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 REPLY COMMENTS OF THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION
AND ACCOMPANYING SUPPLEMENTAL 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. Public Notice DA 11-1348 had established August 24, 2011 as the deadline for the submission of comments and August 31, 2011 for the submission of reply comments. The August 29, 2011 Order by the Chiefs of the FCC Wireless Telecommunications Bureau and Wireline Competition Bureau extended the deadline for the submission of reply comments to September 6, 2011.[1]

[1] *In re Connect America Fund, et al.*, (FCC, August 29, 2011), WC Docket No. 10-90 *et al.*, Order by the Chiefs of the Wireless Telecommunications Bureau and Wireline Competition Bureau, DA 11-1471.

The Pa. PUC appreciates the opportunity to submit these Further Reply Comments along with a separate Supplemental Legal Memorandum that is attached. As a preliminary matter, these Further Reply Comments should not be construed as binding on the Pa. PUC in any proceeding pending before the Pa. PUC. Moreover, these Further Reply 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 Pa. PUC through the submission of its Further Comments[2] in this proceeding expressed its many and strong concerns with the partial industry consensus proposal that was made on July 29, 2011 under the banner of the US Telecom Association (USTA) and labeled as "America's Broadband Connectivity" or "ABC Plan." These concerns have been echoed by numerous other state utility commissions, consumer advocates (e.g., the National Association of State Utility Consumer Advocates or NASUCA), public interest organizations, and members of the telecommunications and communications industries.

The formal filings of the "ABC Plan" proponents in response to the FCC's Public Notice, and their unending stream of ex parte submissions since August 24, 2011, unequivocally establish the following two major points: (1) The concerns of the Pa. PUC and other parties regarding the technical and legal flaws of the USTA proposal are well founded; and (2) the "ABC Plan" is an ever evolving "proposal" with an indeterminate "design and development" phase.[3] It is obvious that the Commission's acceptance of the USTA framework proposal for interstate intercarrier compensation and federal USF reform will constitute reversible error.

The Pa. PUC Further Reply Comments address some of the more salient issue areas below. The Pa. PUC's accompanying Legal Memorandum focuses on various federal preemption arguments that have been advanced by the "ABC Plan" proponents.

[2] Further Comments of the Pennsylvania Public Utility Commission and Accompanying Legal Memorandum, WC Docket No. 10-90 *et al.*, August 24, 2011 (Pa. PUC Further Comments).
[3] The fact that the USTA proposal is still evolving has been noted in the FCC's Public Notice DA 11-1348.

II. THE USTA PROPOSAL IS NOT A BASE FOR NATIONAL POLICY CHOICES

A. The USTA Proposal Does Not Contain Benefits for End-User Consumers

The USTA proposal does not contain concrete benefits for end-user consumers of telecommunications and communications services. A number of comments affirm the Pa. PUC's position that the "ABC Plan" promises of consumer benefits are hypothetical at best in the absence of federal and state regulation of wireline long-distance and wireless service rates, i.e., nothing guarantees that the contemplated carrier access expense reductions will be passed to end-user consumers under the USTA proposal.[4] The USTA proponents explicitly admit that:

> It is certainly true that CETCs will see a reduction in intercarrier compensation expenses and will benefit from a more efficient and economical system. But any effort to engage in some form of "netting" of benefits is misplaced in competitive markets. In fact, the ABC Plan *reasonably assumes* — supported by Professor Hausman's paper — that reductions in intercarrier compensation expenses will flow through in benefits to consumers, whether in the form of lower prices, or beneficial investments and service innovations, or both.
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> * * *
>
> The Commission should leave the "potential realization of consumer pass through benefits from intercarrier compensation reform" to the market. Not only is the market likely to be effective in this regard, there is no other practical means "to ensure that such benefits are realized by consumers."
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> * * *
>
> Moreover, crafting a mechanism to "ensure" that intercarrier compensation savings are passed through to consumers would force the Commission to engage in the equivalent of rate-of-return regulation for services that have long been deregulated.

Joint Comments of AT&T, CenturyLink, FairPoint, Frontier, Verizon, and Windstream, WC Docket No. 10-90, August 24, 2011, at 9 (USTA Joint Comments, emphasis added, footnote omitted).

Thus, the Commission and end-user consumers are invited to "reasonably assume" that the benefits of the "ABC Plan" proposed reductions in carrier access expense will be shared among the broader public and will not inure to the principal benefit of a few selected carriers

[4] Pa. PUC Further Comments, at 6.

alone. But, what would happen if, collectively, the major beneficiaries of the access expense reductions do not decide to pass along such savings to consumers in lower prices for wireline long-distance and wireless services? That will unquestionably constitute a "market failure" which would harm consumers and go unchallenged since it would involve services that are not subject to any rate regulation by either the states or the FCC. National policy choices are not made on the basis of largely hypothetical assumptions and assurances that depend on dubious and one-sided "market dynamics."

The "reasonable assumption" of consumer benefits in the "ABC Plan" has also been tested and found wanting. As the NASUCA Comments point out in detail, the alleged calculation of the consumer benefits by the USTA proponents has totally omitted "the loss of consumer surplus that will result from increased [federal] SLC [subscriber line charge] rates."[5] NASUCA also points out that:

> The ABC Plan also cites to the possibility that rate increases will be constrained by "competition," but the ABC Plan proponents are nonetheless willing to take their chances with rate increases in light of the alleged "competition." Thus as a result of Professor Hausman's failure to estimate the impact of the increase in the SLC charges that are inherent in the ABC Plan, his statements regarding consumer welfare gains from the ABC Plan are, at best, incomplete and at worst, directly contrary to the actual results of the Plan.

