

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

<i>In the Matter of</i>)	
)	
<i>High-Cost Universal Service Support</i>)	WC Docket No. 05-337
)	
<i>Federal-State Joint Board on Universal Service</i>)	CC Docket No. 96-45
)	
<i>Lifeline and Link Up</i>)	WC Docket No. 03-109
)	
<i>Universal Service Contribution Methodology</i>)	WC Docket No. 06-122
)	
<i>Numbering Resource Optimization</i>)	CC Docket No. 99-200
)	
<i>Implementation of the Local Competition Provisions in the Telecommunications Act of 1996</i>)	CC Docket No. 96-98
)	
<i>Developing a Unified Intercarrier Compensation Regime</i>)	CC Docket No. 01-92
)	
<i>Intercarrier Compensation for ISP-Bound Traffic</i>)	CC Docket No. 99-68
)	
<i>IP-Enabled Services</i>)	WC Docket No. 04-36
)	

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

The National Association of Regulatory Utility Commissioners (NARUC) respectfully submits these comments on ¶¶ 38-41 and the four appendices of the November 5, 2008, Federal Communications Commission “*Order on Remand and Order and Further Notice of Proposed Rulemaking*” (FNPRM), available at: <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-262A1.pdf>, published in the Federal Register on November 12, 2008.¹

¹ See, 73 Fed. Reg. 66821 (Nov. 12, 2008) [<<http://edocket.access.gpo.gov/2008/E8-26849.htm>>]

I. NARUC'S INTEREST

NARUC is a nonprofit organization founded in 1889. Its members 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 represent 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

NARUC was one of the many, cited by the Commission in ¶ 40 of the *FNPRM*, mimeo at page 20, as urging “the commission to seek comment on these proposals.”⁶

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 LECs to take the steps necessary to allow 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) (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, October 21, 2008 NARUC Motion/Request for Public Comment on recently circulated “Report and Order, Order on Remand, and Further Notice of Proposed Rulemaking” on Universal Service and Intercarrier Compensation Reform. Available at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520176561

Our motion points out that stakeholders need notice of what the FCC is actually considering as well as adequate time to respond. It also notes the FCC requires a fully developed record as a basis for action.

Because the FCC was reportedly considering a lengthy and complex proposal, a proposal the FRNPM confirms was initially circulated on October 15, 2008, NARUC's motion argued that *at least* a 90-day comment cycle is required to allow stakeholders a reasonable opportunity to analyze the proposals and provide useful comment.

We commend the FCC for putting the actual text of the three proposed orders out for comment. Such transparency is the hallmark of reasoned decision-making. If the comment cycle established were long enough to provide stakeholders with an adequate opportunity to comment, it would vindicate parties' due process rights, as well as create a record to support agency action. Unfortunately, the specified comment cycle is too compressed to allow interested parties to build a proper record for the FCC's consideration. Instead of the 90 days NARUC requested to analyze *one* proposal, stakeholders have three weeks to comment on *three* separate proposals – *and just seven days – including Thanksgiving – to reply to an undoubted avalanche of initial pleadings.* There is not enough time for substantive review and analysis of just one of the draft proposals – much less all three put out for comment.

According to the *FNPRM*, ¶ 40, [mimeo](#) at 20, the first 158 page tome “is the Chairman's Draft” which was circulated internally October 15, 2008.

The second, weighing in at 42 pages, “is a Narrow Universal Service Reform Proposal” circulated internally October 31, 2008,”⁷ and the third, which seems to closely track the *Chairman’s Draft*, is another 157 pages the *FNPRM* calls the *Alternative Proposal* – first circulated November 5, 2008.⁸ This suggests, at a minimum, that FCC is unlikely to have the record needed to support action on the majority of the detailed proposals included in the three drafts.

The States’ interest in this *FNPRM* could not be more obvious. Two of the proposed orders – the *Chairman’s Draft* and the *Alternative Proposal* – virtually rewrite key sections of the Statute – overriding literally decades of case law, ignoring express reservations of State authority, and redefining statutory terms in a manner that Congress could never have intended -- to, among other things:

[1] unlawfully constrain State retail rate design by preempting intrastate access charges, building on the flawed legal rationale of the Core Remand order; and

[2] with no factual basis, based on a specious legal rationale, determine that services that (i) use a particular protocol misleadingly labeled⁹ as Voice over the Internet Protocol (“VoIP”) and which (ii) clearly fit Congresses’ functional

⁷ *FNPRM*, ¶ 40, mimeo at 20. This proposal includes (i) a cap on the high-cost fund (*FNPRM*, Appendix B, ¶¶ 14-18) like the Appendix A *Chairman’s Draft*; (ii) a move to a reverse auction process for all support (*Id.*, ¶¶ 18-38), which goes beyond the *Chairman’s Draft*; and (iii) adoption of a numbers-based USF contribution mechanism for residential customers and a connections-based mechanism for business customers (*Id.*, ¶¶ 39-104), which also goes beyond the *Chairman’s Draft*.

