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

In the Matter of	)	
	)	
Reforming Legacy Rules for an All-IP Future	)	WC Docket No. 25-311
	)	
	)	WC Docket No. 25-208
Accelerating Network Modernization		

INITIAL COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

The National Association of Regulatory Utility Commissioners (NARUC) respectfully submits these comments in response to the Federal Communications Commission's (FCC) February 19, 2026, Notice of Proposed Rulemaking (*NPRM*) in the above-captioned proceedings.[1] This *NPRM*, *inter alia,* contends that the FCC (1) can extend a 15 year old flawed legal analysis to preempt rate-of-return intrastate originating access charges, (2) may have the authority to preempt a state's authority to define the "network edge," (3) may have the authority to preempt duties Congress assigned to States in § 252(c) and (4) may have statutory authority to preempt all state oversight of carriers providing VoIP-PSTN services. The FCC is wrong on all counts. In support of this position, NARUC states as follows:

[1] *In the Matter of Reforming Legacy Rules for an All-IP Future; Accelerating Network Modernization, WC Docket Nos 25-311 and 25-208,* FCC 26-11 (rel. February 19, 2026) at: https://docs.fcc.gov/public/attachments/FCC-26-11A1.docx, 91 Fed. Reg. 14408 (March 24, 2026), at: https://www.federalregister.gov/documents/2026/03/24/2026-05727/reforming-legacy-rules-for-an-all-ip-future-accelerating-network-modernization.

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. NARUC is recognized by Congress in several statutes[3] and consistently by the Courts,[4] as well as a host of federal agencies,[5] as the proper

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[2] NARUC's member commissions have varying degrees of oversight over intrastate telecommunications services and particularly the local service supplied by incumbent and competitive local exchange carriers (LECs). These commissions are obligated to ensure that local phone service 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* 47 U.S.C. §410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of common concern); *see also* 47 U.S.C. §254 (1996); *see also NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (explaining that "[c]arriers, 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").

[4] *See, e.g.*, *U.S. 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) (noting that "[t]he District Court permitted [NARUC] to intervene as a defendant. Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate." 471 U.S. 52, n. 10. *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); *compare*, *NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007); *NARUC v. DOE*, 851 F.2d 1424, 1425 (D.C. Cir. 1988); *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[5] NRC Atomic Safety and Licensing Board *Memorandum and Order* (Granting Intervention to Petitioners and Denying Withdrawal Motion), LBP-10-11, *In the Matter of U.S. Department of Energy (High Level Waste Repository)* Docket No. 63-001-HLW; ASLBP No. 09-892-HLW-CABO4, *mimeo* at 31 (June 29, 2010) ("We agree with NARUC that, because state utility commissioners are responsible for protecting ratepayers' interests and overseeing the operations of regulated electric utilities, these economic harms constitute its members' injury-in-fact.")

entity to represent the collective interests of State utility commissions. In the Telecommunications Act,[6] 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.[7] As Congress noted at the time, States have complementary universal service and low-income programs that will be affected by any FCC action in this docket. *Cf.* 47 U.S.C. §254 (f).

The 1996 Act is a carefully designed exercise in "cooperative federalism." *Puerto Rico Tel. Co. v. Telecom. Reg. Bd. of Puerto Rico,* 189 F.3d 1, 8 (1st Cir. 1999). It required the FCC to work hand-in-hand with the States to open local markets to competition. It is *explicit* both when it preempts State authority and when it has the FCC set *intra*state rates,[8] including access charges. It requires any proposed preemption of intrastate operations to be on a case-specific basis[9] and includes numerous reservations of State authority, *e.g.,* §§ 251(d)(3), 253(b)&(c) and 261(b)&(c).

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[6] *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").

[7] *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).

[8] *See, e.g.*, 47 U.S.C. § 276's specification that the FCC is to set a per call compensation plan for every "intrastate and interstate call" on payphones.

