**Before the**

**Federal Communications Commission**

**Washington, D.C. 20554**

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| In the Matter ofConnect America Fund A National Broadband Plan for Our FutureEstablishing Just and Reasonable Ratesfor Local Exchange CarriersHigh-Cost Universal Service SupportDeveloping a Unified IntercarrierCompensation RegimeFederal-State Joint Board on UniversalServiceLifeline and Link-Up | ::::::::::::::::: | WC Docket No. 10-90GN Docket No. 09-51WC Docket No. 07-135WC Docket No. 05-337CC Docket No. 01-92CC Docket No. 96-45WC Docket No. 03-109 |

**COMMENTS**

**SUBMITTED ON BEHALF OF**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

August 24, 2011

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# INTRODUCTION AND SUMMARY

 On July 29, 2011, six large telecommunications carriers – AT&T, CenturyLink, FairPoint, Frontier, Verizon, and Windstream (Companies) – made an *ex parte* filing with the Federal Communications Commission (FCC) that included their proposal to compre­hensively reform the universal service fund (USF) and intercar­rier compensation (ICC) systems to facilitate more efficient deploy­ment, operation and enhancement of broadband networks in high-cost areas.[[1]](#footnote-1) The pro­posal, known as America’s Broadband Connectiv­ity Plan (ABC Plan or Plan), represents the Companies’ collective answer to the FCC’s ICC/USF reform proposal released on February 9, 2011.[[2]](#footnote-2) On August 3, 2011, the FCC released a public notice entitled *Further Notice into Certain Issues in the Universal Service – Intercarrier Compensation Transformation Proceeding* (Notice),seeking com­ment on the numerous aspects of and issues raised in the ABC Plan. Given the magni­tude of the Plan, the FCC has established a truncated comment period with initial com­ments due on August 24, 2011, and reply comments due on August 31, 2011. These ini­tial comments are timely submitted by the Public Utilities Commis­sion of Ohio (Ohio Com­mission).

 Over the past several years, the Ohio Commission has actively participated in the numerous dockets captioned above[[3]](#footnote-3) and has always appreciated the opportunity to pro­vide its thoughts and recommendations for the FCC’s consideration. The time allotted for comment on the ABC Plan, however, simply does not permit the Ohio Commission, with its limited staff and resources, to ­discuss the Plan as comprehensively as it would like. Nonetheless, the Ohio Commission will address the issue of preemp­tion, which is of primary importance to Ohio. Again, we appreci­ate the comment opportunity.

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# DISCUSSION

## A. Section 251(b)(5)

The success of the ABC Plan’s proposals to reform the ICC system hinges upon the preemption of state authority over intrastate access rates. However, under the Telecom­munications Act of 1996 (Act), author­ity over intrastate access rates rests with the states.

 Section 152(b) of the Act reserves state jurisdiction over intrastate communica­tions service including intrastate access service.[[4]](#footnote-4) The D.C. Circuit Court has suc­cinctly explained the threshold that must be met to deny state jurisdiction under this sec­tion stat­ing:

 [w]hile the apportionment of regulatory power in this dual system is, of course, subject to revision, whether the [FCC] may preempt state regulation of intrastate telephone service depends as in “any pre-emption analysis,” on “whether Con­gress intended the federal regulation supersede state law.” The “best way” to answer that question, the Supreme Court has instructed, “is to examine the nature and scope of the author­ity granted by Congress to the agency.” In cases involv­ing the Communications Act, that inquiry is guided by the language of section 152(b), which the Supreme Court has interpreted as “not only a substantive jurisdictional limitation

on the FCC’s power, but also a rule of statutory construc­tion.”[[5]](#footnote-5)

In the case of intrastate access service, the scope of state authority is set forth in section 152(b). The statutory authority for preempting this state authority must be “so unambigu­ous or straightforward so as to override the command of section 152(b).”[[6]](#footnote-6) In other words, state authority to act, rather than preemption of state authority, is favored.