⁸ *FNPRM*, ¶ 40, mimeo at 20. The *Alternative Proposal* “incorporates changes proposed in the *ex parte* presentations attached as Appendix D.” The Appendix D *ex partes* propose many changes. It does not appear that all are incorporated. Two specific changes from the *Chairman’s Draft* that are included: (i) a total phase-out of CETC support, with another *FNPRM* seeking “comment on an appropriate universal service mechanism (or mechanisms) focused on the deployment and maintenance of advanced mobile wireless services in high-cost and rural areas” (*FNPRM*, Appendix C, ¶ 52); and (ii) unconditional supplemental USF for rate-of-return carriers to make up for lost access charge revenues (*Id.*, ¶¶ 320-321).

⁹ To the uninitiated, VoIP services must be connected to or “ride” the public Internet. For much of the traffic at issue, that is not the case.

definition of “telecommunications services” in the Telecommunications Act of 1996,¹⁰ are instead “information services” that should be regulated under Title I;¹¹ and

[3] undermine State universal service and infrastructure deployment programs by revising without caveat the federal contribution mechanism or addressing required adjustments to the Part 36 separations rules.

Not one of these proposals is likely to survive judicial review. They should be rejected. These comments focus on [1] and [2]. NARUC¹² and State Separations Joint Board members¹³ have already addressed the concerns raised by [3] elsewhere.

¹⁰ Pub. L. No. 104-104, 110 Stat. 56

¹¹ In a November 19, 2003 resolution, available 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.

¹² At least twenty-two States have high cost universal service programs. At least thirty-three have low income programs. Others have programs to promote the deployment of advanced services generally. *See*, Jing Liu & Edwin Rosenberg, *State Universal Service Funding Mechanisms: Results of the NRRI’s 2005–2006 Survey*, National Regulatory Research Institute (July 2006). All advance the Congress’ goals to promote universal service and deployment of advanced infrastructure. In section after section of the Act, Congress recognizes and supports the critical role State commissions must play to advance universal service and the deployment of advanced services. In Section 706, Congress specifies that States (and the FCC) “SHALL encourage the deployment...of advanced telecommunications capability.” In 47 U.S.C. § 254 (b), the linkage between Congress’s desire for States to promote advanced services and universal service is explicit. It mandates that the FCC explicitly base its policies to advance universal service (which includes both “advanced” and “information” services) on the existence of STATE mechanisms. Severability is a key issue when it comes to accessing carriers for State programs. In 47 U.S.C. § 254 (f), Congress mandates that every provider of INTRASTATE telecommunications “shall” contribute to a State’s program. Courts have found this section does not permit States to assess against INTERSTATE revenues. If the Commission chooses to take a preemptive approach to reform based on the purported inseparability of the bulk of system traffic, while awaiting the results of the inevitable appeal, the FCC should also check to quantify the potential disruption of support to State programs that might accompany a reclassification of intrastate traffic to the interstate jurisdiction. There are also carriers pressing appeals that qualification as “information service” providers exempt them from State universal service and related infrastructure programs. *See*, NARUC’s October 2, 2008 Ex Parte Notice, filed in these proceedings and available at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520173893.

¹³ “[T]o the extent the FCC determines it will preempt state access charge rate policies, separations changes must occur to ensure that jurisdictional cost assignments are consistent with rate setting authority.” *See*, October 18, 2008 *State Members of the Joint Board on Separations Letter to all FCC Commissioners*, filed in these proceedings, at p. 4, available at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520176237.

II. DISCUSSION

A. The FCC should reject proposals to preempt State intrastate access rates.

Both the *Chairman's Draft*, *FNPRM*, Appendix A, ¶¶ 215-227, and the *Alternative Proposal*, *FNPRM*, Appendix C ¶¶ 210-222, – using identical language – directly preempt State access charge regimes, and also necessarily unlawfully constrain State retail end-user rate design authority, by building on the flawed rationale of the remand order that accompanies the *FNPRM*.¹⁴

NARUC expects to participate in the inevitable, and likely successful, appeal of that remand decision.