NASUCA Comments, at 25.

B. The FCC Cannot Legally And Technically Rely On The CQBAT Cost Model

The Pa. PUC is not alone in questioning the adequacy, reliability, and the underlying data and assumptions of the CQBAT cost model that is at the core of the USTA proposal.[6] Other parties have explicitly commented that the opacity that characterizes the assumptions, internal operational logic, and the input and output data sets of the CQBAT cost model prohibits the FCC from relying on this model on the basis of the federal Administrative Procedure Act (APA).[7] The Nebraska Rural Cos. point out that an "agency commits serious procedural errors when it

[5] Initial Comments of the National Association of State Utility Consumer Advocates on Further Inquiry Into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding, WC Docket No. 10-90, at 23 (NASUCA Comments).
[6] Pa. PUC Further Comments, at 8-9.
[7] Comments of the Nebraska Rural Independent Companies in Response to August 3, 2011 Further Inquiry, WC Docket No. 10-90, at 5-8 (Nebraska Rural Cos.).

fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary," and by "requiring that the most critical factual material used by the agency be subjected to informed comment, the APA provides a procedural device to ensure that agency regulations are tested through exposure to public comment."[8] Paralleling the concerns of the Pa. PUC regarding the reliability of the CQBAT model, the Nebraska Rural Cos. also state that a "model that inaccurately estimates costs will leave some high-cost areas without service and will provide more support in other areas that would be sufficient."[9]

In a similar vein, both the Pa. PUC and other commenters have questioned the reliance of the USTA proposal and the CQBAT cost model on the use of census blocks and satellite technology in determining the "ABC Plan" parameters of supported broadband deployment on a national basis.[10] The Nebraska Rural Cos. point out that in order to "determine whether more than 35 percent of a wire center is served" (USTA proposal on right of first refusal or ROFR mechanism), "the ABC Plan relies, in part, on the National Broadband Map produced by the National Telecommunications & Information Administration (NTIA)." Unfortunately, "the National Broadband Plan does not accurately depict broadband services in *census blocks greater than two square miles*, which is typical of the areas served by the Nebraska Companies and many rural companies."[11] The very imprecise and thus detrimental reliance of the ABC Plan and the CQBAT model on census blocks is underscored by the Joint Maine-Vermont Comments:

> A third area in which the ABC Plan does not assure reasonable comparability of service, or any broadband service at all, is its treatment of census blocks that presently have at least one customer with an unsubsidized broadband provider. For example, the census block in which the Governor of Vermont resides is shown by the broadband mapping as having some broadband service available. Unfortunately, as in many rural census blocks that have mixed densities, the Governor does not have broadband service available. Under the ABC Plan, no funding would be available through the CAF [Connect America Fund] to extend service to the location of such customers in the unserved areas of the census blocks that are "contaminated" by the presence of competitive broadband services in only one portion; at the same time, neither cable providers nor the incumbent local exchange carrier have an obligation under current requirements to extend service to his residence. Unless modified, this means that less densely populated portions of census blocks that have a small degree of

[8] Nebraska Rural Cos., at 6-7.
[9] Nebraska Rural Cos., at 11.
[10] Pa. PUC Further Comments, at 8-9.
[11] Nebraska Rural Cos. at 52 (emphasis added).

> competition will remain unserved, with no mechanism to provide funding to extend such service. The exclusion of service expansion to unserved portions of contaminated census blocks, is simply arbitrary, fails to ensure that the goal of universal broadband availability is met, and fails to meet the requirements of reasonable comparability.

Maine Public Utilities Commission, Vermont Public Service Board, Vermont Department of Public Service, Comments on Further Inquiry — Intercarrier Compensation and Universal Service Transformation Proceeding, WC Docket No. 10-90, at 6 (Joint Maine-Vermont Comments).

The Joint Maine-Vermont Comments also point out that the latency issue associated with the provision of satellite broadband services make a related "offering inadequate for those who are involved with interactive applications including basic voice, online gaming, remote surgery, or other real-time dependent uses," and that the "unpredictable difficulties that latency can cause with Virtual Private Networks (VPNs) and some forms of VoIP [voice over the Internet Protocol] and videoconferencing cause these applications to be nearly unusable." Furthermore, the Joint Maine-Vermont Comments question whether satellite service providers have sufficient capacity to offer broadband services to high-cost areas.[12]

C. The USTA Proposal Undermines State Intercarrier Compensation Reforms And Broadband Deployment Initiatives of Early Adopter States

The USTA proposal undermines state initiatives to reform intrastate intercarrier compensation mechanisms and to mandate or encourage uniform broadband deployment. The Pa. PUC has explained in detail how it has proceeded with intrastate access charge reform for rural incumbent local exchange carriers (ILECs) operating under its jurisdiction; how both rural and non-rural ILECs have proceeded and are proceeding to deploy retail broadband access facilities and services under Pennsylvania state law; and how the "ABC Plan" will undermine such initiatives through its ROFR mechanism and unlawful federal preemption.[13] The Pa. PUC is not alone in its analysis and assessment of the detrimental impacts of the USTA proposals, especially for states such as Pennsylvania that are "early adopters" for both intrastate access

[12] Joint Maine-Vermont Comments, at 4-5.
[13] Pa. PUC Further Comments, at 11-12, 16-17.

