



N A R U C  
National Association of Regulatory Utility Commissioners

September 19, 2014

The Honorable Fred Upton  
Chairman  
Committee on Energy and Commerce  
2125 Rayburn HOB  
Washington, D.C. 20515

The Honorable Henry Waxman  
Ranking Member  
Committee on Energy and Commerce  
2322A Rayburn HOB  
Washington, D.C. 20515

The Honorable Greg Walden  
Chairman  
Subcommittee on Communications,  
Technology & the Internet  
2125 Rayburn HOB  
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The Honorable Anna Eshoo  
Ranking Member  
Subcommittee on Communications,  
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**Re: NARUC Comments to House Energy & Commerce Committee  
White Paper #5 - "Universal Service Policy and the Role of the Federal  
Communications Commission"**

Dear Chairmen Upton, Walden and Ranking Members Waxman, Eshoo:

The National Association of Regulatory Utility Commissioners (NARUC) appreciates the House's thoughtful approach to reform of the federal telecommunications law and submits these responses to the whitepaper on Universal Service Policy for your consideration.

If you have questions about any of the responses, please do not hesitate to contact the undersigned or NARUC's Legislative Director for Telecommunications Brian O'Hara at 202.898.2205 or [bohara@naruc.org](mailto:bohara@naruc.org) or J. Bradford Ramsay, NARUC's General Counsel at 202.898.2207 or [jramsay@naruc.org](mailto:jramsay@naruc.org).

Respectfully submitted,

/s/ Chris Nelson

Chris Nelson  
Chair, NARUC Committee on Communications  
Vice Chairman, South Dakota Public Utilities Commission

## House E & C Telecom Act Update Whitepaper #5 Universal Service: Questions for Stakeholder Comment

1. *How should Congress define the goals of the Universal Service Fund? Should Congress alter or eliminate any of the six statutory principles, codify either of the principles adopted by the FCC, or add any new principles in response to changes in technology and consumer behavior?*

NARUC hasn't taken a specific position on the propriety of the six statutory principles listed in current 47 U.S.C. §254(b) (1)-(6).

However, Congress should include specific provisions assuring the FCC

- [a] always, at a minimum, conducts the analysis Congress required in those provisions and in §254(b)(c)(1),
- [b] always, seeks and gives considerable (and statutory deference to) a "recent" recommendation from the Federal State Joint Board on Universal Service, and
- [c] apply the burdens and benefits of the federal universal service programs on a technology neutral basis.

Moreover, in any revision, as discussed at length in the answer to question six, *infra*, Congress should make clear that no State universal service funding mechanism can be deemed by the Courts as "burdening" the mechanism for supporting the federal programs.

In a November 18, 2011 order, the FCC determined that it could require as a condition of receiving federal universal service subsidies, the provision of broadband – but not as a supported service because the FCC *discovered* in 2002 that broadband in tandem with Internet access was actually an "information service," and not as Congress apparently intended, a "telecommunications service."<sup>1</sup> There was no analysis or mention of the factors specified by Congress in §254(b)(c)(1). Instead of any similar examination, the FCC just tacked broadband internet access to the supported "voice telephony" services as a "condition" of accessing the

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<sup>1</sup> In the Matter of Connect Am. Fund A Nat'l Broadband Plan for Our Future Establishing Just & Reasonable Rates for Local Exch. Carriers High-Cost Universal Serv. Support Developing an Unified Inter-carrier Comp. Regime Fed.-State Joint Bd. on Universal Serv. Lifeline & Link-Up Universal Serv. Reform -- Mobility Fund, 26 F.C.C. Rcd. 17663 (2011). In ¶71, the FCC provides an interesting discussion illustrating the agency's fidelity to Congressional intent. On the one hand it was clear that high speed broadband data services were considered by all in 1996 – including Congress – as "tariffed telecommunications services." A lawyer unfamiliar with the FCC might erroneously assume Congressional intent was clear with respect to high speed data services. As the FCC stated later in the same paragraph: "It was not until 2002 that the Commission first determined that one form of broadband – cable modem service – was a single offering of an information service rather than separate offerings of telecommunications and information services, and only in 2005 did the Commission conclude that wireline broadband service should be governed by the same regulatory classification. Thus . . . *the Commission's determinations that broadband services may be offered as information services have had the effect of removing such services from the scope of the explicit reference to "universal service" in section 254(c)*" {where everyone thought Congress had placed them}. (emphasis added).

subsidies. Under the FCC's current<sup>2</sup> interpretation of the Act, upheld by the 10<sup>th</sup> Circuit, for a "telecommunications service" to qualify as a "supported service," the FCC must first make specific findings (i) that the service is "essential to education, public health or public safety; (ii) if the service has "through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;" (iii) that the service is being deployed in public telecommunications networks by telecommunications carriers;" and, finally, (iv) if they "are consistent with the public interest, convenience and necessity." But if it's an "information service," the FCC can just tack it on. Congress might want to clarify the analysis that is required before expensive new services can be "tacked on."