[9] 47 U.S.C. § 253 allows the FCC to preempt any State law "to the extent necessary," if it finds, on case-by-case basis, that such law effectively prohibits "any entity" from providing any telecommunications service. But even there, Congress specifically preserved State "requirements necessary to preserve...universal service, protect the public safety and welfare, ensure the continued quality of telecommunication services and safeguard the rights of consumers." *Id.*

NARUC's interest in this *NPRM* is obvious. Any changes to limits on State *sui genesis* police power established by Congress must be grounded in federal statutory text. The *NPRM* uses the words "preempt" or "preemption" at least sixteen times, all in connection with Commission questions about the need or desirability of limiting the authority of NARUC's member commission to perform the tasks Congress assigned to them or preserved in the 1996 Act. To the Commission's credit, the *NPRM* also asks for comment on alternatives to preempting the Congressionally-assigned state roles and, in several places, seeks information on how to better coordinate with State Commissions, as well as, the likely practical impact of those actions.[10]

One thing is clear, the *NPRM* proposals will impact State Commission jurisdiction and operations. Currently, NARUC's member Commissions are addressing affordability issues across all utility sectors. Given the *NPRM*'s insistence on rolling all cost recovery into end-user rates, it is difficult to see how, at a minimum in high-cost areas, this push, which necessarily increases residential and commercial rates, will not undermine those state efforts.

[10] *See, e.g., NPRM,* ¶ 84, *mimeo* at *29, where the NPRM asks if states should allow carriers to tariff certain rates, terms, and conditions of intrastate telecommunications service, if the Commission should preempt state tariffing of remaining access charges, and if so, under what statutory authority, whether there are alternative approaches the FCC could take to encourage States to detariff intrastate access charges and how much time States may need to detariff intrastate access charges.

DISCUSSION

The FCC's legal reasoning is flawed.

According to the *NPRM*,[11] the *2011 Transformation Order* capped (i) price cap incumbent LECs' intrastate and interstate originating and terminating switched access rates and (ii) rate-of-return incumbent LECs' interstate originating and terminating and intrastate terminating access charges. However, rate-of-return incumbent LECs' intrastate originating access charges were not capped. According to the *NPRM*, the FCC,

> "[b]uilding on the *USF/ICC Transformation Further Notice [seeks]* comment on capping all intrastate originating access rates that have not yet been capped and transitioning all remaining intrastate and interstate originating access charges to bill-and-keep, consistent with the Commission's stated goals in the *USF/ICC Transformation Order*.[12]

In this *NPRM* – the FCC proposes to extend the same flawed legal analysis that underlay the *2011 Transformation Order* to preempt rate-of-return intrastate originating access charges[13] by, *inter alia*, continuing to conflate them with

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11 *NPRM* at ¶ 31, mimeo at *11,

12 *NPRM, a*t ¶ 32, mimeo at *11.

13 *Compare*, *NPRM*, at ¶ 7, *mimeo* at *3, ("In the 2011 *USF/ICC Transformation Order*, the Commission significantly modernized the intercarrier compensation system…"); at ¶¶ 25-26 mimeo at *9, ("To further the transition to all-IP networks and promote more efficient, modernized networks, the Commission must complete the reform of intercarrier compensation by transitioning the remaining access charges to a bill-and-keep framework.. [] We now return to complete the task and seek comment on how to best implement bill-and-keep to support carriers as they transition to all-IP calling.") {Footnotes omitted}; at ¶¶ 27-28, *mimeo* at *10 ("[To support] the decision to move most terminating access charges to bill-and-keep, the Commission in 2011 also concluded that the incremental cost of call termination is "very nearly zero," rendering any potential benefit from rate-setting "more than offset by the considerable costs of doing so," and that even if bill-and-keep does not allow for overall cost recovery, "it is more efficient to ensure cost recovery via direct subsidies. . . .We now seek comment on whether these conclusions support the movement of all remaining access charges to bill-and-keep for all carriers.")

Reciprocal Compensation under 47 U.S.C. § 251(b)(5), setting both a zero and interim rates in contravention of the statutory text and Supreme Court precedent. Specifically, the *NPRM* says:

> Consistent with precedent, we propose to rely on sections 251(b)(5) and 201(b). . . to transition all remaining interstate and intrastate access charges, whether originating or terminating, to bill-and-keep.[] The Commission has recognized that its "statutory authority to implement bill-and-keep as the default framework for the exchange of traffic with LECs flows directly from sections 251(b)(5) and 201(b) . . . Section 251(b)(5) states that LECs have a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.[] In the *USF/ICC Transformation Order*, the Commission "br[ought] all traffic within the section 251(b)(5) regime," including access traffic.[483] . . . In addition to providing the substantive authority for various rules and requirements, the Supreme Court in *AT&T Corp. v. Iowa Utilities Board*, held that "the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252."[485] Thus, we intend to rely on sections 251(b) and 201(b) to implement changes to the pricing methodology governing the exchange of traffic with LECs. We seek comment on this proposal.
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> *NPRM*, ¶ 188, *mimeo* at *63.

