

HB

384

<TARGET><BILL>HB 384</BILL><SUBJECT>HB
384</SUBJECT><COMM>HL&C30</COMM></TARGET>

Session:
State Capitol
Juneau, Alaska 99801
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Alaska House of Representatives
David Guttenberg



District 4

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MEMORANDUM

TO: Representative Sam Kito
Chair House Labor and Commerce Committee

FROM: Representative David Guttenberg

DATE: March 20, 2018, 2018

RE: HB384 Hearing Request

Representative Kito,

I am requesting a hearing in the House Labor and Commerce Committee for HB384, REGULATORY COMMISSION OF ALASKA; BROADBAND INTERNET. I appreciate your consideration and look forward to presenting this important piece of legislation to the Labor and Commerce Committee.

Best Regards,

Representative David Guttenberg

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SPONSOR STATEMENT

HB 384: REGULATORY COMM OF AK; BROADBAND INTERNET

House Bill 384, Regulatory Commission of Alaska; Broadband Internet, clearly defines broadband internet as a public utility that is regulated by AS 42.05, the Alaska Public Utilities Regulatory Act.

Current statute defines a corporation furnishing telecommunications to the public as a public utility (AS 42.05.990(6)(B)). Telecommunications are defined as “the transmission and reception of messages, impressions, pictures, and signals by means of electricity, electromagnetic waves, and any other kind of energy, force, variations, and impulses whether conveyed by cable, wire, radiated through space, or transmitted through other media within a designated area or between designated points” (AS 42.05.990(13)). Statute clearly defines telecommunications as a public utility and gives the Regulatory Commission of Alaska the responsibility to regulate providers to “maintain and further efficiency, availability and affordability” of telecommunications services (AS 42.05.145(a)).

While statute establishes that the RCA has the responsibility to regulate telecommunications providers as public utilities, the rapidly changing nature of technology has created uncertainty about what services are included in their purview. HB384 clarifies the RCA’s responsibilities by specifically including ‘broadband internet access’ under the definition of telecommunications.

HOUSE BILL NO. 384

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTIETH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVES GUTTENBERG, Gara, Tuck, Drummond

Introduced: 2/21/18

Referred: Labor and Commerce, Finance

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to the Regulatory Commission of Alaska and broadband Internet**
2 **regulations."**

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 * **Section 1.** AS 42.05.990(6) is amended to read:

5 (6) "public utility" or "utility" includes every corporation whether
6 public, cooperative, or otherwise, company, individual, or association of individuals,
7 their lessees, trustees, or receivers appointed by a court, that owns, operates, manages,
8 or controls any plant, pipeline, or system for

9 (A) furnishing, by generation, transmission, or distribution,
10 electrical service to the public for compensation;

11 (B) furnishing telecommunications service, including
12 broadband Internet access, to the public for compensation;

13 (C) furnishing water, steam, or sewer service to the public for
14 compensation;

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Fiscal Note

State of Alaska
2018 Legislative Session

Bill Version: HB 384
Fiscal Note Number: _____
() Publish Date: _____

Identifier: HB384-DCCED-RCA-03-23-18
Title: REGULATORY COMM OF AK; BROADBAND
INTERNET
Sponsor: GUTTENBERG
Requester: (H) Labor and Commerce

Department: Department of Commerce, Community and
Economic Development
Appropriation: Regulatory Commission of Alaska
Allocation: Regulatory Commission of Alaska
OMB Component Number: 2417

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2019 Appropriation Requested	Included in Governor's FY2019 Request	Out-Year Cost Estimates					
			FY 2019	FY 2020	FY 2021	FY 2022	FY 2023	FY 2024
OPERATING EXPENDITURES								
Personal Services								
Travel								
Services								
Commodities								
Capital Outlay								
Grants & Benefits								
Miscellaneous								
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None								
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time								
Part-time								
Temporary								

Change in Revenues

None								
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimated SUPPLEMENTAL (FY2018) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2019) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? Yes
If yes, by what date are the regulations to be adopted, amended or repealed? 01/01/23

Why this fiscal note differs from previous version/comments:

Not applicable, initial version.

