

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

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<i>In the Matter of</i>)	
)	
<i>Ensuring Customer Premises Equipment Backup Power for Continuity of Communications</i>)	PS Docket No. 14-174
)	
<i>Technology Transitions</i>)	GN Docket No. 13-5
)	
<i>Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers</i>)	RM-11358
)	
<i>Special Access for Price Cap Local Exchange Carriers</i>)	WC Docket No. 05-25
)	
<i>AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services</i>)	RM-10593
)	[FCC 14-185]
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**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

The National Association of Regulatory Utility Commissioners (NARUC) respectfully submits these comments on the November 25, 2014, NPRM¹ seeking

¹ See, *In the Matter(s) of Ensuring Customer Premises Equipment Backup Power for Continuity of Communications*, PS Docket No. 14-174, *Technology Transitions*, GN Docket No. 13-5, *Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers*, RM-11358, *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corporation Petition for Rulemaking to Refrom Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Notice of Proposed Rulemaking and Declaratory Ruling (NPRM), FCC 14-185, rel. Nov. 25, 2014, available online at: <http://apps.fcc.gov/ecfs/comment/view?id=60000984757>.

input on the “transition from networks based on time-division multiplexed (TDM) circuit-switched voice services running on copper loops to all-Internet Protocol (IP) multi-media networks using copper, co-axial cable, wireless, and fiber as physical infrastructure. “ *Id.* at ¶ 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 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

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).

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) 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.)

At NARUC's February 2015 meetings in Washington, D.C., the association passed a "*Resolution Urging the FCC to Partner with States to Protect Residential and Business Consumers During the Technology Transition*" specifically targeting this NPRM. That resolution urges the FCC to:

- [R]eaffirm its commitment to a collaborative, joint approach with the States to further the goals and directives contained in the NPRM regarding consumer protection and public safety;
- [A]dopt rules that respect and do not diminish, impede or otherwise infringe upon State authority in these areas;
- [E]nsure that competition, and current consumer protections, including privacy, complaint resolution, basic service, and service quality, remain in effect regardless of the technology used to provide service, and should endorse the States' continued enforcement of these protections where they exist under State law;
- [R]equire all providers of fixed IP-based networks to notify and educate their consumers of any backup power requirements of their services, including battery life spans and procedures for ordering, installing, replacing, and disposing of batteries, as well as actions consumers may take to extend battery life during a power outage; and
- [P]artner with the States to ensure that consumers are fully informed on the backup power requirements of their IP-based services, regardless of the technology used by the consumer, and to advance the FCC's and States' mutual goals for consumer protection and public safety.

In support of those positions, NARUC respectfully states as follows:

DISCUSSION

In the NPRM, at ¶¶ 3-6, the FCC proposes rules (i) establishing battery replacement and backup power expectations for end-user consumers of Internet

protocol (IP)-based services, (ii) requiring such consumers be given adequate notice of copper retirement network and service changes; and, (iii) maintaining wholesale access to preserve competition.

The NPRM starts with the correct statement of principles that should act as the guide for all future FCC decisions:

Our January 2014 *Technology Transitions Order* unanimously recognized that the success of these technology transitions depends upon the technologically-neutral preservation of principles embodied in the Communications Act that have long defined the relationship between those who build and operate networks and those who use them. These principles include competition, consumer protection, universal service, and public safety and national security.[] We are determined to ensure that these fundamental values are not lost merely because technology changes.

NPRM, at ¶ 1.

Although sometimes a specific technology can engender a new problem, generally, the technology used to provide a service is not a relevant consideration. Consumers care if the service works and that they are getting what they pay for. Fortunately, the definitional scheme in the Act is technology neutral. As NARUC has consistently urged both before Congress⁶ and this Agency:

No regulator or legislator should be intervening in the market to put a thumb on the scale to favor one technology over another. The market should make those choices . . . Policy makers should, as Congress required, adopt a functional approach to defined services. The 1996 Act

⁶ See, e.g., *Testimony by Commissioner John Burke, Chairman NARUC Committee on Telecommunications before the United States House of Representatives Energy and Commerce Committee Subcommittee on Communications and Technology hearing on "The Evolution of Wired Communications Network,"* (October 23, 2013), online at: <http://www.naruc.org/Testimony/13%201022%20Burke%20Testimony2.pdf>, at pages 4 - 7.

is far from a model of perfection. But in key areas, it does properly focus on services – not the technologies used to provide those services.

However, as Congress recognized in 1996, and the FCC has confirmed, a single federal agency lacks the resources to handle this job alone.