reform and broadband deployment.[14] The Kansas Corporation Commission (KCC) notes that it "is greatly concerned that the ABC Plan will penalize states like Kansas that already have state [universal service] funds, particularly where the state fund operates as a backstop to cover ILECs' access restructuring revenue losses not compensated by the FUSF [federal USF]," and that "Kansas law appears to require that its state universal service fund guarantee, or at least, provide recourse for rate-of-return carriers' access charge revenue losses caused by FCC changes in access policy."[15] Naturally, the ill-advised and unlawful broad federal preemption of the states that is inherent in the "ABC Plan" is not going to help or induce individual states to manage intrastate intercarrier compensation reform. As the Nebraska Rural Cos. correctly point out, the potential adoption of the "ABC Plan" framework will provide legal and motivational perverse incentives that can lead to the outright elimination of state-specific USFs[16] (i.e., with the states effectively preempted, all support issues will need to be exclusively resolved through the redirected federal USF). The Nebraska Rural Cos. succinctly state that:

> Early adopter states like Nebraska receive insufficient recognition in the ABC Plan and the RLEC Plan for their prior rate rebalancing and state universal service contributions. Such early adopter states may discontinue their funds for that reason alone, since the state efforts effectively raise the funding burden of customers in those states higher than other states.[17]

The Joint Maine-Vermont Comments are also very much on target when they point out that:

> The industry proposal also has the perverse effect of penalizing those states that made the strongest efforts to extend broadband services. States having very little broadband anywhere will receive most of the support because those states will have the lower cost unserved locations. States like Maine and Vermont that have supported broadband expansion through local rates will receive much less funding in order to extend broadband service in their highest cost areas

[14] Intrastate access reform and statutorily mandated broadband deployment in Pennsylvania have affected and continue to affect retail rates for non-competitive services, including basic local exchange rates. Pa. PUC Further Comments, at 12, 17-18.
[15] Reply Comments of the Corporation Commission of the State of Kansas in Response to Public Notice DA 11-1348's Further Inquiry Into Certain Issues in the Universal Service Intercarrier Compensation Transformation Proceeding, WC Docket No. 10-90, September 2, 2011, at 7, 9 (KCC Reply Comments).
[16] Nebraska Rural Cos., at 78-79.
[17] Nebraska Rural Cos., at 80.

> because the ABC plan totally eliminates funding of service where the cost is over $256 a month.[18]

Unlike the State Plan that was put forward by the State Members of the Federal-State Joint Board on Universal Service,[19] the USTA proposal and its core CQBAT cost model create "winners and losers" among the states through the redirection of federal USF support with often counterintuitive results. Thus, a Midwestern state that is endowed with a relatively benign geographic terrain (Illinois) will see its net redirected annual federal USF support increase by $88.84 million, while a much larger Western state (California) with more diverse and difficult geographic features and much larger population will have its corresponding net support increase by $86.13 million in a counterintuitive fashion.

D. Non-Compensatory Access Rates Will Not Lead To Sustainable Intercarrier Compensation And Federal USF Reform

The Pa. PUC and many other commenters have indicated that the adoption of non-compensatory interstate and intrastate access rates will not lead to sustainable intercarrier compensation and federal USF reform. Both the Pa. PUC and other parties have conclusively demonstrated that the "ABC Plan" targeted $0.0007/MOU access rate is non-compensatory, lacks evidentiary record support and, thus, it is unreasonable, discriminatory and unlawful.[20] The Joint Maine-Vermont Comments point out that:

> A second problem with the ABC proposal is that it results in intercarrier compensation charges that in some circumstances are *below their costs, even short-run marginal costs.* Rates at that level are not only unlawful but will result in an inefficient use of the transport network. It would be economically foolish for end users and other carriers to use dedicated access if they can receive switched access virtually for free. Moreover, the establishment of intercarrier compensation rates below the long-run incremental costs of access by definition results in a subsidy of access users.[21]

The sound analysis of the Nebraska Rural Cos. goes one step further:

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[18] Joint Maine-Vermont Comments, at 7.

[19] 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).

[20] Pa. PUC Further Comments, at 14 and n. 24 (the $0.0007/MOU rate does not account for joint and common costs, it is not compatible with the FCC's total element long-run incremental cost or TELRIC methodology, and violates Sections 251(b)(5) and 252(d) of the federal Telecommunications Act of 1996 or TA-96, 47 U.S.C. §§ 251(b)(5) and 252(d)). *See also* Nebraska Rural Cos., at 66.

[21] Joint Maine-Vermont Comments, at 14 (emphasis added, footnote omitted).

> The Industry Plans reduce terminating access rates to levels that do not recover the cost of billing let alone the cost of the network. Moreover, IP interconnection provisions in the ABC Plan threaten the longevity of rate-of-return terminating transport access charges. The Industry Plans provide for only a small portion of those lost ICC revenues through end-user rate increases and a Recovery Mechanism. The Industry Plans on the other hand increase profit margins for the largest telecommunications companies by decreasing access expenses and leaving large revenue streams such as special access and transiting service in place.[22]

The Pa. PUC also ascertained that the "ABC Plan" $0.0007/MOU rate accompanied by the substantial increases in the federal SLC will lead to the unlawful recovery of interstate traffic-sensitive access costs from end-user consumers.[23] The NASUCA Comments similarly opine that:

> The proposed unified rate approach is a rate set without any determination that it will result in mutual recovery of costs and its adoption would lead to an economically inefficient outcome, and would unfairly require end-user customers to underwrite the grant of free (or near free) access to ILEC networks. This violates the central tenet of § 252(d)(2)(B).[24]

The Nebraska Rural Cos. also point out additional adverse effects because of the potential adoption of a non-compensatory and unlawful $0.0007/MOU access rate:

