

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

In the Matter of	)	
	)	
AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition	)	GN Docket No. 12-353
	)	
Petition of the National Telecommunications Cooperative Association for a Rulemaking to Promote and Sustain the Ongoing TDM-to-IP Evolution	)	
	)	
Connect American Fund	)	WC Docket No. 10-90
	)	

**INITIAL COMMENTS BY STATE MEMBERS OF THE  
FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE**

The State Members<sup>1</sup> of the Federal-State Joint Board on Universal Service (State Members) submit these Initial Comments responding to the Federal Communications Commission (FCC or Commission) Public Notice of December 14, 2012, that established a pleading cycle on the AT&T petition for an FCC proceeding “to facilitate the ‘telephone’ industry’s continued transition from legacy transmission platforms and services to new services based fully on the Internet Protocol (‘IP’)” (AT&T Petition), and the National Telecommunications Cooperative Association (NCTA) petition to “initiate a rulemaking to examine the means of promoting and sustaining the ongoing evolution of the Public Switched Telephone Network” from time division multiplexing (TDM) to IP (NTCA Petition – collectively IP Transition Petitions).<sup>2</sup> The relief that is sought by the AT&T Petition and the outcome of this proceeding — depending what procedural and substantive approach the Commission takes — will have direct effects on the preservation and advancement of universal service.

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<sup>1</sup> State Members include four State commissioners nominated by the National Association of Regulatory Utility Commissioners and approved by the Commission and one State-appointed utility consumer advocate nominated by the National Association of State Utility Consumer Advocates. The current members are Commissioner James H. Cawley, Pennsylvania Public Utility Commission (State Chair), Commissioner Anne C. Boyle, Nebraska Public Service Commission, Commissioner Randy Mitchell, South Carolina Public Service Commission, Commissioner Stephen Michael Bloom, Oregon Public Utility Commission, and Consumer Counsel William Levis, Colorado Office of Consumer Counsel. Commissioner Randy Mitchell, South Carolina Public Service Commission, took no part in the preparation of these Initial Comments.

<sup>2</sup> FCC Public Notice DA 12-1999, released December 14, 2012.

## State Interests and the Role of the Joint Board

The preservation and advancement of national universal service policies continue to be joint enterprises between the States and the federal government.<sup>3</sup> The IP Transition Petitions, and especially the AT&T Petition, raise fundamental issues that affect these national universal service policies and the State-federal partnership that has traditionally preserved and advanced the evolving concept of universal service enshrined in and protected by both federal and independent State statutes.<sup>4</sup> The same issues also bring into question the respective roles and jurisdictional boundaries of federal and State regulatory oversight over telecommunications carriers and communications providers and their services. The State Members believe that State and federal regulatory policies that operate to maintain and advance the statutorily protected universal service concept must not be undermined by changes in telecommunications technologies and communications protocols, including the TDM to IP transition and evolution of the common carrier telecommunications public telephone switched network (PSTN). Arguments that allege the “technological” erosion of this protected universal service principle are simply unfounded. Similarly, the State Members believe that carrier of last resort (COLR) obligations for wireline telecommunications common carriers continue to play an inherent and significant part in the joint State and federal goals for preserving and enhancing universal service.

The State Members are deeply concerned that the positions advanced in a series of petitions that are currently pending before the Commission are simply designed to weaken the State-federal regulatory partnership for preserving and advancing universal service, and to unilaterally undermine the lawful role of the States in protecting the interests of their own end-user consumers of telecommunications and communications services.<sup>5</sup> These petitions have

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<sup>3</sup> *In re Universal Service Contribution Methodology*, (FCC Rel. April 30, 2012), WC Docket No. 06-122, Further Notice of Proposed Rulemaking, FCC 12-46, ¶ 6 at 4 (acknowledging the historic partnership with state governments to ensure universal service). *See also In re Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, (FCC Rel. May 8, 1997), Report and Order, *slip op.* FCC 97-157, (*First USF Order*) (subsequent history omitted), ¶ 818 at 419 (indicating that “[w]e fully appreciate and support the continuation of the historical informal partnership between the states and the Commission in preserving and advancing the universal service support mechanisms envisioned by section 254. Indeed, we believe that section 254 envisions the continuation of this partnership”).

