

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

<i>In the Matter(s) of</i>)	
)	
)	
<i>AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition</i>)	WC Docket No. 12-353 [DA No. 1999]
)	
<i>Petition of the National Telecommunications Cooperatives Association for a Rulemaking to Promote and Sustain the Ongoing TDM-to-IP Evolution</i>)	
)	

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

The National Association of Regulatory Utility Commissioners (NARUC) respectfully submits these comments in response to the Federal Communications Commission (FCC) December 14, 2012 Public Notice (*Notice*) DA No. 12-1999 in the above-captioned proceeding.¹

NARUC, a nonprofit organization founded in 1889, has members that include the government agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the activities of telecommunications,²

¹ See, *Pleading Cycle Established on AT&T and NTCA Petitions*, DA 12-1999, GN Docket No. 12-353 (rel. Dec. 14, 2012), at: http://transition.fcc.gov/Daily_Releases/Daily_Digest/2012/dd121217.html.

² NARUC's member commissions have oversight over intrastate telecommunications services and particularly the local service supplied by incumbent and competing local exchange carriers (LECs). These commissions are obligated to ensure that local phone service supplied by the incumbent LECs is provided universally at just and reasonable rates. They have a further interest to encourage unfettered competition in the intrastate telecommunications market as part of their responsibilities in implementing: (1) State law and (2) federal statutory provisions specifying LEC obligations to interconnect and provide nondiscriminatory access to competitors. See, e.g., 47 U.S.C. § 252 (1996).

energy, and water utilities. Congress and the courts³ have consistently recognized NARUC as a proper entity to represents the collective interests of the State public utility commissions. In the Federal Telecommunications Act,⁴ Congress references NARUC as “the national organization of the State commissions” responsible for economic and safety regulation of the intrastate operation of carriers and utilities.⁵

The December *Notice* seeks comment on separate petitions filed by AT&T on November 7, 2012⁶ and by the National Telecommunications Cooperative Association (NTCA) on November 19, 2012.⁷ Both raise issues that directly impact a range of State commission responsibilities imposed by State and federal law.

The *NTCA Petition* asks the FCC to “initiate a rulemaking to examine the means of promoting and sustaining the ongoing evolution of the Public Switched Telephone Network” from TDM to IP.⁸ NTCA wants the agency to seek comment on

³ See *United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), *aff'd* 672 F.2d 469 (5th Cir. 1982), *aff'd en banc on reh'g*, 702 F.2d 532 (5th Cir. 1983), *rev'd on other grounds*, 471 U.S. 48 (1985). See also *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

⁴ *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. §151 *et seq.*, Pub.L.No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) (“Act” or “1996 Act”).

⁵ See 47 U.S.C. § 410(c) (1971) (NARUC nominates members to FCC Joint Federal-State Boards which consider universal service, separations, and related concerns and provide formal recommendations that the FCC must act upon; *Cf.* 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). *Cf.* *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains “...Carriers, to get the cards, applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system.)

⁶ See, *AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, (filed Nov. 7, 2012) (*AT&T Petition*), online at: <http://apps.fcc.gov/ecfs/document/view?id=7022086087>.

⁷ See, *Petition of the National Telecommunications Cooperative Association for a Rulemaking to Promote and Sustain the Ongoing TDM-to-IP Evolution*, (filed Nov. 19, 2012) (*NTCA Petition*), online at: <http://apps.fcc.gov/ecfs/document/view?id=7022086108>.

⁸ *NTCA Petition* at 1.

whether certain regulations should be eliminated, retained or modified to further Congressional consumer protection, competition, and universal service goals.⁹

The *AT&T Petition* asks the FCC to conduct a proceeding “to facilitate the ‘telephone’ industry’s continued transition from legacy transmission platforms and services to new services based fully on the Internet Protocol.”¹⁰ AT&T requests that the agency consider conducting trials where certain equipment and services are retired and IP-based services are offered, after a public comment period on how to conduct the trials and on “the ultimate transition to all-IP networks and services.”¹¹

Conceptually, if limited to only these two choices,¹² the approach NTCA suggests is the most logical insofar as it suggests the FCC examine first what *federal* rules have (or have not) worked in protecting consumers, promoting competition, and ensuring universal service.¹³ Also, NARUC has spent the last decade urging the FCC to follow the technology-neutral approach of the Telecommunications Act and confirm the obvious, *i.e.*, (1) that fixed (and nomadic) VoIP services are, in fact, “telecommunications services”¹⁴ and, as the *NTCA Petition* suggests, that “all

⁹ *Id.* at 11.

¹⁰ *AT&T Petition* at 1.

¹¹ *Id.* at 6.

¹² A third option, referring related issues to the proper Joint Board, has been suggested by the State members of the Federal State Joint Board on Universal Service in their January 28, 2013 Initial Comments filed in this docket, at 16. That approach is likely to provide the FCC with a better record and more informed basis for action.

¹³ *NTCA Petition* at ii & 5.