I. PARTNERSHIP, NOT PREEMPTION

The FCC should ensure that competition, and current consumer protections, including privacy, complaint resolution, basic service, and service quality, remain in effect regardless of the technology used to provide service, and should endorse the States' continued enforcement of these protections where they exist under State law.

The 1996 Act is a carefully designed exercise in “cooperative federalism.” *Puerto Rico Tel. Co. v. Telecom. Reg. Bd. of Puerto Rico*, 189 F.3d 1, 8 (1st Cir. 1999). It requires the FCC to work hand-in-hand with States to open local markets to competition.⁷ Indeed, as the FCC recognized, shortly after the 1996 Act was signed into law:

Our contact with state commissioners and their staffs, as well as recent state actions, make clear that states and the FCC share a common commitment to creating opportunities for efficient new entry into the local telephone market. Our experience in working with state commissions since passage of the 1996 Act confirms that *we will achieve that goal most effectively and quickly by working cooperatively with one another now and in the future as the country's emerging competition*

⁷ See, e.g., *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872 at 876, 882 (2004); Weiser, Philip, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U.L.Rev. 1692, 1694 (2001) (describing the 1996 Act as “perhaps the most ambitious cooperative federalism regulatory program to date”). The act requires, in § 253, that proposed preemption of intrastate operations must be on a case-specific basis and includes numerous reservations of State authority, e.g., 47 U.S.C. §§ 152(b), 251(d)(3), 253(b)&(c) and 261(b)&(c).

policy presents new difficulties and opportunities. (emphasis added)⁸

More recently, the FCC has highlighted the crucial role States were assigned by Congress concerning 911 service and power outages, noting specifically, in its November 25, 2014 Policy Statement and Notice of Proposed Rulemaking, *In the Matter of 911 Governance and Accountability*, PS Docket Nos. 14-193, 13-75, FCC 14-186, ¶ 2 mimeo at 2, that:

State regulators and local emergency response agencies play critical roles in ensuring that 911 is available when needed and that every 911 call will be answered, and it is undoubtedly in the public interest that the Commission should work in close partnership with these stakeholders to carry out its responsibility.

We appreciate and agree with these FCC statements which correctly characterize Congressional allocations of authority in the 1996 Act.

The FCC will always lack the financial and personnel resources needed to oversee telecommunications markets across a country the size of the United States *alone*. Moreover, the FCC is not positioned, nor does it have the same incentive, to acquire the same insight into local markets as NARUC's member commissions.

That's why Congress specified a cooperative approach and specifically preserved, in the single most preemptive provision of the Statute, State authority over a range of issues. 47 U.S.C. § 253 (a) – (b) permits preemption of any State law that “may prohibit or have the effect of prohibiting the ability of any entity to provide any

⁸ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C. Rcd. 15499, 15518 (August 8, 1996)

interstate or intrastate telecommunications service.” However, the same section preserves 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.*”

No FCC action should directly or indirectly take State “cops” off the beat or otherwise limit consumer or competitor access to existing State protective *fora*.

As the 2015 resolution and other comments⁹ confirm, Federal and State policymakers need to continue to work together to ensure a competitive marketplace and protect consumers. What is needed is a common sense values-based approach that addresses the FCC-specified principles of “competition, consumer protection, universal service, and public safety and national security.” That is what NARUC has consistently advocated. Our November 2013 “*NARUC Federalism Task Force Report: Cooperative Federalism and Telecom in the 21st Century*” at 5, available online at: <http://www.naruc.org/Publications/Federalism-task-force-report-November-20131.pdf>, at pages 10-14, has specific sections on competition, consumer protection, universal service, network reliability and public safety.

⁹ March 9, 2015 Reply Comments of the Massachusetts Department of Telecommunications and Cable (MDTC Reply Comments), at 3.

However, central to each of those section discussions is the need for a cooperative federal-state approach to protect the listed key values. As the NPRM notes at ¶ 79, “States serve a vital function in safeguarding the values of the Network Compact.”

The FCC should re-affirm its commitment to a collaborative, joint approach with the States to further the goals and directives contained in the NPRM regarding consumer protection and public safety.

It is important for the FCC to be explicit. If FCC policy makers agree with the Congressional scheme and believe that the agency cannot handle enforcement for the entire country alone and/or want State assistance to promote competition, universal service, and public safety, the agency needs to say so.