<sup>4</sup> *See generally* 47 U.S.C. § 254(c); 66 Pa. C.S. § 3011(2) (Pennsylvania statute with legislative declaration of policy to “[m]aintain universal telecommunications service at affordable rates...”).

<sup>5</sup> *See generally 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); *In re Petition of USTelecom for Declaratory Ruling that Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services*, WC Docket No. 13-3.

been filed in the aftermath of the Commission's *USF/ICC Transformation Order* while both the Commission and the States are working on its implementation, notwithstanding the pending federal court appeals and administrative petitions for reconsideration.<sup>6</sup> These developments are not conducive to the necessary and deliberate dialogue that must take place between interested stakeholders, including the States and with the active participation of the full Federal-State Joint Board membership on the issues that these petitions raise.<sup>7</sup>

The Federal-State Joint Board on Universal Service (Joint Board) has played an important role in the formulation of universal service principles and policies since its creation through the enactment of the federal Telecommunications Act of 1996 (Act or TA-96). The Joint Board has explicit authority to recommend "from time to time" modification of the definition of supported services, a responsibility that extends indefinitely into the future.<sup>8</sup> In addition, the Act requires that the Commission act within one year on any recommendation received from the Joint Board.<sup>9</sup> The Joint Board also has a continuing statutory responsibility to ensure that federal universal service policies are based on a list of articulated principles.<sup>10</sup> In view of the strong and unwavering State interests in a universal service partnership with the Commission — where State USFs and regulatory policies play a critical role — cooperation between the Commission and the States continues to be essential to implement various universal service reforms. Meaningful collaboration between the Commission and the Joint Board is vital. Since the issues that are brought forward in the IP Transition Petitions can impact the joint State and federal regulatory administration of universal service and are not the subject of an explicit referral to the Joint Board, the State Members hereby submit these Initial Comments.

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<sup>6</sup> *In re Connect America Fund, et al.*, WC Docket No. 10-90 *et al.*, (FCC, Rel. Nov. 18, 2011), Report and Order and Further Notice of Proposed Rulemaking, *slip op.* FCC 11-161, 26 FCC Rcd 17663 (2011), and subsequent Reconsideration and Clarification rulings (collectively *USF/ICC Transformation Order*), *appeals pending*.

<sup>7</sup> This dialogue is suggested by the Intergovernmental Advisory Committee to the Federal Communications Commission, Policy Recommendation 2013-3, Regarding Technological Transition from Legacy Copper Wire Infrastructure to Newer Technologies, January 8, 2013, at 5.

<sup>8</sup> 47 U.S.C. § 254(c)(2); *see also* 47 U.S.C. § 254(c)(1)(C) ("The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported ... shall consider the extent to which such telecommunications services ... are being deployed in public telecommunications networks by telecommunications carriers.")

<sup>9</sup> 47 U.S.C. § 254(a)(2) (after its May 8, 1996, deadline to implement the 1996 Act, "the Commission shall complete any proceeding to implement subsequent recommendations from [the] Joint Board ... within one year after receiving such recommendations.")

<sup>10</sup> 47 U.S.C. § 254(b) ("Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles ...")

## **I. Jurisdictional Perspectives and IP Transition Issues**

### **A. The FCC Lacks Appropriate Authority to Preempt the States and Grant the Requested Relief in the AT&T Petition**

The FCC lacks legal authority to preempt the States and grant the relief requested in the AT&T Petition. Although the ultimate relief requested in the AT&T Petition is couched in terms of an IP Transition on the basis of a wire center-by-wire center “trial” or “experiment,”<sup>11</sup> the Commission is not alone in exercising jurisdiction over the wireline telecommunications common carrier operations and facilities of AT&T subsidiaries or affiliates in various States. Irrespective of whether such AT&T wireline telecommunications common carrier subsidiaries or affiliates are incumbent or competitive local exchange carriers (ILECs or CLECs), the States exercise appropriate jurisdiction and regulatory oversight over their intrastate operations and facilities. In addition, where AT&T ILECs operate and there is intrastate regulation of telecommunications carriers as public utilities, the States have the ultimate responsibility to ensure the preservation and existence of universal service for their citizens at reasonable and affordable rates, and to exercise appropriate regulatory oversight over the COLR obligations of such ILEC telecommunications utilities.