 In an effort to overcome this hurdle, the proponents of the ABC Plan argue the FCC’s author­ity to preempt state authority over intrastate access rates based upon their *interpreta­tions* of section 251(b)(5) of the Telecommunications Act (Act).[[7]](#footnote-7) Relying on the FCC’s broad interpretation of “telecommunications,”[[8]](#footnote-8) the Plan’s supporters assert that section 251(b)(5), which requires all local exchange carriers (LECs) “to establish recipro­cal compensation arrangements for the transport and termination of telecommunication,”[[9]](#footnote-9) applies to all traffic subject to existing, disparate ICC regimes, including the reciprocal compensation for local traffic regime and the intrastate access regime.[[10]](#footnote-10) Section 251(g) of the Act, they allege, provides additional support for this interpretation.[[11]](#footnote-11) The Ohio Commis­sion respectfully disagrees.

 As the ABC Plan notes, section 251(g) temporarily preserves the regulatory status quo for all traffic within that section’s scope until such time as it is explicitly superseded by regulations prescribed by the FCC. It does not, however, empower the FCC to preempt the authority of the states to restructure and set the rates for local traffic compensa­tion and intrastate access service or to establish a recovery mechanism for lost intrastate revenue, so long as that mechanism is consistent with the requirements of sec­tion 251 and does not substantially prevent the implementa­tion of that section. Section 251(d)(3), specifi­cally preserves state access regulation, a matter that the ABC Plan fails to address.[[12]](#footnote-12) The FCC does, in fact, have the authority to bring intrastate access traffic under the section 251(b)(5) framework to establish the parameters and criteria for

establishing rates.[[13]](#footnote-13) ­Authority for establishing the actual rates, however, remains reserved to the states under section 252.[[14]](#footnote-14) If the FCC ultimately relies on section 251(b)(5) for the legal authority to require specific ICC charges for intrastate access traffic, the Act requires that the actual setting of these rates be left to the states.

The FCC should follow the process established in sections 251 and 252 of the Act for deter­mining rates for the termination and transport of telecommunications traffic.

## B. Doctrine of “Inseverability”

 In addition to relying on section 251(b)(5), the proponents of the ABC Plan cite the “impossibility” or “inseverability” doctrine as a means to preempt state jurisdiction over intrastate access rates by extending the uniform default rate to jurisdictionally intra­state traffic.[[15]](#footnote-15) The Plan’s supporters further assert that technological and marketplace changes have rendered all traffic inseverable.[[16]](#footnote-16)

 ­Preemption on this basis is permissible only where a single service has both inter- and intrastate aspects that cannot be separated. [[17]](#footnote-17) ­It cannot be reasonably concluded that, after decades of separation, interstate and intrastate access services have suddenly become inseparable.[[18]](#footnote-18) Further, the Ohio Commis­sion does not accept that technological and marketplace changes have rendered it impractical to separate interstate access traffic from intrastate access traffic. Clearly, the most significant changes in technology and the marketplace involve the migration away from the traditional wireline network (PSTN) to wireless and IP-based networks. While perhaps IP-based and wireless traffic present more separations challenges than traditional wireline traffic, a significant portion of all telecommunications traffic is still carried over the PSTN. For this traffic, separations are no more impractical today than 10 years ago. The Ohio Commission submits that the devel­opment of competing technolo­gies and markets makes this no less so.

## C. Conflict Preemption

 ­Additionally, the proponents of the ABC Plan argue that continued state regulation of intrastate access rates poses a direct obstacle to the FCC achieving its longstanding pol­icy goals, creating conflict pre­emption.[[19]](#footnote-19) ­Plan proponents are incorrect as there simply is no conflict between state and federal law with regard to intrastate access regula­tion.

