

telecommunications carriers, on November 19, 2012 (NTCA Petition). The NTCA Petition asks the FCC to initiate a rulemaking to examine the means of promoting the transition from an analog-copper TDM network to an IP network while protecting consumers, promoting competition, and preserving universal service.

The AT&T and NTCA Petitions (collectively, the IP Petitions) request that the FCC comprehensively review existing state and federal rules governing interconnection and network infrastructure, *inter alia*, in light of technological change. The IP Petitions build upon the reasoning of the FCC Universal Service/Intercarrier Compensation Reform Order and Rulemaking at Docket No. 10-90 (ICC/USF Order) issued on November, 18, 2011, a matter currently under appeal in the 10th Circuit Court of Appeals. The Pa. PUC is an appellant in that appeal along with multiple states, providers, trade associations, and tribal representatives.

The Pa. PUC appreciates the opportunity to Comment. These Comments should not be construed as binding on any matter pending before the Pa. PUC. The positions taken herein could change in response to later events, including developments in state or federal law and review of Comments, Reply Comments, or Ex Parte filings submitted in this or other dockets. Finally, the Pa. PUC's participation in this proceeding is without prejudice to the ongoing litigation between the Pa. PUC and others currently pending in the 10th Circuit Court of Appeals at Docket Nos. 10-1099 *et seq.*

These Comments reiterate the Pa. PUC positions set out in prior FCC proceedings. These proceedings include, among others, the National Broadband Plan, the Connect America Fund proceeding, various forbearance requests, intercarrier compensation matters, federal preemption, universal service, the current ICC/USF Order, and ancillary proceedings such as the pending petitions on retirement of copper in the existing network and the Triennial Regulatory Review Order proceedings.¹ Those filings consistently urge the FCC: (1) to preserve the structure of

¹ *USTA v. FCC*, 290 F.3d 415 (D.C. 200), cert denied sub nom *World Com v. USTA*, 538 U.S. 940 (2003) (*USTA I*); *USTA v. FCC*, 359 F.3d 344, 578-585 (D.C. Cir. 2004), cert denied *NARUC v. FCC*, 543 U.S. 925 (2004) (*USTA II*); *COVAD v. FCC*, 450 F.3d 528 (D.C. 2006). *In re: Verizon Petition for Forbearance In the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Docket No. 06-172, Pa. PUC Comments (March 6, 2007), Reply Comments (April 18, 2008).

joint federal-state regulation premised on constitutional and cooperative federalism to; (2) retain a modified form of common carriage on networks providing information to consumers regardless of the technology or provider; (3) promote reasonable access to networks by incumbents and competitors on comparable terms regardless of technology so that consumers obtain the benefits of effective competition in the delivery of traditional and advanced services; and (4) ensure that networks providing information to consumers are safe, reliable, provide quality of service at reasonably comparable rates while supporting universal service, Telecommunications Relay Service, 911, and other important policy mandates of the states or the Congress.

The FCC should deny the IP Petitions in light of these considerations. If the IP Petitions are granted, the FCC should impose conditions reflective of the Pa. PUC's concerns already set out before the FCC, and without engaging in any federal preemption of state independent statutory and regulatory authority over the subject matters contained in the IP Petitions.

The Pa. PUC does not think that this is the time to initiate yet another rulemaking on