> Many small rural companies that offer retail long distance service to their subscribers are forced to raise retail long distance rates in the face of large wholesale rate increases. Rural carriers routinely purchase wholesale long distance service from facilities-based interexchange carriers and resell that service to their customers. A few independent resellers exist, but even these companies typically rely on underlying services from larger companies, such as AT&T or Verizon. Over the past three years, these wholesale resellers have increased their wholesale rates to the Nebraska Companies by anywhere from 100% to 200%. The ability of retail long-distance providers to pass along increased wholesale costs to customers in the form of retail rate increases is limited because of competitive options. For many long-distance providers, margins are already low, if not negative. Not surprisingly, no conditions to curtail wholesale market pricing for originating traffic are included in the Industry Plans.[25]

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[22] Nebraska Rural Cos., at 65.
[23] Pa. PUC Further Comments, at 14-15.
[24] NASUCA Comments, at 32-33 (footnote omitted).
[25] Nebraska Rural Cos., at 69-70.

The potential adoption of a non-compensatory and unlawful uniform access when combined with the proposed sweeping federal preemption of state regulation over intrastate intercarrier compensation matters (inclusive of the utility of state-specific USFs), will bring additional pressures to the redirected federal USF support mechanism. These pressures still remain unknown and non-quantified in the "ABC Plan."

For example, certain proponents of the USTA proposal allege that the total access restructuring mechanism (ARM) support that will be needed during the 2012-2015 period for *both* interstate *and* intrastate access reforms of certain rural ILECs will amount to a cumulative amount of $704 million.[26] The Pa. PUC's recent reform of intrastate carrier access charges of the rural ILECs is estimated at an approximate magnitude of $50 million. This Pennsylvania intrastate carrier access reform will largely be handled through the rate rebalancing for the non-competitive services of the rural ILECs and without the involvement of the Pennsylvania-specific USF (Pa. USF).[27] Assuming *arguendo* that the "ABC Plan" preemption proposals prevail, the Pennsylvania rural ILEC intrastate access reform (which simply transitions rural ILEC intrastate traffic sensitive carrier access charges to their federal counterparts and significantly lowers but does not totally eliminate intrastate per line common carrier charges), will amount to 7.1% of the above-referenced $704 million ARM amount. If intrastate and interstate access rates are driven to the uniform and non-compensatory figure of $0.0007/MOU, the ARM amounts currently "budgeted" under the USTA proposal will prove to be insufficient, even with the implementation of the substantial and unlawful increases to the federal SLC.[28]

[26] NECA Ex Parte, WC Docket No. 10-90, August 29, 2011, "Preliminary RLEC CAF + RM Computation" Chart.
[27] *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. This Pennsylvania intrastate access reform for rural ILECs also implicates entities that are considered to be federal price cap carriers (i.e., ILEC subsidiaries of CenturyLink, Frontier, and Windstream).
[28] KCC Comments, at 7-8.

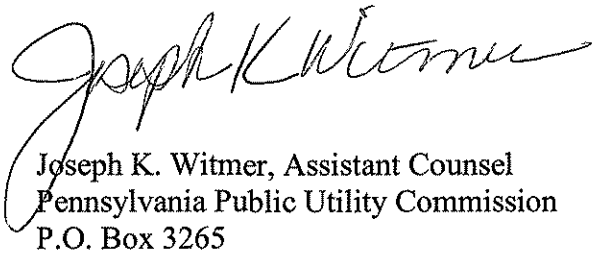
III. CONCLUSIONS AND RECOMMENDATIONS

The FCC has no choice but to summarily reject the USTA proposal. The FCC should adopt the State Plan framework for a sustainable and lawful reform of interstate intercarrier compensation and the federal USF.

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

Respectfully Submitted,

The Commonwealth of Pennsylvania
Public Utility Commission



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SUPPLEMENTAL LEGAL MEMORANDUM OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

The Pa. PUC opposes constructive or actual forbearance. The Pa. PUC also opposes preemption, particularly conflict preemption. None of the comments supporting forbearance[1] or preemption[2] to accomplish universal service or intercarrier compensation reform are consistent with law and precedent.

The Pa. PUC also supports comments that raise due process concerns under Section 553(b), 5 U.S.C. § 553(b), and *Prometheus Radio Project v. FCC,* ___ F.3d ___ (2007), 2011 U.S. App. Lexis 13855 (July 7, 2011) (*Prometheus Radio).*[3]

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[1] *In re: ABC Plan,* Docket No. 10-90, Comments of AT&T, Verizon, *et al.* (August 24, 2011), p. 19, n. 67.
[2] *In re: ABC Plan,* Docket No. 10-90, Comments of AT&T, Verizon, *et al.* (August 24, 2011), p. 12.

[3] *In re: ABC Plan et al.,* Docket No. 10-90, Comments of the Universal Service for America Coalition (August 26, 2011), pp. 1-2.

A. THE NOTICE AND COMMENT PERIODS FOR THIS COMPLEX PROCEEDING DO NOT COMPLY WITH SECTION 553 OF THE ADMINISTRATIVE PROCEDURES ACT.

Section 553(b) of the Administrative Procedures Act requires a federal agency to give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. The adequacy of the notice must be tested by determining whether it would fairly apprise interested persons of the subjects and issues before the agency. *Prometheus Radio,* ____ F.3d ____, 2011 U.S. App. Lexis 13855 (2011).

In *Prometheus Radio,* the Third Circuit ruled that the FCC violated Section 553(b) of the Administrative Procedures Act. Section 553(b) requires a federal agency to give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. The Third Circuit found in *Prometheus Radio* that the FCC violated Section 553(b) by providing two very general questions related to an FCC rulemaking on its media ownership rules which was accompanied by irregular comment periods. *Prometheus Radio,* ___ F.3d ___ (2007).

