

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

In the Matter of

Connect America Fund)	WC Docket No. 10-90
Vermont Public Service Board)	DA 12-81
Motion for Clarification)	
)	
A National Broadband Plan For Our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link Up)	WC Docket No. 03-109
)	
Universal Service Reform – Mobility Fund)	WT Docket No. 10-208

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

The Pennsylvania Public Utility Commission (Pa. PUC) files these Reply Comments to the Comments filed on February 23, 2012 addressing the FCC's earlier Notice of Proposed Rulemaking on Issues L-R (LR NPRM) in the FCC's *Connect America Fund Order (CAF Order)* released on November 18, 2011, and published in the Federal Register at Vol. 76, No. 229 on Tuesday, November 29, 2011, at pp. 73830 through 73882 (the *CAF Order*).

The FCC seeks comment on several issues involving the *CAF Order*. These include the implementation of Bill and Keep, particularly the transition of rate elements

(mostly originating charges) not adopted in the *CAF Order*. In addition, the FCC sought input on the reform of end-user surcharges, including the federal Subscriber Line Charge (SLC) and the Access Recovery Charge (ARC) adopted in the *CAF Order*. Also, the FCC solicited comments on the legality and implementation of IP-to-IP interconnection as part of the transition to an all-IP network. The FCC seeks input on call-signaling rules for one-way Voice over Internet Protocol (VoIP) and new rules set out in the *CAF Order* that reform the current compensation structure.¹

The Pa. PUC appreciates an opportunity to file Reply Comments. As an initial matter, these Pa. PUC Reply Comments should not be construed as binding on the Pa. PUC in any matter brought before the Pa. PUC for adjudication. Moreover, these Pa. PUC Reply Comments could change in response to later events, including Ex Parte filings or the review of other filed Reply Comments and legal or regulatory developments at the state or federal level. The Pa. PUC Reply Comments build upon and reiterate prior filings of the Pa. PUC on several issues, particularly the FCC's legal authority to regulate intrastate telecommunications under federal law.²

1. *Further Reform of Intrastate Rates Using Bill and Keep*. The Pa. PUC supports those comments which raise concerns about the FCC's reliance on Bill and Keep to reform current or future intrastate rates.³ The Pa. PUC reiterates its position that any intrastate carrier access rate reforms or rate-setting are within the jurisdictional authority of the States. Federal reform of those rates must proceed on an incentive or

¹ *In Re: Connect America Fund*, Docket No. 10-90 (November 18, 2011), Paragraphs 1297-1314, 1315-1325, 1326-1334, 1335-1398, and 1399-1402.

² These include, but are not limited to, *In re: Connect America Fund*, Docket No. 10-90, Reply Comments of the Pa. PUC (September 26, 2011), Further Reply Comments of the Pa. PUC (September 6, 2011), Comments and Legal Analysis of the Pa. PUC (August 24, 2011), Reply Comments of the Pa. PUC (May 23, 2011); *In Re: Intercarrier Compensation*, Docket Nos. 01-92 and 06-122, Comments of the Pa. PUC (November 26, 2008), Reply Comments of the Pa. PUC (December 22, 2008), pp. 7, 31-32; *In re: Universal Service and the Federal-State Joint Board*, Docket Nos. 05-337 and 96-45, Comments of the Pa. PUC (July 18, 2008), pp. 21-23.

³ *In re: Connect America Fund*, Docket No. 10-90, Comments of the National Exchange Carriers Association (February 24, 2012), pp. 9-10; Comments of the Nebraska Rural Independent Companies (February 24, 2012), pp. 2-4; Comments of the National Association of State Utility Consumer Advocates (NASUCA – February 24, 2012), p. 6, n. 16 citing NASUCA Reply Comments of May 23, 2011, pp. 120-152.

voluntary basis because the FCC lacks the authority to preempt the states or to regulate intrastate rates.⁴ The Pa. PUC believes that the FCC should revert to a total element long-run incremental cost (TELRIC) standard for reciprocal compensation in place of the Bill and Keep regime.⁵ The use of TELRIC or a similar cost-based model is needed so that the intrastate intercarrier compensation rates prescribed by the States can lawfully recover joint and common and/or long-run incremental costs of the landline carrier access networks.⁶