¹⁴ In a November 19, 2003 resolution, online at: http://www.naruc.org/Resolutions/info_services.pdf, NARUC cautioned the FCC to consider the negative implications associated with a finding that IP-based services are subject to Title I jurisdiction, including the (i) uncertainty and reduced capital investment while the FCC’s authority under Title I is tested in the courts; (ii) loss of consumer protections applicable to telecommunications services under Title II; (iii) disruption of traditional balance between federal and State jurisdictional cost separations and the possibility of unintended consequences; (iv) increased risk to public safety; (v) customer loss of control over content; (vi) loss of State and local authority over emergency dialing services; and (vii) reduced support base for federal and State universal service as well as State and local fees and taxes. Those warnings remain valid today. Compare, Comments by the State Members of the Federal

interconnection for the exchange of traffic subject to Sections 251 and 252 is governed by the [1996 Act] regardless of the technology used to achieve such interconnection.”¹⁵

If the FCC chooses to proceed to consider forbearance of *federal* requirements, coordination with State counterparts is crucial to avoid unintended consequences that undermine State legal mandates as well as State consumer interests.¹⁶

The approach suggested in the AT&T Petition, particularly the novel idea of imposing exclusive federal jurisdiction over phone service provided using VoIP technology by classifying it as an “information service,” is not only flawed from a policy perspective, but it is also a prescription for wasteful litigation as the petition nowhere outlines in any detail an adequate legal basis for, or provides empirical evidence to support, preemptive FCC action. Moreover, the approach AT&T asks the Commission to “trial” will unquestionably require a dramatic change to the FCC’s Part 36 rules. Such changes cannot be considered without a recommended decision from the Federal State Joint Board on Separations. 47 U.S.C. § 410(c).

In support of these positions, NARUC respectfully submits the following:

State Joint Board on Universal Service, *In re Connect America fund et al.*, WC Docket No. 10-90 et al. (filed May 2, 2011), at 19, recommending that the “FCC classify interconnected VoIP as a telecommunications service,” and NARUC’s July 20, 2011 *Resolution Strongly Supporting the Proposals Submitted on Universal Service Reform by the State Members of the Federal-State Joint Board on Universal Service*, online at: <http://www.naruc.org/Resolutions/Resolution%20Supporting%20USF%20State%20Members%20Proposals%20on%20USF%20Reform.pdf>.

¹⁵ *NTCA Petition* at iii & 14. See also, NARUC’s July 23, 2008 *Resolution Regarding the Interconnection of New Voice Telecommunications Services Networks*, noting, accurately that “Congress has clearly intended and NARUC has consistently advocated that the State commissions have a clear role to exercise their explicit authority under Sections 251 and 252;” available online at: <http://www.naruc.org/Resolutions/TC%20Interconnection.pdf>,

¹⁶ *NTCA Petition* at 12. {emphasis added}

DISCUSSION

While the AT&T petition discusses at length the need to grant the pending USTA petition seeking forbearance of several *federal* requirements under 47 U.S.C. § 160,¹⁷ there is almost no discussion of the source of the FCC's legal authority to preempt existing State jurisdiction – either over “legacy TDM-based services” – *which AT&T's petition explicitly concedes* (as it must) *are currently subject to State jurisdiction*¹⁸ – or over functionally equivalent voice services provided via IP, *i.e.*, the misleadingly referenced “Voice-over-internet protocol” or VoIP services.

THE FCC LACKS AUTHORITY TO PREEMPT STATE JURISDICTION OVER WHAT AT&T DESIGNATES AS “LEGACY SERVICES”

States have clear jurisdiction to impose so-called Carrier of Last Resort (COLR) and similar requirements on “legacy TDM-based” services. As noted *supra*, the AT&T Petition necessarily concedes this as it is part of its case in chief seeking preemption.¹⁹ However, the *Petition* is deficient in its discussion of the statutory basis allowing the FCC to preempt State prerogatives with respect to both legacy and VoIP services. The only real discussion of the basis of FCC authority to take action is a series of conclusory statements on pages 22-23, where AT&T argues, first, that, the FCC:

has ample legal authority under its waiver and forbearance powers to conduct these geographically limited trial runs. Congress explicitly authorized the Commission to forbear from applying any legal provision "to a telecommunications carrier ... in any or some of its ... geographic markets." 47 U.S.C. § 160(a). Additionally, the Commission may waive its rules in the areas identified, because

¹⁷ *AT&T Petition* at 13-15.

¹⁸ *AT&T Petition* at 16 (and note 25) pointing out that “[i]n many States, legacy service obligations effectively preclude retirement of the TDM-based network....” NARUC takes no position on AT&T's *unsupported* conclusory statement alleging State laws are retarding upgrades of the network. There is no empirical data/or actual State laws cited in the petition. However, this petition text makes clear that, to set the stage for its request, AT&T has necessarily conceded binding State authority over legacy networks.

¹⁹ Id.

"special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest." [footnote omitted]

But, the FCC's forbearance authority, found in 47 USDC § 160 (1996), does not provide a basis for preempting State law. The provision specifies that the FCC can forbear "from applying ... any provision of this chapter to a telecommunications carrier or telecommunications service." Forbearance allows the FCC to stop applying only "provisions of this chapter" (i.e., Title II of the Act).²⁰

Nor does the statute give the FCC any authority to "waive" State rules. Indeed, the only authority cited in the accompanying footnote is an FCC order dealing only federally imposed structural separation requirements.

