing that federal preemption proposals are unlawful and undesirable, propose three new mechanisms to support broadband and mobility through a Provider of Last Resort (POLR) Fund, a Mobility Fund, and a Wireline Broadband Fund, recommend changes to reduce fraud and waste through specific proposals for the POLR Fund, recommend expansion of the contribution base of the federal USF by those using the national Public Communications Network, present compelling evidence that a nationally uniform ICC rate will be detrimental and recommend that Voice over the Internet Protocol (VoIP) services be classified and/or treated as telecommunications services for ICC purposes; *and*

WHEREAS, A House Energy and Commerce Committee, Subcommittee on Telecommunications and the Internet authored “Federal Communications Commission Process Reform Act of 2011” discussion draft, released in June 2011, memorializes the frequent criticism by academic legal experts of the FCC’s heavy reliance on ex parte submissions by proposing “the Commission may not rely, in any order, decision, report, or action, on . . . an ex parte communication or any filing with the Commission, unless the public has been afforded adequate notice of and opportunity to respond to such communication or filing;” *and*

WHEREAS, A group of carriers is expected to file an industry supported “settlement” in the USF/ICC NPRM proceeding purporting to provide a reasonable solution to the FCC-identified issues; *now, therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its 2011 Summer Committee Meetings in Los Angeles, California, recognizing the critical role specifically assigned to States by Congress in the Act, including in part through the mechanism of the Joint Board, and upon review and consideration of the State Members’ comments and recommendations, commends the State Members and their staff for the thoughtful and thorough evaluation of the USF/ICC NPRM, and specifically endorses the State Members’ plan, subject always to the doctrine of federalism and the privilege of States to take exception to selected provisions thereof; *and be it further*

RESOLVED, That should an industry supported “settlement” proposal be filed in the USF/ICC NPRM and subsequently released by the FCC for public comment, that the FCC is urged to jointly offer the State members’ plan for comment simultaneously and include a request to contrast the two plans; *and, be it further*

RESOLVED, That the FCC should always take advantage of the expertise and insight of State commissioners on key issues, acknowledge and give appropriate weight and deference to the carefully considered and record-based State Members’ comments, and refuse to place undue reliance on the *ex parte* process or disregard the formal notice-and-comment procedure to the extent such practice would marginalize either the opportunity for meaningful participation in any reform efforts by the States or effective deliberation on the part of the commissioners therein.

*Sponsored by the Committee on Telecommunications
Adopted by the NARUC Board of Directors July 20, 2011*