The legal deficits in the FCC's 2011 legal rationale, regurgitated in ¶ 188 of the *NPRM*, remain. Fifteen years have done nothing to improve the FCC's reasoning, which still cannot be reconciled with the unambiguous text of the statute, established principles of statutory construction, and Supreme Court precedent.

The proposed legal justification underpinning the FCC's authority to impose an interim and a final zero rate starts with its discovery in 2011,[14] that *Reciprocal*

[14] Before the 1996 Act passed everyone in the Telecom sector used the term Reciprocal Compensation to refer to the compensation for the reciprocal exchange of local traffic that terminates locally and to distinguish such charges from Access Charges, including **(1) legal/economic experts** detailing State competition experiments, *see, e.g.,* Dingwall, Craig D., *The Last Mile: A Race for Local Telecommunications Competition Policy*, 48 FCLJ 105 (1995) discussing *Reciprocal Compensation* and State orders and citing an *Economic Strategy Institute* study that said one regulatory "choke point" that could "'forestall local exchange service competition" was "reciprocal compensation for terminating traffic." {*emphasis added*}. **(2) utility industry executives testifying before Congress in 1995,** *see, e.g., 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) ("The single most important "right" element of H.R. 1555 is the requirement for reciprocal compensation for the mutual exchange of local traffic.") {*emphasis added*} **(3) State regulators**, *see, e.g.*, Communications Daily Vol. 15, No. 245 (Warren Publ. 12/21/95) Pg. 3 ("Fla. PSC approved 2-year interconnection agreement involving competitive access provider. . . sets terms for rates, reciprocal compensation."); *Industry Lukewarm on FCC Plan To Collect Data on Competition*, Communications Daily, Vol. 15, No. 239 (Warren Publ. 12/13/95) 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."); *Brief Transmission MFS, Pac Bell Form Local Telecomms Pac*t, 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 . . . providing . . .reciprocal compensation.") *NARUC Convention; Work Group Urges Fewer Telecom Entry Barriers*, Communications Daily Vol. 15, No. 222 (Warren Publishing 11/17/95) Pg. 2 ("NARUC Communications Subcommittee local competition work group in recommendations [says] terms must. . .include . . .reciprocal compensation.'). {*emphasis added*} **(4) Congress,** *see, e.g.*, H.R. CONF. REP. 104-458, at pp 117, 123, where the Senate distinguishes *Access Charges* from *Reciprocal Compensation* by discussing its version of §251 of the conferenced bill, which included the current *Reciprocal Compensation* provision: "[t]he obligations and procedures proscribed in this section do not apply to interconnection arrangements between local exchange carriers and telecommunications carriers under §201 . . . for the purposes of providing interexchange service, and nothing in this section is intended to affect the Commission's access charge rules" {*emphasis added*} It makes no sense for the Senate to say *Reciprocal Compensation* does NOT include *Access Charges* and the FCC to opine that it does; and, even **(5) the FCC,** the same year about a month the Act passed, *In the Matter of Ameritech Operating Companies*, 11 F.C.C. Rcd. 14028 (1996), the FCC granted a 1993-filed LEC petition that "proposes the establishment of reciprocal compensation agreements for terminating local traffic between Ameritech and new providers of local exchange services." *Id.* at 14038. In 1995, the Illinois Commission agreed Ameritech "and new local exchange providers should compensate each other at the same rate for terminating each other's traffic but rejected Ameritech's proposal to use switched access rates as a basis for such reciprocal compensation." *Id*

Compensation and *Access Charges* are the same thing.

But they clearly are not. Nonetheless, in 2011 the Commission brought all traffic within the 251(b)(5) reciprocal compensation regime including access traffic/charges. *NPRM*, ¶ 188, *mimeo* at *63.