In any order in this proceeding, the FCC should be clear it endorses continued the State authorities preserved in Section 253(b), *supra*, (and elsewhere) and specify that States retain the role Congress assigned to protect competition, consumers, universal service, and “the public safety and welfare.” If federal policy makers want consumers to have the benefit of State remedies for service quality and State protections of the network and public safety – the agency needs to send the right signals. No State wants to “buy a lawsuit.” *Moreover, policy makers should not want taxpayers funding unnecessary lawsuits to settle the scope of State authority under federal law.* By the same token, if the FCC really is interested in States having vibrant USF policies or continuing in the role Congress assigned them to protect

competition, the agency needs to make certain the incentives are there for States to have a policy apparatus to support such programs.

II. SPECIFIC PROVISIONS

As NARUC's resolution points out, this NPRM proposes rules in three areas:

(i) establishing battery replacement and backup power expectations for end-user consumers of Internet protocol-based services, (ii) requiring such consumers be given adequate notice of copper network retirement and service changes; and, (iii) maintaining wholesale access to preserve competition.

Back-up Power

The FCC begins its inquiry on Back-up power by observing that consumers have been accustomed to being able to use their landline phones even when the power went out because copper networks have "line power" - that is, the copper wire conducts "electricity from the local exchange carrier's central office to the customer premises equipment." However, the migration to IP-based facilities comes at a cost. IP-based services do not directly supply line power. Instead, some sort of "on-premises" back-up power is needed for the services to function. The NPRM seeks comment on how it can "safeguard continuity of communications throughout a power outage." It proposes rules to "establish reasonable expectations in a technology-neutral fashion, and would apply to all fixed networks supplying this fundamental means of residential communication."

NARUC's resolution outlines the minimum protections that any FCC rule should provide.

Specifically, the agency should require all providers of fixed IP-based networks to notify and educate their consumers of any backup power requirements of their services, including battery life spans and procedures for ordering, installing, replacing, and disposing of batteries, as well as actions consumers may take to extend battery life during a power outage.

The FCC is not the only affected agency to recognize and address these challenges. For example, the California Public Utilities Commission in CPUC Decision(D.) 10-01-026) adopted back-up power education policies which require all facilities-based providers of telephony services, including cable providers and facilities-based providers of Voice-over Internet Protocol services, to inform their residential and small business customers that their services require back-up power on the customer's premises. The CPUC also mandated that service providers inform their customers of the limitations of service, including potential service failure during a power outage. In addition, the CPUC required these voice service providers to educate customers about how best to maximize the ability to make or receive necessary phone calls during an outage.¹⁰

¹⁰ See, February 26, 2015, *Comments of the California Public Utilities Commission*, at 2-3, available online at: <http://apps.fcc.gov/ecfs/comment/view?id=60001023462>.

The FCC should partner with States like California to ensure that consumers are fully informed on the backup power requirements of their IP-based services, regardless of the technology used by the consumer, and to advance the FCC's and States' mutual goals for consumer protection and public safety.

The FCC should specify that any FCC rules are a floor that does not impact more protective State measures.

Similar opportunities for a cooperative approach are presented by the MDTC, Pennsylvania Public Service Commission, and New York Public Service Commission proposals concerning notice to consumers regarding copper retirement.¹¹

Wholesale Carrier Issues

The NPRM, at ¶¶ 106-113, also requests comments regarding wholesale and carrier access issues that may result from copper retirements.

The NPRM points out that “technology transitions must not harm or undermine competition.” *Id.* at ¶ 110. It acknowledges that “if incumbent LECs discontinue TDM-based services in the transition from TDM to IP-based services, competitive LECs will lose the ability to access last-mile facilities necessary to serve their customers, such as DS1 and DS3 special access lines.” *Id.* at ¶ 106. It tentatively concludes that carriers seeking to discontinue a copper-based service used as a

¹¹ MDTC Reply Comments at: 4, February 5, 2015 *Comments of the New York State Public Service Commission*, at <http://apps.fcc.gov/ecfs/comment/view?id=60001014310>, at 9; February 5, 2015 *Comments of the Pennsylvania Public Utility Commission*, at: <http://apps.fcc.gov/ecfs/comment/view?id=60001014289> at 13-14.

wholesale input should be required to provide CLECs and other competitive providers, equivalent wholesale access going forward.

The February 5, 2015 comments of the New York Public Service Commission “generally agree(s) with this conclusion.” The NY PSC, which garnered real world experience with this problem in the wake of Hurricane Sandy, explained:¹²

When copper facilities are broadly retired without a similarly functional and priced alternative wholesale product being available, the cost of providing telecommunications services, including broadband, to small and medium size businesses by CLECs can become a significant hardship. . . . It is important that the ability to provide competitive carriers equivalent wholesale access at fair and reasonable rates, terms, and conditions be maintained going forward. However, we also believe that legacy policies regarding wholesale access and obligations should be reviewed so as to not burden ILEC investment in more reliable, robust and innovative networks.