Prepared By:	Stephen McAlpine, Chairman	Phone:	(907)276-6222
Division:	Regulatory Commission of Alaska	Date:	03/23/2018
Approved By:	Catherine Reardon, Director	Date:	03/23/2018
Agency:	Division of Administrative Services, DCCED		

LEGAL SERVICES

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MEMORANDUM

February 18, 2018

SUBJECT: Broadband Internet Regulations
(Work Order No. 30-LS1211\A)

TO: Representative David Guttenberg
Attn: Seth Whitten

FROM: Allison M. Laffen *AML*
Legislative Counsel

Attached is the above mentioned bill draft based on your request to provide the Regulatory Commission of Alaska (RCA) with regulatory authority over broadband Internet. I have the following drafting comments.

RCA Authority. As I mentioned in my conversation with Mr. Whitten on February 16, 2018, it appears that the RCA has sufficient authority under current law to regulate broadband Internet service providers.¹ Based on my conversation with Mr. Whitten and my understanding that the RCA authority over broadband internet is in dispute, the bill draft amends the definition of "public utility" or "utility" under AS 42.05.990(6) to clarify that the furnishing of telecommunications services includes broadband Internet service. The bill draft includes a definition of "broadband internet access" based on the material you sent and the definition of "broadband internet access" in AS 15.13.040 (m) (l) (A) (ii).

Federal preemption. As I discussed with Mr. Whitten, RCA regulation of broadband Internet may raise federal preemption concerns.

The Alaska Supreme Court has noted that "[u]nder the Supremacy Clause of the federal

¹ See AS 42.05.990(6)(B), defining "utility" to include an entity that furnishes "telecommunications service to the public for compensation." AS 42.05.990(13) defines "telecommunications" as "the transmission and reception of messages, impressions, pictures, and signals by means of electricity, electromagnetic waves, and any other kind of energy, force variations, or impulses whether conveyed by cable, wire, radiated through space, or transmitted through other media within a specified area or between designated points." It is my understanding that this definition includes broadband Internet services. The RCA also directly regulates telecommunications utilities under AS 42.05.145 and 42.05.860.

Representative David Guttenberg
February 18, 2018
Page 3

requirements for any aspect of broadband service that we address in this order.^[2]

An attempt by the RCA to reinstate the very rules or requirements that the FCC intends to preempt by the Order would likely be unconstitutional. I am not an expert on federal Internet regulations and would be unable to advise you on every possible area of Internet regulation that may be preempted by federal law, you may want to consult with the RCA or an expert on federal Internet regulations.

If I may be of further assistance, please advise.

AML:boo
18-102.boo

Attachment

² *Declaratory Ruling, Report and Order, and Order: In the Matter of Restoring Internet Freedom*, WC Docket No. 17 - 08, Page 109, available at http://apps.fcc.gov/edocs_public/attachmatch/DOC-347927A1.pdf.

Alaska Telecom Association

Dave Goggins
President

201 E. 56th Avenue, Suite 114
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(907) 563-4000
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Christine O'Connor
Executive Director

March 29, 2018

The Honorable Sam Kito III
Chair, House Labor and Commerce Committee
State Capitol, Barnes 124
Juneau, AK 99801

RE: HB 384 An Act relating to the Regulatory Commission of Alaska and broadband Internet regulations

Dear Chairman Kito and Members of the Committee,

We are writing to express our opposition to HB384 and provide information regarding the authority federal and state regulators have over broadband service.

Support for an Open Internet

ATA member companies have been steadfast in their commitment to an open internet. We do not and will not impair our customers' access to lawful internet services or content. The Federal Communications Commission recently restored the light-touch regulation that allowed the internet to flourish for over 20 years. To the extent additional rules are needed to guarantee that customers will continue to be in charge of their online experience, we support bi-partisan federal legislation and will continue to work with Alaska's delegation to achieve this result.