 Conflict preemption occurs “when compliance with both state and federal law is impossible, or when the state law ‘stands as an obstacle to the accomplishment and execu­tion of the full purpose and objective of Congress.’”[[20]](#footnote-20) Further, a federal agency may, acting within the scope of its delegated authority, preempt a state regulation that is inconsistent with federal law.[[21]](#footnote-21) That is not the case, however, with regard to state access regulation. Congress has expressly provided for the preservation of state access regula­tion in section 251(d)(3) for regulation that is con­sistent with section 251 and which does not substantially prevent the implementation of the requirements of section 251 and Part II of Title II of the Act.[[22]](#footnote-22) The Ohio Commis­sion submits that state access regulation ­meets the requirements of the Congressional savings clause.

 Section 251(b)(5) sets forth the duty of local exchange carriers to establish recipro­cal compensation for the transport and termination of telecommunications traffic. Section 252(d)(2)(A) authorizes the *states* to determine the just and reason­able rates for purposes of section 251(b)(5).[[23]](#footnote-23) Such determination is to be made on a cost basis and be non-discriminatory.[[24]](#footnote-24) Accordingly, the intent of Congress, as expressed in section 251 and Part II of Title II of the Act, is for the states to establish rates necessary for transport and termination of telecommunications traffic. Such an interpretation is con­sistent with section 152(b), which authorizes the states to establish charges for or in connection to intra­state telecommunications service.[[25]](#footnote-25) While “[[t]he Supreme] Court has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law,”[[26]](#footnote-26) state access regulation does no violence whatsoever to the “careful regulatory scheme” established by the Act. Indeed, when states exercise their authority under section 251, they, in fact, *follow* the dual regulatory scheme intended by Congress. The FCC has the authority to bring intrastate access traf­fic under the section 251(b)(5) framework; however, authority for establishing the actual rates is still reserved to the states under the dual regulatory scheme established by Con­gress in the Act.[[27]](#footnote-27)

## D. COLR/State Legacy Service Obligations Preemption

 The ABC plan proponents assert that failing to eliminate state legacy service and carrier of last resort (COLR) obligations undermines universal service by deter­ring carri­ers from deploying broadband and IP-enabled services.[[28]](#footnote-28) ­The proponents’ filing shows that the opposite is the case. As of December 2010, there were nearly 24 million cable voice subscribers – who generally receive VoIP ser­vice – a 22 percent increase since 2008, and a more-than-fourfold increased since 2005.[[29]](#footnote-29) Further, “[i]incumbent LECs, too, are broadly deploying innova­tive new VoIP services” and “[t]hese services also offer integrated packages of features and capabilities, allowing customers to perform multiple communica­tions simultaneously while also access information on the Internet.”[[30]](#footnote-30) The Plan’s proponents note that, as a result of this growth in intermodal services, there has been a “large decline in tradi­tional wireline service.”[[31]](#footnote-31) Clearly, the deployment of broad­band and IP-enabled services has been and continues to be very robust.

 In Ohio, broadband deployment is 98.26 percent as of April 2011,[[32]](#footnote-32) up 38 percent from April 2010.[[33]](#footnote-33) Nationally, broadband service deployment is 90.5 percent.[[34]](#footnote-34) This level of broadband deployment has been achieved coincident with COLR obliga­tions. The Ohio Commission submits that this actual experience tends to belie the assertions of the Plan’s supporters. Accordingly, the Ohio Commission encourages the FCC to reject Plan proponents’ arguments to avoid their COLR obliga­tions.