Both terms, *Access Charge* and *Reciprocal Compensation,* had separate and established meanings the FCC, and everyone else in the telecom sector, spoke about in proceedings that predate the 1996 Act, confirmed after the Act passed, and used consistently for 16 years thereafter.[15]

By redefining *Reciprocal Compensation* to include *Access Charges* and extending the *2011 Transformation Order* to again set interim (and a final zero rate) for originating intrastate access charges, the *NPRM's* legal rationale (a) conflicts with the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999) (*IUB*), and (b) is contrary to any reasonable reading of the Act as it, *e.g.*: (i) blocks State application of the 47 U.S.C. § 252(d)(2)(A) *Reciprocal Compensation* rate rule; (ii) interprets 47 U.S.C. § 252(d)(2)(B) so as to render § 252(d)(2)(A) surplus/a nullity; (iii) is contrary to an express § 252(d)(2)(B)(ii) prohibition; (iv) ignores express reservations of State authority in 47 U.S.C. §§ 251(d)(3)&(f); (v) is contrary to the plain meaning of the term *Reciprocal Compensation***;** and (vi) renders reservations of State authority in § 601(c) of the 1996 Act[16] and 47 U.S.C. § 152(b) of the Act a nullity.

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15 **See** note 14, *supra*.

16 *Telecommunications Act of 1996*, Pub. L. No. 104-104, § 601(c), 110 Stat. 56, 143 (codified as amended at 47 U.S.C. § 152 note).

In the *2011 Transformation Order*, more than fifteen years after the 1996 Act became law, the FCC discovered numerous new grants of statutory authority that are the basis for the proposed preemption of the remaining intrastate access charges. The 2011 novel statutory constructions relevant to this rulemaking include the FCC's 2011 legal conclusion that the FCC can redefine the § 251(b)(5) *Reciprocal Compensation* duty imposed only on Local Exchange Carriers[17] to require "bill-and-keep" as the only permissible compensation among all carriers, eliminating a mandated §252(d)(2)(A) State *cost-based* review and preempting intrastate rate design options preserved elsewhere. This flawed interpretation also claims the FCC can establish with particularity the additional costs of transporting or terminating local traffic (and all other *inter-* and *intra*state traffic) as zero, notwithstanding § 252(d)(2)(B)(ii)'s requirement that the *Reciprocal Compensation* cost standards shall not be construed "to authorize the [FCC] to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls."[18]

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[17] The 1934 Act defined "telephone exchange service" as "services within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunication services of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge." 47 USC 153(54)(A). The 1996 Act updates the definition to include, in (B), any "comparable service."

[18] 47 U.S.C. § 152(b) states that:

> "Except as provided in sections 223 through 227 of this title, inclusive, section 276 of this title, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V–A, nothing in this chapter 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."

In terms of state jurisdiction, § 252 – which is in this chapter - necessarily must be read narrowly given it is not one of the "exceptions" listed to the Congressional command that "nothing in this chapter shall be construed to …give" the FCC jurisdiction with respect to an intrastate communications service by wire or radio of any carrier."

The FCC's tortured legal rationale was flawed at its debut in 2011 and remains so today. It cannot justify the FCC's proposed actions.

In the inevitable appeal, the FCC will have to address the impact of the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*[19] overturning the *Chevron* doctrine, which required courts to defer to federal agencies' reasonable interpretations of ambiguous laws. Instead, courts must exercise independent judgment when interpreting statutes.[20]

The *2011 Transformation Orde*r upon which the FCC relies, was upheld by the Tenth Circuit[21] on the basis of that now-defunct *Chevron* standard.[22] That Tenth Circuit decision arguably sets the high-water mark for the broad application of

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[19] *Loper Bright*, 603 U.S. 369 (2024). Agencies still get deference on factual determinations and there is a case to be made that so-called *Skidmore* deference will apply to agency decisions. Chief Justice Roberts' *Loper Bright* Majority opinion favorably mentions *Skidmore* deference five times, 603 U.S. at 388, 393-394, 374, & 399, and Justice Kagan's dissent states that *Skidmore* will apply in future cases, *Id.* at 475 (Kagan, J., dissenting) ("[T]he majority makes clear that what is usually called *Skidmore* deference continues to apply.") Under *Skidmore,* agency interpretations "made in pursuance of official duty" and "based upon . . . specialized experience" provide informed judgment to which courts . . . [can] properly resort for guidance." When deciding the weight to be given to the interpretation, courts are to weigh various factors that include "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade." *Skidmore v. Swift & Co*, 323 U.S. 134 at 139-40. (1944). As pointed out *infra,* the legal rationale outlined in the *2011 Transformation* order was, on its face, inconsistent with precedent and the plain statutory text and it also was clearly inconsistent with earlier FCC pronouncements.