Whatever one's view of the federal program, for it to function, it is clear that the definition of "supported services" cannot be static. That's why NARUC has specifically endorsed the decision by Congress to utilize State expertise, via the so-called "joint boards," to develop a factual record and recommendation for periodic revisions in the definition of universal service outlined in §254(b)(7), which states:

*ADDITIONAL PRINCIPLES.- Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act.*

This principle, as discussed *infra* in NARUC's response to question 3, should be retained and strengthened in any update of the 1996 legislation. Every State regulator shares Congress' desire to bring high quality, advanced telecommunications to their constituents. Indeed, the FCC recognized in its 2011 *NPRM* at ¶ 13, mimeo at 8, "USF and ICC are both hybrid state federal systems, and *that reforms will work best with the Commission and State regulators cooperating to achieve shared goals.*"<sup>3</sup> {emphasis added} Our federalist system allows States to act as laboratories for programs providing useful and tested templates to guide federal (and other State) policy makers' decisions. The Joint Board process, among other things, assures that the impact on complementary State universal service programs is considered.

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<sup>2</sup> Stay tuned, the FCC's view of broadband internet access could change yet again in the so-called Open Internet Proceeding.

<sup>3</sup> See, *In the Matter(s) of the Connect America Fund*, WC Dkt 10-90, *A National Broadband Plan for Our Future*, GN Dkt 09-51, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Dkt 07-135, *High-Cost Universal Service Support*, WC Dkt 05-337, *Developing an Unified Intercarrier Compensation Regime*, CC Dkt 01-92), *Federal-State Joint Board on Universal Service*, CC Dkt 96-45), *Lifeline and Link-Up*, WC Dkt 03-109, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (rel. Feb. 9, 2011) at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-11-13A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-13A1.doc), published at 76 Fed. Reg. 11632 (Mar. 2, 2011) at: <http://www.gpo.gov/fdsys/pkg/FR-2011-03-02/pdf/2011-4399.pdf>; See also the separate FCC March 2, 2011 DA 11- 411 notice at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-11-411A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-411A1.doc) specifying comment dates. See also, *In the Matter of Universal Service Reform – Mobility Fund*, Notice of Proposed Rulemaking, 25 FCC Rcd 14,716(rel. October 14, 2010) at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-10-182A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-182A1.pdf)

2. ***Universal service was created to fund buildout in areas incapable of economically supporting network investment. How should our policies address the existence of multiple privately funded networks in many parts of the country that currently receive support?***

On its face, supporting more than one carrier in areas that purportedly are economically incapable of supporting a single carrier's network investment seems to make no sense. Some argue that consideration must be given to assuring all Americans have access to both mobile and fixed wireline infrastructure options. Excluding wireless competitors, most often, new entrants have only built facilities and only compete where it is the most profitable – usually in the business sector or in high density urban and suburban areas. If the subsidy for incumbents is eliminated in competitive areas it increases further the cost of service in non-competitive areas. The answer to this question is also impacted by carrier-of-last-resort (COLR) obligations. ILECs, particularly those that receive universal service support, have an obligation to serve all consumers within their territorial boundary and must obtain State and FCC approval to terminate service. If a wireless or cable company serving a rural area became the dominant carrier and the ILEC relieved of its COLR obligation as a result what would happen if a natural disaster decimated the infrastructure and the carriers decided it wasn't in their financial interest to rebuild the network? Could the carrier be allowed to rebuild a network of perceived inferior quality as Verizon proposed on Fire Island after Hurricane Sandy? Wireless and new local service providers are not subject to COLR obligations unless they accept federal or State universal service funds.

NARUC has not specifically taken a position on any of these issues/arguments. Certainly all are worthy of examination in any re-write. NARUC has supported the FCC's elimination of the so-called identical support rule and pointed out that State authority to maintain COLR obligations were specifically preserved by Congress in the 1996 Act.

3. ***What is the appropriate role of States and State commissions with respect to universal service policy?***

Congress wisely specified a role for State public service commissions in the 1996 Act. Indeed, most of the '96 Acts pro-competitive provisions were modeled on ongoing State experiments introducing competition in local telephone services. It is a role States have performed well and one that the FCC lacks the resources and ability to supplant.

*Every federal measure that preempts State options simultaneously and necessarily increases the size and cost of federal government while simultaneously blocking State experimentation that can inform policy makers at all levels.*

The telecommunications ecosystem will not remain static. It will continue to change. Competition in new services (and infrastructure) have never and will not spread uniformly throughout the country. States as the ultimate "boots on the ground" are valuable partners. Logic dictates that a federal/State partnership form the foundation for oversight going forward.

In the context of universal service, a precursor for any revisions to the program should always be close consultation with State commissions. There simply is no one else that has a greater interest or expertise about the likely practical impact of revised federal universal service policies than NARUC's member commissioners.<sup>4</sup> States are much better positioned than the FCC to know where networks are and are not being deployed within their borders and to understand challenges peculiar to their jurisdiction. States know how federal policy will implicate their State universal service programs strengths and weaknesses in a way the FCC cannot duplicate. Removing States from the existing USF process can only reduce federal program efficiency, integrity and open it to additional waste, fraud and abuse.

In any revision, it is crucial that the Joint Board process outlined in the 1996 legislation be maintained and strengthened. Unfortunately, history documents the FCC's reticence to utilize the expertise of the Joint Board before making enormous changes to both federal AND STATE<sup>5</sup> universal service mechanisms.

For example, in a rewrite, Congress can *require* specific reviews of the definition of universal service at specified intervals. Logically, Congress should also specify that Court's give deference to the Joint Board's findings of fact. Congress should also provide some requirement stronger than the existing simple requirement to "act" on recommendation within a year – a requirement that in practice has seldom compelled substantive FCC action.