Federal Preemption

Under Democratic and Republican leadership, the FCC has unequivocally asserted its jurisdiction over broadband internet access service, noting that "it is well-settled that Internet access is a jurisdictionally interstate service." The FCC expressly prohibits state and local governments from adopting their own separate requirements, including specifically preempting, "any so-called 'economic' or 'public utility-type' regulations."¹ HB384 directly conflicts with this federal preemption by defining providers of broadband internet access as public utilities for purposes of the Regulatory Commission of Alaska, the body which imposes public utility-type regulation on Alaska's utilities.

States' Role

States have a role in oversight of broadband internet access service under existing law. The FCC describes that role as a valued partnership, stating, "We appreciate the many important functions served by our state and local partners, and we fully expect that the states will 'continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints' within the framework of this order."² The states are also expressly authorized to continue to designate eligible telecommunications carriers, administer rights-of-way, and adopt state universal service policies.

¹ See Restoring Internet Freedom Order at paragraphs 194-204.

² Id.



NATIONAL CONFERENCE of STATE LEGISLATURES

BROADBAND STATUTES

Last update: August 11, 2017

Broadband is considered by many to be a fundamental vehicle for new services and applications—such as telecommuting and online education—that require high speed Internet connections. State legislative involvement has been an important factor for successful implementation of broadband in the states. This table provides examples of various types of state broadband initiatives.

State	Statute	Description	Category
Alabama	Code of Ala. § 37-2A-2	Defines broadband and related terms for purposes of public utility regulation.	Definition
Arizona	A.R.S. § 15-249.07	Establishes the Broadband expansion fund and outlines requirements for disbursement.	Funding
Arizona	A.R.S. § 28-7381, et seq.	Defines broadband and related terms for purposes of infrastructure projects.	Definition/Regulation
Arizona	A.R.S. § 42-14403	Requires valuation of broadband assets for telecommunications companies.	Regulation
Arizona	A.R.S. §§ 41-3508; 15-1261	Establishes the “Statewide E-rate Program Fund” and requires all school districts and charter schools that receive e-rate funding to establish an e-rate fund, which may be used to reimburse the school district or charter school for broadband Internet and telecommunications costs.	Funding
Arkansas	A.C.A. § 14-200-101	Defines broadband and provides for regulation by	Definition/Regulation

		expansion and appropriate broadband infrastructure for all areas of the state.	
California	Cal. Gov. Code §14051	Regulates fiber optic cables and broadband placement on state highways.	Regulation
California	Cal. Gov. Code § 53395.3.2	Authorizes any infrastructure financing district funding to be used for broadband.	Funding
California	Cal. Pub. Util. Code § 884	Provides for increased access to broadband and funding.	Regulation/Fund
California	Cal. Pub. Util. Code § 5830	Defines broadband for the purposes of the Public Utility Code.	Definition
California	Cal. Gov. Code §61100(af)	Regulates the provision of broadband service for individuals.	Regulation
California	Cal. Gov. Code § 8885-8889	Authorizes community services districts to construct, own, improve, maintain, and operate broadband facilities and to provide broadband services until a private person or entity can acquire and operate facilities and provide broadband service at a cost and quality of service comparable to that offered by the community services district.	Gov't Ownershi Operation
California	Cal. Pub. Util. Code § 281	Establishes the California Broadband Council. The purpose of the Council is to promote broadband deployment in unserved and underserved areas of the state and broadband adoption throughout the state. The act also imposes duties on the	Coordination an

Colorado	C.R.S. 40-15-102, et seq.	Provides definitions for broadband and related terms for purposes of intrastate telecommunications.	Definitions
Connecticut	Conn. Gen. Stat. § 16-2a.	Establishes an Office of State Broadband.	Coordination an
Connecticut	Conn. Gen. Stat. 32-391	Creates the Broadband Internet Coordinating Council, whose duties involve monitoring trends and developments in the state's efforts to develop a state-wide world-class communications infrastructure; and issuing any reports it deems necessary to the joint standing committee of the General Assembly having cognizance of matters relating to technology.	Coordination an
Delaware	26 Del. C. § 707 et seq.	Establishes and regulates the Delaware Broadband Fund.	Coordination an Leadership/Fun
Delaware	26 Del. C. § 115	Requires certain regulatory assessments be paid directly to the Delaware Broadband Fund.	Regulation/Fun
District of Columbia	D.C. Official Code § 1-1403	Provides that the Office of the Chief Technology Officer shall develop and implement solutions designed to ensure that residents and businesses in all areas of the District have reasonable, affordable access to high-speed Internet services, including obtaining and expending federal grant funds for digital inclusion efforts and awarding sub-grants to nonprofit entities established in the District for the purpose of supporting digital inclusion efforts.	Coordination an Leadership/Fun