The FCC's imposition of interstate rates on intrastate originating, terminating, transit service or other intrastate communications would be inconsistent with U.S. Supreme Court precedent. That precedent holds that the states are to set specific rates for intrastate telecommunications using an FCC model. As far back as 1999, the U.S. Supreme Court held that the States were to set rates for intrastate communications because the FCC lacked authority to set rates under Section 252 of the federal Telecommunications Act of 1996 (TA-96). 47 U.S.C § 252. However, the States could be directed to use a pricing model developed by the FCC. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 384-358 (1999).

The Eighth Circuit later vacated FCC efforts to impose "proxy" rates that the states were required to use in setting Section 252 reciprocal compensation based on the TELCRIC model. The Eighth Circuit read the 1999 *AT&T* decision as requiring the FCC

⁴ *In re: Connect America Fund*, Docket No. 10-90, Further Reply Comments and Supplemental Legal Memorandum (September 6, 2011), pp. 1-13, Further Comments of the Pa. PUC and Accompanying Legal Memorandum (August 24, 2011), pp. 1-58, *In re: Intercarrier Compensation*, Docket No. 01-92 and 06-122, Reply Comments of the Pa. PUC (December 22, 2008), pp. 7, 31-32.

⁵ *In Re: Connect America Fund*, Docket No. 10-90, NASUCA Comments (February 24, 2012), pp. 4-5.

⁶ Even parties that are generally in favor of the FCC's *CAF Order* Bill and Keep regime are now seeking "protections that ensure that traffic" exchanged between carriers "is not significantly out of balance in order for it to be subject to bill-and-keep" so that the Bill and Keep "system" is not abused. Comments of Verizon, (February 24, 2012), p. 9. Neither the FCC nor any other regulatory agency can assure that exchanged traffic volumes are or are not "in balance." As the State Members of the Federal-State Joint Board had presciently pointed out, Bill and Keep is unworkable where exchanged traffic volumes *and* network access costs are not "in balance." *In re: Connect America Fund*, Docket No. 10-90, Comments by State Members of the Federal State Joint Board on Universal Service, State Plan (May 2, 2011), p. 148.

to establish the pricing model but that the States set the specific rates. *Iowa v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000) (quoting *AT&T Corp.*, 525 U.S. at 385), *aff'd in part and rev'd in part*, *Verizon v. FCC*, 535 U.S. 467 (2002), and *vacated in part*, *Iowa v. FCC*, 301 F.3d 957 (8th Cir. 2002).

Equally important, imposition of a federal rate ignores Verizon's well-reasoned comments which argue that the FCC cannot rely on its general rulemaking authority, in this case Section 201, 47 U.S.C. § 201, to expand its jurisdictional authority beyond boundaries established by the statute. The Pa. PUC shares that view as well as Verizon's view that the FCC cannot rely on Section 706 because Section 706 is not an open-ended grant of authority.⁷ 47 U.S.C. § 706.

Moreover, the more recent *ISP Remand Order* decision interpreting Section 201, a decision upheld on appeal without review by the United States Supreme Court,⁸ is a decision that is, by the FCC's recognition, a case of limited and rapidly diminished significance.⁹ The limited scope of that decision is of limited practical significance for Section 201 let alone Section 706. The FCC cannot rely on Section 201 or Section 706 to further reform originating intrastate access rates or any other intrastate rates, including terminating access rates. The Pa. PUC is not convinced that Bill and Keep is a methodology. Bill and Keep is a rate, a conclusion consistent with the earlier comments of major carriers and other participating parties.¹⁰

⁷ *In re: Connect America Fund*, Docket No. 10-90, Comments of Verizon (February 24, 2012), pp. 34-35. Although the Verizon argument is made in the context of IP-to-IP interconnection, the broad legal principle is equally applicable for intercarrier compensation issues and denotes the lack of the relevant FCC authority under Sections 201 and 706.

⁸ *Core Communications, Inc. v. FCC*, No. 08-1356 (United States Court of Appeals for the District of Columbia: January 12, 2010), Rehearing Denied March 26, 2010, Writ of Appeal Denied November 2010.