This will not be easy. The federal judiciary currently gives the FCC an astounding amount of deference on even *mandatory* Congressional instructions. For example, in the 2011 so-called Transformational order radically restricting the federal USF program, the FCC made a change to its separations rules that shifts costs between jurisdictions (a.k.a. is actually "separations"). In 47 U.S.C. §410(c), Congress mandated that the FCC refer changes to the separations rules occurring in the context of an informal rulemaking to a Federal State Joint Board. Even though there was no question that (1) there was a change to the Part 36 "Separations" rules, (2) it occurred in the context of an informal rulemaking and (3) costs were shifted between jurisdictions as a result of the rule change (which is the definition of separations), the 10<sup>th</sup> Circuit gave the FCC "deference" on its claim that §410(c) was not implicated.<sup>6</sup>

States were also given the task by Congress, in 47 U.S.C. §214(d) of designating carriers eligible for federal universal subsidies. Given their expertise and proximity to the markets, this is a logical role for States to play.

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<sup>4</sup> As noted elsewhere, NARUC is careful to balance its representatives to the Federal State Joint Board on Universal service between States that are net recipients of federal USF subsidies, and States that are net donors.

<sup>5</sup> See, e.g., the discussion responding to question 6, *infra*.

<sup>6</sup> *In re FCC 11-161*, 753 F.3d 1015, 1086 (10th Cir. 2014) ("In this case, we are not persuaded that the FCC, in determining that the Order did not involve jurisdictional separations issues, has violated that deferential standard.")

Where no carrier wants to provide service, never a problem in the days when every State imposed so-called “carrier-of-last-resort” (COLR) obligations on monopoly local providers, §214 also specifies a State can require a carrier to provide service. This is a logical procedure that should remain a specific option for States experimenting with removing or reducing COLR obligations. Here again, recent experience<sup>7</sup> suggests Congress will have to be very specific in any revisions to this section if it really would like to insure the FCC adheres to its instructions.

Designated carriers must also certify to the State each year that they are using universal service monies for their intended purposes. But States do much more to prevent waste, fraud and abuse. In 2013, the Communications and Technology Subcommittee held a hearing on the low income USF program titled “*The Lifeline Fund: Money Well Spent?*” In preparation for the testimony of Commissioner Phil Jones, NARUC took an informal survey of the State commissions on several questions of interest to the Subcommittee, including what States do to combat waste, fraud and abuse in the Lifeline program. Many of the cited State processes may also apply to other portions of the federal USF program. Supports for an efficiently run federal program necessarily translates into support for ongoing State authority to continue this policing role. An excerpt provided from Commissioner Jones’ March 26 letter illustrating the crucial oversight States play follows:<sup>8</sup>

*Screening Databases: As the FCC continues work on databases to eliminate duplicate support and verify eligibility, some States moved ahead and created their own. For example, California, Texas, Vermont, Oregon, and Puerto Rico each have established programs to eliminate duplicative support and have been allowed to opt out of the FCC’s National Lifeline Accountability Database. States can opt out of the national database if they demonstrate to the FCC showing there is a state-wide system in place to detect, eliminate, and prevent duplicate Lifeline claims at least as robust as what the FCC plans for the national database.*

*Several States have also established programs to verify subscriber eligibility in qualifying low-income/assistance programs, including the home States of Chairman Walden (Oregon) and Ranking Members Eshoo (California). At least eleven States in our informal survey use State social service databases to confirm consumer eligibility for participation in the Lifeline program. But more States are considering establishing such database verification systems. The cost of establishing such databases can be prohibitive and States, like the federal government, have not been immune from the financial and fiscal troubles in recent years. As often happens, the expectation that the FCC will create federal databases may cause some States to wait to leverage the federal databases and avoid the costs of creating standalone State databases.*

<sup>7</sup> Whatever the relative merits of an auction procedure to allocate funds for wireless services, the structure of §214 on its face is inconsistent with the idea of an auction. Moreover, there are places in the Act where Congress explicitly gives the FCC auction authority, examples that look nothing like the language in §214. Still the FCC has successfully pursued auctions and a revised ETC designation procedure citing that section.

<sup>8</sup> See, NARUC Response to March 26 letter for data on State actions to combat waste, fraud and abuse in the Lifeline USF Program from the House Subcommittee on Communications and Technology (Apr. 19, 2013), at: <http://www.naruc.org/Testimony/13%200419%20Response%20to%20questions%20on%20Lifeline%20State%20actions%20FINAL.pdf>.