		<p>policies with regard to telecommunications and information technology directed toward positioning Hawaii as a leader in broadband communications and applications in the Pacific Region.</p>	
Hawaii	HRS § 27; HRS § 46 / 2013 H.B. 635, Act 264	Requires the state and the counties to approve, approve with modification, or disapprove all broadband-related permits within specified business days of submitting a permit application and a fee; provides that if no action is taken on the next business day, the application will be deemed approved; relates to cable installation, tower construction, placement of broadband equipment in the road rights-of-way, undersea boring, or the landing of an undersea communications cable.	Regulation
Idaho	Idaho Code § 33-910	Provides definitions for the purpose of broadband infrastructure improvement grant fund.	Definition/Regu
Idaho	Idaho Code §63-3029I	Creates a tax credit for qualified broadband expenditures.	Funding
Idaho	Idaho Code § 67-4734	Creates the Idaho opportunity fund and regulates the use of such funds.	Funding
Illinois	ILCS 20 § 661/1 et seq.	Illinois' High Speed Internet Services and Information Technology Act.	Coordination an
Illinois	Ill. Rev. Stat. ch. 20, §661/20 et seq.	Relates to broadband	Coordination an

service deployment and adoption initiative, creates a statewide geographic information system of telecommunications and information technology services and exempts from the state gross retail tax certain tangible personal property used to provide broadband services.

Indiana	Ind. Code § 6-1.1-12.5	Provides for the establishment by counties of infrastructure development zones in which natural gas, broadband and advanced services, and water infrastructure are exempt from property taxation; allows certain electric customers to petition for rate discounts; authorizes a utility that provides electric or gas service to petition to recover transmission, distribution, and storage improvement costs; provides for coordination of public right-of-way use for transportation infrastructure improvement projects.	Regulation
Indiana	Ind. Code § 8-1-2.6-1.3 / 2013 S.B. 492	Provides that a communications service provider is not eligible for property tax exemptions for broadband service if the facilities or technologies are used in a location where wireline broadband service is provided.	Regulation
Indiana	Ind. Code § 32-30-16-17	Regulates broadband internet service providers.	Regulation
Iowa	Iowa Code § 8B.1 et seq.	Creates and provides for the administration of a broadband	Funding

partnerships among broadband providers and relevant government entities to encourage the deployment and adoption of advanced broadband services; Serve as a resource for all citizens, broadband providers, and technology businesses regarding broadband and information technology issues; Report progress on deployment and adoption to the Legislative Research Commission upon request and at least annually; and Ensure notification to the public of the availability of public funds for broadband and information technology investments prior to awarding any contracts or grants.

Kentucky	Ky. Rev. Stat. §224A.1121	<p>Creates an incentive program to give highest funding priority to those projects which most effectively provide broadband service to the greatest number of unserved Kentucky citizens and at the lowest cost. Funding shall not be used for projects with an intent to deploy broadband service to areas where broadband service already exists; however, it may consider funding for projects that, in providing broadband service for an unserved area, create an overlap in existing broadband coverage for less than twenty percent (20%) of households in the proposed coverage area.</p>	Coordination an
Kentucky	Ky. Rev. Stat. §278.546 et seq.	Exempts a number of	Regulation

conduct an annual review of all loans, financial instruments that require repayment, or lines of credit with the Michigan Broadband Development Authority. Specifies that the review is to include an analysis of the Michigan Broadband Development Authority's ability to repay all of its debts to the Authority. Requires an analysis of the number of authority assisted or financed developments and homes purchasing high-speed internet connections at substantially reduced rates.