Such State regulatory oversight over the COLR obligations of AT&T and other ILECs encompasses the public safety obligations of each State towards its respective citizens. Thus, State utility commissions exercise jurisdiction over matters affecting the quality of services that are offered by ILEC — and other — wireline telecommunications utilities, as well as the reliability of their interconnected networks, including access to 911/E911 emergency services. These State regulatory responsibilities are often exercised irrespective of the level of industry competition that may be present. Simply put, wireline network failures, absence of dial tone, and the inability to make a lifesaving 911/E911 call cannot be timely and decisively mitigated by resort to a wireless phone or switching to a new competitive supplier of telecommunications services. The States also police and manage the obligations of interconnected carriers under both federal and independent State law, and adjudicate both interconnection and intercarrier compensation disputes. Such State regulatory oversight over 911/E911 and wholesale switched

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<sup>11</sup> AT&T Petition at 20-23.

access connectivity exists even where there may be intrastate deregulation of *retail* IP-based services such as Voice over the Internet Protocol (VoIP).<sup>12</sup>

The AT&T Petition is silent on the States' role in these matters but strongly implies — without advancing a concrete legal theory or rationale — that the Commission should somehow, and in the context of a rulemaking, engage in the wholesale federal preemption of the States. Such positions and inferences are legally unsustainable and operationally unwarranted. For example, the AT&T Petition suggests that first “the Commission would *eliminate* within the trial wire centers, outdated ‘telephone company’ regulations that may require carriers to maintain legacy TDM-based networks and services even after replacement services are in place,” and that “the Commission would make clear that providers need *not obtain* section 214 approval from the Commission or *similar state authorities* in order to replace TDM services with alternatives.”<sup>13</sup> The AT&T Petition expresses its unqualified support for the USTA Forbearance Petition and argues about the elimination of Section 214, 47 U.S.C. § 214, requirements.<sup>14</sup> However, AT&T does not present any cogent legal or factual arguments how the potential abandonment of essential wireline telecommunications network facilities (irrespective of the legacy and the types of traffic and their communication protocols that such network facilities handle), should or would escape review under independent State law. This matter has already been addressed by a number of States that have opposed the USTA Forbearance Petition:

The provision of basic wireline retail voice telecommunications services that involve a number of attendant and critical functionalities such as access to 911/E911 emergency services, “1+” equal access dialing for interexchange calls, access to telecommunications relay services (TRS), etc., constitute COLR obligations of the ILECs and are traditionally and lawfully regulated by State public utility commissions as intrastate retail telecommunications services. Even if the USTA Petition were to be somehow — and inadvisably — successful, federal forbearance from Section 214 abandonment of service requirements would not and could not lawfully preempt the COLR obligations of the ILEC members of USTA under the operation of independent State laws and regulations. In addition forbearance of COLR obligations is not appropriate at this time. The Commission soundly has reaffirmed the necessity for State regulated and enforced COLR obligations that involve basic retail wireline voice telecommunications services. The FCC [*USF/ICC Transformation Order*] unambiguously states the following:

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<sup>12</sup> See generally 73 Pa.S. 2251.6(1)(i)&(iv) (preservation of Pennsylvania Public Utility Commission jurisdiction over 911 services and intrastate switched network access rates).

<sup>13</sup> AT&T Petition at 21 (emphasis added).

<sup>14</sup> AT&T Petition at 13-14, 15.

Therefore, we do not seek to modify the existing authority of the states to establish and monitor carrier of last resort (COLR) obligations. We will continue to rely upon states to help us determine whether universal service support is being used for its intended purposes including by monitoring compliance with the new public interest obligations described in this Order.

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Importantly, these reforms do not displace existing state requirements for voice service, including state COLR obligations. We will continue to work in partnership with the states on the future of such requirements as we consider the future of the PSTN.

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We decline to preempt state obligations regarding voice service, including COLR obligations, at this time. Proponents of such preemption have failed to support their assertion that state service obligations are inconsistent with federal rules and burden the federal universal service mechanisms, nor have they identified any specific legacy service obligations that represent an unfunded mandate that make it infeasible for carriers to deploy broadband in high-cost areas. Carriers must therefore continue to satisfy state voice service requirements.