Paragraphs 190-192 of the *Chairman's Draft* describe this new and preemptive “approach” to ICC – asserting that all intercarrier traffic – including interstate and intrastate access – are properly categorized as 47 U.S.C. § 251(b)(5) *reciprocal compensation*.¹⁵ At the end of a transition period, all telecommunications traffic will be treated as falling within the reciprocal compensation provisions of Section 251(b)(5), and States will set default reciprocal compensation rates pursuant to the FCC's new methodology.

¹⁴ See, discussion at ¶¶ 6-16 of the “*Order on Remand and Report and Order*”, [mimeo](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-262A1.pdf) at 4-9, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-262A1.pdf.

¹⁵ The new approach includes a ten-year transition plan. According to the *Chairman's Draft*, at 192: In the first stage, intrastate access rates are reduced to the levels of interstate rates. During stage two, carriers will reduce their rates to an interim uniform termination rate, set by the state. Carriers whose current rates are below the interim uniform rate set by the state, however, may not increase their rates. During stage three, the rates carriers charge at the end of stage two (either the interim uniform rates or their prior rates, whichever are lower) will be gradually reduced to the rates that will apply at the end of the transition. This transition will be designed by the State so as to minimize market disruptions and adverse economic effects.”

In Appendix A, at ¶ 213, and Appendix C, at ¶ 218, the FCC concludes that Section 251(b)(5) is not limited only to the transport and termination of certain types of traffic. “Its scope is not limited geographically (“local,” “intrastate,” or “interstate”) or to particular services.”

This attempt to expand § 251(b)(5) reciprocal compensation to include intrastate access charges flounders on any examination of either the legislative history or the unambiguous statutory text.

The touchstone of any statutory analysis is Congressional intent. The Supreme Court has specified that technical terms in a statute should be interpreted by reference to the industry to which they apply.¹⁶ Until the November 5th remand order, as the Chairman’s Draft, the Alternative proposal, and the remand all order acknowledge, even the FCC *consistently* insisted that Congress intended Section 251(b)(5) “reciprocal compensation” to only apply to local traffic.¹⁷ The reasons for the Commissions findings were and remain obvious.

The utility industry, State regulators, Congress, and the FCC have all – both before and after enactment of the 1996 legislation – always used the term “reciprocal compensation” to refer to local traffic that terminates locally (or in the same MTA) and distinguished them from both inter- and intrastate access charge regimes. Congress’ selection of this term tracked the commonly used and widely understood

¹⁶ See, *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 at 371-2 (1986) (“in accordance with the rule of construction that technical terms of art should be interpreted by reference to the trade or industry to which they apply”) (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 201 (1974)) See also, Cornell University Law School, Legal Information Institute, http://topics.law.cornell.wex/statutory_construction.

¹⁷ See, e.g., *Appendix C* at ¶¶ 175-176, pointing out that the 1996 *Local Competition Order* concluded that the reciprocal obligation in section 251(b)(5) applied only to local traffic”, that the two previous orders on ISP traffic – the 1999 “*Declaratory Ruling*” and the subsequent 2001 “*ISP Remand Order*” reinforced that finding.

meaning at the time the 1996 legislation¹⁸ was being drafted.¹⁹ The 1996 Act overtly mirrors the prior approach of several State commissions – designing section 251(b)(5) to address local competition. At the same time, Congress made clear that it was not altering pre-existing federal authority by adopting both sections 251(i) and 251(g), which are carve-outs designed to preserve FCC jurisdiction and authority.²⁰

Reading Section 251(b)(5), “reciprocal compensation” in context forecloses expansion of that term to cover non-local access traffic as the two FCC proposals require. Section 251(b)(5) cannot be interpreted by looking to the single word,

¹⁸ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 et. seq.).