***Recertification/Compliance Audits:*** Eleven responding States have programs to periodically conduct compliance audits on ETCs and/or of Lifeline recipient. In some cases, the ability of States to audit and/or investigate waste, fraud, and abuse may be hampered by State rules or statute. This is the case for several States with respect to wireless. On the other end of the spectrum is California. In addition to financial and compliance audit provisions, the State has had annual renewal/recertification requirements since 2006. As a result the FCC's recent annual recertification requirement has had a negligible impact on California's program. Their experience has also shown that some consumers do indeed reapply after being de-enrolled from the program during recertification. In Kansas, the KUSF third party administrator conducts compliance audits on sixteen carriers per year. The carriers are randomly selected and may or may not be ETCs. The results of these random audits are made publicly available online. Massachusetts, which wasn't able to complete our survey because it has recently opened an investigation into its Lifeline programs, requires ETCs to regularly report data as a condition of ETC designation. Specifically, the Department of Telecommunications and Cable requires ETCs to file each of the following 1) quarterly reports on the number of Lifeline subscriber accounts terminated for non-usage each month; 2) quarterly reports on the number of consumer complaints from Massachusetts subscribers regarding its Lifeline service; 3) quarterly reports on the amount of Universal Service Fund support received for Massachusetts Lifeline subscribers each month; and 4) participation in dispute resolution by the Department's Consumer Division to resolve Lifeline subscriber disputes (including eligibility disputes, program offering issues, and limited equipment related issues, but not matters related to rates or entry). Florida has been very active in combating waste, fraud and abuse in the program. The Florida Public Service Commission (FPSC) staff review USAC disbursements to ETCs data on a monthly basis to watch for abnormalities. Staff also checks the number of Lifeline customers claimed by each Florida ETC by taking the total USAC amount reimbursed for Lifeline and dividing it by \$9.25, the Federal amount reimbursable for each Lifeline customer. If a disbursement or series of disbursements appear questionable, the FPSC has the ability to issue subpoenas to landline carriers to determine the number of lines purchased by ETCs to provide Lifeline service. The FPSC also has the authority to review books and records of wireline ETC, but NOT wireless ETCs. However, Florida also established by statute the Florida Lifeline Work Group which includes the Public Service Commission, the Department of Children and Families, the Office of Public Counsel, and each eligible telecommunications carrier offering Lifeline services. Its purpose is to determine how the eligible Lifeline subscriber information will be shared, the obligations of each party with respect to the use of that information, and the procedures to be implemented to increase enrollment and verify eligibility in these programs. The FPSC generates an annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives on the number of customers subscribing to Lifeline service and the effectiveness of procedures to promote participation in the program

**State Recourse on Bad Actors:** One key capability States have to ensure carriers follow rules is ability to pull/not grant ETC designation. Six States responding to our survey have in the past refused an application for ETC designation filed by a carrier. Seven others have pulled the ETC designation of a carrier for questionable practices and/or violating program rules. But these numbers do not tell the whole story. In many cases, a carrier whose application for or existing ETC designation is being challenged will often withdraw its application or relinquish its ETC status once it becomes clear it will not be granted/may be pulled. Such actions are not reflected in any statistics on State actions. Many States require ETCs to certify - when they are seeking designation or submitting annual filings - that it is in compliance with all federal and State rules and whether the provider's ETC designation has been suspended or revoked in any jurisdiction. Many States can and, when necessary, do initiate investigations into the program generally or on a specific carrier. The previously referenced Massachusetts Department of Telecommunications and Cable April 1, 2013 investigation into the federal Lifeline program is one example. They are examining the implementation of the FCC's 2012 Lifeline Order, as well as ways the Department can protect against waste, fraud, and abuse. The investigation will include: (1) compliance with existing Department Lifeline ETC requirements; (2) annual ETC certifications and other reporting obligations; (3) expansion of Lifeline eligibility criteria; (4) outreach, consumer safeguards, and service quality; and (5) related matters. Florida's monthly review of data, referenced earlier, resulted in, among other things, investigations of two ETCs whose designations were eventually revoked for questionable monetary claims at USAC. Another company claiming to be a Florida ETC was also caught before it was given any USAC money.

States have been active in combating waste, fraud and abuse in the federal Lifeline and other USF programs. Any Congressional legislation should make clear that State's jurisdiction to continue in those efforts remains intact.

NARUC's 2012 whitepaper *Federalism Task Force Report: Cooperative Federalism and Telecom in the 21<sup>st</sup> Century* sums up the proper State role, specifying the following:

- Universal service remains a key policy goal of the nation as a whole. The States and the FCC should work together to ensure that service is affordable, ubiquitous, and reliable for all consumers.<sup>9</sup>

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<sup>9</sup> See, e.g., the November 2013 "NARUC Federalism Task Force Report: Cooperative Federalism and Telecom in the 21<sup>st</sup> Century" at p. 15 (NARUC 2013 Report), noting that even as far back as 2005, NARUC urged "that any rewrite of TA 96 focus on dividing the responsibility for "overseeing" communications functionally, assigning the primary responsibility to the States in areas where they have specific knowledge and expertise (for example individual consumer protection issues), and giving the FCC the lead on issues that address the needs of the nation as a whole (e.g., spectrum allocation, and the federal USF)." Text available at: <http://www.naruc.org/Publications/Federalism-task-force-report-November-20131.pdf>.

- The States retain an important role in working with the FCC to ensure that service providers continue to meet social policy goals, including the universal availability of communications services, providing reasonably comparable and affordable service between urban and rural areas, and providing access to services such as Lifeline, Telecommunications Relay Service, and carrier of last resort (COLR) obligations as permitted by State law, regardless of technology.
- The States and the FCC should continue to focus on the role set forth in Section 254 of the Telecommunications Act of working together to define and implement the requirements for universal service, regardless of technology.
- The FCC can best fulfill its responsibilities under Section 254 by working with the Federal-State Joint Board on Universal Service to determine the requirements for universal service, including funding and contribution mechanisms.
- The States are well positioned to work with the FCC to determine the effects of changes to the universal service funding methodology. Potential reforms of the federal USF contribution and support mechanisms should not negatively affect State USF funds or create the potential for causing gaps in the ubiquitous availability of service.
- The need for Universal Service Fund (USF) support will continue regardless of changes in technology. The States should retain a prominent role in all decisions related to USF.

States have the expertise and incentive to be valuable partners in assuring universal service in the United States. Congress should make certain they retain authority to continue as the FCC partner in maintaining that goal.