In re: Petitions of Embarq and Verizon for Forbearance From Certain ARMIS Reporting Requirements, Docket Nos. 07-204 and 7-273 (March 17, 2008); *In re: Petition of XO Communications for Rulemaking on ILEC Retirement of Copper Loops*, Docket No. RM 11358, Comments of the Pa. PUC (April 2, 2007); *In re: Federal-State Joint Board on Universal Service*, Docket No. 96-45 and WC 05-337, Comments of the Pa. PUC (April 27, 2008), *In re: Petition of AT&T For Waiver of ESP Exemption of Access Charges for VoIP Providers*, Docket No. 08-152, Comments of the Pa. PUC (August 21, 2008); *In re: Petition of AT&T For Declaratory Ruling and Limited Waivers*, Docket Nos. 08-152, Comments of the Pa. PUC (August 21, 2008); *Embarq Local Operating Companies and AT&T For Interim Limited Relief*, Docket Nos. 08-160 and 08-152, Reply Comments of the Pa. PUC (September 5, 2008); *In re: Universal Service Contribution Methodology* and *In re: Intercarrier Compensation Reform*, Docket No. 06-122 and 01-92, Reply Comments of the Pa. PUC (December 27, 2008); *In re: Deployment of Advanced Telecommunications to All Americans*, Docket Nos. 09-137 and 09-51, Comments of the Pa. PUC (September 4, 2009); *In re: National Broadband Plan Notice No. 25: Transition From Circuit-Switched to All-IP Network*, Comments of the Pa. PUC (December 21, 2009); *In re: Framework for Internet Service and Broadband National Plan For Our Future*, Docket Nos. 10-127 and 09-51, Comments of the Pa. PUC (July 15, 2012); *In re: Issues in the Open Internet Proceeding, et al.*, Docket Nos. 10-127, 09-51, and WC 07-52, Further Comments of the Pa. PUC (October 12, 2010); *In re: Modernizing the FCC Form 477 Data Form*, Docket Nos. 11-10, 07-37, 08-190, and 10-132, Comments of the Pa. PUC (April 1, 2011); *In re: Connect America Fund et al.*, Reply Comments of the Pa. PUC (May 23, 2011); *In re: Connect America Fund*, Docket No. 10-90, Further Comments and Legal Analysis Memorandum of the Pa. PUC (August 24, 2011) and Reply Comments of the Pa. PUC (September 6, 2011); *In re: Petition of Vaya Telecom, Inc. For Declaratory Ruling on LEC-to-LEC VoIP Traffic Exchanges*, Docket Nos. 01-92, 11-119, and 99-200 Comments of the Pa. PUC (October 6, 2011); *In re: Connect America Fund*, Docket No. 10-90 (January 17 and January 18, 2012); *In re: Connect America Fund*, Docket No. 10-90, Reply Comments of the Pa. PUC (February 17, 2012), Comments of the Pa. PUC (March 9, 2012); *In re: Connect America Plan NPRM*, Docket No. 10-90, Reply Comments of the Pa. PUC (February 17, 2012) and (March 9, 2012); *In re: Connect America Plan NPRM on Issues L-R*, Reply Comments of the Pa. PUC (March 30, 2012); *In re: Connect America Plan and Petition of Sprint for Declaratory Ruling Regarding CenturyLink's Access Tariff to VoIP Originated Traffic*, Reply Comments of the Pa. PUC (July 16, 2012).

federal-state issues, particularly IP interconnection, when those matters are being considered in the rulemakings initiated in the *In re: Connect America Fund* proceeding.² Moreover, the uncertainty with the proposed preemption of many state regulatory programs that is currently under appeal before federal courts warrants limiting consideration to the current proceedings. The Pa. PUC urges the FCC to simply preserve the existing status quo, including the current rulemakings, as opposed to starting another proceeding likely to engender still more uncertainty surrounding preemption and additional litigation before the current proceeding is completed.

While opposed to the IP Petitions, the Pa. PUC supports the US Telecom Association's (USTA's) view that important federal rule changes on complex matters are appropriate only in a rulemaking -- as opposed to a declaratory ruling.³ The Pa. PUC also supports the IP Petitions' claim that the nation needs to address the deployment of broadband networks and IP interconnection. Broadband deployment policies have been pursued for a long time in Pennsylvania under independent state law.⁴ The FCC is already addressing both broadband deployment and IP interconnection issues in the current *Connect America Fund* proceeding. There is no need to devote more time and resources to redundant regulatory proceedings. The Pa. PUC also notes that a number of issues contained in the AT&T Petition are already being addressed by the Commission in the parallel USTA Forbearance Petition that is still pending before the FCC and is opposed by a number of states including the Pa. PUC.⁵

² Compare IP Petitions herein with *Connect America Fund* (November 18, 2011), ¶ 1010 (We seek comment in the pending FNPRM regarding the specific elements of the policy framework for IP-to-IP interconnection) and Reply Comments of the Pa. PUC (February 27, 2012), pp. 9-10 (the Pa. PUC supports development of a process governing IP interconnection premised on Pennsylvania's VoIP Freedom Bill).