Michigan	Mich. Comp. Laws § 484.2102	Provides definitions of "broadband service" and related terms.	Definition
Michigan	Mich. Comp. Laws §484.3201 et seq.	Creates the Michigan Broadband Development Authority.	Coordination an
Minnesota	Minn. Stat. §237.012	Establishes a goal for the state that by no later than 2015, all state residents and businesses have access to broadband that provides specified download and upload speeds. Requires annual reports by the Commissioner of Commerce that identify barriers impeding the achievement of those goals and suggests strategies to overcome those barriers, and requires the commissioner of commerce to appoint and convene a broadband advisory group.	Coordination an

Montana	M.C.A. 35-18-102 et seq.	Defines broadband related terms and allows for cooperative nonprofit membership corporations to be organized for the purpose of making broadband available in rural areas.	Definition/Regu
Nebraska	Neb. Rev. Stat. §86-579 et seq.	Creates the Nebraska Internet Enhancement Fund; sets terms for the fund's use.	Funding/Regula
Nevada	Nev. Rev. Stat. § 408__ [Added by Acts 2017, ch. 120, § 25]	Creates the Telecommunications Advisory Council.	Coordination an
Nevada	Nev. Rev. Stat. §704.684 et seq.	Exempts broadband service from regulation by the Nevada Public Utility Commission except under certain circumstances.	Regulation
Nevada	Nev. Rev. Stat. § 704.6878 / 2013 A.B 486	Revises provisions relating to telecommunication providers; authorizes competitive telecommunication providers to apply to the State Public Utilities Commission for relief from the obligations and status of a provider of last resort when alternative services are available; revises provisions relating to the regulation of Internet Protocol-enabled service or Voice over Internet Protocol service.	Regulation
New Hampshire	N.H. Rev. Stat. Ann. § 12-A:59	Establishes the position of Director of Broadband Technology Planning and Development in the Department of Resources and Economic Development and provides that the director's duties include the development of a	Coordination an

		not to be regulated by the Public Service Commission.	
North Carolina	N.C. Gen. Stat. § 62-113	Permits certain broadband services providers to offer voice grade service along with broadband service outside the providers' service territory or franchise area.	Regulation
North Carolina	N.C. Gen. Stat. §§160A:340 et seq.	Regulates the provision of broadband services by cities.	Gov't Ownership/Operation
North Carolina	N.C. Gen. Stat. § 143B-437.01	Creates the Industrial Development Fund; provides funds to assist local government units of the most economically distressed counties in the state in creating and retaining jobs in certain industries. Allows funds to be used for high-speed broadband.	Coordination and opportunity
North Carolina	N.C. Gen. Stat. § 153A-349.60	Provides that counties may provide grants to unaffiliated qualified private providers of highspeed Internet access service, as that term is defined in G.S. 160A-340(4), for the purpose of expanding service in unserved areas for economic development in the county	Regulation/Funding
North Dakota	N.D. Cent. Code § 49-21-01	Provides definitions of broadband related terms.	Definition
Ohio	Oh. Rev. Stat. § 4905.02	Revises state regulation of telephone companies, including any broadband service offered by a telephone company.	Regulation
Oklahoma	Okla. Stat. tit. 17, §139.110	Prohibits the Oklahoma Corporation Commission from	Regulation

		attractive environment for investment in broadband technology by establishing certainty regarding the regulatory treatment of that technology.	
Texas	Tex. Util. Code §43.001 et seq.	Encourages the deployment of Broadband over Power Lines (BPL) by permitting affiliates of the electric utility, or permitting unaffiliated entities, to own or operate all or a portion of such BPL systems. Provides the appropriate framework to support the deployment of BPL.	Coordination an
Utah	Utah Code § 54-8b-15	Creates and regulates the Universal Public Telecommunications Service Support Fund.	Coordination an
Utah	Utah Code §63M-1-2301 et seq.	Creates a Rural Broadband Service Account. Provides for grants to assist providers that want to deploy rural broadband service.	Funding
Vermont	Vt. Stat. tit. 30, §8079	Authorizes the Vermont telecommunications authority to build infrastructure to meet the cellular and broadband needs of unserved Vermonters.	Coordination an
Vermont	Vt. Stat. Ann. tit. 30, §8090 et seq.	Requires electric or gas utility companies to allow communications service providers access to their infrastructure for the installation and maintenance of communications facilities. Specifies that the communications service provider is responsible for any	Rights-of-way

reduce the cost of broadband access.