 The FCC can preempt state legacy service obligations, including COLR obliga­tions, that are inconsistent with the FCC’s rules, that burden federal universal support mecha­nisms or that are not equitable or non-discrimina­tory pursuant to section 254(f).[[35]](#footnote-35) Legacy service obligations required in Ohio do not meet any of these three criteria for preemption. ­First, as pointed out above, Ohio’s legacy service and COLR obligations are consistent with the FCC’s efforts to achieve ubiquitous broad­band deployment. In Ohio at least, the deployment is in fact occurring. Broadband deployment will occur for sound business reasons, whether these obligations exist or not. In those areas where business considerations limit deploy­ment of broadband service, removing the COLR obligation will not ­change this result. Nor do legacy and COLR obligations bur­den federal univer­sal support mechanisms. To the contrary, some carriers receiving univer­sal service sup­port have used this support to deploy broadband.[[36]](#footnote-36) In doing so, these carriers have used universal service support in such a manner to meet the FCC’s broadband deployment objec­tives and, in turn, to promote the FCC’s policy of universal broadband service. Finally, the argument that COLR obligations are not an “equitable and non-discrimina­tory” form of promoting universal service is a *non sequitur.* As the beneficiaries of dec­ades of monopoly regulation, ILECs have been afforded many advantages that competi­tive carriers have not. Consequently, Congress, through the Act, and the FCC, through its rules, have imposed burdens on the ILECs that have not been imposed on competitive carriers.[[37]](#footnote-37) Accordingly, the Ohio Commission urges the FCC to reject the arguments of the Plan’s supporters and maintain state legacy service and COLR obligations.

## E. State Access Reform

 The Ohio Commission strongly believes that intrastate access regulation falls within authority granted to the states under the Act. It also recognizes that ICC reform is long overdue. Accordingly, the Ohio Commission has opened its own intrastate access reform proceeding.[[38]](#footnote-38) Implementation of the ABC Plan would detrimentally affect the states’ ability to guarantee that all carriers recover their costs associated with intrastate access. Like the ABC Plan, the access reform plan proposed by the Ohio Commission staff includes a unified rate with intrastate access rates mirroring interstate rates.[[39]](#footnote-39) The Ohio Commission suspects that most, if not all, states that have undertaken access reform have done likewise. Nonetheless, this is a voluntary approach that the states have adopted. FCC preemption of state authority to set intrastate access rates, would jeopard­ize carriers’ abilities to recover their costs of providing such service should the intrastate rate proposed by the Plan prove to be insufficient. This, in turn, could lead to uneven results – windfalls for some carriers and shortfalls for others. The Ohio Commission urges the FCC to consider this possibil­ity and to recognize the authority conferred upon the states, by the Act, to regulate intrastate access.[[40]](#footnote-40)

# CONCLUSION

 Ohio has long held that the states have delegated authority under the Act to estab­lish intrastate access rates and, as such, may not be preempted from exercising this author­ity under any access reform proposal. These comments further articulate the Ohio Commission’s position in this regard. Nonetheless, due to the short time granted to com­ment on the ABC Plan, the Ohio Commission is unable to provide comment on each legal argument that the Plan’s proponents have made in support of preemption. Accord­ingly, the silence of the Ohio Commission with regard to any argument or justifica­tion for preemp­tion not addressed in these comments should not be construed as agreement with or acceptance by the Ohio Commission. The Ohio Commission respectfully requests that the FCC give its studied consideration to these comments and it appreciates the oppor­tunity to provide its thoughts and recommendations for consideration.