⁹ *Core Communications, Inc. v. FCC*, Supreme Court Docket Nos. 10-185 and 10-189 (Brief of Respondents in Opposition to Petition for Writ of Certiorari (October 2010), p. 12.

¹⁰ Compare *In re: Connect America Fund*, Docket No. 10-90 (November 11, 2011), Comments of The National Association of Consumer Advocates (NASUCA), (February 23, 2012), pp. 2-6 with *In re: Implementation of the Telecommunications Act of 1996*, Docket No. 96-98, Reply Comments of Bell-Atlantic (May 30, 1996), pp. iii-iv.

Assuming, *arguendo*, that the economic imperative that charges must recover costs has been somehow obviated in telecommunications due to technological change, the rates set for intrastate communications must be set by the states using an FCC model. The FCC cannot set rates for intrastate communications.

2. *End-User Surcharges.* The Pa. PUC supports those comments which urge the FCC to address separations and special access reforms before deciding if the FCC should impose end-user surcharges to support intercarrier compensation and universal service reform.¹¹ The Pa. PUC reiterates its earlier view that the FCC should use all revenues from all services to ensure that all users of the Public Switched Telecommunications Network (PSTN) or Packet Sending Transmission Network (PSTN) shoulder the fixed and variable costs of landline access network maintenance and broadband modernization. This will continue to be of importance, if not increasing importance, to multiple retail and wholesale access users who benefit from the use of these landline access networks.¹²

The Pa. PUC reiterates its view that preservation of a dual federal-state regulatory structure and the inclusion of all revenues from a public network to support access to and compensation for that public network is necessary to ensure that the users of a public network contribute to the cost for legally sustainable reforms.¹³ This is preferable to

¹¹ *In re: Connect America Fund*, NASUCA Comments (February 24, 2012), pp. 6-7.

¹² *In re: Connect America Fund*, Docket No. 10-90, Comments of the Pa. PUC (August 2010), p. 7; *In re: Broadband Plan for Our Future*, Docket No. 09-51, Comments of the Pa. PUC (July 15, 2010), p. 5, *In re: High Cost and Federal State Joint Board on Universal Service*, Docket Nos. 05-337 and 96-45, Comments of the Pa. PUC (July 17, 2008), pp. 21-23.

¹³ *In re: Connect America Fund*, Docket No. 10-90, Further Reply Comments and Supplemental Legal Memorandum (September 6, 2011), pp. 1-13; Further Comments of the Pa. PUC and Accompanying Legal Memorandum (August 24, 2011), pp. 1-58, Reply Comments of the Pa. PUC (May 23, 2011), pp. 1-23 (Law, Technology, nor Public Policy support preemption); *In re: Broadband Plan for Our Future*, Docket No. 09-51, Comments of the Pa. PUC (July 15, 2010), p. 5, *In re: High Cost and Federal State Joint Board on Universal Service*, Docket Nos. 05-337 and 96-45, Comments of the Pa. PUC (July 17, 2008), pp. 21-23; *In re: Intercarrier Compensation*, Docket No. 01-92 and 06-122, Reply Comments of the Pa. PUC (December 22, 2008), pp. 7, 31-32.

reliance on surcharges given the negative impact already demonstrated from end-user surcharges i.e., subscriber line charges (SLCs), on universal service in the past.¹⁴

The Pa. PUC reminds the FCC that the last time major carriers, including AT&T, proposed reform of intercarrier compensation and expanding universal service to include broadband, they minimized those costs. They claimed that a small charge in the range of \$.30 per telephone number would generate approximately \$2.5B to support reform.¹⁵

A timely expansion of the federal Universal Service Fund (USF) contribution mechanism base to include all revenues as suggested by the Pa. PUC is better even if it has to be coupled with something like a numbers-based assessment. This approach should produce an overall net cost to end users that will likely be much smaller than strict reliance on surcharges alone. This is particularly the case if the access recovery charges (ARC) and/or the SLC were to continue in perpetuity.