Virginia	Va. Code Ann. § 15.2-2419 et seq.	Creates the Broadband Infrastructure Loan Fund which empowers local governments to build or facilitate the building of wired or wireless broadband infrastructure to areas currently unserved by broadband services.	Funding
Washington	Wash. Rev. Code §§ 43.330.403 to 43.330.415	Creates a broadband mapping account, coordinates use of funds. Authorizes creation of a geographic information system map with broadband adoption information, availability information, type of high-speed internet deployment technology, and available speed tiers for high-speed internet based on any publicly available data.	Funding, Coord Leadership
West Virginia	W. Va. Code § 31G-1 et seq.	Establishes and regulates the Broadband Enhancement Council. Also regulates broadband expansionary policies.	Coordination an Leadership/Reg
West Virginia	W. Va. Code §31-15C	Establishes the Broadband Deployment Council and creates the Broadband Deployment Fund. Directs the Council to develop a strategy to provide universal broadband access by stimulating demand for broadband services and by constructing the necessary infrastructure. Requires a report describing the existing broadband infrastructure owned, leased, used, or	Coordination an

DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

Re: *Connect America Fund*, WC Docket No. 10-90, *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, *Connect America Fund—Alaska Plan*, WC Docket No. 16-271.

I have seen firsthand what broadband means for Alaska. I have toured the Arctic Regional Supercomputing Center in Fairbanks. I have touched the fiber optic cables that have brought high-speed Internet access and economic growth to the Mat-Su Valley. I have spoken with the board of the Alaska Native Tribal Health Consortium about how telehealth allows the Southcentral Foundation in Anchorage to connect native Alaskans statewide. I have heard what broadband means to the Gwitchyaa Zhee Gwich'in Tribal Government and have seen what it's meant for Tatitlek, a traditional Alutiiq coastal village. And I have met patrons of the Tuzzy Library and students at the Iisagvik Tribal College in Barrow, 320 miles north of the Arctic Circle, about how the Internet has helped keep tribal communities informed and intact.

But when it comes to broadband, Alaska has a problem that most of the United States doesn't: High-capacity, terrestrial middle-mile connections between communities are few and far between. That's because the distances in Alaska are vast—the state is larger than Texas, California, Florida, and New York *combined*—and most remote villages are not accessible by road. As such, those living in the Alaskan Bush often connect to the Internet through performance-limiting satellite links at speeds of less than 1 Mbps. Those are the speeds at which most Americans accessed the Internet more than a decade ago.

The Alaska Plan (and this *Order* largely adopting it) presents a chance to fix these problems. Alaska currently receives about \$150 million a year in universal service funding. The Alaska Plan locks that money in for the next ten years, committing over \$1.5 billion to preserve and advance universal service in Alaska. That's money the state needs.

But the Alaska Plan won't help everyone. It dedicates no funding to solve the middle-mile problem. So even if every carrier does what it's promised to do over the next ten years, 21,871 rural Alaskans won't have access to 4G LTE mobile broadband (and of those, 10,202 won't even have 3G service).¹ 46,650 rural Alaskans won't have access to the 25 Mbps fixed broadband that is the Commission's benchmark (of those 5,971 won't even have 4 Mbps fixed broadband—the standard from 6 years ago).² In other words, tens of thousands of Alaskans will have to wait at least a decade before being connected with the broadband speeds that most Americans take for granted. That's a shame.

The problem isn't a lack of money; it's the waste of taxpayer dollars. In three separate ways, the *Order* violates basic tenets of universal service reform that we have employed since the *Universal Service Transformation Order* to maximize the value of the Universal Service Fund for consumers.³

¹ See Letter from Christine O'Connor, Executive Director, Alaska Telephone Association, to Marlene Dortch, Secretary, FCC, WC Docket No. 10-90, Attach. at 19 (May 9, 2016) (ATA *Ex Parte* Letter). Unfortunately, even those receiving 4G LTE service may not get access to the speeds urban Americans are accustomed to. Compare *id.* at 24, 25 (identifying 13,000 LTE users promised only 1 Mbps connections and another 42,443 LTE users promised only 2 Mbps connections in areas without fiber backhaul), with *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All America in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 15-191, 2016 Broadband Progress Report, 31 FCC Rcd 699, 735 Table 4 (2016) (showing that 55% of urban Americans already have access to LTE service at 10 Mbps).