But it does not appear AT&T is alleging that either the FCC's forbearance or waiver authority justifies preemption, because the next line of the petition states:

The Commission also has clear authority to preempt any state regulatory obligations that would interfere with these experiments or subvert the most important objective on the Commission's agenda: a smooth and rapid transition to the all-IP broadband environment of tomorrow. *See generally Vonage Order*, 20 FCC Red 14853; *Louisiana Pub. Serv. Comm 'n v. FCC (Louisiana)*, 476 U.S. 355, 376 n.4 (1986).

Unfortunately, for AT&T, the cited cases do not provide "clear authority to preempt." Indeed, any rational reading of either²¹ suggests preemption cannot be justified.

Obviously, whether the FCC is preempting in the context of the proposed limited trials or more broadly in the aftermath of such trials, the agency must have a

²⁰ For the official text of § 160, see GPO's United States Code, Title 47 at pages 42-43, available online at: <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title47/pdf/USCODE-2011-title47.pdf>. The only caveat affecting States is found in § 160(d) and prevents States from enforcing "provisions of" Title II if and when the Commission chooses to forbear from applying that Title II requirement on a telecommunications carrier.

²¹ The *Vonage Order* does contain broad dicta, but as discussed, *infra*, that dicta is constrained by the appellate court's review of the decision and subsequent FCC actions.

statutory basis for acting. The mere fact that the “initial” preemption suggested by the AT&T Petition involves limited trials cannot confer any greater authority to preempt.

Moreover, AT&T provides no empirical data to back up the “facts” alleged to justify preemption. Specifically, the carrier alleges, in a series of conclusory statements, that State “legacy service obligations” reduce “carriers’ financial incentives to invest in new, IP-based networks and services” and “therefore deter broadband investment.”²² But AT&T offers zero empirical evidence to back up this claim. The only evidence that is available indicates that incumbent local exchange carriers and the private sector have invested well over \$1.2 trillion in broadband networks and IP technology.²³ This hardly suggests that the current regime has deterred investment in, and transition to IP technologies.²⁴

Notwithstanding the AT&T’s unsupported allegations about the putative inhibitory impact of decentralized, local telecommunications “legacy” regulations on IP roll-out, the petition fails to provide any *statutory* basis for preemption.²⁵ The

²² *AT&T Petition* at 16.

²³ See, *Broadband Investment*, USTelecom, the Broadband Association, webpage reports: “In recognition of the extraordinary value wired and wireless broadband communications offers, private sector broadband investment reached \$66 billion in 2011, and the industry has invested nearly \$1.2 trillion since 1996.”, online at: <http://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment> (last accessed 1/28/13); see also, *AT&T Petition* at 3 and 8, noting AT&T’s recent announcement of a \$14 billion strategic investment to deploy next-generation services; see also *NTCA Petition* at 6, n 11.

²⁴ Moreover, the thrust of AT&T’s petition rests on the notion that IP networks and the PSTN are separate and distinct networks. As the *NTCA Petition* notes, at, 2, that too is simply not true: “[W]hat is occurring already and should be promoted and sustained is an evolution of the PSTN – a technology shift with in a network (or, really, a series of interconnected networks) that already enables essential, state-of-the-art communications among all.”

²⁵ The Supreme Court has generally established a special requirement of showing clear Congressional intent where pre-emption touches an area traditionally regulated by States. When Congress legislates in a field that the States have traditionally occupied, the Court must assume that the historic police powers of the States were not to be superseded by the Federal Act, unless that was the clear and manifest purpose of Congress. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542, 121 S. Ct. 2404, 2414, 150 L.Ed.2d 532 (2001); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447 (1947). It has long been settled that “the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States.” *New Orleans Public Service, Inc. v. City of New Orleans*, 491 U.S. 350, 365-366, 109 S. Ct. 2506, 2517, 105 L.Ed.2d 298 (1989) (and cases cited therein). In

United States Supreme Court has already addressed and rejected similar goal-themed FCC arguments decades ago in the very case AT&T cites as supporting preemption.

In *Louisiana*, the FCC complained that if the FCC and the States apply different regulations to the same facilities, then the whole purpose of the federal regulations will be frustrated.²⁶ The Court responded: “[w]hile we do not deprecate this concern, §152(b) precludes both the FCC and this Court from providing the relief sought. As we do often admonish, only Congress can rewrite this statute.”²⁷ The Court further elaborated on this concept of centralized national uniformity versus the effect of §152(b)’s dual federal/State jurisdiction:

To [a] degree, § 151 may be read as lending some support to [the FCC’s] position that state regulation which frustrates the ability of the FCC to perform its statutory function of ensuring efficient, nationwide phone service may be impliedly barred by the Act.

*We might be inclined to accept this broad reading of § 151 were it not for the express jurisdictional limitations on FCC power contained in §152(b). * * * By its terms, this provision fences off from FCC reach or regulation intrastate matters – indeed, including matters “in connection with” intrastate service. Moreover, the language with which it does so is certainly as sweeping as the wording of the provision declaring the purpose of the Act and the role of the FCC.*

Louisiana PSC, 476 U.S. at 369-370 (internal citations omitted; emphasis added).