**4. *What is the appropriate role of the Federal-State Joint Board on Universal Service in a broadband, IP-enabled, largely interstate world? What is the appropriate role of related joint boards, such as the Federal-State Joint Board on Separations or the Federal-State Conference on Advanced Services?***

This question seems include to an inaccurate premise concerning the interest and practicality of State oversight. That premise is inaccurate from both a legal and a practical perspective. Moreover, as the basis for policy making, it makes no sense.

Since Congress is considering a re-write, the *questions* are pretty clear.

No one can argue that there is not a sufficient nexus to allow States to exercise jurisdiction *in the absence of preemptive Congressional legislation*.

Despite much unsupported rhetoric – the fact is - States have not been completely ousted from oversight – particularly in the universal service area, by Congress (or the FCC) under existing legislation.

But since Congress is considering a re-write, that is not even a relevant inquiry. The only real question for Congress is: practically, does preemption in new legislation make sense?

The answer is: it most certainly does not.

Interestingly, in the most preemptive provision of the 1996 legislation 47 U.S.C. §253, allowing the FCC to preempt any State or local law that prohibits or has the effect of prohibiting any telecom provider from providing any telecom service, *Congress still explicitly preserved State authority to assure universal service* (as well as service quality).

Practically, the majority of your constituents' voice and text communications are still within a sixty to one hundred mile radius of the place they designate as home. Think about it. Regardless of the equipment used to initiate the communication, the bulk of their calls and texts are to family, friends, local business and government (including, of course, 911 calls) and (1) are both "local" and (2) never touch the public internet." If there is a disaster – be it a hurricane or an ice storm – restoration is still led at the State level. The FCC and Congress are likely, for all of the reasons articulated above, to want to keep State authorities in their policing role for federal (and State USF programs) as well as for emergencies. They are also unlikely to want to eliminate local consumer avenues for relief from improper disconnections, poor service quality, etc. To all of your constituents, their IP-based voice calls are indistinguishable from voice services provided using earlier technologies. States are also unlikely to walk away from questions about the ubiquity of telecommunications services within the State. As the plethora of State programs cited elsewhere indicate, universal service has obvious implications for a State's economy.

In the universal service area, as in all others, the reasons for both federal and State oversight of this sector have not changed.<sup>10</sup> There is nothing about the technology used to provide the service – in this case a new IP "packetized" voice (or text) communication – as opposed to a CDMA or TDM or ISDN "packetized" communication – that changes the reasons why federal and States have a clear interest in maintaining oversight.

States will retain jurisdiction unless Congress chooses to increase the power, size and cost of the federal government by ousting them from it.

Why would anyone want to increase the costs and potential for fraud and abuse of the federal universal service programs by eliminating concurrent State policing efforts?

Why would anyone want to undermine or limit State programs – propagated by locally elected officials, to insure universal service (and the related economic activity) in that State (while simultaneously expanding the cost and complexity of federal oversight)?

Why would anyone want to implement, maintain or limit federal universal service programs without understanding whether they enhance or undermine existing "complementary" State efforts?

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<sup>10</sup> See *Testimony of Commissioner John Burke on the Evolution of the Wired Communications Network before the Subcommittee on Communications and Technology Committee on Energy and Commerce, U.S. House of Representatives*, at 1 (Oct. 22, 2013) (*Burke Testimony*) at: <http://www.naruc.org/Testimony/13%201022%20Burke%20Testimony2.pdf>.

The answers to these questions are obvious.

The State's role in the existing Act is clear and takes advantage of the benefits of undeniable State expertise and resources to assure the efficiency of federal universal service programs in both creation and implementation. That role should be continued and enhanced.

As the Republican leaders of the House Energy and Commerce Committee and the Senate Commerce, Science and Transportation Committee recognized earlier this year:

*In these fiscal times, it is more important than ever to ensure that money is spent wisely and that these funds are allocated appropriately and effectively. This is why we urge you to refer evaluation of any E-rate expansion proposals to the Federal-State Joint Board on Universal Service. The Joint Board was established in 1996 to make recommendations to implement the universal service provisions of the Telecommunications Act of 1996. The Board, composed of FCC Commissioners, State Utility Commissioners, and a consumer advocate, is a mechanism to coordinate federal and state policies, and should be used as a tool for the Commission to ensure any changes to the fund achieve the statutory goals in an effective and appropriately tailored way. The recent Lifeline reform order reflecting the recommendations of the Joint Board demonstrates the contemplated use of the board.”<sup>11</sup>*

The State members of the Federal State Joint Board on Universal Service, in comments endorsed by NARUC, agreed that referrals are one critical step for any future reforms of the USF process that assures the costs and benefits – as viewed by both donor and recipient states – are considered before the FCC can act.<sup>12</sup>

5. ***The Universal Service Fund is one of several federal programs that support buildout of communications facilities. Are current programs at other federal agencies, like the National Telecommunications and Information Administration (which oversaw the Broadband Technology Opportunities Program) or the Rural Utility Service (which oversees lending programs and oversaw the Broadband Initiatives Program) necessary?***

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<sup>11</sup> *House & Senate Leaders Urge FCC to Use Joint Board on Universal Service to Evaluate E-Rate Expansion Proposals - Concern with Growing Cost of the USF to American Families* (January 30, 2014), available online at: <http://energycommerce.house.gov/press-release/house-senate-leaders-urge-fcc-use-joint-board-universal-service-evaluate-e-rate>.