Respectfully submitted,

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1. Letter from Robert W. Quinn, Jr., AT&T, Steve Davis, CenturyLink, Michael T. Skrivan, FairPoint, Kathleen Q. Abernathy, Frontier, Kathleen Grillo, Verizon, and Michael D. Rhoda, Windstream, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.* (filed July 29, 2011) (ABC Plan). [↑](#footnote-ref-1)
2. Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554 (Rel. February 9, 2011) (NPRM/FNPRM). [↑](#footnote-ref-2)
3. *See, e.g., In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (Comments of the Public Utilities Commission of Ohio) (Filed May 24, 2005) (Missoula Plan Comments); *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Lifeline and Link Up, Universal Service Con­tribution Methodology, Numbering Resource Optimization, Implementation of Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercar­rier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, IP-Enabled Service,* WC Docket No. 05-337, CC Docket No. 96-45, WC Docket No. 03-109, WC Docket No. 06-122, CC Docket No. 99-200, CC Docket No. 96-98, CC Docket No. 01-92, CC Docket No. 96-, WC Docket No. 04-36, (Comments Submitted on Behalf of the Public Utilities Commission of Ohio) (Filed Nov. 26, 2008); *Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Support, Developing a Unified Inter­carrier Compensation Regime, Federal-State Joint Board on Universal Service, Life­line and Link Up*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, (Comments Submitted on Behalf of the Public Utilities Commission of Ohio) (Filed April 18, 2011) (ICC/USF Reform Comments). [↑](#footnote-ref-3)
4. *See* 47 U.S.C. § 152(b) (2011). “Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, *nothing* in this chapter shall be construed to apply or give the [FCC] jurisdiction with respect to…*charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier*…” [Emphasis added]. [↑](#footnote-ref-4)
5. *New England Pub. Comm. Council v. F.C.C.*, 334 F3d 69, 75 (D.C. Cir. 2003) (citations omitted). [↑](#footnote-ref-5)
6. *Illinois Pub. Telecomm. Ass’n., v. F.C.C*., 117 F3d 555, 561 (D.C. Cir. 1997) quoting *Louisiana Pub. Service. Comm. v. FCC*, 476 U.S. 355, 377 (1986). [↑](#footnote-ref-6)
7. *See* ABC Plan, Attachment 5: Legal Authority White Paper (Attachment 5) at 9-17; 47 U.S.C. §§ 251, 252 (2011). [↑](#footnote-ref-7)
8. 47 U.S.C. § 153(43) (2011). “The term ‘telecommunications’ means the transmis­sion, between or among points specified by the user, of information of the user’s choos­ing, without change in the form or content of the information as sent and received.”