The *1996 Act* amended the Communications Act but did not eliminate Congress’ dual jurisdiction design or delete §152(b). Moreover, the *1996 Act* amendments included a host of explicit reservations of State authority and also

the *1996 Act*, Congress demonstrated that it knows how to expressly preempt intrastate authority. *See, e.g.*, 47 U.S.C. §332(c)(3) (preempts State “authority to regulate the entry of or the rates charged by any commercial mobile service”); 47 U.S.C. §276 (Congress decided to override the dual jurisdictional design relative to payphone services by expressly authorizing the FCC to regulate payphone line rates.) Congress knows how to override §152(b) but it simply has not done so relative to intrastate telecommunications services generally or VoIP-based services specifically.

²⁶ *Louisiana*, 476 U.S. at 376.

²⁷ Id.

created a new definition for “State commission” as the State agency that “has *regulatory jurisdiction with respect to intrastate operations of carriers.*” 47 U.S.C. §152(41) (emphasis added). Three years later, in 1999, the Supreme Court pointed out that:

The Commission could not, for example, regulate *any aspect of intrastate communication not governed by the 1996 Act* on the theory that it had ancillary effect on matters within the Commission’s primary jurisdiction.

AT&T v. Iowa Utilities Board, 525 U.S. 366, 381 (note 8) (1999) (emphasis added).

The FCC simply cannot preempt State authority without a specific Congressional grant of authority.

Unfortunately for *AT&T’s Petition*, in the context of supporting and promoting universal service, Congressional intent with respect to the State role could not be clearer. The Congressional vision of universal service policy explicitly reserves a crucial and explicit role for State commissions in Sections 254, 214,²⁸ and 706. Indeed, in the broadest grant of preemptive authority in the entire statute, Congress still expressly reserves State authority to impose “*requirements necessary to preserve and advanced universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers.*”²⁹ COLR and related public safety obligations that AT&T wants preempted all fall squarely within these express reservations.³⁰

²⁸ The Courts have held that the FCC cannot prohibit States from imposing additional requirements on carriers otherwise eligible for ETC designations. *See, Texas Office of Public Utilities Counsel v. FCC*, 183 F.3d 393, 418 (5th Cir. 1999), *cert. dismissed sub nom. GTE Serv. Corp. v. FCC*, 531 U.S. 975, 121 S.Ct. 423, 148 L.Ed.2d 327 (2000).

²⁹ 47 U.S.C. § 253(a) allows the FCC to preempt *any* state law or regulation that prohibits or has “the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services.” For the official text of § 253, see GPO’s United States Code, Title 47 at page 59, available online at: <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title47/pdf/USCODE-2011-title47.pdf>.

³⁰ *Compare*, 47 U.S.C. §261(c), where Congress reiterated that nothing “precludes a State from imposing requirements on a telecommunications carrier for *intrastate* services that are necessary to further in

The statute indicates quite clearly that preemption of State COLR, and related requirements, is not what Congress intended. But assuming *arguendo* such preemption could survive judicial review, the FCC has only recently declined “to preempt State obligations regarding voice service, including COLR obligations,” specifying, with respect to the *same arguments* raised by AT&T in its Petition, that:

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 USF/ICC Transformation Order, at ¶ 82, mimeo at 31, online at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-161A1.pdf.

NARUC agrees. AT&T has again filed to support its assertions.

THE FCC LACKS AUTHORITY TO PREEMPT STATE JURISDICTION OVER FIXED VOIP SERVICES

The *AT&T Petition* is premised on the notion that an IP-enabled network can provide only “information services” as defined under federal law and therefore State regulation of both the services and the network is wholly preempted by federal authority.³¹ This necessarily includes fixed VoIP services. Again, other than the bare citation to the FCC’s *Vonage* decision on page 23 (an interesting reference given the

the provision of telephone exchange service or exchange access,” consistent with the Act; 47 U.S.C. §152 note § 601, which indicates that Congress did not intend for decision makers to find State law to be preempted by mere implication; rather, it stated, the 1996 Act “shall not be construed to modify, impair or supersede Federal, State, or local law unless expressly so provided.” (emphasis added).

³¹ See *AT&T Petition* at 19.

decision does not classify the nomadic VoIP services at issue as “information services”), the *AT&T Petition* fails to cite to a single case where the FCC concludes that any fee-based VoIP services are in fact “information services” or any specific text in the Act that would justify preemption of such services.

Rather on page 18 of the *Petition*, AT&T states:

As AT&T previously has explained, IP-enabled services, including all VoIP services, are appropriately classified as interstate information services over which the Commission has exclusive jurisdiction. *See AT&T April 18, 2011 Comments* at 26-30.

The “explanation” in the cited April 18, 2011 comments is limited to the same AT&T arguments that State legacy obligations on VoIP services necessarily inhibit investment. Careful readers of the April comments will not be surprised that AT&T again fails to provide any empirical or even anecdotal data to back its arguments or specific citations to controlling statutory authority. This “explanation” concludes,³² with AT&T arguing that the FCC “should conclude” in that earlier proceeding “that *all* VoIP services are information services over which the Commission has exclusive jurisdiction.”³³

But the *AT&T Petition*’s formulation faces three problems.