³ *In re: Number Optimization*, Docket No. 99-200, Ex Parte Presentation of the United States Telephone Association (October 31, 2003), pp. 1-2 (the FCC cannot change wireline porting boundary or intervals as set forth in 47 CFR § 52.26(a) by a declaratory ruling proceeding but rather must institute a rulemaking proceeding in conformance with the Administrative Procedure Act.).

⁴ 66 Pa.C.S. §§ 3010, *et seq.* (Chapter 30) and 73 Pa. S. §§ 2251.1 *et seq.* (VoIP Freedom Act). Chapter 30 has been promoting and attaining, broadband deployment under independent Pennsylvania law since at least 1993 and the VoIP Freedom Act retains Pa. PUC regulation of important interconnection and intercarrier compensation matters for VoIP while retail VoIP service rates and certain consumer protections are non-jurisdictional (with the exception of such matters as access to 911/E911, telecommunications relay service or TRS, intrastate universal service fund, and protected services provided under tariff, 73 Pa. S. § 2251.6).

⁵ AT&T Petition at 13-14, 15 (AT&T support for USTA Forbearance Petition on elimination of Section 214, 47 U.S.C. § 214, requirements). See also *In re Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) From Enforcement Of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61 (USTA Forbearance Petition), and Reply Comments of Pa. PUC, April 24, 2012 (abandonment of essential services and facilities is a matter of independent state law).

The Pa. PUC shares the IP Petitions' focus on advancing the deployment of broadband IP-based networks. However, the Pa. PUC opposes these IP Petitions to the extent they rely upon preemption, forbearance, or questionable allegations about technology and network modernization. The Pa. PUC does not agree that technology alters the ongoing challenges of meshing market-based economic pricing and competition with traditional consumer protection and carrier of last resort (COLR) obligations. The Pa. PUC continues to believe that federal-state joint jurisdiction policies addressing this ongoing tension and reflected in intercarrier compensation and universal service are not obviated by technological change, particularly given its uneven deployment in America today.

1. The Pa. PUC Opposes These IP Petitions To The Extent They Rely Upon Preemption Or Forbearance

The Pa. PUC has filed in support of the FCC's current rulemaking on IP-interconnection to the extent it preserves joint jurisdiction and existing state law. The Pa. PUC would oppose any FCC rulings on these IP Petitions if they undermine that state law or the existing federal-state joint regulatory paradigm even in a pilot. Congress enacted the current federal-state joint jurisdictional paradigm in the Telecommunications Act of 1996 (TA-96). The Congress alone, not the FCC or industry, can alter that paradigm, including pilot programs.

The Pa. PUC also repeats the concerns it previously set out in the pending USTA Petition in Docket No. 10-90. The Pa. PUC again states that TA-96 cannot be used to undermine state law, or obligations imposed under state law, including carrier of last resort, regarding intrastate telecommunications or information. TA-96 expressly preserves existing state authority over intrastate telecommunications and expands that authority to include interconnection arbitration and mediation. TA-96 also places important universal service obligations on the states as well in, *inter alia*, Sections 214 and 251. 47 U.S.C. §§ 214 and 251. This includes, but is not limited to, the designation of Eligible Telecommunications Carriers (ETCs) and use of the Federal-State Joint Board consultation process under Section 214.