This more beneficial result would likely be even better if the FCC's use of a numbers assessment did not use equivalency ratios that are currently used for contribution assessments from end-users of services such as Centrex. Equivalency ratios are formulas whereby the assessment on consumers above a predetermined number of access lines is less than an assessment on consumers below that same predetermined number of access lines. If the FCC has to use assessments, an assessment on every number used without such an equivalency ratio would be better. It results in the same contribution from every number regardless of the amount of numbers used by a given consumer. This also has the ancillary benefit of promoting numbers conservation.

¹⁴ *In re: Intercarrier Compensation*, Docket No. 01-92, Ex Parte Comments of the Pa. PUC (October 27, 2008), pp. 2-3 and *In re: AT&T Petition*, Docket Nos. 08-152 and 01-92, Pa. PUC Comments (August 21, 2008), pp. 22-25.

¹⁵ *In re: Intercarrier Compensation*, Docket No. 01-92, Comments of the Pa. PUC (November 28, 2008), pp. 15-25, n. 32 citing Oral Statements of Joel Lubin, Pa. PUC Workshop on the Missoula Plan, Docket No. M-00061972, Tr. 29-32; *Accord*, NARUC Webinars (September 25, 2008).

3. *IP-to-IP Interconnection.* The Pa. PUC reiterates its position that IP-to-IP interconnection is appropriate because Internet Protocol (IP) is a successor telecommunications services protocol. Application of Section 251 to IP-based interconnection is consistent with the general recognition that the current PSTN is evolving into an IP network.¹⁶ It is commonly understood that IP-to-IP interconnection will provide for greater network engineering efficiencies and reductions in associated costs since communication protocol translations and associated equipment requirements can be substantially reduced or eliminated.

The Pa. PUC does not agree that federal law prohibits the FCC from applying Section 251 interconnection requirements to IP-interconnection. That view seems to rest on the dubious proposition that Section 251 applies only to the technology in place when Section 251 was enacted in 1996. Clearly, Section 251 suggests that the FCC and the states will find it hard to promote advanced telecommunications without an express interconnection requirement under Section 251 for IP. Without that interconnection, the end result would be very different from today's promotion of advanced networks and services and providing interconnection wherever that is feasible.

The Pa. PUC recognizes that a major consideration driving the claim that IP interconnection is required by Section 251 is a concern about ending what some advocates see as avoidable costs for translating IP into TDM, and vice versa. These "gateway" translation costs could be eliminated for IP-based network providers if IP interconnection was required wherever or whenever the IP-based network provider demanded it. However, that result comes at the network owners' expense. One IP-based network provider's cost savings from no longer having to pay for TDM-IP translations will likely result in another network owner's service revenue loss.

¹⁶ *In re: Petition of tw telecom for a Declaratory Ruling*, Docket No. 11-119, Comments of the Pa. PUC (October 6, 2011), pp. 5-6.

The Pa. PUC alternatively suggests that any IP-based interconnection mandate be limited only to where it is feasible on existing or future networks. A mandate to provide IP-based interconnection wherever or whenever an IP-based network provider demands IP-to-IP interconnection may require certain carriers to modify existing access networks to comply with that mandate. The Pa. PUC proposes a limited IP interconnection approach that provides IP-based network service providers with the interconnection they may need while allowing network owners to secure the necessary resources from TDM-IP translation so that they may construct and finance an IP network capable of delivering IP interconnection. The end result is that TDM-IP translation revenues could potentially finance the build out of IP-based network interconnections, thus increasing the number of locations where IP interconnection is possible over time. Since actual monetary intercarrier compensation for the exchange of traffic — and not a zero (0) rate under Bill and Keep — provides the actual incentive to effectuate technical network modifications for efficient IP-to-IP interconnection, a number of carriers will not be willing to make the necessary investments for which they will not realize a return of and a return on their financial capital.¹⁷

4. *Allocation of Lost Revenue Recovery and Waivers from ARCs.* The Pa. PUC agrees with the Massachusetts Department of Telecommunications and Cable (MDTE) about the problem created by allowing carriers to recover lost revenues on a holding company level. That approach is overly burdensome to states like Pennsylvania. States with intrastate access rate reforms in place are to be allocated a portion of the costs, in the form of ARCs, to underwrite reform in areas that have not reformed their intrastate rates. Consequently, states like Pennsylvania could be paying twice. Recovery should be on a state-by-state and/or study area basis and not on a holding company basis. The Pa. PUC recognizes that this may need refinement if the rates in the rural states or study areas are not reasonably comparable to rates in urban areas as required by

¹⁷ *In re: Connect America Fund*, Docket No. 10-90 State Plan (May 2, 2011), p. 149.