<sup>12</sup> See, Comments by the State Members of the Federal State Joint Board on Universal Service, *In the Matters of Connect America Fund* (WC Docket No. 10-90), *A National Broadband Plan for Our Future* (GN Docket No. 09-51), *Establishing Just and Reasonable Rates for Local Exchange Carriers* (WC Docket No. 07-135), *High-Cost Universal Service Support* (WC Docket No. 05-337), *Developing an Unified Intercarrier Compensation Regime* (CC Docket No. 01-92), *Federal-State Joint Board on Universal Service* (CC Docket No. 96-45), *Lifeline and Link-Up* (WC Docket No. 03-109); filed May 2, 2011. Available at: [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CC0QFjAC&url=http%3A%2F%2Fwww.in.gov%2Furc%2Ffiles%2F11\\_0502\\_USF\\_State\\_JB\\_Member\\_Comments\\_10\\_90\\_fin\\_\(2\).pdf&ei=t2IQVICmL4v5yQTasYLIDw&usq=AFQjCNGL4tubPm8zqG2QTu\\_waHxGMeN15g&bvm=bv.74649129,d.aWw&cad=rja](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CC0QFjAC&url=http%3A%2F%2Fwww.in.gov%2Furc%2Ffiles%2F11_0502_USF_State_JB_Member_Comments_10_90_fin_(2).pdf&ei=t2IQVICmL4v5yQTasYLIDw&usq=AFQjCNGL4tubPm8zqG2QTu_waHxGMeN15g&bvm=bv.74649129,d.aWw&cad=rja).

NARUC does not have a specific position on whether the relative merits of each program and, if they do overlap if, which if any should be eliminated. NARUC did not take a specific position on the BTOP and BIP programs, but did call on “Congress to ensure NTIA and RUS have adequate funds to continue oversight of the BTOP and BIP grant and loan awards.”<sup>13</sup>

**6. *How can we ensure that the Universal Service Fund is sufficiently funded to meet its stated goals without growing the fund beyond fiscally responsible levels of spending?***

NARUC is a bipartisan organization that includes States that are both net donors and net recipients of federal universal service subsidies. Historically, members have been very sensitive to federal surcharges, like the federal universal service assessment, which constituents can inaccurately perceive as local rate increases. For that reason, NARUC is careful to always nominate an equal number of representatives to the Federal State Joint Board on Universal Service from both donor and recipient States (as well as from both Republican and Democrat parties). NARUC’s members understand better than most both the costs and the benefits of these federal programs. In a 2012 whitepaper, NARUC points out what should be obvious:

States are well positioned to work with the FCC to determine the effects of changes to the universal service funding methodology. Potential reforms of the federal USF contribution and support mechanisms should not negatively affect State USF funds or create the potential for causing gaps in the ubiquitous availability of service.<sup>14</sup>

In 2014, NARUC adopted a specific position on reform of the USF contribution mechanism.<sup>15</sup> According to the FCC, in a 2012 rulemaking, the agencies failure to reform the contribution mechanism has led to stresses on the system which could “result in competitive distortions because different contribution obligations may apply to similar services depending on how a service is provided.”<sup>16</sup> The same rulemaking points out that “[C]hanges to the marketplace also have led to a decline in the contribution base at the same time that the communications market has grown.”<sup>17</sup> NARUC’s resolution urges the FCC to expeditiously refer to a Federal State Joint Board reform of the contribution mechanism. The resolution

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<sup>13</sup> See, NARUC *Resolution Supporting Funding for Oversight of the NTIA Broadband Technology Opportunities Program and RUS Broadband Initiatives Program*, adopted November 17, 2010; text available at: <http://www.naruc.org/Resolutions/Resolution%20Supporting%20Funding%20for%20BTOP%20and%20BIP%20Programs.pdf>.

<sup>14</sup> See, “NARUC Federalism Task Force Report: Cooperative Federalism and Telecom in the 21<sup>st</sup> Century” at 15 (Nov. 2013), online at: <http://www.naruc.org/Publications/Federalism-task-force-report-November-20131.pdf>.

<sup>15</sup> *Resolution Supporting Reform of the Federal Universal Service Fund Contribution System* (Feb. 12, 2014) <http://www.naruc.org/Resolutions/Resolution%20Supporting%20Reform%20of%20the%20Federal%20Universal%20Service%20Fund%20Contribution%20System.pdf>.

<sup>16</sup> *In the Matter of Universal Serv. Contribution Methodology A Nat'l Broadband Plan for Our Future*, Further Notice of Proposed Rulemaking 27 F.C.C. Rcd. 5357, 5369-70 (rel April 30, 2012), available online at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-12-46A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-46A1.doc).

<sup>17</sup> *Id.*

suggests that logically, the FCC should “expand the contribution base so that all communications services, including services such as broadband that are required to be offered in order to receive federal support, contribute to the USF.” NARUC was pleased when the FCC took the step of referring the issue of USF contributions to the USF Joint Board in August.<sup>18</sup> A recommended decision from the Joint Board is due to the FCC by April 7, 2015, likely before any new federal legislation, after which the agency will have one year within which to act.

One aspect of contributions reform often overlooked by federal policymakers is the impact of changes to the federal funding mechanism, under the current law, on funding mechanisms for the twenty-one plus complimentary State “High Cost” universal service programs.<sup>19</sup>

Without question, the FCC’s November 18, 2011 restructuring of the federal universal service program significantly constrained State options for supporting universal service in high cost areas, *e.g.*, by eliminating intrastate rate designed options (via the elimination of intrastate access charges). It also virtually dictated local rate increases in some areas via establishment of a benchmark rate screening for eligibility for federal subsidies.