¹⁹ See, Communications Daily (Warren Publ. 6/23/95) Vol. 15, No. 121; Pg. 7 (“[The PA PUC] ... adopt “bill-and-keep” model for reciprocal compensation *between competing local exchange carriers*,”); Communications Daily (Warren Publ. 12/21/95) Vol. 15, No. 245; Pg. 3 (“Fla. PSC approved 2-year interconnection agreement involving competitive access provider Intermedia Communications and BellSouth. . . sets terms for rates, reciprocal compensation.”); “Industry Lukewarm on FCC Plan To Collect Data on Competition”, Communications Daily (Warren Publ. 12/13/95) Vol. 15, No. 239; Pg. 4 (“[S]urvey has 2 “fundamental flaws”: (1) Bureau “omitted requests for data on the essential elements for [local] competition” -- such as reciprocal compensation, interconnection, number portability.”); Communications Daily (Warren Publ. 19/21/95) Vol. 15, No. 224; Pg. 6 (“(PT) and MFS Communications announced interconnection agreement in Cal. . . grants co-carrier status to MFS, including provisions for number portability . . . reciprocal compensation.”); Brief Transmission MFS, Pac Bell Form Local Telecomms Pact, Telecomworldwire (M2 Communications Ltd. 10/21/95) MFS Communications has aligned in an agreement with Pacific Bell to provide the first Californian competitive local telephone company and its customers to receive the financial and operational benefits of co-carrier status. MFS says the pact will promote effective local telephone competition in California as well as providing number portability, reciprocal compensation, unbundled local loops.”) NARUC Convention; Work Group Urges Fewer Telecom Entry Barriers, Communications Daily (Warren Publishing Nov. 17, 1995) Vol. 15, No. 222; Pg. 2 State regulators should work to remove telecom entry barriers even though competition could develop in current environment, said NARUC Communications Subcommittee local competition work group in recommendations issued at convention here...Interconnection terms must be “reasonable and nondiscriminatory,” offered to all competitors, said group on interconnection and technical standards. It said those terms must include functions and switching software at any location, number portability and dialing parity, reciprocal compensation, “equal status in and control” over databases.’); Communications Daily, (Warren Publ. 12/01/95) Vol. 15, No. 211; Pg. 4 (Wis. PSC granted local exchange certificate to Teleport. . .will meet Dec. 4 to discuss interconnection, number portability, reciprocal compensation issues.”) Communications Daily (Warren Publ. 07/26/95) Vol. 15, No. 143; Pg. 8 (“Cal. PUC issued long-awaited decision Mon. opening local telephone service to competition. It permits competitors to enter local market by building own facilities or by reselling services of incumbent LECs. . . and sets interim rules for reciprocal compensation, interconnection and number portability.”) Prepared Testimony of Robert Annunziata, President, Chairman and CEO, Teleport Communications Group before the Subcommittee on Telecommunications and Finance, Commerce Committee, U.S. House of Representatives H.R. 1555, Communications Act of 1995 May 11, 1995 (“but the legislation that is finally passed must be the right legislation. The single most important “right” element of H.R. 1555 is the requirement for reciprocal compensation for the mutual exchange of local traffic.”)

²⁰ See also H.R. Conf. Rep. No. 104-458, at 117 (1996) (“nothing in [§ 251] is intended to affect the Commission’s access charge rules”).

“telecommunications,” “in isolation.”²¹ Black letter law requires “a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.”²² Therefore, “[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.”²³ “The meaning . . . of certain words or phrases may only become evident when placed in context.”²⁴

Read in context, section 251(b)(5) can only apply to local traffic. Section 251(b) specifies interconnection requirements applicable to *LOCAL exchange carriers in competitive LOCAL markets*. Subsection (b)(5) specifies the LEC duty to transport *and terminate*²⁵ the traffic of other LECs competing *in the same local exchange service area*. On its face, it has no applicability to either interstate or INTRASTATE exchange access services. LECs have never established “reciprocal compensation arrangements” with interexchange carriers. Indeed, Congress specifically distinguished *exchange access services* from the “reciprocal compensation” transport and termination arrangement required by § 251(b)(5), when it specified that competitive LECs can utilize the facilities and equipment of

²¹ *Dolan v. United States Postal Service*, 546 U.S. 481, 486 (2006) (*Dolan*).

²² *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991).

²³ *Dolan*, 546 U.S. at 486.

²⁴ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

²⁵ Section 251(b)(5) cannot apply unless traffic is both transported AND *terminated by the carrier seeking compensation*. The FCC relied on this limitation in the *Local Competition Order*, in finding that “transport and termination of local traffic” is distinct from “access service for long distance communications,” and so rejected claims that section 251(b)(5) governs the exchange of traffic between a LEC and an IXC. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, ¶¶ 1033-1034 (1996) (“*Local Competition Order*”). As the Commission noted, it is the LEC, not the IXC, that terminates the traffic. *See id.* ¶ 1034. As a D.C. Circuit judge in *WorldCom* recognized, everyone agrees that section 251(b)(5) “doesn’t apply” to long-distance calls, “although you might think that” if you were just to read the word “telecommunications” in isolation. *WorldCom* Oral Arg. Tr. at 9-10. The Commission defined transport “as the transmission of terminating traffic that is subject to section 251(b)(5).” *Id.* ¶ 1039. Therefore, termination defines the scope of Section 251(b)(5) traffic.

incumbent's "for the transmission and routing of telephone exchange service and exchange access." 47 USC Sec. 251(c)(2)(A).²⁶ Section 252(d)(2)(A) adds further support to this view – when it talks about an "incumbent local exchange carrier's" compliance with § 251(b)(5) and specifies "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." Obviously, toll traffic is usually passed on to an intervening carrier by a LEC, it rarely terminates on such "carrier's carrier" networks.