[20] "[C]ourts need not and *under the APA may not* defer to an agency interpretation of the law simply because a statute is ambiguous." *Loper Bright,* 603 U.S. 369, 413 (2024).{Emphasis added}

[21] *In re: FCC 11-161,* 753 F.3d 1015 (10th Cir. 2014),

[22] "[W]e apply *Chevron* deference to the FCC's interpretation of the statute and its own authority." 753 F.3d at 1114.

Chevron deference to an FCC decision.[23] The Supreme Court chose not to accept petitions for discretionary review of the Tenth Circuit's 2014 decision. If it had, a recent Sixth Circuit case provides some insight on how, 15 years later, an appellate court might consider a Supreme Court opinion upholding the Tenth Circuit's decision in an appeal of any final rules in this case.

A Congressional Research Service (CRS) report notes how a Sixth Circuit January 2025 decision[24] explained its view of the extent to which the U.S. Courts of Appeals are bound by prior Supreme Court cases decided under the *Chevron* doctrine:

> In a 2005 decision, *NCTA v. Brand X Internet Services*, the Supreme Court had applied *Chevron* to uphold a prior FCC order classifying BIAS as an information service. As a result, litigants debated whether the Sixth Circuit was bound by this decision when interpreting the same statutory terms or whether it could approach the statutory interpretation question with a blank slate. The Sixth Circuit held it had a blank slate. It was not bound by *Brand X* because, while the interpretive question was the same, the particular agency order was new."[25]

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[23] True, in *Loper Bright*, the Supreme Court did "not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful . . . are still subject to statutory stare decisis despite our change in interpretive methodology." *Loper Bright*, 603 U.S. 369, 412 (citations omitted) But as the Sixth Circuit decision discussed *infra* demonstrates, the Courts are still working though exactly what that means.

[24] *In re MCP No. 185*, 124 F.4th 993, 1002–03 (6th Cir. 2025) ("Following *Loper Bright*, we cannot agree with petitioners that *Brand X* expressly bars the FCC's order at issue. The "specific agency action" that the Court approved in *Brand X* was the FCC's 2002 Internet Over Cable Declaratory Ruling. The specific action before us here is the FCC's 2024 Safeguarding Order, which came 22 years later. The Safeguarding Order therefore is not the "specific agency action" that the Court approved in *Brand X*. And that means we are not bound by *1003 *Brand X*'s holding as a matter of statutory *stare decisis*.")

[25] *No More Deference: Sixth Circuit Relies on Loper Bright to Strike Down Net Neutrality Rules*, Congressional Research Service, LSB11264 (February 3, 2025), at page 1.

It will take some time before the ramifications of *Loper Bright* are fully elucidated in all circuits,[26] but in any case, both pre- and post-*Loper Bright:*

> If a plaintiff challenges a regulation in a jurisdiction that has not previously rendered a decision evaluating the regulation, then that court would not be bound by any precedent regarding the legality of the regulation. Decisions by courts in other jurisdictions regarding the legality of the regulation may be persuasive authority, but they would not control the outcome of the new case.[] …The *Loper* decision does not change that basic fact. [27]

The FCC lacks the authority to establish the network edge.

In ¶ 65 of the *NPRM*, *mimeo* at *27, the FCC seeks comment on two questions: (1) does "the Commission . . . have the authority to define the network edge when the transition to all-IP networks is completed," and (2) "given that IP traffic is jurisdictionally mixed in nature, should the Commission preempt state authority to define the network edge for all-IP traffic?"

The answer to both questions is no.