FCC Reform Order [*USF/ICC Transformation Order*] ¶ 15 at 10, ¶ 75 at 29, ¶ 82 at 31 (citing ABC Plan Attach. 1 at 13 and Attach. 5 at 8).

Thus, to the extent that the USTA Petition, through forbearance of Section 214 obligations, intends to circumvent and undermine lawful State COLR obligations and intends to re-litigate the issues that have already been addressed in the FCC [*USF/ICC Transformation Order*], this effort is both legally and technically unsustainable and should be rejected. Furthermore, if USTA and its ILEC members continue to have issues with the State COLR obligations set forth in the FCC [*USF/ICC Transformation Order*], they can address such issues in the appropriate judicial and/or administrative forums. However, such issues should not be addressed through the vehicle of a petition for federal forbearance because it is illegal, improper, and appears to be a collateral attack on the FCC [*USF/ICC Transformation Order*] and its ongoing rulemakings.

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A core issue that remains is the *fundamental entitlement* of end-user consumers to have affordable and reliable access to retail wireline voice telecommunications services, inclusive of functionalities such as 911/E911, non-discriminatory “1+” dialing, and TRS, and the availability of essential facilities to

provide such services under appropriate State COLR obligation regulatory oversight. This fundamental entitlement is part and parcel of the universal service concept that is enshrined in both federal and independent State laws. If USTA's member ILECs intend to continue providing basic retail wireline voice telecommunications services that are compatible with the established concept of universal service, *irrespective* of the technological platform, then the USTA Petition for forbearance relief from Section 214 obligations serves no purpose.

USTA Forbearance Petition, Reply Comments of the Pennsylvania Public Utility Commission, WC Docket No. 12-61, April 24, 2012, at 5-6, 7 (emphasis in the original).

The AT&T Petition fails to address the role of the States, even within the context of its proposed wire center "trials" or "experiments," as if the primary jurisdictional role and the interests of the States in the regulation of wireline retail telecommunications services to end-user consumers do not exist or do not matter. At a minimum, State concurrence in such "experimentation" is a legal prerequisite under State-specific due process requirements because potential interruptions and/or degradation of basic wireline retail voice telecommunications services are not and cannot be condoned under independent State law and regulations. Assuming that the "experiments" advocated by AT&T could go forward, the State role at a minimum is essential in: (1) selecting the local exchanges in question; (2) designing and monitoring the "experiment;" (3) affording the due process participation of end-user consumers under applicable State law and regulations; and, (4) timely mitigating either any "experimental" failure or any other unforeseen and undesirable result. Furthermore, the State role and participation in such "trials" are essential because the results of such "experiments" cannot be arbitrarily extrapolated among types of exchanges within a State (e.g., urban, suburban, and rural), nor can they be extrapolated across states (i.e., what may be applicable in Illinois may not be equally applicable in Utah, and most likely will not be readily applicable in Alaska).

Therefore, even in the context of the rulemaking "trials" or "experiments" suggested in the AT&T Petition, the interests and the role of the States are legally and factually unavoidable and cannot be summarily preempted by the Commission. This approach is recognized in the NTCA Petition which suggests a "middle course" that "would also ensure that the authority and core competencies of state public utility commissions and the interests of consumer advocates are acknowledged, respected, and incorporated within the process," and that the "Commission should seek to maintain certainty by retaining and reasserting a firm and clear regulatory founda-

tion, while coordinating with state counterparts to examine specific bricks for potential replacement, repair, or removal where their utility or effectiveness is in question.”<sup>15</sup>

**B. The States Have Independent Statutory Authority to Designate Eligible Telecommunications Carriers and Define Their Obligations**

The AT&T Petition urges the Commission to “shift to a *rational procurement model for ensuring universal service*” where “compulsory service requirements would be abolished, and the sole purpose of designating a provider as an ETC [eligible telecommunications carrier] would be to allow it, once it chooses to undertake voluntary service commitments in clearly defined areas, to receive the universal service funding necessary to provide supported services in those areas.” AT&T further argues that “the Commission cannot reasonably, or indeed legally, maintain its ETC rules in their current, often compulsory form, given the dramatic changes it made to the universal service regime in the *USF/ICC Transformation Order*.”<sup>16</sup>