² See ATA *Ex Parte* Letter Attach. at 1.

³ *Connect America Fund et al.*, WC Docket Nos. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011).

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Demonstration of the New National Broadband Map* (February 22, 2018)

To have a fair shot at 21st century success, you need access to broadband. This is true in urban areas, in rural areas, and in everything in between. But according to the data from this agency, more than 24 million Americans lack access to broadband. That is not acceptable. It consigns too many of our fellow citizens to the wrong side of the digital divide. It's a problem we need to fix.

So today we start with a map. This is important because the old adage is true: you cannot manage problems you do not measure. With this tool, we can identify where service is and is not, where facilities are being built and where they are lacking, and how communities are connected and how they are at risk of falling behind. In other words, we have a blueprint for action that will provide everyone from consumers to policymakers with more information.

This is good. So thank you to our staff for the hard work that went into this update. It represents a step forward and comes not a moment too soon.

But while this is good for starters, we can't stop here. For this effort to be truly meaningful, there are some serious shortcomings we need to address.

First, any responsible map should incorporate the availability of mobile broadband services. This does not. I think it does the country a disservice to have a National Broadband Map with only half the picture. It is disappointing if our efforts end here with fixed technologies. In other words, we still have work to do.

Second, this map has errors. How do I know? I looked up my house and can tell you with good authority it lists service that is not available at my location. You can go ahead and plug in your address and you might find the same thing.

So I think it's time for a public project. It's time to use the wisdom of crowds to fix deficiencies in our data. It's time to use crowdsourcing to improve this new National Broadband Map. No matter who you are or where you live you probably have a story to tell—about how service stops short of your street, about how speeds are not what are commercially reported, about how you're waiting for deployment that was promised long ago. Or maybe you have tales to share about how another service not listed on our records is available at your location.

I know our map would be better off if we had this data. I know that slicing and dicing data in Washington conference rooms never gives you a truly accurate picture of what is really happening on the ground. I think we can come together and do this. And to get this effort started, I set up an e-mail box at the FCC: broadbandfail@fcc.gov. It's for those who want to relay to this agency their facts, their stories, and the difficulties they have had securing broadband. It is a way for this agency to learn what is wrong with our map—and how we can

make it right. We can do this. Let's make it happen. Let's build the first Citizens Broadband Map.

**DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Connect America Fund*, WC Docket No. 10-90, *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, *Connect America Fund—Alaska Plan*, WC Docket No. 16-271.

I have seen firsthand what broadband means for Alaska. I have toured the Arctic Regional Supercomputing Center in Fairbanks. I have touched the fiber optic cables that have brought high-speed Internet access and economic growth to the Mat-Su Valley. I have spoken with the board of the Alaska Native Tribal Health Consortium about how telehealth allows the Southcentral Foundation in Anchorage to connect native Alaskans statewide. I have heard what broadband means to the Gwitchyaa Zhee Gwich'in Tribal Government and have seen what it's meant for Tatitlek, a traditional Alutiiq coastal village. And I have met patrons of the Tuzzy Library and students at the Ilisagvik Tribal College in Barrow, 320 miles north of the Arctic Circle, about how the Internet has helped keep tribal communities informed and intact.

But when it comes to broadband, Alaska has a problem that most of the United States doesn't: High-capacity, terrestrial middle-mile connections between communities are few and far between. That's because the distances in Alaska are vast—the state is larger than Texas, California, Florida, and New York *combined*—and most remote villages are not accessible by road. As such, those living in the Alaskan Bush often connect to the Internet through performance-limiting satellite links at speeds of less than 1 Mbps. Those are the speeds at which most Americans accessed the Internet more than a decade ago.