Section 254, 47 U.S.C. § 254. The Pa. PUC also believes that the MDTE's proposed waiver from ARCs in states with reforms in place should be expanded to include those, like Pennsylvania, that had reforms underway when the *CAF Order* was issued.

The Pa. PUC supports a joint State-FCC approach that would effectively police the jurisdictional allocation of the Eligible Recovery ARC amounts where the ARC will be utilized and imposed on end-users of landline telephone services by price cap carriers that are holding company subsidiaries or affiliates. This joint approach will prevent arbitrary misallocations of Eligible Recovery ARC amounts at the holding company level on the basis of individual State or even locality price elasticity of demand, and will also prevent "cost-shifting or double dipping by carriers." *CAF Order*, ¶ 880, p. 308. This is particularly important for end-users of landline telecommunications services that reside in States that already are net contributors to the federal USF mechanism such as Pennsylvania.¹⁸

5. *Transit Service and Special Access.* The Pa. PUC does not agree with the United States Telecomm Association (USTA) that Transit or Special Access should be unregulated.¹⁹ The Pa. PUC urges retention of the current regulatory structure based on observations made in the ongoing proceeding about special access in Docket No. 05-25 and comments from parties in this proceeding claiming that transit is not competitive and has very few viable alternatives.²⁰

The Pa. PUC, however, does not support a mandatory \$0.0007 rate cap rate nor the accompanying preemption logically necessary so that the FCC can impose that rate on intrastate communications. A state proceeding must establish the proposed rates based

¹⁸ *In re: Connect America Fund*, Comments of the Massachusetts Department of Telecommunications and Cable, (February 24, 2012), pp. 8-10.

¹⁹ *In re: Connect America Fund*, Docket No. 10-90, Comments of the USTA (February 24, 2012), pp. 4-6.

²⁰ *In re: Connect America Fund*, Docket No. 10-90, Comments of Windstream (February 24, 2012), pp. 8-11; Comments of Sprint-Nextel (February 24, 2012), pp. vii and 68.

on an FCC model for intrastate joint and common and incremental costs. The Pa. PUC takes this view given prior filings by the Pa. PUC and carriers, among others, showing that \$0.0007 does not reflect costs.²¹

The Pa. PUC supports the comments of the Indiana Regulatory Utility Commission (IURC) supporting the FCC's interim compensation rule for Rural Local Exchange Carrier (RLEC)-Commercial Mobile Radio Service (CMRS or wireless) interconnection set out in Paragraphs 998-1002 of the *CAF Order*.²² Under this interim approach, the RLEC is responsible for transport to the wireless carrier's chosen interconnection point when it is located within the RLEC's study area. When the interconnection point is outside the RLEC's study area, the RLEC's obligation stops at its meet point and the wireless carrier is responsible for costs beyond the meet point to the wireless carrier's interconnection point.

The Pa. PUC also urges the FCC to retain this "interim rule" pending resolution of the petitions for clarification and appeals. The FCC should not transition to a default "bill and keep" rate on July 1, 2012. This preserves the status quo and minimizes additional compensation losses or stress on RLECs pending resolution of the *CAF Order*.

6. *Tariffs and Commercial Agreements.* The Pa. PUC agrees that Commercial Agreements might be useful for interconnection,²³ including IP interconnection although

²¹ *In re: Connect America Fund*, Docket No. 10-90, Further Reply Comments of the Pa. PUC, Legal Memorandum of the Pa. PUC (August 24, 2011), pp. 2-3; Compare *In re: Intercarrier Compensation*, Docket No. 01-92, Ex Parte of Consolidated Communications, Windstream, Embarq, CenturyTel, Frontier, et. Al (October 20, 2008), pp. 1-2 (\$0.0007 rate is confiscatory and not cost-based) with *In re: Connect America Fund*, Docket No. 10-90, ABC Plan Comments of Rural Local Exchange Carriers (May 2, 2011) and ABC Legal Analysis, pp. 1-68 (the FCC should expeditiously approve the ABC Plan, preemption, and the \$0.0007 rate).