NARUC’s resolution did not address many of the specific elements raised in the NPRM. However, it does specify, in the third resolve, that the FCC assure that the existing protections of competition and consumers remain intact. Absent a finding based on record evidence that the FCC’s proposal will inhibit competition, the New York comments suggest the FCC is on the right track.

¹² February 5, 2015 *Comments of the New York State Public Service Commission*, at <http://apps.fcc.gov/ecfs/comment/view?id=60001014310>, at 12-14.

CONCLUSION

NARUC respectfully requests the agency incorporate the positions listed, *supra*, in its final rules in this proceeding.

Respectfully Submitted,

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Appendix A

Resolution Urging the FCC to Partner with States to Protect Residential and Business Consumers During the Technology Transition

WHEREAS, On November 25, 2014, the Federal Communications Commission (FCC) released a Notice of Proposed Rulemaking and Declaratory Ruling (NPRM) (In the Matter of Ensuring Customer Premises Equipment Backup Power for Continuity of Communications, PS Docket No. 14-174, FCC 14-185, ¶ 2 at 2), in which the FCC sought comment on ways to ensure reliable backup power for consumers to dial 911 and protect consumers through better information about retiring legacy facilities and discontinuing services; and

WHEREAS, In the NPRM (¶¶ 3-6), the FCC proposed rules establishing battery replacement and backup power expectations for end-user consumers of Internet protocol (IP)-based services, requiring consumers be given adequate notice of copper retirement network and service changes; and

WHEREAS, In the NPRM, the FCC proposed rules to maintain wholesale access in order to preserve competition; and

WHEREAS, State public service commissions and other state agencies (States) share responsibility, statutory authority and oversight with the FCC regarding consumer protection, competition and access to 911/E911 public safety services, using different regimes and approaches to network reliability and public safety; *and*

WHEREAS, Several States are examining the intrastate impacts of battery backup and copper retirement or transition, within the States' regulatory and legal parameters including any State basic services, or other, rules and laws; *and*

WHEREAS, States have a long history of partnering with the FCC to the benefit of consumers on numbering administration and number routing issues, such as area code relief, number conservation and number portability and these issues will continue to have importance to States as the transition to IP technology moves forward; *and*

WHEREAS, The FCC has partnered with States to conduct consumer education and provide consumer notices regarding VoIP's 911/E911 limitations, Lifeline Awareness Week, and the Digital Television (DTV) transition; *and*

WHEREAS, NARUC adopted resolutions at its 2013 Summer Meeting encouraging the States and the FCC to optimize consumer protection and the public interest by working together in a collaborative process on several issues, including network power outages, next generation telecommunications network technologies, the federal Lifeline service program, and billing complaint trends; *and*

WHEREAS, The FCC recognized the important role that States play concerning 911 service and power outages in its November 25, 2014 Policy Statement and Notice of Proposed Rulemaking (In the Matter of 911 Governance and Accountability, PS Docket Nos. 14-193, 13-75, FCC 14-186, ¶ 2 at 2), by stating that: "State regulators and local emergency response agencies play critical roles in

ensuring that 911 is available when needed and that every 911 call will be answered, and it is undoubtedly in the public interest that the Commission should work in close partnership with these stakeholders to carry out its responsibility”; *now, therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its 2015 Winter Committee Meetings in Washington, D.C., urges the FCC to reaffirm its commitment to a collaborative, joint approach with the States to further the goals and directives contained in the NPRM regarding consumer protection and public safety; *and be it further*

RESOLVED, That the FCC should, in any order issued pursuant to the NPRM, adopt rules that respect and do not diminish, impede or otherwise infringe upon state authority in these areas; and be it further

RESOLVED, That the FCC should ensure that competition, and current consumer protections, including privacy, complaint resolution, basic service, and service quality, remain in effect regardless of the technology used to provide service, and should endorse the States’ continued enforcement of these protections where they exist under State law; and be it further

RESOLVED, That the FCC should require all providers of fixed IP-based networks to notify and educate their consumers of any backup power requirements of their services, including battery life spans and procedures for ordering, installing, replacing, and disposing of batteries, as well as actions consumers may take to extend battery life during a power outage; and be it further

RESOLVED, That the FCC should partner with the States to ensure that consumers are fully informed on the backup power requirements of their IP-based services, regardless of the technology used by the consumer, and to advance the FCC’s and States’ mutual goals for consumer protection and public safety.

*Sponsored by the Committee on Telecommunications and the Committee on Critical Infrastructure
Adopted by the NARUC Board of Directors February 18, 2015*