In this proceeding, there are irregular comment and reply comment periods. There is also an ongoing lack of access to the CQBAT Model supporting the ABC Plan. Interested persons, particularly the states, cannot submit data, views, or arguments to the FCC based on the CQBAT Model or, even, analyze the CQBAT Model.

This proceeding has also been accompanied by irregular comment periods. The matter arose from an ex parte submission by the proponents to the FCC on July 29, 2011. The submission came from portions of the telecommunications industry. The ex parte advocated adoption of a partially supported industry plan called the ABC Plan and an accompanying RLEC Plan, modified by an ancillary July 29, 2011 submission.

The FCC issued a public notice soliciting comments and reply comments to the July 29, 2011 filing on August 3, 2011. The FCC set comment and reply comment

deadlines for August 24, 2011 and August 31, 2011, respectively. The FCC subsequently extended the Reply Comment deadline to September 6, 2011.

The interested persons impacted by this proceeding, particularly the states, have not received access to the CQBAT model used to generate the data submissions that ostensibly support adoption of the ABC Plan. Interested persons, and the states in particular, are unable to submit written data, views, or arguments using the CQBAT Model. However, the parties supporting the ABC Plan rely on the CQBAT Model to support adoption of the ABC Plan, including forbearance or preemption of state authority

B. THE FCC CANNOT USE FORBEARANCE TO PRECLUDE STATE REGULATION OF INTRASTATE COMMUNICATIONS.

Section 160, 47 U.S.C. § 160, governs forbearance. Section 160(a) allows the Commission to forbear from any regulation or provision if the Commission determines that enforcement is not necessary to ensure that charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory, is not necessary for the protection of consumers, and is consistent with the public interest. Section 160(b) requires the Commission to evaluate competitive impact. Section 160(c) allows carriers to submit petitions although Section 160(d) precludes forbearance from any Section 251(c) or 271, 47 U.S.C. §§ 251(c) and 271, requirements. Section 160(e) prohibits the states from enforcing provision that is the subject of FCC forbearance.

As an initial matter, the Pa. PUC objects to any reliance on a forbearance decision issued under Section 160, 47 U.S.C. § 160, if the FCC issues a decision or press release within the statutory timelines but subsequently releases the text of that decision outside those statutory limits. The Pa. PUC raises this objection given the holdings in *Core v. FCC,* 455 F.3d 267, 277 (U.S. App. D.C. 2006) (*Core I*)[4] and *Fones4All v. FCC,* 550 F.3d 811, 813 (9th Cir. 2009) (*Fones4All).*[5]

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[4] In *Core I,* on July 14, 2003, Core filed a petition addressing the *ISP Remand Order.* The Commission exercised its authority to extend the one-year deadline by 90 days. That extension moved the deadline to October 11, 2004. On

Those decisions recognize that the practice of adopting a decision within the time constraints of Section 160 although waiting until after that time period has passed to release the decision may be procedurally infirm under federal law. In *Core I* and *Fones4All,* the parties failed to properly raise that issue with the FCC either in their initial filing or in a reconsideration petition. Those parties waited until their appeal to raise the issue. The reviewing court determined that the matter was not properly before the reviewing court. To avoid that problem, the Pa. PUC raises that concern in these reply comments given that, on the issue of timely objection to this "back dating" practice, the reviewing courts have said:

> None of the foregoing should be understood to place this court's imprimatur on the FCC's actions. Waiting until the eleventh hour to vote on a forbearance petition, and then waiting until the thirteenth hour to issue the explanatory order, is hardly an ideal procedure for notifying a party of the disposition of a petition. And relying on an informal press release and a back-dating regulation to satisfy a statutory deadline could unnecessarily place Commission policies at risk of judicial invalidation. *Core I,* 455 F.3d at 277.

October 8, 2004, the Commission voted to adopt an order granting in part and denying in part Core's petition. In a press release issued on the day of the vote, the FCC announced the outcome of the decision and stated that an order detailing the result would be forthcoming. The Commission's press release stated that this was an unofficial announcement of Commission action. It was the release of the full text that constituted official action. Ten days after the vote and seven days after exhaustion of the statutory deadline, the Commission released the text of its decision. The *Core I* court recognized that Core had good reason not to address whether a timely denial of its petition would require a written decision or only the announcement of the Commission's vote: Core could not have known that the FCC would wait to issue its written denial until after the October 11 deadline had passed. The *Core I* court did not address this procedural practice based on adherence to the language of Section 405(a), 47 U.S.C. § 405(a), which holds that, even when a petitioner has no reason to raise an argument until the Commission issues an order that makes the issue relevant, the petitioner must file "a petition for reconsideration" with the Commission before it may seek judicial review. The reviewing court refused to consider the matter because the matter had not first been raised with the Commission. The Pa. PUC raises the procedural practice if it is used as part of any forbearance sought in this proceeding.

[5] In *Fones4All,* the 9th Circuit noted that the timeliness issue involved the practice of the FCC announcing a decision on the last possible day and then "backdating" the later explanation for that decision to the date on which it was announced. The *Fones4All* court joined the D.C. Circuit in holding that a challenge to the practice was not properly before the court because it was never raised before the FCC and, therefore, administrative remedies were not exhausted. This Reply Comment and Legal Analysis expressly raise objection to that practice to the extent it may be practiced or become relevant in this proceeding.