Reciprocal compensation – under the Act - necessarily excludes – both by definition – and the action of §152(b)²⁷– intrastate access. Section 152 operates in tandem with other sections of the 1996 legislation mandating reservation of continuing State authority to "establish access and interconnection obligations of local exchange carriers."²⁸ Exceptions to this authority are,²⁹ and must be express³⁰ and explicit.³¹

²⁶ Indeed, in the Conference report, the Senate's specification that "[t]he obligations and procedures proscribed in this section do not apply to interconnection arrangements between local exchange carriers and telecommunications under section 201..for the purposes of providing interexchange service, and nothing in this section is intended to affect the Commission's access charge rules" morphed into new section 251(i). H.R. CONF. REP. 104-458, at pp 117, 123.

²⁷ See, 47 USC Sec. 152(b) (1996), which reserves States authority over intrastate rates and services – specifying: "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier."

²⁸ See, 47 USC Sec. 251(d)(3) (1996): "Preservation of State Access Regulation: In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that (a) establishes access and interconnection obligations of local exchange carriers; (b) is consistent with the requirements of this section . . ."

²⁹ 47 USC Sec. 223 – 227 (1996)

³⁰ See, Section 601(c)(1) [note to 47 USC Sec. 153 (1996)] entitled "Effect on Other Laws", states "[t]his Act and the amendments made by this Act shall not be used to modify, impair or supersede or authorize the modification, impairment, or supersede Federal, State, or local law unless *expressly so provided* in such acts or amendment." {Emphasis added}

³¹ See, *Louisiana Public Service Commission v. FCC*, 106 S.Ct. 1890, 476 U.S. 355, 90 L.Ed.2d 369, n.4 (1986) (*Louisiana*). Agency attempts to achieve a policy goal via an unsupported reading of other statutory provisions to

The *FNPRM*'s approach illegally constrains State retail rate design options and restricts States' ability to set intrastate rates based solely upon State-determined reasonable costs of service. *Id.* It also requires a prior and significant adjustment of the FCC's separations rules. But legal infirmities aside, the policy problems associated with expanding Section 251(b)(5) *reciprocal compensation* to encompass State intrastate access charges are obvious. Any approach that effectively eliminates intrastate access charges, on its face, undermines State universal service policies and will cause a cascading series of implementation problems for many States.³²

B. The FCC should not classify IP voice traffic as information services.

In ¶ 209, the Chairman's Draft³³ states,

We now classify as "information services" those services that originate calls on IP networks and terminate them on circuit-switched networks, or conversely that originate calls on circuit-switched networks and terminate them on IP networks (collectively "IP/PSTN" services). Such

expand preemptive authority has been a feature of several FCC orders. In *Louisiana*, the Supreme Court considered and fully rejected the argument that the Commission should be able to preempt state authority in order to foster federal policy:

"While it is certainly true, and a basic underpinning of our federal system, that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, *Hines*, 312 U.S., at 67, 61 S.Ct., at 404, it is also true that *a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority*. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency. Section 152(b) constitutes, as we have explained above, a congressional *denial* of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate ratemaking purposes. *Thus, we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy*. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do *Louisiana* at pp. 374-375. {emphasis added}.

³² See, e.g., October 24, 2008 filed *Letter from James H. Cawley, Chairman, Pennsylvania Public Utility Commission to Federal Communications Commission Secretary Marlene Dortsch*, in the above captioned proceedings, available at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520178434.

³³ Compare, *FNPRM*, Appendix C, *Alternative Proposal* at ¶¶ 204 et seq.

traffic today involves a net protocol conversion between end-users, and thus constitutes an “enhanced” or “information service.”

In ¶ 211, the *Chairman’s Draft* further “preempts any State efforts to impose “traditional ‘telephone company’ regulations”” as they relate to IP/PSTN information services as inconsistent with our generally unregulated treatment of information services.”