Paradoxically it simultaneously significantly increased pressure on State subsidy programs. As a 2012 NRRI survey points out:

Proceedings to revise the rules governing state universal service funds are open in a number of States . . . [in part] as a result of the FCC USF/ICC Transformation Order...These States include Vermont, where the new telecommunications legislation (Act 169) creates a high-cost program; Texas, which is reviewing ways to make the Texas fund more transparent; and Maine, which is reviewing the high-cost fund in light of its new law. Arkansas is also reviewing the impact of the Federal USF/ICC Transformation Order on the Arkansas High Cost Fund. . . And, in New York, carriers have proposed a Joint Settlement Agreement to establish a State Universal Service fund. Other States, including California and Wyoming, are changing assessment levels.<sup>20</sup>

According to 47 U.S.C. § 254(f), only “telecommunications carriers” that provide “intrastate telecommunications services” are *required* to contribute to State programs. Many large carriers today, *albeit with no support in the text of the 1996 or 1934 Act*, argue that they no

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<sup>18</sup> See *In the Matter of Federal State Joint Board on Universal Service (WC Docket No. 96-45)*, *Universal Service Contribution Methodology (WC Docket 06-122)*, and *A National Broadband Plan For Our Future (GN Docket 09-51)*, Order, (Aug. 6, 2014) at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0807/FCC-14-116A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0807/FCC-14-116A1.pdf).

<sup>19</sup> Akeya, Bernt, & Lichtenberg, *Survey of State Universal Service Funds* (NRRI-12-10) (rel 7/31/12), at iv-v, (*NRRI State USF Survey*) online at: <http://www.nrri.org/documents/317330/e1fce638-ef22-48bc-adc4-21cc49c8718d> (“Forty -four(44) states and the District of Columbia have a combination of various universal service funds, including high-cost, lifeline, schools and libraries, and other types of funds. Twenty-one (21) states out of the 44 have funds specifically dedicated to high-cost support.”)

<sup>20</sup> *Id.*

longer offer *any* “intrastate telecommunications services.” Moreover, § 254(f) also specifies that States can provide additional USF standards “only to the extent that such regulations adopt ...mechanisms to support such...standards that *do not rely on or burden* Federal Universal service support mechanisms.” This is not an academic issue. In the past, Courts have handicapped State efforts by limiting or banning outright specific carrier funding options as either “burdening” the federal funding mechanism or because they were deemed by the Court to involve “inseverable” intrastate and interstate communications.<sup>21</sup>

State funds face the same problems that face the federal fund plus these additional and counterproductive arguments. Currently, the federal fund assesses a percentage of interstate revenues and most State funds assess a percentage of intrastate revenues. Total State USF funding exceeds \$1.3 billion every year.<sup>22</sup> Maintaining if not expanding State level funds is in the public interest. Accordingly, any revision of Congressional legislation should correct the problems cited earlier. If the FCC or Congress is going to continue to shift more of the burden for universal service to the States, it should take pains not to handicap State funding mechanisms. State-specific USF mechanisms have always been a crucial aspect of the America’s universal service policy. Federal legislation should assure that State USF mechanisms can function in concert with the operation of any federal mechanism and affirmatively and conclusively forestall interpretations of federal law to the contrary.<sup>23</sup>

**7. *Are all of the funds and mechanisms of the current Universal Service Fund necessary in the modern communications marketplace?***

NARUC has consistently endorsed a *properly functioning* Lifeline program.<sup>24</sup> However, NARUC has not taken a specific position on the relative merits of the other federal Universal Service mechanisms.

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<sup>21</sup> See, e.g., *AT & T Commc'ns, Inc. v. Eachus*, 174 F. Supp. 2d 1119 (D. Or. 2001), holding that the State universal service programs “‘depend on’ same interstate revenues used by federal universal service fund program, regulations improperly ‘rely on’ federal universal service support mechanisms in violation of Telecommunications Act, and (2) surcharge burdened federal universal support mechanisms in violation of Telecommunications Act.” Compare, *Vonage Holdings, Corp. v. Nebraska Pub. Serv. Comm'n*, 543 F. Supp. 2d 1062, 1069 (D. Neb. 2008) *aff'd*, 564 F.3d 900 (8th Cir. 2009), barring Nebraska from collecting from Vonage based on its intrastate use for the State high cost fund even though the FCC required the company to contribute support to the federal USF program.

<sup>22</sup> See, *NRRI State USF Survey*, at p. 4, online at: <http://www.nrri.org/documents/317330/e1fce638-ef22-48bc-adc4-21cc49c8718d>.

<sup>23</sup> See *Resolution Supporting Reform of the Federal USF Contribution System* (Feb. 12, 2014), online at: <http://www.naruc.org/Resolutions/Resolution%20Supporting%20Reform%20of%20the%20Federal%20Universal%20Service%20Fund%20Contribution%20System.pdf>. Compare, *Resolution to Protect State Authority to Assess Taxes and Fees for State Universal Service Funds and E911 Services* (July 25, 2012) online at: <http://www.naruc.org/Resolutions/12%200801%20Passed%20Resolution%20to%20Protect%20State%20Authority%20to%20Assess%20Taxes%20and%20Fees%20for%20State%20Universal%20Service%20Funds%20and%20E911%20Services.pdf>

<sup>24</sup> See *Resolution to Improve Lifeline Annual Recertification Process* (July 24 2013) available online at: <http://www.naruc.org/Resolutions/Resolution%20to%20Improve%20Lifeline%20Annual%20Recertification%20Pr>

We also have urged expansion of the existing Lifeline program to broadband.