In addition, forbearance must be denied based on the FCC's rules and prior precedent. For one thing, the Pa. PUC opposes forbearance because the proponents have not clearly established that they meet the FCC's long-standing three-prong test. Forbearance undermines the state commissions' ability to ensure that intrastate rates and practices are just and reasonable and are not unreasonably discriminatory. Forbearance will actually harm consumer protections as the states' historically focus on intrastate consumer issues. Finally, forbearance and the resulting complete preemption is not consistent with the public interest because it violates federalism.

For another, this filing does not comply with the Commission's rules, specifically Section 1.53 , 47 C.F.R. § 1.53. Section 1.53 states that, in order to be considered as a petition for forbearance and subject to the one-year deadline set forth in Section 160, any petition seeking forbearance must be filed as a separate pleading and be identified in the caption as a petition for forbearance. Any filing not in compliance with that rule is deemed not to constitute a forbearance filing.

The proponents seek forbearance in the alternative. Forbearance is embedded in the general filing seeking preemption as part of the proponents' plan. The proponents have not filed a separate pleading seeking forbearance. The comments supporting forbearance do not address this procedural infirmity. Accordingly, the Commission must reject forbearance based on the proponents' noncompliance with FCC rules.

Assuming, *arguendo,* that the proponents properly filed a forbearance pleading in conformity with the rules, Section 160 does not permit forbearance on behalf of anyone except a petitioner. Section 160(c) limits forbearance to a forbearance filed by *that carrier or carriers.*

There is no language in Section 160(c) authorizing a carrier or carriers to act as Petitioners' General to obtain forbearance from all requirements imposed on all carriers. There is no authority to include all carriers, including carriers opposed to the very forbearance sought by a filing. No carrier or carriers can seek relief for anyone except themselves and then only for matters clearly within the FCC's interstate authority – not

the states' intrastate authority. There is no language in Section 160 authorizing the FCC to forbear from intrastate communications obligations imposed on a carrier or carriers under independent state law.

Forbearance is a vehicle for obtaining relief from a regulation under Section 201, 47 U.S.C. § 201, not the establishment of rates governed by Section 205, 47 U.S.C. § 205.[6] There is no federal regulation governing the setting and collection of intrastate access rates or reciprocal compensation rates for all 50 states, territories, protectorates, and tribal enclaves under Section 201. There is no federal regulation governing consumer protections or intrastate public policy mandates like broadband deployment, state universal service, service quality, or network reliability as well.

On that issue, the United States Telephone Association's comment in the *FGIP* proceeding in 2008 is instructive. The USTA properly claimed that forbearance under Section 160 is inappropriate to create a new regulatory requirement.[7] The creation of a new regulatory requirement, as opposed to forbearing from a current requirement, is properly the subject of a rulemaking.

The proponents seek forbearance to impose a new regulatory regime that sets a uniform $.0007 rate after a transition period, eliminates state and federal Carrier of Last Resort Obligations except if a carrier receives federal support (and then only as long as it receives federal support), and completely preempts state authority.[8] The creation of this

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[6] *In re: ABC Plan, et al,* Docket No. 10-90, Comments of Earthlink (August 24, 2011), pp. 27-29 in particular.

[7] *In re: FGIP,* Docket No. 07-256, Comments of the United States Telephone Association (February 19, 2008), pp. 1-14, particularly p. 2. The federal court upheld the FCC's denial of forbearance from Section 251(g) because granting the relief would not result in the imposition of reciprocal compensation but would create a regulatory void. *Feature Group IP West et al. v. FCC and United States of America, Respondents, and AT&T, Inc. et al. Intervenors,* 2011 U.S. App. Lexis 10923 (May 27, 2011).

[8] Precedent in the 2nd and 9th Circuits does not support such a complete preemption of all communications regulation by the states over all aspects of interstate communications, let alone the complete preemption of all matters pertaining to all intrastate communications sought here. See *Marcus v. AT&T,* 138 F.3d 46, 54 (2nd Cir. 1998) ("federal common law does not completely preempt state law claims in the area of interstate telecommunications."); *In re NOS Communications v. NOS Communications,* 495 F.3d 1052, 1058 (9th Cir. 2007)("A savings clause is fundamentally incompatible with complete field preemption; . . . The Second Circuit's reasoning in *Marcus* is persuasive and we hold that complete preemption does not apply to federal regulation under the Federal Communications Act.").

new regulatory regime, as opposed to the elimination of an FCC regulation, is the subject of a rulemaking and not a Section 160 forbearance proceeding.

Forbearance is unsustainable under the provisions of Section 251(g), 447 U.S.C. § 251(g), as well. Section 251(g) preserves mandates that were in place before TA-96 became effective. Forbearance applies to federal requirements for interstate communications and not on consumers of access services.[9]

These proponents are consumers of access services who seek forbearance from the Section 251(g) requirements imposed on other carriers who provide them with termination services. This includes those termination services which currently trigger the obligation to pay intrastate access or reciprocal compensation under state law.

Many carriers who are providing these termination service to the proponents either oppose the plan or compete against the proponents.[10] Forbearance from the obligation to comply with mandates in place before TA-96 governing termination services received by the proponents as consumers does not make forbearance for carriers applicable.[11]

As AT&T clearly explained to the FCC in 2008 and 2009, forbearance from Section 251(g) pre-act requirements if applied to IP-enabled voice service will create a regulatory void. Consequently, the FCC properly denied forbearance from the obligation to pay access charges sought in the *FGIP* proceeding for IP-enabled voice service in 2009.[12] AT&T does not explain why the logic supporting the FCC's refusal to grant

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[9] *In re: FGIP,* Docket No. 07-256, Comments of XO, (December 19, 2008), p. 5.