First, the FCC has specifically chosen – so far – not to classify fixed (or nomadic) VoIP services as either a telecommunications service OR an information service. However, other than the FCC’s inexplicable reticence to classify any VoIP services,³⁴ without exception, since Computer II, the FCC has always treated all voice

³² Id. at 29

³³ See, Comments of AT&T, *In the Matter(s) of the Connect America Fund et al.*, WC Docket Nos. 10-90 et al., at 26-301 (filed Apr. 18, 2011) online at: <http://apps.fcc.gov/ecfs/document/view?id=7021239553>

³⁴ Given the FCC has imposed universal service obligations – that the Act expressly limits to common carriers under Title II providing “telecommunications services”– on VoIP providers, even though the

service that utilizes the public switched network as common carrier services – whatever protocols were utilized – because, as the definitions in the Act specify, the voice communication from the end-user’s standpoint undergoes no change in the form or content of the information as sent and received. See, e.g., Computer and Communications Industry Ass’n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983). See also, NARUC v. FCC, 525 F.2d 630, 643 (D.C. Circuit 1976) “[W]e reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve . . . A particular system is a common carrier *by virtue of its functions.*” {emphasis added}

Second, the FCC is not free to ignore the express terms of the statute to shoehorn a service that clearly meets the functional definition of a “telecommunications service” specified by Congress into the “information services” classification. There is no question Congress defined both “telecommunications services” and “information services” in terms of the service offered, not the technology used to provide that service.

According to Congress:

The term “telecommunications service” means the offering of telecommunications for a fee directly to the public...regardless of the facilities used. 47 U.S.C. §153 (46). {emphasis added}
and

The term “telecommunications” means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received. 47 U.S.C. §153 (43).

Fixed VoIP is offered for a fee directly to the public in head-to-head competition with voice services provided using different technologies. Fixed VoIP

Commission has failed to classify VoIP, one can make an argument that such providers have still been treated on key issues like common carriers/telecommunications service providers.

also, like all other voice services, provides “transmission between or among points specified by the user, of information of the user’s choosing without change in the form or content of the information as sent and received.” It is undeniably “telecommunications”.

From a regulatory perspective, fixed VoIP traffic is indistinguishable from any other voice service. Such traffic is never a part of the so-called public Internet. Such traffic is severable. Fixed VoIP providers interface with the PSTN as do all other carriers. To end-users such services are indistinguishable from services provided by existing carriers subject to State oversight. Indeed, even AT&T effectively concedes that fixed providers of VoIP services are the functional equivalent of existing services, noting at page 13 of its *Petition* that:

[w]here a carrier transitions from legacy TOM-based services to superior IP-based ones; in such circumstances, a provider does not "discontinue, reduce, or impair service to a community" ...[rather] . . . [w]hen a carrier upgrades to IP services, *consumers receive all the essential functionalities as before. . .*” {*emphasis added and footnotes/citations omitted*}.

Moreover, Congress the Act makes a parallel exclusion from “Information Service,” which is defined as:

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, ***but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.***³⁵

Congress made clear that distinctions in technology deployed to transmit voice communication are not relevant in classifying a service as a “telecommunications service.” 47 U.S.C. § 153(46). Congress’ definition of “advanced

³⁵ 47 U.S.C. §153(24) (emphasis added).

telecommunications capability” in § 706 likewise makes clear that such capability is “without regard to any transmission media or technology” and “enables users to originate and receive high-quality voice ... telecommunications *using any technology.*” 47 U.S.C. § 157 (reproduced in note thereto) {emphasis added}. The fact that any service uses IP technology rather than some other technology to deliver its voice telecommunications service is immaterial to a proper classification of the service. By mandating technology neutral determinations, Congress intended that functionally similar services, like basic telecommunications services, be classified similarly. Indeed, the FCC has affirmed elsewhere that telecommunications services are not limited to those employing circuit-switched technology.³⁶

Moreover, a focus on the functional nature of particular VoIP services *from the end user’s standpoint* - which compels classification of such services as “telecommunications services” - is consistent with the *1998 Universal Service Report*. There, the FCC correctly observed, “Congress’ direct[ed] that the classification of a provider should not depend on the type of facilities used ... Its classification depends rather on the nature of the service being offered to customers.” They also noted: “. . . a telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable satellite, or some other infrastructure.” *Universal Service Report* at ¶ 59.³⁷ The nature of the service in turn “depends on the functional nature of the end-user offering.” *Id.* at ¶86. “Congress intended the categories of ‘telecommunications service’ and ‘information service’ to parallel the [pre-1996] definitions of ‘basic service’ and ‘enhanced service’” in the 1996 Act. 290 F. Supp. 2d at 999, note 7.

³⁶ *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24032, ¶ 41 (1998). (“Nothing in the statutory language or legislative history limits these terms to the provision of voice, or conventional circuit-switched service. . .The plain language of the statute thus refutes any attempt to tie these statutory definitions to a particular technology”).

³⁷ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report to Congress, 13 F.C.C.R. 11501 (Released April 10, 1998) (*1998 Universal Service Report*).