 *See* NPRM/FNPRM at ¶ 513. [↑](#footnote-ref-8)
9. 47 U.S.C. § 251(b)(5) (2011). [↑](#footnote-ref-9)
10. *See* Attachment 5 at 11. [↑](#footnote-ref-10)
11. *Id*. [↑](#footnote-ref-11)
12. *See* 47 U.S.C. § 251(d)(3) (2011). “Preservation of state access regulations. 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; and (C) does not substantially prevent implementation of the requirements of this section and the pur­poses of this part.” [↑](#footnote-ref-12)
13. *See Connect America Fund, A National Broadband Plan for Our Future, Establish­ing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Univer­sal Support, Developing a Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link Up*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, (Comments Submitted on Behalf of the Public Utilities Commission of Ohio at 8-9) (Filed March 31, 2011) (Section XV Com­ments); ICC/USF Reform Comments at 51-53. [↑](#footnote-ref-13)
14. *See* 47 U.S.C. § 252 (2011). In recent comments, the Ohio Commission recommended that the FCC follow the same process established in sections 251 and 252 of the Act for determining rates for transport and termination of VoIP traffic. Using this process, the FCC would establish the parameters, criteria and methodology for the gradual transition of ICC traffic as well as the parameters for a long-term ICC regime, but leave the details of implementation to the states. Such an approach would preserve and promote the established authority of the states to determine the appropriate mechanism(s) to recover intrastate revenue lost during he transition phase as well as the ultimate unified ICC rates, so long as such rates are consistent with sections 251 requirements and the FCC’s parameters. *See* Section XV comments at 8 – 9. [↑](#footnote-ref-14)
15. *See* Attachment 5 at 18. [↑](#footnote-ref-15)
16. *Id*. at 21. [↑](#footnote-ref-16)
17. *See* Missoula Plan Comments at 4 citing *Public Service Comm.v. FCC*, 909 F2d 1510 (D.C. Cir. 1990). In its comments, the Ohio Commission referred to the “inseverability” doctrine as the “mixed-use” doctrine. [↑](#footnote-ref-17)
18. *Id*. at 4-5. [↑](#footnote-ref-18)
19. Attachment 5 at 26. [↑](#footnote-ref-19)
20. *United States v. Locke*, 529 U.S. 89, 109 (2000) (internal quotations omitted). [↑](#footnote-ref-20)
21. *Id.* at 110. [↑](#footnote-ref-21)
22. 47 U.S.C. § 251(d)(3)(A)-(C) (2011). [↑](#footnote-ref-22)
23. 47 U.S.C. § 252(d)(2) (2011). “For the purpose of compliance by an incum­bent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms of conditions for reciprocal compensation to be just and reasonable unless i) such terms and conditions provide for the 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; and ii) such terms and con­ditions determine such costs on the basis of a reasonable approximation of the addi­tional costs of terminating such calls.” Section 251(d)(2) is set forth in the negative. The inverse of this section is that state commissions *shall* consider the terms and conditions of reciprocal compensation just and reasonable if they meet the requirements set forth in subsec­tions (A)(i) and (A)(ii). [↑](#footnote-ref-23)
24. 47 U.S.C. § 252(d)(2)(A)(i)(ii) (2011). [↑](#footnote-ref-24)
25. *See* 47 U.S.C. § 152(b)(1) (2011). [↑](#footnote-ref-25)
26. *Qwest Corp. v. Arizona Corp. Com’n*, 567 F3d 1109, 1120 (9th Cir. 2009) quot­ing *Geier v. Am. Honda Motor Co*., 529 U.S. 861, 870 (2000). [↑](#footnote-ref-26)
27. *See* Section XV Comments at 8-9; ICC/USF Reform Comments at 53-54. [↑](#footnote-ref-27)
28. Attachment 5 at 49. [↑](#footnote-ref-28)
29. *Id*. at 21. [↑](#footnote-ref-29)
30. *Id.* at 22. [↑](#footnote-ref-30)
31. Attachment 5 at 23. [↑](#footnote-ref-31)
32. Data obtained from Connected Nation. For purposes of this analysis, broadband was defined as greater than 3Mbps download speed and .768 Mbps upload speed. The 98.26 percent figure does not include wireless broadband. When wireless broadband is included, the level of deployment increases to 99.3percent. [↑](#footnote-ref-32)
33. *Id*. [↑](#footnote-ref-33)
34. *Id*. Cf. Federal Communication Commission, *Connecting America: The National Broadband Plan* at 20 (rel. March 16, 2010) (NBP). According to the NBP, approxi­mately 95% (roughly 290 million Americans) of the U.S. population live in housing units with access to terrestrial, fixed broadband infrastructure capable of meeting the NBP’s tar­get universalization download speed of at least 4 Mbps actual download speed. [↑](#footnote-ref-34)
35. Attachment 5 at 66. [↑](#footnote-ref-35)
36. *See* NBP at 141. [↑](#footnote-ref-36)
37. S*ee, e.g.,* 47 U.S.C. § 251(c) (2011). Section 251(c) imposes additional interconnec­tion obligations on ILECs that are not imposed on competitive local exchange carri­ers. [↑](#footnote-ref-37)
38. *In the Matter of the Commission’s Investigation into Intrastate Carrier Access Reform Pursuant to Sub. S.B. 162*, Case No. 10-2387-TP-COI (Entry) (Issued Nov. 3, 2011) (Ohio Access Proceeding). [↑](#footnote-ref-38)
39. Ohio Access Proceeding, Appendix A. [↑](#footnote-ref-39)
40. Alternatively, the Ohio Commission recommends that the FCC consider establishing a default ICC regime that would be implemented only in those states that have not undertaken ICC reform, while states that have undertaken a reform process would continue that process so long as it is consistent with the Act and the FCC’s policy objectives. This approach addresses the FCC’s desire to encourage states that have not undertaken reform to do so without penalizing states that have begun this process. *See* NPRM/FNPRM at ¶¶ 544, 547, 549. Additionally, recognition of state authority over transport and termination rates for *all* intrastate telecommunications traffic would enable states that have undertaken access reform to assume a leading role in promoting broadband deployment within their respective jurisdictions. *See* Section XV Comments at 3 – 9. In the Ohio Commission’s view, such an approach provides an effective means of achieving the FCC’s policy objective of universal broadband deployment. [↑](#footnote-ref-40)