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

In the Matter of	:	
Connect America Fund	:	WC Docket No. 10-90
	:	
A National Broadband Plan for Our Future	:	GN Docket No. 09-51
	:	
Establishing Just and Reasonable Rates for Local Exchange Carriers	:	WC Docket No. 07-135
	:	
High-Cost Universal Service Support	:	WC Docket No. 05-337
	:	
Developing a Unified Intercarrier Compensation Regime	:	CC Docket No. 01-92
	:	
Federal-State Joint Board on Universal Service	:	CC Docket No. 96-45
	:	
Lifeline and Link-Up	:	WC Docket No. 03-109

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] 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] 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).

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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).

2 Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554 (Rel. February 9, 2011) (NPRM/FNPRM).

Over the past several years, the Ohio Commission has actively participated in the numerous dockets captioned above[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.

[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).

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] 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

[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].

> on the FCC's power, but also a rule of statutory construction."[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] 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] Relying on the FCC's broad interpretation of "telecommunications,"[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] applies to all traffic subject to existing, disparate ICC regimes, including the reciprocal

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5 *New England Pub. Comm. Council v. F.C.C.*, 334 F3d 69, 75 (D.C. Cir. 2003) (citations omitted).

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).

7 *See* ABC Plan, Attachment 5: Legal Authority White Paper (Attachment 5) at 9-17; 47 U.S.C. §§ 251, 252 (2011).

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."

8 *See* NPRM/FNPRM at ¶ 513.

9 47 U.S.C. § 251(b)(5) (2011).

compensation for local traffic regime and the intrastate access regime.[10] Section 251(g) of the Act, they allege, provides additional support for this interpretation.[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] 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

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10 *See* Attachment 5 at 11.

11 *Id.*

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."

establishing rates.[13] Authority for establishing the actual rates, however, remains reserved to the states under section 252.[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 intra-

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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.

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.

state traffic.[15] The Plan's supporters further assert that technological and marketplace changes have rendered all traffic inseverable.[16]

Preemption on this basis is permissible only where a single service has both inter- and intrastate aspects that cannot be separated.[17] It cannot be reasonably concluded that, after decades of separation, interstate and intrastate access services have suddenly become inseparable.[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.

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15 *See* Attachment 5 at 18.

16 *Id*. at 21.

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.

18 *Id*. at 4-5.

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] 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] Further, a federal agency may, acting within the scope of its delegated authority, preempt a state regulation that is inconsistent with federal law.[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] The Ohio Commission submits that state access regulation - meets the requirements of the Congressional savings clause.

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19 Attachment 5 at 26.

20 *United States v. Locke*, 529 U.S. 89, 109 (2000) (internal quotations omitted).

21 *Id.* at 110.

22 47 U.S.C. § 251(d)(3)(A)-(C) (2011).

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] Such determination is to be made on a cost basis and be non-discriminatory.[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] 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] 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

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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).

24 47 U.S.C. § 252(d)(2)(A)(i)(ii) (2011).

25 *See* 47 U.S.C. § 152(b)(1) (2011).

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).

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]

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] 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] 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] The Plan's proponents note that, as a result of this growth in intermodal services, there has

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27 *See* Section XV Comments at 8-9; ICC/USF Reform Comments at 53-54.

28 Attachment 5 at 49.

29 *Id*. at 21.

30 *Id.* at 22.

been a "large decline in traditional wireline service."[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] up 38 percent from April 2010.[33] Nationally, broadband service deployment is 90.5 percent.[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] 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

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31 Attachment 5 at 23.

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.

33 *Id*.

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.

35 Attachment 5 at 66.

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] 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] 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

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[36] *See* NBP at 141.

[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.

long overdue. Accordingly, the Ohio Commission has opened its own intrastate access reform proceeding.[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] 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]

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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).

39 Ohio Access Proceeding, Appendix A.

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.

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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01-92	Developing a Unified Intercarrier Compensation Regime.
96-45	FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE
03-109	In the Matter of Lifeline and Link-Up

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