Like traditional voice communication service classified as a “basic service” under the pre-1996 Act precedent, most “VoIP” voice services – including the nomadic offerings from companies like Vonage, as well as those offered or planned by facilities-based carriers like AT&T, Comcast, and Verizon – do not provide subscribers with additional, different, or restructured information.³⁸ Nor does the

³⁸ The ubiquitous protocol conversions that characterize PSTN voice traffic do not change the form or content of the input to the service (e.g., real time voice communications) and have never been the basis for reclassifying a telecommunications service. Protocol conversions “management, control or operations of a telecommunications system or the management of a telecommunications service” are part and parcel of any telecommunications network. To begin a telephone call, a sound wave is necessarily converted to an electronic wave. In most PSTN telephone calls, these analog electronic waves are converted to digital signals (and packetized) as well as multiplexed with other traffic. In some cases, the digital electronic signals are converted to light signals and back again into electronic signals. *These protocol conversions cannot change telecommunications services into information services.* The protocol conversions to so-called “Internet Protocol” – even in that small percentage of so-called “nomadic” VoIP traffic that actually does ride the public Internet – cannot create an information service. The 1996 Act defined “information services” based in large measure on the FCC’s pre-act definition of *enhanced services*, which were: “services offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber addition, different or restructured information, or involved subscriber interaction with stored information.” Newton’s Telecom Dictionary, 18th Updated and Expanded edition, at page 269. *See In re Independent Data Communications Manufacturers Ass’n, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 13717, ¶16 (1995). There, the FCC said (i) communications between the subscriber and the network for call setup or call routing, and (ii) protocol conversions necessitated by the introduction of new technology are not enhanced services. *Id.* at ¶¶14-15. The FCC classified frame relay service, a type of high-speed packet switching service, as a basic telecommunications service under Title II. *Id.* at ¶22. AT&T argued that because protocol conversion was an integral part of its frame relay service offering, the entire offering should be classified as an enhanced service. The FCC disagreed. *Focusing on the data transmitted by the customer, the FCC said that regardless of changes made to the frame header, the customer’s data contained within the frame are not modified in any way as they travel through the network and arrive intact.* *Id.* at ¶30 The FCC further noted that changes to the header information were in part responsible for the carriage of the customer’s data through the network to the proper termination point, and hence are part of a basic transmission service. *Id.* *And perhaps most critically, the FCC found that, to the extent protocol conversion was performed, such conversion did not change the essential character of the frame relay service as a basic common carrier transmission service.* *Id.* at ¶41 In particular, the FCC emphasized that the LECs treated functionally equivalent frame relay service as a basic transmission service. *Id.* at ¶40. The FCC thus rejected the notion that the mere bundling of a protocol conversion service that might be classified as enhanced altered the fundamental character of the basic frame relay service as a telecommunications transmission service. *Id.* at ¶40. As the definition of enhanced services provided the basis for the 1996 Act’s “information service” definition, the FCC’s reasoning appears applicable here. Assuming *arguendo*, a carriers protocol conversion service used in conjunction with a basic transmission service is “enhanced”, that is irrelevant. The enhanced protocol conversion service does not change the basic character of the voice service as a telecommunications service. Like AT&T’s protocol conversion service, such a service simply facilitates “the overall transparency and efficiency” of the basic voice service. *See In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 (Released April 21, 2004). *Cf. Computer II*, Final Decision, 77

real-time voice service they provide involve subscriber interaction with stored information, which is a characteristic of an “enhanced” or information service. The information transmitted—i.e., the voice communication – is of the subscriber’s own design and choosing. The IP technology used to transmit the voice transmission is completely transparent to the calling and called parties and functionally equivalent to existing phone service.

On a broader level, AT&T also seems to be putting forth a novel construction that a change in the technology used to provide service from TDM to IP somehow converts a carrier’s network from providing voice and other telecommunications services, to something else.³⁹ But the shift to IP technology merely changes the technology for managing the existing network. It no more creates a new category of regulation than did the conversion from electro-mechanical to electronic switches, the introduction of multiplexers (which use packetized data), or the introduction of ISDN and frame relay services, which are also packet technologies.⁴⁰ Indeed, significant network upgrades and transitions have occurred every since phone service was invented. None of these shifts in technology changed the fact that providers were still providing voice and data telecommunications services.

F.C.C. 2d 384, 394 (1980). ([T]he confluence of communications and data processing renders unlimited the possible combinations and permutations of services which can be offered to the consumer. *Moreover, we noted that the nature of these services are determined not by the transmission facilities, but, rather, by the specific processing applications offered through electronic equipment attached to the channel of communication.*)

³⁹ As the State Members of the Federal State Joint Board on Universal Service, point out in their January 28, 2013 comments in this docket, at 13, 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.”

⁴⁰ ISDN offers circuit-switched connections for either voice or data and packet-switched connections for data. *See* Wikipedia *Integrated Services Digital Network* and Wikipedia *Frame Relay* (accessed 1/15/13).

AT&T's third problem is that classification of VoIP traffic as an information service, reclassification of the network based on technology upgrades, and State preemption as a necessary byproduct of incorrectly classifying VoIP service as information services, are not supported by existing case law.

The *Vonage Order* cited by *AT&T's Petition* specifically eschewed classification of VoIP traffic as either an information service or telecommunications services. The basis for preemption – severability - that was ultimately upheld by the 8th Circuit necessarily had nothing to do with the traffic's classification – and zero applicability to the bulk of fixed services that are the subject of *AT&T's Petition*. Indeed, the FCC's original *Vonage* order effectively concedes,⁴¹ the FCC can *only* preempt: (1) to the extent necessary to avoid a conflict between federal law and state law;⁴² AND (2) where the intrastate telecommunications service is inseverable from the interstate service component.⁴³ With respect to facilities-based or “fixed” interconnected VoIP services – severability is a non-issue.⁴⁴ For such services, it

⁴¹ See, *Memorandum Opinion and Order, In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, (rel. November. 12, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-267A1.doc, at ¶20-22 arguing that any State regulation will necessarily conflict with federal policy and at ¶23-32 pressing the – even then factually inaccurate – statement that intrastate nomadic VoIP services are impossible to separate from interstate services – based pretty much solely upon self-serving statements by the industry petitioner.