Specifically,

- In 2008,<sup>25</sup> we urged Congress to “support the designation of broadband services as eligible to receive support under the Lifeline and Link-Up programs, so that individuals with disabilities who qualify under these programs are given the choice of directing their subsidies to either PSTN-based or broadband-based communication services,” and suggested that Congress “support a set-aside of universal service funds in the amount of \$10 million annually to support the distribution of specialized customer premises equipment to eligible individuals who are deaf-blind;” and
- In November of 2009,<sup>26</sup> we encouraged Congress to “enact legislation, to implement a broadband Lifeline/Link-Up program” to allow “qualifying low-income customers residing in urban and rural areas to purchase broadband service at reduced charges by reimbursing providers for each such customer served;” and
- In July of 2011, we passed a resolution that “urges the FCC, on behalf of the Native Nations, and the States *to work within the existing federal Universal Service Fund’s budget* in order to improve broadband service adoption in urban and rural areas and for Native Nations communities located on Tribal lands through coordinated Lifeline and Link-Up Broadband Service Pilot Program projects.”<sup>27</sup>

While not commenting specifically on the mechanisms in existence before the FCC’s November 2011 massive restructuring of universal service, NARUC did pass a resolution in July of that year generally endorsing a detailed proposal put forth by the State members of the Federal State Joint Board on Universal Service that proposed “three new mechanisms to support broadband and mobility through a Provider of Last Resort (POLR) Fund, a Mobility Fund, and a Wireline Broadband Fund.”<sup>28</sup> The State member proposal also recommended changes to reduce

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[cess.pdf](#) resolving that “the FCC should swiftly take strong enforcement action against Lifeline providers and customers engaging in fraudulent practices and/or failing to comply with FCC rules that ensure households that truly qualify receive assistance.” See also *Resolution Supporting the efforts of the Federal Communications Commission and the National Association of Regulatory Utility Commissioners to promote Lifeline Awareness* (July 27, 2005) online at: [http://www.naruc.org/Resolutions/LifelineAwareness\\_s0705.pdf](http://www.naruc.org/Resolutions/LifelineAwareness_s0705.pdf).

<sup>25</sup> *Resolution to Support Equal Access to Communication Technologies by People with Disabilities in the 21st Century* (Feb. 20, 2008) at: <http://www.naruc.org/Resolutions/People%20with%20Disabilities%20Resolution1.pdf>.

<sup>26</sup> *Resolution on Legislation to Establish a Broadband Lifeline Assistance Program* (Nov. 18, 2009) online at: <http://www.naruc.org/Resolutions/Resolution%20on%20Legislation%20to%20Establish%20a%20Broadband%20Lifeline%20Assistance%20Program.pdf>.

<sup>27</sup> *Resolution Supporting Low-Income Broadband Adoption Program* (July 20, 2011), online at: <http://www.naruc.org/Resolutions/Resolution%20Supporting%20a%20Low-Income%20Broadband%20Adoption%20Program.pdf>

<sup>28</sup> See *Comments by the State Members of the Federal-State Joint Board on Universal Service*, WC Docket No. 10-90 et al. (filed May 2, 2011) at: <http://fjallfoss.fcc.gov/ecfs/document/view.action?id=7021344856> (narrative – 177 pages) and <http://fjallfoss.fcc.gov/ecfs/document/view.action?id=7021344857> (spreadsheet). See also

fraud and waste through specific proposals for the POLR Fund, recommended expansion of the contribution base of the federal USF by those using the national Public Communications Network, and, among other things, presented compelling evidence that a nationally uniform ICC rate will be detrimental.” Unfortunately, the FCC’s 2011 restructuring, ignored key aspects of the State members’ recommendations – including the recommendation not to eliminate access charges.<sup>29</sup>

8. ***In lieu of the current support mechanisms, could any of the programs be better managed or made more efficient by conversion to: a. A state block grant program; b. A consumer-focused voucher program; c. A technology-neutral reverse auction; or, d. Any other mechanism.***

Other than noting the desirability of approaching any regulatory regimes on a technology-neutral basis, *NARUC has not taken a specific position on any of these proposals*. Logically, whatever its flaws, *if properly structured*, a State block grant program, might be able to take better advantage of State authorities’ expertise and knowledge of local market conditions. Similarly, whatever its flaws, NARUC has long supported the current and expanded consumer-focused lifeline type programs – which like any voucher program - has the advantage of focusing directly upon assuring service to needed customers.

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*Resolution Strongly Supporting the Proposals Submitted on Universal Service Reform by the State Members of the Federal-State Joint Board on Universal Service* (July 20, 2011) available online at: <http://www.naruc.org/Resolutions/Resolution%20Supporting%20USF%20State%20Members%20Proposals%20on%20USF%20Reform.pdf> .

<sup>29</sup> Note the FCC’s restructuring of access charge as part of its overhaul of universal service in 2011 is wildly inconsistent with arguments being advanced today in the net neutrality context with respect to broadband traffic. Large carriers that specifically endorsed phase out of “access charges” for imbalanced voice traffic now are detailing at length the need for compensation when other “data” traffic is imbalanced.