At first glance, AT&T is attempting to redefine the COLR obligations for its subsidiary ILECs and potentially for other ILECs as well, where the main oversight of such COLR obligations is mainly exercised under the statutory and regulatory jurisdiction of individual States. Second, the States possess *independent* statutory authority to designate ETCs and define their obligations under Section 214(e)(2) of the federal Telecommunications Act of 1996 (TA-96), 47 U.S.C. § 214(e)(2). Third, AT&T’s argument is nothing more than an attempt to ask for the same relief that was originally requested in the “American Broadband Connectivity” or “ABC” Plan and was conclusively rejected in the Commission’s *USF/ICC Transformation Order*.<sup>17</sup> Finally, without sufficient explanation, AT&T suggests the abolition of “compulsory service requirements” and their replacement with a legally and operationally undefined “rational procurement model for ensuring universal service” that appears to largely rest on “voluntary service commitments” and “universal service funding to provide supported services.”

Existing COLR obligations administered by the States, in conjunction with ETC designations, and continuous federal and State USF funding support provide legally founded and concrete assurances for preserving and enhancing the evolving concept of universal service. Such concrete assurances are lacking under AT&T’s “rational procurement model” since

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<sup>15</sup> NTCA Petition, at 10 (footnotes omitted).

<sup>16</sup> AT&T Petition at 17-18 (emphasis added, footnotes omitted).

<sup>17</sup> *USF/ICC Transformation Order*, ¶¶ 15, 75, 82, 26 FCC Rcd 17663 at 17672, 17691, 17693-17694 (citing “ABC” Plan at n. 121 & 122).

“voluntary service commitments,” especially in high-cost areas that are served by ILECs (including Bell Operating Company or BOC ILECs) will be clearly insufficient to meet the evolving goals of universal service under both federal and independent State law. AT&T’s largely undefined “rational procurement model” creates adverse implications for the continuous wireline network reliability and quality of service standards and parameters that are inherent components of universal service, operate irrespective of telecommunications technologies and communications protocols, and are primarily supervised by the States. Simply put, there cannot be a degraded form of universal service because network reliability and quality of service are permitted to selectively deteriorate under a “rational procurement model” while awaiting competitive market outcomes — if and where they exist — to correct or not correct the problem for end-user consumers. Furthermore, degradation of reliability and quality of service for the wireline networks of ILECs automatically affects the reliability and quality of service that are associated with interconnected networks that are operated by other telecommunications and communications services providers.<sup>18</sup>

### **C. The Evolution of Telecommunications Technologies and Communications Protocols Does Not Affect Wholesale Interconnection Obligations**

The State Members are extremely concerned that the relief sought by AT&T — allegedly founded on network technological and communication protocol evolution — can undermine statutorily well-established principles of wholesale interconnection. The AT&T Petition argues that the Commission should “preclude carriers (including carrier customers) from demanding service or interconnection in TDM format in” those IP transitioned “wire centers,” nor would carriers have the “right to demand TDM-based interconnection or services, including TDM-based transit services or SS7-based [Signaling System 7] signaling.”<sup>19</sup> However, the AT&T Petition fails to provide any explanation whether the statutory wholesale interconnection requirements for ILECs — and BOCs in particular — under applicable federal (e.g., TA-96) and independent State law would continue to apply *irrespective* of the network technological and communication protocol transition.

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<sup>18</sup> Absent State regulatory intervention and enforcement and assuming that wholesale interconnection is still governed by certain performance metrics, an ILEC may accept certain monetary penalties associated with reduced reliability and quality of service associated with its wholesale interconnection functions as an “ongoing cost of doing business” that does not have any deterrent effects.

<sup>19</sup> AT&T Petition at 21.