⁴² The FCC bears the burden of justifying its entire preemption order by showing “with some specificity” that it is narrowly tailored to preempt only such state regulations as would necessarily negate FCC regulations. *California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990); *California v. FCC*, 39 F.3d 919, 931 (9th Cir. 1994). To be valid, preemption must be limited to state regulation that would negate the FCC's exercise of its own lawful authority over interstate communications. *NARUC v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989). The FCC must explain why preemption is required in order to advance legitimate federal regulation. *Texas Office of Pub. Util. Counsel*, 183 F.3d at 422.

⁴³ See, generally, *Louisiana PSC*, 476 U.S. at 374-376; *National Ass'n of Reg. Utils. Comm'rs v. FCC*, 880 F.2d 422, 429 (D.C. Cir. (1989).

⁴⁴ Fixed VoIP services can be accessed from one and only one geographic point -- the physical location where the service connection is established. Fixed VoIP providers know where their subscribers are calling from. This fixed VoIP telephony is provided by companies which have their own fixed connections to customer premises and have bandwidth specifically dedicated to VoIP telephony. For the most part, instead

appears the traffic never touches the internet – but interfaces with the PSTN just like other communications systems with different dedicated protocols.⁴⁵

of using the Internet, cable companies operate their own high-speed data networks on their cable facilities. These facilities typically only permit the end-user to access VoIP telephony from the hardwired connection at that user's premises.

⁴⁵ Lawson, Stephen, *Comcast Calls on VoIP - Cable company announces plans to launch phone service this year*, IDG News Service (2006) According to *Comcast Chairman and Chief Executive Officer Brian Roberts*, Cable operator Comcast VoIP service "[w]ill not be an Internet telephony service, he says: Though they will use IP, the voice calls won't touch the Internet, running instead over Comcast's private data network, with priority over regular data packets to ensure good quality." Available at: <http://pcworld.about.com/news/Jan112005id119241.htm>. (Last accessed January 28, 2013) {emphasis added} See also, July 23, 2008 *Sworn Initial Testimony of James R. Burt on behalf of Sprint Communications Company L.P.* filed before the Arkansas Public Service Commission, *In the Matter of Petitions for Arbitration by Sprint Communications Company L.P. against Yelcot Telephone Company, DOCKET NO. 08-0764, and against Northern Arkansas Telephone Company, DOCKET NO. 08477-U*, Exhibit JRB-1 at page 65, and at pages 29-30, where Mr. Burt notes: available at http://www.apscservices.info/pdf/08/08-076-u_14_1.pdf. (Excerpt: "Is the proposed service an Internet Telephony, Internet-based VoIP or over-the-top VoIP service? No. I am not speaking to the regulatory treatment of these services, but rather, the functionality of the proposed service . . . The terms Internet Telephony, Internet-based VoIP and/or over-the-top VoIP services are used to describe voice services that utilize the public Internet. An example would be the service provided by Vonage. By contrast, the service provided by Sprint and Suddenlink does not use the public Internet in any manner. . . . The voice services provided by Sprint and Suddenlink are not nomadic; the customers only use the service in their homes. Internet Telephony, Internet-based VoIP service and over-the-top VoIP services have also struggled with providing 911 service consistent with customer or public safety official expectations. The voice services provided by Sprint and Suddenlink provide reliable 911 service. . . There is one factor that is sometimes used to attempt to create confusion between Internet Telephony, Internet-based VoIP service and over-the-top VoIP service and the voice service king provided by Sprint and Suddenlink. It is the fact that all of these services happen to use the Internet protocol. Since all of these services use the Internet protocol, there is a tendency to claim the services are the same. The mere fact that there is one technical similarity, use of the Internet protocol, should not lead one to the conclusion that the services are the same.) {emphasis added} Cf. June 6, 2008 *Prefiled Testimony of Corey R. Chase on Behalf of the Vermont Department of Public Service, State of Vermont Public Service Board Docket No. 7316 Investigation into regulation of Voice over Internet Protocol Services*, at pages 12-14, 13, (Excerpt: Q. Is it true that CDV packets "flow interwoven with other data packets such as email or video along Comcast's private IP data network" as Mr. Kowolenko stated on page 10 of his prefiled testimony? A. It appears to be true that at some points within the Comcast network, packets containing CDV data travel with packets containing other data types on the same IP network, with CDV packets marked to maintain quality. However, in the response to DPS Information Request 1-12, Mr. Kowolenko stated that, "It [CDV] does not contend with other IP based traffic destined for the public Internet that flows across the Comcast access network." Since packets carrying various data types do not contend for bandwidth and thus cannot affect each other, they should not be considered "interwoven" because CDV traffic can be identified separately from other data. Furthermore, as discussed above combining various traffic types on a single network is a function of all modern networks, not just IP networks. See also, July 25, 2008 *Prefiled Rebuttal Testimony of David J. Kowolenko on behalf of Comcast of Vermont, State of Vermont Public Service Board Docket No. 7316 Investigation into regulation of Voice over Internet Protocol Services*, at pages 8-9, where he points out, as does his CEO, *supra*, that Comcast's phone service "uses IP technology but provides a facilities-based service that does not traverse the public Internet unlike 'over the top' providers that do not directly connect via a private network to the PSTN as Comcast does. It also does not conflict with other IP-based traffic destined