[10] *In re: ABC Plan et al,* Docket No. 10-90, Comments of Northern Telephone and Data Corporation (August 24, 2011), pp. 1-3 (Reductions in intrastate access rates will harm competitors and not produce the consumer welfare benefit claimed); Comments of ICORE (August 24, 2011)(a $.0007 rate or bill and keep should not be adopted because neither mechanism recognizes actual costs, or cost differences among companies, or the unique cost characteristics of providing access in high-cost rural America).

[11] *In re: Feature Group IP Petition for Forbearance from Enforcement of Section 251(g), Rule 51.701(a)(1)* and *Rule 69.5(b),* Docket No. 07-256, XO Communications Ex Parte (December 19, 2008), p. 5. Windstream Communications, a proponent of the $.0007 rate for IP-enabled voice service in this proceeding, previously opposed forbearance and supported imposition of interstate and intrastate access charges on IP-enabled voice providers. *In re: FGIP*, Docket No. 07-256, Comments of Windtream (February 19, 2008), p. 1.

[12] *In re: FGIP,* Docket No. 07-256, Opposition of AT&T to Reconsideration (March 5, 2009); Comments of AT&T (February 19, 2008), pp. 1-14, particularly 5-14. The federal court affirmed the FCC's decision in *FGIP v. FCC and United States of America, Respondents AT&T, et al., Intervenors,* 2011 U.S. App. Lexis 10923 (May 27, 2011).

forbearance from the obligation to pay access charges imposed on IP-enabled voice service based on the Enhanced Service Provider (ESP) exemption in 2009 is not applicable here. As AT&T previously stated:

> But, as AT&T explained in response to Level 3's petition and reiterates below, the Commission's rules and precedent, coupled with sound policy, require a result in which access charges apply to interexchange IP-PSTN traffic. . . . AT&T believes that the IP-enabled voice services offered by VoIP providers to their end users qualify as information services. . . . That regulatory classification, however, does not impact the access charge liability of those VoIP providers or the wholesale providers who provide them with connectivity to the PSTN. [13]

For these reasons, the FCC may not use forebearance in this instance as a method of precluding state regulation of intrastate communications.

C. NEITHER INSERVERABILITY OF VoIP NOR COURT PRECEDENT SUSTAIN CONFLICT PREEMTPION

The Pa. PUC supports the comments of those parties demonstrating that there is no "impossibility" sufficient to support preemption of the states' authority, particularly VoIP.[14] The Pa. PUC agrees with those parties that a presumption that VoIP traffic is "inseverably interstate" in nature is based on factual error. The Pa. PUC also believes that Supreme Court precedent on conflict preemption does not support preemption.

1. There Is No Inseverability of VoIP Traffic Sustaining Preemption.

The Comments append no factual documentation supporting the claim of supposed impossibility due to the inability to separate VoIP traffic into an interstate or intrastate component. The Pa. PUC agrees with the comments of those like Brighthouse[15] who

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[13] *In re:FGIP,* Docket No. 07-256, Comments of AT&T (February 19, 2008), pp. 1-5, particularly p. 5, n.9.
[14] *In re: ABC Plan et al,* Docket No. 10-90, Comments of Brighthouse (August 24, 2011), p. 1 and 7-9.
[15] *In re: ABC Plan, et al.,* Docket No. 10-90, Comments of Brighthouse (August 24, 2011).

conclude that it is no harder to identify the end points of the vast majority of interconnected VoIP calls – which begin or end on non-nomadic cable-affiliated VoIP services – than it is to identify the end points of plain old telephone calls.

Indeed, the FCC itself recognized that there is no barrier to identifying the jurisdiction of calls to or from interconnected VoIP services. *Universal Service Contribution Methodology,* Report and Order and Notice of Proposed Rulemaking 21 FCC Rcd 7518 (2006), ¶ 56 (*2006 USF Order).* The FCC noted in the *2006 USF Order* that some interconnected VoIP providers have the capability to track the jurisdiction of their calls. Moreover, the FCC expressly stated to the 8th Circuit in the *Vonage Preemption* appeal that the inseverability analysis applicable to nomadic VoIP did not extend to non-nomadic VoIP providers. *Minnesota Public Utilities Commission v. FCC,* 483 F.3d 570, 582-583 (8th Cir. 2007).

2. Recent Supreme Court Precedent Undermines Conflict Preemption Based On *Geier v. American Honda Motor Company*, 529 U.S. 861 (1984).

The proponents and comments in support of the proponents rely on the 1984*Geier v. American Honda Motor Company Co.,* 529 U.S. 861 (1984) (*Geier)* decision of the Supreme Court as grounds for conflict preemption. Those comments overlook the Supreme Court's most recent February 2011 interpretation of *Geier* in the *Williamson v. Mazda Motor of America, Inc.,* 2011 U.S. Lexis 1711 (February 23, 2011) decision (*Williamson).*

Williamson interpreted the same statute and later regulations at issue in *Geier.* The critical difference is that in *Williamson* the Supreme Court did not find conflict preemption.

The statute and the federal regulations in *Geier* and *Williamson* required manufacturers to equip their vehicles with passive restraint systems, thereby providing occupants with automatic accident protection. The regulations consistently provided manufacturers a choice among several different passive restraint systems.

The issue in *Geier* was whether a federal statute and regulations, which focused on the importance of choice for manufacturers, should preempt a state tort suit. The suit would have held a manufacturer liable for not installing airbags, essentially requiring one type of restraint. That result made the federal regulation providing manufacturers a choice on safety devices a nullity. The court in *Geier* struck down the state tort suit. A state tort suit would have deprived the manufacturers of the important policy of choice among passive restraint systems.