The legal rationale provided to support preemption based on this traffic’s classification is limited to:

- (i) Bare citations to two previous commission orders – orders where either the FCC’s classification of the services was not in issue and preemption was upheld based on the alleged (and potentially temporary) inseverability of the inter- and intrastate traffic provided by “nomadic” VoIP providers – the *Vonage* order, or were – like the *Pulver.com* order – never challenged because Pulver did not charge for the service – a key characteristic of regulated telecommunications services under both federal and State law,
- (ii) the idea that such calls include a “net protocol conversion” and are thus properly classified as information services, and finally,
- (iii) the idea that the FCC can preempt State authority because it is “inconsistent with our generally unregulated treatment.”

These proffered legal rationales are woefully deficient.

This is particularly true to the extent the FCC sweeps the so-called fixed VoIP providers within this classification. 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.³⁴ Currently, so-called fixed providers of VoIP services are indistinguishable from their PSTN brethren. Their traffic never is part of the so-called public Internet. Their traffic is severable. They interface with the PSTN as do all other carriers. To both end-users and the PSTN, they are indistinguishable from other carriers currently subject to State oversight.

[1] Net Protocol Conversions Cannot Justify Preemption. 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.³⁵ Protocol

³⁴ Without exception, since Computer II, the FCC has treated voice service that utilizes the public switched network as a “basic transmission service” – whatever protocols utilized - because 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 Computer and Communications Industry Ass’n. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). The definition of basic service parallels the definition of “telecommunications” in the 1996 Act.) *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.”

³⁵ *See In re Independent Data Communications Manufacturers Ass’n, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 13717, ¶16 (1995). The FCC also 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. 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

conversions “management, control or operations of a telecommunications system or the management of a telecommunications service”³⁶ are part and parcel of any telecommunications network. To begin a telephone call, a sound wave is necessarily converted to an electronic wave. In almost all current 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 do not 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.

In § 153(46), 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 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). 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

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 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.*)

³⁶ 47 U.S.C. 153(20).

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.³⁷

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 ¶ 59.³⁸ 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.

Like traditional voice communication service classified as a “basic service” under the pre-1996 Act precedent, most of the planned “VoIP” voice services – including the nomadic offerings from companies like Vonage, as well as those offered or planned by facilities-based carriers like Qwest, AT&T, Comcast, and BellSouth – do not provide subscribers with additional, different, or restructured

³⁷ *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”).

³⁸ *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*).

information.³⁹ Nor does the 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.

[2] Prior Case Law Does Not Support Preemption. The Vonage order 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 would be affected by the proposed new classification. Indeed, the FCC’s original *Vonage* order effectively concedes,⁴⁰ the FCC can *only* preempt: (1) to the extent necessary to avoid a conflict between federal law and state law;⁴¹ AND (2) where the intrastate telecommunications service is inseverable from the interstate service component.⁴²

³⁹ An “information service” is “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 capability for the management, control, or operation of the telecommunications system or the management of telecommunications service.” 47 U.S.C. § 153(20).

⁴⁰ *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.

⁴¹ 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.

⁴² *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).

A bare allegation that a State action “frustrates” a federal goal is insufficient. Indeed, in a subsequent order also addressing so-called “nomadic” VoIP,⁴³ 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 possible future classification of nomadic VoIP as an information service**) – the FCC, in that June 2006 order, goes on to concede 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 the central rationale justifying preemption . . . would no longer be applicable.” Id.

[3] A Bare Information Service Classification Cannot Justify Preemption.

The *FNPRM* bare references to the *Pulver* and *Vonage* decisions appears to rely on untested dicta in – at least the *Pulver* order - as grounds for preempting State oversight. It suggests that by classifying IP based services as “information services” – somehow that makes its view that State oversight frustrates the agency’s goals

⁴³ 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.”

sufficient to justify preemption. There is no textual support for this argument – which if upheld – reads every single reservation of State authority out of the Statute. As noted supra, a bare FCC allegation of frustration of its goals is not sufficient under existing caselaw. Congress has had no difficulty providing specifying preemption in the 1996 Act when there is an outright or actual conflict between State and federal law.⁴⁴ The absence of similar clarity in regards to telecommunications (or information) services provided over the Internet (or – as is the case with the bulk of the services at issue – over dedicated networks using IP protocol to deliver the voice traffic) indicates that there is no such conflict.⁴⁵ Indeed, far from “occupying the field,” the text of the Act itself makes clear that States have an integral and important role to play in protecting *both* competition in telecommunication services and consumers. Even 47 U.S.C. § 253 contains an express reservation of authority for States to make regulations for public safety (and universal service) as long as those regulations are applied in a competitively neutral manner.