A bare allegation that a State action “frustrates” a federal goal is insufficient. Indeed, in a subsequent order also addressing so-called “nomadic” VoIP,⁴⁶ the FCC specifies that “a fundamental premise of our decision to preempt Minnesota’s regulations in the *Vonage Order* was that it was impossible to determine whether calls by Vonage’s customers stay within or cross state boundaries.” Without any reference to an *alleged potential* conflict between State and Federal oversight, or the possible future classification of nomadic VoIP as an information service, that 2006 order concedes that, “an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to State regulation. This is because

for the public Internet that flows across the Comcast access network.” All 3 documents can be downloaded from:

<http://www.naruc.org/Publications/Testimony%20filed%20in%20Vermont%20PSB%202008%20Examination%20of%20VOIP.pdf>. See also, May 9, 2008 FINAL DECISION, in *Public Service Commission of Wisconsin Docket 5911-NC-101, Application of Time Warner Cable Information Services (WI), LLC to Expand Certification as an Alternative Telecommunications Utility*, at 8, Findings of Fact # 8 "Under the business model established by Sprint and TWCIS, Digital Phone uses IP technology as a transmission protocol, but does not use the Internet as such." Available at: http://www.psc.wi.gov/apps/erf_search/content/docdetail.aspx?docid=94163. See also, Briefing Memorandum in *Public Service Commission of Wisconsin Docket 5911-NC-101, Application of Time Warner Cable Information Services (WI), LLC to Expand Certification as an Alternative Telecommunications Utility*, available at: http://www.psc.wi.gov/apps/erf_search/content/docdetail.aspx?docid=84954.

⁴⁶ See Universal Service Contribution Methodology, WC Docket 06-122; CC Dockets 96-45, 98-171, 90-571, 92-237; CC Dockets 99-200, 95-116, 98-170; WC Docket 04-36, *Report and Order and Notice of Proposed Rulemaking*, 21 FCC Rcd 7518 (2006), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-94A1.pdf (Contribution Order), aff'd in part, vacated in part, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007), at ¶ 56, mimeo at 29 (“While . . .interconnected VoIP providers may report their actual interstate telecommunications revenues . . . some interconnected VoIP providers do not currently have the ability to identify whether customer calls are interstate and Indeed, a fundamental premise of our decision to preempt Minnesota’s regulations in the *Vonage Order* was that it was impossible to determine whether calls by Vonage’s customers stay within or cross state boundaries [note 188 See *Vonage Order*, 19 FCC Rcd at paras. 23-31.] Therefore, an interconnected VoIP provider may rely on traffic studies or the safe harbor . . . in calculating its federal universal service contributions. Alternatively, to the extent that an interconnected VoIP provider develops the capability to track the jurisdictional confines of customer calls, it may calculate its universal service contributions based on its actual percentage of interstate calls. [Footnote omitted] . . . an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the *Vonage Order* would no longer be applicable to such an interconnected VoIP provider.”

the central rationale justifying preemption . . . would no longer be applicable.” Id.

Finally, even if the FCC can get Court sanction of classification of VoIP as an “information service”, that alone does not provide a basis for preemption of all State oversight. Services that are otherwise defined as subject to State certification as a matter of State law remain subject to State oversight. In *California v. FCC*, 905 F.2d 1217, 1239-1242 (1990), the Ninth Circuit “reject[ed] the FCC’s attempt to limit the reach of Section 152(b) to ‘intrastate common carrier communication services’ and overturned FCC preemption of State regulation of intrastate enhanced services – the precursor for “information services” defined in the 1996 legislation. Relying on *Louisiana Public Service Comm’n v. FCC*, 476 U.S. 355, 370 (1986) and *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 880 F.2d 422, 426 (D.C. Cir. 1989), the court instead “agree[d] with the D.C. Circuit” that the authority reserved to the States under § 152(b) “does not turn on whether the services are provided on a common carrier or non-common carrier basis.” Id. at 1242. Compare 47 U.S.C. § 541(d)(1) & (2) (preserving State jurisdiction over intrastate communications service provided by a cable system, other than cable service, whether offered on a common carrier or private contract basis).

CONCLUSION

The relief requested by the *AT&T Petition* from the FCC can only affect interstate services and has no applicability to intrastate services provided over the network, absent a change in the law. Regulation or deregulation of intrastate services remains within the province of State commissions (and State legislatures). The trials that are the heart of the AT&T petition cannot take place without consent of any affected State.

While the *NCTA Petition* provides a better and more transparent analytical framework for analysis of the efficacy of federal rules than the deeply flawed *AT&T Petition*, both should be rejected in favor of the referrals suggested by the State Members of the Federal State Joint Board on Universal Service.

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January 28, 2013