Wholesale interconnection obligations as enunciated in TA-96 and independent State laws remain unaffected by the evolving network technologies and the utilized communications protocols. The overriding legal principles continue to rest with Sections 251 and 252 of TA-96, 47 U.S.C. §§ 251 and 252, that guarantee the seamless and reliable exchange of traffic between telecommunications carriers *irrespective* of the network telecommunications technologies and communications protocols that are being used. These overriding legal principles cannot be undermined by extending preferential treatment and/or applying special conditions to specific network telecommunications technologies and communications protocols for interconnection purposes. Engineering efficiencies in network interconnection arrangements can be achieved through technological evolution and innovation and by intercarrier compensation arrangements that appropriately recognize cost causation principles.<sup>20</sup> Simply put, the focus on network technologies and communications protocols — assuming that there should be such a focus in the first place — cannot lead to a situation where telecommunications and communications traffic cannot be exchanged seamlessly and reliably between interconnected providers and their networks. In other words, neither the Commission nor the States need to be faced with a “technological gaming” that can produce similar results to the one that still persists and involves the non-completion of voice calls to end-users of telecommunications services that reside in service areas of rural ILECs.<sup>21</sup>

Non-adherence to well-established and practiced common carrier telecommunications network interconnection principles can and will have inimical effects on the level and the robustness of competition for the provision of telecommunications and communications services to end-user consumers. Similarly, if wholesale interconnection arrangements cease to be governed by technology-neutral principles as those that are currently enumerated in Sections 251 and 252 of TA-96, the States will be in a difficult position to exercise the appropriate regulatory jurisdiction under both federal and independent State law as the common practice is today (e.g.,

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<sup>20</sup> The State Members maintain their doubts as to the economic feasibility of the bill and keep intercarrier compensation regime adopted in the *USF/ICC Transformation Order* consistent with their prior State Plan comments. *In re Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, Comments by State Members of the Federal State Joint Board on Universal Service, May 2, 2011, at 148-151 (State Plan).

<sup>21</sup> See generally *In re Developing an Unified Intercarrier Compensation Regime, et al.*, (FCC Rel. Feb. 6, 2012), CC Docket No. 01-92, Declaratory Ruling, DA 12-154.

State evidentiary adjudication of wholesale interconnection arrangements and intrastate intercarrier compensation disputes).<sup>22</sup>

## II. The Issue of End-User Customer Migration to “Next-Generation” Networks and Retail Services Is A Matter of Direct Interest to the States

AT&T’s proposals regarding the “experimental” end-user customer migration to “next-generation” networks and services<sup>23</sup> is a matter of direct interest to the States. AT&T’s argument is based on the premise that “IP-enabled services, including all VoIP services, are appropriately classified as interstate information services over which the Commission has exclusive jurisdiction.”<sup>24</sup> AT&T is apparently missing the point that the Commission has assiduously refrained from according *any* Title II common carrier telecommunications or Title I information services classification to VoIP services.<sup>25</sup> Instead, the Commission has recognized the common carrier telecommunications-like attributes of retail VoIP services in a series of proceedings, e.g., it has permitted the contribution assessment of interconnected retail VoIP services by both the federal and State USF mechanisms.<sup>26</sup> Furthermore, the Commission has taken the position that the wholesale transport and termination of traffic that also includes interconnected VoIP calls constitutes a telecommunications service that is properly subject to the bi-jurisdictional oversight of the States and the FCC.<sup>27</sup> This conclusively facilitated State resolution of numerous inter-carrier compensation disputes well in advance of the *USF/ICC Transformation Order*.

Despite the fact that a number of States have made the choice to abstain from the regulation of retail IP-based services including VoIP (while maintaining jurisdiction over such

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<sup>22</sup> Such State evidentiary adjudications are routinely based on live hearings and cross-examination and not just on “paper hearings” as is the common practice before the FCC.

<sup>23</sup> AT&T Petition at 21-22.

<sup>24</sup> AT&T Petition at 18 (footnotes omitted).

<sup>25</sup> The State Members recommended “that the FCC classify interconnected VoIP as a telecommunications service.” State Plan at 19.

<sup>26</sup> See generally *In re Universal Service Contribution Methodology – Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, (FCC Rel. Nov. 5, 2010), WC Docket No. 06-122, Declaratory Ruling, FCC 10-185 (see n. 15 for prior FCC decisions addressing the regulatory obligations of VoIP providers).