The Pa. PUC asserts that any forbearance in the IP Petitions must be rejected to the extent that the IP Petitions attempt to expressly or constructively abrogate independent state law or authority. This is particularly the case when forbearance attempts to co-opt intrastate ratemaking and regulation by the FCC or Congress. This was previously tried and rejected.⁶

The Pa. PUC challenges the IP Petitions' belief that some pressing policy need arising from technological change allows the FCC to rewrite federal law, including these pilot programs. TA-96 does not permit that. TA-96 actually defines the federal-state relationship in terms of joint federalism on "telecommunications" and "information service" as opposed to "voice" or "voice-centric" networks. Federal law uses "information" to define telecommunications or information service. The absence of the words "voice" or "voice-centric" in federal law for telecommunications and information service warrants denial of the petitions. The pressing policy goal of IP evolution attained by the proposed pilots cannot rewrite federal law, particularly when the FCC is already considering a rulemaking on IP [?] interconnection [?] issues.

The Pa. PUC reiterates that the nation's transition in the Public Switched Telecommunications Network (PSTN) to a Packet Sending Transmission Network (PSTN by copper or fiber or a combination) can be done under existing law and use of the successful federal-state joint jurisdictional paradigm. Congress enacted that paradigm; it alone can alter it.

The Pa. PUC opposes the IP Petitions to the extent they seek to rewrite federal law and centralize regulatory authority at the federal level, even for pilot projects or "experiments." It is neither legal nor necessary and unavoidable. Any consolidation of regulatory power must be made by Congress and reflected in a legislative amendment of the existing federal-state joint jurisdiction paradigm. Centralization in legislation can run afoul of constitutional doctrine⁷ let alone regulatory action.

⁶ *In re: Petition of Embarq Local Operating Companies For Forbearance and AT&T Petition for Limited Declaratory Ruling and Interim Relief*, Docket Nos. 08-152 and 08-160, *In re: Petition of AT&T For Declaratory*, Docket No. 08-152 Comments of the Pa. PUC (September 5, 2008), pp. 5-12; *Accord Louisiana PSC v. FCC*, 476 U.S. 355 (1986); *National Federation of Independent Business v. Sibelius*, 567 U.S. ____ (2012), slip op. at 45-59.

⁷ *National Federation of Independent Business v. Sibelius*, 567 U.S. ____ (2012), slip op. at 47-49, 51-53, and 56 (judicial review striking down a provision is not rewriting the statute but merely enforcing the Constitution).

Until centralization is constitutional doctrine, the Pa. PUC suggests that the FCC, the states, industry, nor trade associations and consumer groups can rely upon preemption or forbearance, even in pilots, to rewrite federal law. This is equally true for policy determinations as well. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986)

The Pa. PUC urges the FCC to take a cautious approach and reject the IP Petitions. The issues raised here are complex and deeply intertwined. They are already under examination in the *Connect America Fund* proceeding. A precipitous grant here could have unintended long-term impacts on issues being more broadly addressed in the *Connect America Fund* implementation. The Pa. PUC does not support use of declaratory pleadings to get results on issues under consideration elsewhere.⁸ That same logic is applicable here as well.

2. If The FCC Grants The IP Petitions, The FCC Must Work Cooperatively With The States On Conditions For Pilot Programs And Final Rules.

If the FCC grants the IP Petitions and initiates yet another rulemaking or pilot program that addressing IP interconnection and IP evolution, the resulting FCC action cannot undermine independent state law, regulations, or policies. The states must be active partners assigned to identify the pilot study areas and wire centers. The states should also have active responsibility to monitor and report back to the FCC on developments in any proposal. Monitoring is critical to ensuring that the identified areas are not getting additional resources above and beyond those allocated to other legacy portions of a network. This is needed to avoid biasing the results or triggering allegations of unreasonable discrimination in service contrary to state or federal law.