Classification of a particular service as an “information service” – either by FCC precedent pre-1996, or as a result of a strained reading of the amended statutory text post-1996 – standing 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

⁴⁴ See, e.g., 47 U.S.C § 276 (express preemption of aspects of payphone oversight), 47 U.S.C § 332(c) (preemption of State entry oversight of wireless carriers), 47 U.S.C § 251(e) (express grant of exclusive jurisdiction over numbering issues).

⁴⁵ In the 1996 Act, Congress’s intent to preserve State authority is repeatedly emphasized. See 47 U.S.C. § 261. (Preserving existing State regulations and allowing States to prescribe new regulations.) See also 47 U.S.C. §§ 252(e)(3) (preserving “requirements of State law in [the State commission’s] review of an agreement”); 253(b) (preserving “the ability of a State to impose . . . requirements necessary to preserve and advance universal service . . . and safeguard the rights of consumers”); 254(i) (directing States to ensure that “universal service is available at rates that are just, reasonable, and affordable”); 153(41) (recognizing State “regulatory jurisdiction with respect to intrastate operations of carriers”); 601(c), as codified in notes to § 152; and 706(c), as codified in notes to § 157, (establishing cooperative paradigm where both State and federal authorities are to encourage the deployment of advanced telecommunications capability).

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.

A finding that Congress intended to “occupy the field” of *information services*, not only conflicts with decisions of the Ninth and D.C. Circuit Courts of Appeal, but also directly conflicts with § 152(b), which indicates Congress’ intent to adopt a dual scheme of regulation of communication services which reaches to both enhanced (information) and basic (telecommunications) services. The Ninth Circuit held that Congress did not intend to divest the State from asserting jurisdiction over intrastate enhanced services. 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).

Congress specified that the provisions of the Act do *not* preempt State authority unless Congress expressly so stated. Section 601 instructs decision makers they are not to find State law to be preempted by mere implication; rather, it specifies, the 1996 Act “shall not be construed to modify, impair or supersede Federal, State, or local law unless *expressly* so provided.” Pub. L. No. 104–104, § 601(c)(1), 110 Stat. 56 (1996), 47 U.S.C. § 152 note {Emphasis added}.

A preemptive approach effectively mandates regulatory arbitrage and undercuts state oversight of public safety and network reliability by forestalling the application of minimal State oversight that applies to some but not all of the competing phone service providers – regardless of the technology being used or the facilities being used to carry the traffic.

[5] Inseverability Cannot Justify Preemption. Although the order itself does not reference the inseverability of traffic as a basis for preemption, as pointed out, supra, it clearly was the key component of the FCC’s reasoning in the *Vonage* decision which is referenced in support of the action proposed. In the record before the agency, Verizon has urged widespread “inseverability” as one potential basis for preemption of State access charge regimes. Verizon asserts that providers are unable to distinguish between intrastate and interstate traffic, or between purely circuit switched and IP traffic, and therefore “all traffic that is routed on the PSTN can no longer be reliably separated and treated differently and is therefore inseverable for jurisdictional purposes.”⁴⁶

However, the factual predicate for this statement – the purported inseverability of traffic on the networks, is, to be charitable, a gross overstatement.⁴⁷

⁴⁶ See, September 19, 2008 *Letter from Verizon’s Donna Epps* with attached Memorandum captioned: “*The Commission has Legal Authority to Adopt a Single, Default Rate for All Traffic Routed on the PSTN*” filed in the proceedings captioned: *In the Matters of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, and *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, (*Verizon White Paper*), at 2, {emphasis added}, available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520169702.

⁴⁷ Verizon argues that if nomadic VoIP and wireless services are growing *economically* inseverable from other traffic, and not subject to State economic jurisdiction, *Verizon White Paper* at 5-7, 15 then it must also be concluded that “*all traffic routed over the PSTN is inseverable for jurisdictional purposes.*” *Id.* at 4, 7 {emphasis added}.

Indeed, with respect to facilities-based or “fixed” interconnected VoIP services – severability is a non-issue.⁴⁸ For them, as referenced earlier, it appears the traffic never touches the internet – but interfaces with the PSTN just like other communications systems with different dedicated protocols.⁴⁹

⁴⁸ 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 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.