The Tenth Circuit ignored the plain text of § 252(c)(2) designating the states' rate setting authority, along with Supreme Court and Eighth Circuit decisions

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[26] *See, e.g.*, Nash, Jonathan Remy, *Chevron Stare Decisis in a Post-Loper Bright World* (Forthcoming in the Iowa Law Review online) ("The Court in *Loper Bright* seems to have announced *Chevron stare decisis* without having thought much (if at all) about how *stare decisis* would work in this context or the ramifications of it. The extent of *stare decisis* in this context is highly ambiguous. Moreover, whatever form it takes, the inconsistency that ongoing agency discretion in some contexts but not others is problematic. It will have deleterious effects on judicial legitimacy and on democratic accountability. It seems that the more prudent course would be to render decisions under *Chevron* to be fair game for reconsideration after *Loper Bright*.")

[27] *Loper Bright Enterprises v. Raimondo and the Future of Agency Interpretations of Law*, Congressional Research Service, R448320 (December 31, 2024), at Page 13, {Footnotes omitted).

confirming that state role, based on a somewhat counterintuitive rationale. Specifically, it decided that state's undisputed authority to define the network edge constituted "setting the rate" under that section. That rationale was sufficient to support the FCC's 2011 decision to ignore statutory text and set both an interim and a final zero rate for "reciprocal compensation."

Section 252(c)(2) specifies that "[i]n resolving by arbitration . . . a State commission shall (2) establish any rates for interconnection, services . . . according to subsection (d)."[28] Despite the fact that section indicates the States set the rate,[29] the Supreme Court construed § 201(b) to permit the FCC to establish a *methodology* for setting prices involving interconnection but specified that States "determin[e] the

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[28] The 10th Circuit never really explained how – setting the rate by setting the network edge -s complies with the pricing standards in § 252(d) for reciprocal compensation nor did it explain how the state setting the network edge, which does impact the costs borne by each carrier but not any rate they pay to other carriers, is the same as setting a zero rate for reciprocal compensation.

[29] Section 252(d)(2) deals with "reciprocal compensation" – not access charges – and requires the State commission to assure "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." The FCC relies on the rules of construction in 47 U.S.C. § 252(d)(2)(b) – that specify that state commissions must allow "mutual recovery of costs though the offsetting of reciprocal compensation, including arrangements that waive mutual recovery (such as bill-and-keep)." It is obvious from context that the State (or if the State defaults – the FCC) is allowed to permit the parties to waive mutual recovery of costs – up to and including bill and keep arrangements. It does not allow the State (or the FCC) to impose such arrangements where the traffic is not equivalent/balanced. In its justification for ignoring the Supreme Court's decision, the Tenth Circuit avoided any discussion or mention of the waiver in the text.

> "The phrase "terms and conditions" does not necessarily require intercarrier compensation, for the statute expressly provides that § 252(d)(2)(A) should "not be construed ... to preclude ... bill-and-keep arrangements." *Id.* at § 252(d)(2)(B)(i)."
> *In re FCC 11-161*, 753 F.3d 1015, 1128 (10th Cir. 2014)

Moreover the second rule of construction – specifies "[t]his paragraph shall not be construed (ii) to authorize the Commission or any State Commission to engage in any rate regulation proceeding to establish with particularity, the additional costs of transporting or terminating calls." The FCC could only rely on this section if Access charges are actually also "reciprocal compensation."

concrete result in particular circumstances. That is enough to constitute the establishment of rates." *IUB*, 525 U.S. at 384. In *Iowa Utilities Board v. FCC,* 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part by Verizon Communications, Inc. v FCC,* 535 U.S. 467 (2002), the Eighth Circuit struck down the FCC's proxy prices for interconnection, network element charges, wholesale rates, and transport and termination rates, holding "[s]etting specific prices goes beyond the FCC's authority to design a pricing methodology and intrudes on the states' right to set the actual rates pursuant to §252(c)(2)." *Id.* at 757.

In 2011, the FCC did not establish a methodology; it simply set a zero rate and interim specific non-zero rates, just as this *NPRM's* proposes to phase intrastate access charges down to a zero over the next three years.