The Pa. PUC believes that pilot programs should be limited to only those study areas which have 83% of the nation's exchanges without broadband particularly the study areas of AT&T, Verizon, or CenturyLink which are 82% of those exchanges.⁹ These carriers apparently

⁸ Compare *In re: AT&T Petition for Interim Declaratory Ruling and Limited Waivers*, Docket No. 08-152, Ex Parte Filing of AT&T (July 17, 2008), Comments of the Pa. PUC (August 21, 2008, p. 3, n.1 with *In re: Intercarrier Compensation and Missoula Plan*, Docket No. 01-9, Ex Parte Letter of the Pa. PUC (October 27, 2008), Comments of the Pa. PUC (November 26, 2008), Reply Comments of the Pa. PUC (December 22, 2008).

⁹ *In re: Connect America Plan*, (November 11, 2011), Para. 21; www.broadband.gov, Broadband National Plan, FCC Staff Presentation (September 29, 2009), slide 47.

failed to deploy broadband and are the carriers who would likely benefit from a pilot program with conditions as set out herein. The Pa. PUC takes this view, given the petitioners reliance on a position that these IP Petitions are extensions of the policies aimed at deploying broadband to those areas in the ICC/USF Order.¹⁰ Since that is the case, it follows that the pilot areas should be so focused.

The pilots also should be limited to states that have broadband deployment programs underway or are net contributors to the existing federal universal service fund (USF). Moreover, those pilots should occur only in study areas where the petitioners have not deployed broadband and be divided equally among urban and rural areas. No carrier with a considerable number of exchanges without broadband under state or federal law, as is the case with those carriers that currently have 83% of the nation's exchanges without broadband, should be allowed to use pilot programs to overturn existing federal or state regulations, commitments or oversight, undermine network reliability, erode consumer protections, engage in unjust or unreasonable pricing to retail or wholesale customers, or evade important public interest concerns including interconnection obligations. That could occur if carriers with pilots are allowed to deviate from regulatory standards or requirements related to successful federal and/or state programs.

The Pa. PUC recognizes the argument that these reasonable proposals are burdensome or a disincentive to pilot participation. But, as the Pa. PUC already pointed out, the prevalence of broadband deployment among carriers under traditional regulation compared to the absence of broadband availability among carriers under federal price cap regulation is more the failure of the regulatory paradigm than the market. The states and the FCC are already burdened with implementing an ICC/USF Order whose existence is aimed at remedying that failure with yet another broadband deployment paradigm for federally classified price-cap carriers.¹¹

Since pilots are cited by AT&T as a further extension of this newer price-cap deployment paradigm, it follows that the broadband focus in the ICC/USF Order warrants conditions to

¹⁰ The Pa. PUC notes that although certain carriers and their exchanges were the intended beneficiaries of the FCC's federal USF reforms for broadband deployment, such carriers have declined the Connect America Fund Phase I support distributions for this purpose.

¹¹ Pennsylvania Chapter 30 incumbent local exchange carriers (ILECs) have engaged in broadband deployment under an intrastate price-cap incentive regulation method and under Pa. PUC approved network modernization plans.

properly examine if the problem is joint jurisdiction or otherwise. This approach makes the proposal consistent with broadband deployment under state or federal law, while preserving the regulatory and legal paradigm if the pilots should fail. Importantly, no pilot program should be permitted unless the proponent agrees to operate a modified common carrier network and submits proposals that will also provide unbundled network elements to competitors under any network that is the subject of a pilot.

A pilot operator must be required to remit compensation to other network owners or carriers for any interconnection that allows them access to another network. No pilot carrier should be permitted to rely on some legal fiction that interconnection compensation, as opposed to interconnection arbitration and mediation, is a unique requirement of some carrier relationships but not others.¹² Interconnection is not costless as a matter of technology or federal law.¹³ It cannot be otherwise for any pilot or rulemaking that also involves IP interconnection. A pilot carrier must be required to remit interconnection compensation to any carrier and agree to the states' arbitration and mediation process under Section 251(c)(1), 252(b), and Section 208(a) as a condition in any pilot.