<sup>27</sup> See generally *In re Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, (FCC March 1, 2007), WC Docket No. 06-55, Memorandum Opinion and Order, DA 07-709 (*Time Warner*); *In re DQE Communications, Inc. v. North Pittsburgh Telephone Company*, (FCC February 2, 2007), File No. EB-05-MD-027, 22 FCC Rcd 2112, 2007 FCC LEXIS 1066 (DQE); and, *In re Fiber Technology Networks, L.L.C. v. North Pittsburgh Telephone Company*, (FCC February 23, 2007), File No. EB-05-MD-014, 22 FCC Rcd 3392, 2007 FCC LEXIS 1593 (Fiber Technology) (wholesale common carrier service constituted “telecommunications” under state and federal law).

matters as State-specific USF mechanisms, 911/E911 and telecommunications relay service or TRS connectivity, intrastate switched carrier access services and rates, etc.), the States are not mere “disinterested observers” on the end-user customer migration to IP-based services. Such migration can and will affect the preservation and enhancement of universal service that the States have the duty to protect under both federal and independent State statutory law. Because VoIP can become the substitute for traditional TDM-based voice services that are provided by wireline telecommunications carriers that also have COLR obligations and are regulated as public utilities by State commissions, the States have an inherent interest in consumer protection that includes such areas as reliability and quality of service, cramming, and slamming. The States also have inherent public safety and protection responsibilities for their citizens. Thus, the wireline access to 911/E911 emergency calling services is of paramount State concern irrespective of the telecommunications technologies and communications protocols that are used to provide such access. As the NTCA Petition points out “[i]t is unclear whether such an experimental and sweeping ‘sledgehammer’ approach, where the interests of individual consumers and the terms and conditions by which networks are connected hinge largely on the discretion of individual industry participants, can satisfy the statutory cornerstones of consumer protection, competition, and universal service,” and it “is also unclear how such an approach would (or even could) work in light of legal mandates that compel state regulators and consumer advocates to protect the interests of their own consumers.”<sup>28</sup>

The States also regulate the reliability and quality of service existing in the *physical* telecommunications network *facilities* irrespective of the technologies and communications protocols that these facilities utilize and their respective evolution. A fiber optic or copper cable cut or a power outage that can affect one or more central office (CO) switching facilities is capable of causing widespread network and service outages irrespective of whether these services are TDM or IP-based. State utility commissions and emergency management agencies (where 911/E911 service outages are concerned), actively intervene, inquire, investigate, and disseminate information in such situations. State utility commissions often adjudicate informal and formal consumer complaints regarding the quality of service and physical network reliability.

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<sup>28</sup> NTCA Petition at 6-7. The NTCA Petition poses the question “if a dispute arises between interconnected networks in a ‘deregulated’ environment and connections are slowed, misrouted, degraded, or even shut off altogether, can a federal or state regulator act quickly enough to step back in and protect consumers and the public interest?” *Id.* at 7 and n. 12.

The State Members believe that it is an inherent fallacy to engage in a fruitless exercise of distinguishing “legacy” network facilities from “new-generation” ones as AT&T appears to do. Ordinary copper coaxial cable is used for the provision of “new-generation” IP-based services, and fiber optic cable is used for the transport of traffic in a variety of protocols including ordinary and traditional TDM-based voice calls. Thus, the boundaries of the “legacy” and “new-generation” wireline network physical facilities of telecommunications carriers are virtually indistinguishable. Even AT&T in many areas utilizes “legacy” copper distribution facilities to provide “new-generation” U-verse services that include retail broadband access to the Internet and video content delivery. Thus, AT&T’s reluctance to maintain its own wireline facilities irrespective of their vintage and the communications protocol that they utilize is indeed puzzling.<sup>29</sup>

The dependence of IP-based services including VoIP on commercial power supplies is much greater than that for traditional TDM-based services. For example, conventional PSTN voice telephone services rely on the centralized power supply of COs that are equipped with back-up power resources including standby diesel generators and batteries. In contrast, retail VoIP network services are more often than not dependent on commercial power supplies and distributed premises batteries of limited life.<sup>30</sup> Severe weather that causes prolonged commercial power supply disruptions to individual households will often deplete the premises batteries that support the provision of VoIP services with the consequent loss of dial tone and the ability to make wireline 911/E911 calls. Back-up power system failures at COs during prolonged commercial power outages also cause widespread network outages and can negatively affect wireline and wireless 911/E911 access.<sup>31</sup> Because of their regulation of energy distribution utilities, the States are intimately familiar with commercial power disruptions and accompanying restoration efforts.