The *Williamson* decision recognized the importance of choice but went on to hold that this was insufficient to preempt. The *Williamson* decision did so in part because the emphasis on federal "cost effectiveness" would elevate federal minimums to maximums while negating an important role for the state set out in the statute's savings clause.

The Supreme Court's preemption analysis in *Williamson* builds upon the three-part test of *Geier*. First, one looks to express preemption. There were express preemption provisions in *Geier* but the only express preemption provisions in TA-96 are in Section 253 and 252, 47 U.S.C. §§ 252 and 253.

The second part of the *Williamson* and *Geier* precedent recognizes that state law is not preempted if there is a savings clause (state tort suits can fall outside the scope of a pre-emption clause). Since tort law is ordinarily "common law," the Supreme Court reasoned that "the presence of the saving clause" makes it clear that Congress intended state tort suits to fall outside the scope of the express pre-emption clause. *Geier*, 529 U.S., at 868, 120 S. Ct. 1913, 146 L. Ed. 2d 914.

In TA-96, there are two very limited preemption provisions and a general savings clause. Moreover, as in *Williamson,* the presence of savings clause for intrastate regulation by the states makes it more likely than not that Congress intended intrastate regulation to fall outside the scope of express preemption *unless* state commission action triggered Section 253 or 252.

There is nothing supporting preemption based on any particular state action or refusal to act (the trigger for preemption in Section 252) or some collective state

requirement that is not competitively neutral as required by Section 253. Given the savings clause for state authority, the failure to establish action or inaction under Section 252 or evidence that state requirements are not competitively neutral, the FCC must reject preemption.

The *Williamson* decision also made a second determination. The *Williamson* decision concedes that the saving clause preserving state authority can remove some actions from express preemption, However, that savings clause does not preclude use of "the operation of ordinary preemption principles insofar as those principles instruct us to read" federal statutes as preempting state laws (including state common-law standards) that "actually conflict" with the federal statutes or related regulations.

In other words, conflict preemption is not irrelevant because of a savings clause. Conflict preemption must also be addressed even if a savings clause is present.

In this proceeding, there is a savings clause but there is no actual conflict sufficient to preempt state laws under conflict preemption consistent with *Geier* or *Williamson.* There are limited express preemption clauses in Sections 252 and 253. Given the lack of evidence showing that some state action or collective state actions come within the provisions of Sections 252 or 253, the FCC cannot preempt.

As in *Williamson,* the Pa. PUC next turns its attention to *Geier*'s third question. That question is whether, in fact, the state action (tort suits in *Geier* and *Williamson* but state intrastate regulation here) actually conflicts with federal regulation. The Pa. PUC concludes that state law does not conflict.

Under ordinary conflict pre-emption principles, a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of a federal law is pre-empted. *Williamson* citing *Hines* v. *Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941). *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) *Fidelity Fed. Sav. & Loan Assn.* v. *de la Cuesta*, 458 U.S. 141, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982) (federal regulation can pre-empt a state statute). The *Geier* decision rests on a determination that giving auto manufacturers a

choice among different kinds of passive restraint devices was a *significant objective* of the federal regulation.

In *Williamson*, by contrast, the overarching importance of choice was insufficient to sustain conflict preemption. The *Williamson* court reached that by looking to the basis of the regulation, including its history, the promulgating agency's contemporaneous explanation of its objectives, and the agency's views of the regulation's preemptive effect.

Geier was not controlling in *Williamson* because the "important federal objective" of choice in restraints upheld in *Geier* was no longeran "important federal objective" in *Williamson.* In *Williamson,* the Court recognized that the regulation provided "choice" in restraints and conceded that tort suits would restrict that choice. However, the *Williamson* court went on to note that the choice objective in *Geier* was not a significant regulatory objective in *Williamson* sufficient to warrant preemption.

A very important factor in making that distinction was consideration of the federal "cost-effectiveness" that would effectively set federal standards as the maximum standard instead of the minimum standard supplemented by independent state law, i.e., *tort suits* in *Williamson* and *intrastate regulation* under TA-96. The *Williamson* decision did not consider "choice" in restraints to be the controlling consideration if the end result elevates federal minimums to maximums and negates the meaningful state role envisioned in the savings clause.

In this case, the proponents' focus on "rational" and "uniform nationwide" compensation rates, is making a "cost-effectiveness" claim similar to that in *Williamson.* The proponents seek a conflict preemption that will make federal minimums the maximum and negate the savings clause which preserves a meaningful state role even though that result contradicts *Williamson*. Importantly, the proponents use "cost-effectiveness" to negate other state laws on universal service, broadband deployment, network reliability, and even quality of service.

Moreover, it is instructive that in *Williamson* the Solicitor General informed the *Williamson* court that federal regulation does not preempt state law. If an agency's own

views should make a difference as the court held in *Williamson,* the FCC's long-standing practices should make a difference on preemption here. The FCC has never completely preempted all intrastate regulation of intrastate communications. The FCC continually used imputation factors to preserve state authority when communications were of a "mixed" interstate/intrastate nature or even when the communications were "interstate" in nature when doing so preserved federalism as in the *2006 USF Order.*

As in *Williamson,* even when state law may restrict an agency's policy goal, a restriction is not tantamount to an "obstacle to the accomplishment . . . of the full purposes and objectives" of federal law. *Williamson* citing *Hines,* 312 U.S. at 67. As in *Williamson,* the FCC decision should not preempt state law based on conflict preemption simply because the proponents confuse the restrictions arising from joint federal-state jurisdiction with an obstacle that must actually conflict with an important federal policy objective before conflict preemption arises under *Williamson.*