²² *In re: Connect America Fund*, Docket No. 10-90, Comments of the Indiana Regulatory Utility Commission (February 24, 2012), pp. 7-8.

²³ *In re: Connect America Fund*, Docket No. 10-90, Comments of Verizon (February 24, 2012), pp. 19-21 and USTA Comments (February 24, 2012), p 9 (peering model appears to be working well).

any reliance on Commercial Agreements must contain an ancillary regulatory structure which relies on a federal model and state regulators.²⁴

The Pa. PUC takes this position given the National Cable & Telecommunications Association (NCTA) observation that Section 251 interconnection rights are critical to developing voice competition, including the delivery of transit at cost-based rates.²⁵ While the Pa. PUC does agree with NCTA that a federal-state regulatory structure governing Section 251 interconnection should be retained, the Pa. PUC does not agree with the NCTA to the extent that their comments do not contemplate any role for state commissions. In addition, the Pa. PUC does not agree with NCTA Comments refusing to extend Section 251 to interconnection for things like backbone providers.

As the telecommunications IP network of the future rolls out, the Pa. PUC believes that IP-based or similar backbone facilities will likely become the next generation telecommunications facilities used to provide communications service or the equivalent of interexchange access. This is a logical result given the industry and regulators' focus on replacing traditional network technologies such as Time Division Multiplexing (TDM) with IP-based networks. The absence of a state role in addressing the interconnection disputes in an IP-world is inadvisable and would likely contravene federal law which gives States the authority to address interconnection. This approach would also likely undermine the Pa. PUC's responsibility for Pennsylvania's VoIP Freedom Act, 22 Pa.C.S. §§ 2251.1, *et seq.* That law retains Pa. PUC authority over wholesale IP-based access connectivity.

²⁴ *In re: Connect America Fund*, Docket No. 10-90, Comments of NECA (February 24, 2012), pp. 14-18 (the Commission should not migrate tandem switching and transport (or transit service) to bill and keep but if it does so the FCC should do so based on Sections 251 and 252 where state commissions set rates based on a federal model); Comments of NCTA (February 24, 2012), pp. 2-5.

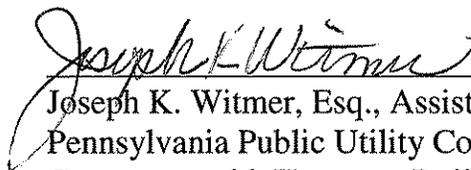
²⁵ *In re: Connect America Fund*, Docket No. 10-90, Comments of the NCTA (February 24, 2012), pp. 2-4.

Although IP-to-IP interconnection may be effectuated under individual “commercial interconnection agreements” that may not require regulatory intervention, the FCC and the States should be prepared to exercise appropriate authority to address IP-to-IP interconnection disputes as those may arise under the auspices of TA-96.²⁶ In this respect, the FCC should clarify with better precision reciprocal interconnection obligations for entities that have different regulatory classifications under the federal Communications Act of 1934 as amended. Under TA-96, the reciprocal interconnection obligations of telecommunications common carriers are rather clear (Title II). However, there is a lack of clarity when it comes to reciprocal interconnection obligations involving non-common carriers, and the FCC should issue the necessary guidance while, preferably, staying away from the “network neutrality” debate.

For these reasons, the Pa. PUC urges the FCC to proceed at a slower pace in addressing any reforms of originating intrastate access rates. If the FCC decides to proceed with substantial reform of existing originating access rates, the FCC should adopt the substantive views set out by the Pa. PUC in these Reply Comments.

The Pa. PUC appreciates this opportunity to file Reply Comments.

Respectfully Submitted,



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²⁶ *In re: Connect America Fund*, Comments of the Nebraska Rural Independent Cos., (February 24, 2012), pp. 29-30.