The evolution of the PSTN with the use of IP-based technologies and communications protocols and its increased dependence on commercial power bring into question the AT&T

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<sup>29</sup> AT&T Petition at 16 (footnotes omitted).

<sup>30</sup> See generally David Gabel and Steven Burns, *The Transition from the Legacy Public Switched Telephone Network to Modern Technologies*, (National Regulatory Research Institute, Silver Spring, MD, October 2012), Report No. 12-12, at 17-20, 30-32.

<sup>31</sup> 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).

arguments that the States are not entitled to any role whatsoever over the allegedly “new-generation” wireline networks and services. When there is increased dependence on commercial power for interconnected wireline and wireless networks and when entities such as AT&T advocate a yet undefined “rational procurement model” for the operation of critical network facilities and the delivery of essential telecommunications services to end-user consumers, it is not the time to unlawfully force the departure of State regulators from the bi-jurisdictional role of safeguarding, preserving, and enhancing the evolving concept of universal service.

### **III. Procedural Aspects of the Instant Proceeding**

The FCC Notice establishing the initial and reply comment cycle for the pending AT&T and NTCA Petitions classified this matter as “a ‘permit-but-disclose’ proceeding in accordance with the Commission’s *ex parte* rules.”<sup>32</sup> The present proceeding has the potential to impact the bi-jurisdictionally administered and evolving concept of universal service. A number of the arguments that have been, are, and will be presented have already been adjudicated by the Commission in its *USF/ICC Transformation Order* proceeding. Thus, the Commission may decide this proceeding on the basis of the formal record generated through the formal submission of the initial and reply comments.

The State Members respectfully suggest that the Commission does not need to rely on *ex parte* written submissions and in-person presentations with subsequent “permit-but-disclose” filings of memoranda in this proceeding. It is obvious from the Commission’s own Electronic Comment Filing System (ECFS) records that such *ex parte* presentations and submissions have started even before the formal initial and reply comment period had commenced. The State Members are seriously and increasingly concerned that the liberal utilization of *ex parte* written submissions and in-person meetings with the Commission and its Staff seriously undermine the utility and the underlying purpose of the formal initial and reply comments. Furthermore, the observed frequency of such *ex parte* submissions and in-person meetings does not avail other parties of adequate and commensurate opportunity to respond under the federal Administrative Procedure Act since interested parties that do not possess legal and/or technical consulting representation in the Washington, D.C., metropolitan area will be hard pressed to monitor the ECFS *ex parte* disclosure memoranda (some of which may contain proprietary and redacted

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<sup>32</sup> FCC Public Notice, GN Docket No. 12-353, December 14, 2012, DA 12-1999, at 2.

information and data), and timely and adequately respond through their own electronic *ex parte* submissions. Furthermore, remote electronic filings are hardly a substitute for in-person meetings that will undoubtedly take place between the Commission and its Staff and parties that possess the necessary legal and technical representation in the Washington, D.C., area.

For these reasons, the State Members respectfully suggest that the Commission curtail the use of *ex parte* submissions and in-person meetings in this proceeding. If the Commission and its Staff require additional information, data, and analysis beyond what is and will be submitted in the initial and reply comments, the Commission can issue additional notices inviting the same from all interested and participating parties.

### **Conclusion and Recommendations**

The State Members urge the Commission to deny the AT&T and NTCA Petitions. The AT&T Petition, although couched in terms of a “trial” or “experiment,” is substantially based on legal positions and requests for relief that either have been denied in prior proceedings in the very recent past or are the subject of other adjudications that are still pending before the Commission (e.g., the USTA Forbearance Petition). Furthermore, AT&T’s “trial” or “experiment” does not change the underlying legal foundation of State jurisdiction, interest, and involvement in the relief that AT&T requests.

The State Members recommend that, if the Commission wishes to comprehensively examine the network transition issues for regulated wireline telecommunications common carriers and their potential impact on the evolving concept of universal service, the Commission make the appropriate referral to the Federal-State Joint Board on Universal Service.

Respectfully Submitted,

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