Both actions, on their face, conflict directly with the Supreme Court's holding in *IUB* and the cited Eighth Circuit decision yet, the Tenth Circuit accepted the FCC's argument that its actions were not inconsistent with the cited cases, arguing that:

> The "edge" of a carrier's network consists of the points "at which a carrier must deliver terminating traffic to avail itself of bill-and-keep." []. The location of the "edge" of a carrier's network determines the transport and termination costs for the carrier.[30]

And, that

> The FCC reasonably determined that by continuing to set the network "edge," states retain their role under § 252(d) in "determin[ing] the concrete result in particular *1127 circumstances." *Id.* at 649–50 ¶ 776 (quoting *AT & T v. Iowa Utils. Bd.,* 525 U.S. 366, 384, 119 S.Ct. 721,

[30] *In re FCC 11-161,* 753 F.3d 1015, 1126 (10th Cir. 2014) {footnotes omitted}

142 L.Ed.2d 835 (1999)).[31]

For the same reason, the Tenth Circuit also found there was no violation of the statute because:

> Through bill-and-keep, state commissions will continue to define the edges of the networks; that role preserves state regulatory authority over the "terms and conditions" of reciprocal compensation. There is no violation of § 252(c).[32]

Absent, at a minimum, forbearance of § 251(c), if the FCC ultimately concludes that the FCC has the authority to also "set the network edge," the FCC will have to invent another brand new legal theory to explain how its previous actions setting interim rates and a zero rate remain` consistent with the cited Supreme Court and Eighth Circuit cases and the statutory text.

The FCC lacks authority to preempt duties Congress assigned to States in § 252(c)

The second questions posits that the FCC might be able to preempt the duties that Congress assigned the States under § 252(c) "given that IP traffic is jurisdictionally mixed in nature."

The short answer to that question is also no.

Congress assigned states specific tasks in § 252(d).

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[31] *Id.*, 753 F.3d at 1126–27. The illogic of this view of the statute is apparent on its face. Note, the court never discusses rate setting and the state role in setting the final rate – but rather says setting the network edge "preserves state regulatory authority over the "terms and conditions" of reciprocal compensation" under § 252(c).

[32] *Id.,* 753 F.3d at 1128.

Indeed, § 252 mentions State Commissions 50 times. It mentions the FCC seven times and *specifies that the FCC can act only if the State abdicates its role*.[33] Where a State does abdicate its § 252 duties, Congress directed the FCC to stand in the shoes of the State for that specific proceeding only.[34] Section 252(e)(6) gives the Courts, not the FCC, exclusive authority to review State commission decisions on rate determinations. Section 252(d)(2)(A)(i) mandates that States base *Reciprocal Compensation* rates on "the additional costs of" termination and ensure "mutual and reciprocal recovery by each carrier" of the costs of terminating "calls that originate on . . . the other carrier."

The inter-, intra- or mixed nature of the traffic subjection to § 252 is irrelevant. As the FCC acknowledged in 1996 shortly after Sections 251-2 became law, Congress assigned the States arbitration duties that necessarily addressed interstate traffic:

> The Commission concludes that sections 251 and 252 address both interstate and intrastate aspects of interconnection, resale services, and access to unbundled elements. The 1996 Act moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act and instead expands the applicability of national rules to historically intrastate issues, *and state rules to historically interstate issues*.[35]

The inter- or intrastate character of the traffic subject to Sections 251-2 has no impact on the State duties Congress specified.

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33 47 U.S.C. §§ 252(e)(5) & (6).

34 *Id.*

35 *In the Matter of Implementation of the Loc. Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C. Rcd. 15499, 15513 ¶ 23 (1996) {Emphasis Added}

In ¶ 73 of the *NPRM*, *mimeo* at *30, the FCC asks a related question:

> "What is the role of state commissions, if any, in resolving disputes between incumbent LECs and competitive LECs over rates for reciprocal compensation"

The short answer to this question is obvious. The state's role is the role Congress specified in §§ 251-2.

Accepting, arguendo, the FCC's contention that all VoIP- PSTN Traffic is "inherently mixed" and inseverable, the FCC still must provide a statutory basis for preempting state oversight.

In ¶ 76, *mimeo* at *31, the FCC asks a related question: whether "VoIP-PSTN traffic [is] inherently jurisdictionally mixed in nature and therefore not subject to state regulation."