⁴⁹ 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 October 28, 2008) {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 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%](http://www.naruc.org/Publications/Testimony%20filed%20in%20Vermont%20PSB%202008%20Examination%20of%20)

Inseverability is a factual issue. Footnote 47 cites sworn testimony and an on the record adjudication about the severability of facilities-based VoIP. The record statements in these hearings are consistent. Even the FCC conceded in the cited June 2006 Order, at footnote 189, that fixed interconnected VoIP services do currently contribute to the federal program based on actual revenues (aka – severed traffic).⁵⁰ Because there is no question it is possible to separate intrastate non-nomadic facilities-based VoIP calls from interstate calls, the FCC has no jurisdiction over such intrastate calls. Indeed, now that the FCC has *required* both constructive severance by means of a proxy interstate safe harbor for nomadic VoIP providers to contribute to the federal universal service programs, as well as actual severance, by requiring nomadic VoIP providers to have functioning 911 services,⁵¹ it may be time to re-examine that FCC action.

[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.

⁵⁰ Contribution Order at note 189 ("Because we permit interconnected VoIP providers to report on actual interstate revenues, this Order does not require interconnected VoIP providers that are currently contributing based on actual revenues to revise their current practices.") Added to these "State-jurisdictional" facilities-based services, are the majority of households (64%), that Verizon's own statistics indicate will still rely on circuit-switched based telephone service by December of this year. *Verizon White Paper* at 8.

⁵¹ "In May 2005, the FCC adopted rules requiring providers of interconnected VoIP services to supply 911 emergency calling capabilities to their customers as a mandatory feature of the service *by November 28, 2005*. "Interconnected" VoIP services are VoIP services that allow a user generally to receive calls from and make calls to the traditional telephone network. Under the FCC rules, interconnected VoIP providers must: Deliver all 911 calls to the local emergency call center; Deliver the customer's call back number and location information where the emergency call center is capable of receiving it." See: <http://www.fcc.gov/pshs/services/911-services/voip/Welcome.html>

The Proposed Default Interconnection rules

As is clear from our previous comments, NARUC has consistently endorsed a technology neutral approach to oversight. Our 2004 intercarrier compensation principles specify that charges should not be based on “the architecture or protocols of the requested carrier's network or equipment.” In July, we passed a *Resolution Regarding the Interconnection of New Voice Telecommunications Services Networks*, available at: <http://www.naruc.org/Resolutions/TC%20Interconnection.pdf>, that logically extends this concept to the default regime Congress specified to assure fair interconnection agreements when arms-length negotiations break down. That resolution directs NARUC to “protect[] the authority, under Sections 251 and 252, of State commissions and the preservation of telecommunications carriers’ interconnection rights and traffic exchange obligations, under Sections 251 and 252, in a technologically neutral manner.” Recognizing that networks are evolving away from circuit-switched architectures, the resolution clarifies that evolution cannot change the Congressionally-mandated Section 251-2 process to facilitate interconnection.

Both the *Chairman’s Draft* and the *Alternate Proposal* include “default” interconnection and network edge rules. See, e.g., Appendix C, ¶ 271. These rules, which would not become effective until the end of the proposed 10 year transition period, are based on an already outdated circuit-switched network hierarchy – an architecture rapidly being supplanted by IP networks. The rules do not make any provision for the *exchange* of IP-based traffic. Some argue the proposal undermines the current right of competitors, under Section 251(c), to interconnect at any technically feasible point. The rules do not seem, on their face, to be technology neutral in application. Moreover, it does not appear that the draft provides either a

legal or policy justification for the rules.⁵² Perhaps the only thing that is clear about this proposal, is the concept should not be adopted without additional clarifications and additional public comment.

Conclusion

NARUC's resolutions confirm the widely held principle that functionally equivalent services should be treated the same, that regulators should not intervene in markets by favoring one technology over another, that the 1996 Act requires a functional approach, that an approach that treats services that are substitutable for/functionally equivalent to existing telephony services differently is inconsistent with Congressional intent, and that the express terms of the Act does not permit, and an appropriate policy approach would not countenance, preemption of all State oversight of information services, much less the intrusion into retail intrastate rate design proposed by the proposed preemption of State access charges.

Respectfully Submitted,

James Bradford Ramsay
GENERAL COUNSEL

**National Association of
Regulatory Utility Commissioners
1101 Vermont Ave, NW Suite 200
Washington, DC 20005
202.898.2207**

November 26, 2008

⁵² In lieu of such analysis, the Draft simply recites AT&T's and Verizon's explanations of what the network edge rules do not do.