The Pa. PUC also believes that the FCC should require any pilot study area or wire center to support federal universal service. However, on a pilot basis, the base for this assessment or support should be based on all revenues for all services provided in that study area or wire center. These conditions would allow the parties and governments to consider in a real world context exactly how future networks can be used to support, or provide support to, information deemed necessary as a matter of public policy.

The Pa. PUC urges the FCC to include, but not be limited to, as the contribution base for the USF contribution base during the pilots or any rules, special access, bundled service, and other wholesale or retail services provided in that study area or wire center. This provides the FCC and the states with real-world information on how universal service can operate going

¹² *AT&T Communications, Inc. v. PAC-West Telecomm, Inc.*, 651 F.3d 980, 982, and nn. 2-3 (9th Cir. 2011) (“Interconnection compensation is not limited to ILEC-CLEC relationships but CLEC-CLEC relationships, even without an interconnection agreement, although arbitration and mediation may be different although that enforcement gap can be may addressed by 27 U.S.C. § 208(a).”).

¹³ *AT&T*, 651 F.3d at 983.

forward, what issues will likely arise from competitive access to IP networks, what services consumers are interested in, and what revenues can be generated over the networks. This information will be critical to ensuring compliance with the Section 254 mandate to provide reasonably comparable services at reasonably comparable rates in urban and rural America as the network transitions to an all-IP network given that the law does not change simply because technology changes.

Finally, any pilot program and its parameters should be established after issuance of a rulemaking and the receipt of comments including specific recommendations from the Federal-State Joint Board. This will provide the FCC and the states, in conjunction with the state members of the Joint Board, an opportunity to get a recommendation on what management and operation components should be required in such pilot programs or “experiments.” This provides the nation with a better understanding what IP interconnection is, how it would work, how retail IP-based services operate, what problems may arise with the migration of end-user consumers to IP-based services, and what the role of the federal and state governments should be in areas such as universal service — inclusive of COLR obligations — and consumer protection.¹⁴ The FCC should draw upon the states’ expertise in any pilot program because the pilot addresses the transitioning of the current Public Switched Telecommunications Network to an IP-based Packet Sending Transmission Network.

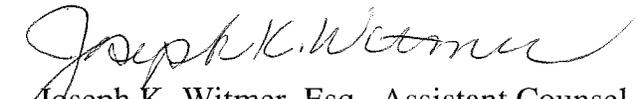
An IP rulemaking or pilot presents the FCC with an ideal opportunity to examine the viability of its current regulatory paradigm and the wisdom of prior decisions denying unbundled network elements to competitors on an IP network. The conditions herein allow the

¹⁴ The Pa. PUC and other state utility commissions under independent state law and regulations exercise regulatory oversight over matters that affect both the availability of universal service to and the public safety of their citizens (e.g., access to 911/E911), irrespective of the telecommunications network technologies and protocols that are being utilized by intrastate telecommunications public utilities. Similarly, the states exercise regulatory oversight and are involved with issues involving quality of service and the reliability of physical wireline telecommunications networks of such intrastate telecommunications public utilities irrespective of their technologies, vintage, and communication protocols that they utilize. Such state regulatory oversight is of particular importance when and where such physical networks become disrupted causing service outages. *See generally* Federal Communications Commission, Public Safety and Homeland Security Bureau, *Impact of the June 2012 Derecho on Communications Networks and Services*, (Washington, D.C., January 2013); *In re Investigating 911 Emergency Call Service Outages and Problems*, Case No. PUC-2012-00042, Virginia State Corporation Commission, Division of Communications, Staff Report of Final Findings and Recommendations, (Richmond, VA, January 17, 2013).

parties and the governments to use pilots to determine the wisdom of continuing policies in the future, particularly as the network becomes an IP network.

The Pa. PUC thanks the FCC for providing this opportunity to file Comments asking that the IP Petitions be denied and that the FCC maintain the existing status quo which preserves the states jurisdictional role and interests.

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