NARUC has already explained in comments filed in a related proceeding that it is past time for the FCC to classify VoIP as a Title II Telecommunications service.[36] But, however classified, the mere fact that VoIP traffic is jurisdictionally

[36] *See*, February 19, 2026 Initial Comments of the National Association of Regulatory Utility Commissioners, filed the proceeding captioned: *In the Matters of, Advancing IP Interconnection, WC Docket No. 25-304, Accelerating Network Modernization, WC Docket No. 25-208, Call Authentication Trust Anchor, WC Docket No. 17-97*. Interconnected VoIP meets the statutory definition of telecommunications provided in 47 U.S.C. § 153(50); the transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received. Consumers talk into a handset, and the service transmits that voice to the recipient. The service does not store, process or transform communication; it transmits it. Whether a service is telecommunications is a technology neutral analysis. Congress did not care about the "facilities" used to provide the service. The Sixth Circuit's recent decision in *Ohio Telecom Association v. FCC,* 124 F.4th 993, 1007 (6th Cir. 2025), supports this conclusion, drawing a clear line between broadband, which provides the capability to retrieve stored data, and voice service, which "merely transmits" what the user creates. Interconnected VoIP falls on the voice side of that line.

mixed and allegedly inseverable does not by itself eliminate all state jurisdiction/oversight.

As explained *supra*, at pages 20-21, discussing State duties under §§ 251-2, in the 1996 Act, Congress assigned States some roles that impact both inter- and intrastate traffic. In addition to Sections 251-2, in 47 USC Section 214 Congress appointed the states as the default designator of carriers that receive federal universal service funds (used to pay for facilities that provide both inter- and intrastate services). 47 U.S.C. § 253 (a) also speaks specifically to the FCC's authority to preempt state laws that effectively prohibit "the ability of any entity to provide any *interstate* or *intrastate* telecommunications service." Significantly, the corresponding reservation of State authority in § 253(b) specifies that *nothing* in this section

> "shall affect the ability of a State to impose on a competitively neutral basis…requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

If there is intrastate traffic in a "mixed" traffic stream, the state retains jurisdiction over that traffic as specified in § 152(b). In such cases, a state can impose the listed requirements on a competitively neutral basis on a mixed-use service provider, even though to do so would also necessarily impact interstate services. If the state actions fall within the listed categories of permissible state requirements, the plain text of § 253(a)&(b) does not permit the FCC to preempt such measures. Definitionally, such state laws cannot be in conflict with Congress's goals. Congress recognized that States are better positioned to and can respond faster to consumer violations, create policies on a competitively neutral basis

tailored to protect consumers against abuse, ensure service quality and preserve universal service.

Moreover, if the FCC decides instead, to promote some version of ancillary jurisdiction for VoIP traffic, the same factors that permit the use of ancillary jurisdiction to satisfy Congressional directions necessarily require the application of the specific protections for state universal service and service quality oversight Congress reserved to the States. Indeed, where the FCC has not acted to impose conflicting service quality standards, a state has already imposed service quality obligations on mixed traffic classified as interstate under the FCC's so-called Ten Percent rule.[37]

Finally, except in some corridor areas, E911 and NG911 calls provided by VoIP service providers are definitionally both intrastate and severable and thus subject to state oversight.[38]

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[37] *See, Qwest Corporation v. Minnesota Public Utilities Commission*, 380 F.3d 367 (8th Cir. 2004) (FCC did not preempt authority of state commission to regulate quality of special access services on interstate lines provided by incumbent provider and other companies.)

[38] NG911 (and IP based services) technical capabilities continue to improve. See, generally, Next Generation 911 (NG911) Services, FCC Webpage, online at: https://www.fcc.gov/policy-and-licensing-division/911-services/NG911 (last accessed May 22, 2026). In 2007, state petitioners argued an FCC order requiring Nomadic VoIP providers to offer 911 services, was inconsistent with its earlier order preempting state oversight because the traffic was supposedly mixed and inseverable. *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570, 579 (8th Cir. 2007). The Eighth Circuit punted. noting: "Our review is limited to the issue whether the FCC's determination was reasonable based on the record existing before it at the time. If, in the future, advances in technology undermine the central rationale of the FCC's decision, its preemptive effect may be reexamined." Id. 483 F.3d at 580.

Conclusion

There is no question the FCC has undertaken a broad rulemaking that raises the prospects of unintended consequences and, that will, in some cases, undermine Congressional directions in the 1996 Act. NARUC respectfully requests the FCC carefully examine comments filed by the affected carriers and NARUC's state commission members.

Respectfully submitted,

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Dated May 26, 2026

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