The Alaska Plan (and this *Order* largely adopting it) presents a chance to fix these problems. Alaska currently receives about \$150 million a year in universal service funding. The Alaska Plan locks that money in for the next ten years, committing over \$1.5 billion to preserve and advance universal service in Alaska. That's money the state needs.

But the Alaska Plan won't help everyone. It dedicates no funding to solve the middle-mile problem. So even if every carrier does what it's promised to do over the next ten years, 21,871 rural Alaskans won't have access to 4G LTE mobile broadband (and of those, 10,202 won't even have 3G service).¹ 46,650 rural Alaskans won't have access to the 25 Mbps fixed broadband that is the Commission's benchmark (of those 5,971 won't even have 4 Mbps fixed broadband—the standard from 6 years ago).² In other words, tens of thousands of Alaskans will have to wait at least a decade before being connected with the broadband speeds that most Americans take for granted. That's a shame.

The problem isn't a lack of money; it's the waste of taxpayer dollars. In three separate ways, the *Order* violates basic tenets of universal service reform that we have employed since the *Universal Service Transformation Order* to maximize the value of the Universal Service Fund for consumers.³

¹ See Letter from Christine O'Connor, Executive Director, Alaska Telephone Association, to Marlene Dortch, Secretary, FCC, WC Docket No. 10-90, Attach. at 19 (May 9, 2016) (ATA *Ex Parte* Letter). Unfortunately, even those receiving 4G LTE service may not get access to the speeds urban Americans are accustomed to. Compare *id.* at 24, 25 (identifying 13,000 LTE users promised only 1 Mbps connections and another 42,443 LTE users promised only 2 Mbps connections in areas without fiber backhaul), with *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All America in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 15-191, 2016 Broadband Progress Report, 31 FCC Rcd 699, 735 Table 4 (2016) (showing that 55% of urban Americans already have access to LTE service at 10 Mbps).

² See ATA *Ex Parte* Letter Attach. at 1.

³ *Connect America Fund et al.*, WC Docket Nos. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011).

First, the *Order* condones duplicative build out.⁴ Our staff analysis shows that the Alaska Plan spends about \$12 million extra each year to subsidize two or more wireless carriers for 32,541 consumers in the Alaska Bush.⁵ In contrast with the Alaska Plan, the *Order* maintains this support for five years and promises to consider eliminating it during the second half of the Plan’s ten-year term.⁶

This is a serious mistake. Faced with the expenditure of \$120 million in taxpayer funds, the *Order* guarantees that at least \$60 million will be wasted.⁷ And the other \$60 million will likely be wasted as well. After all, the *Order* promises to evaluate overlap at the four-year mark and only eliminate duplicative support in areas where at least two wireless carriers have built out 4G service.⁸ Since the first performance benchmark for wireless carriers doesn’t come until the five-year mark and the majority of 4G buildout doesn’t come until the ten-year mark,⁹ there’s a substantial likelihood that the overlap eliminated after five years will be precisely zero.

Even if some overlap does emerge, the *Order* makes clear that no one has thought through what happens next. How will we identify the support associated with the overlap? We don’t know. How will we decide which wireless carrier will continue to receive support? We don’t know. How will we change the performance obligations of the carrier that loses support? We don’t know. How will the carrier that loses support maintain the 4G network it just constructed? We don’t know. How can we justify maintaining support for even one carrier when “our general policy [is] not providing funding where there is an unsubsidized provider”?¹⁰ We don’t know.

Second, the *Order* rewards wireless carriers for serving remote areas already served by qualified competitors. Our staff analysis shows that the Fund is spending \$27 million each year on Alaskan wireless carriers that serve customers already served by unsubsidized competitors offering 4G LTE service. In line with the Alaska Plan, the *Order* eliminates \$4 million of that funding—but allows wireless carriers to retain the other \$23 million each and every year for a decade.¹¹

What a waste of \$230 million.¹² The FCC’s policy has been to identify where “universal service provides more support than necessary to achieve our goals”¹³ and eliminate any excess support so that it

⁴ The Commission has repeatedly declined to provide duplicative support, i.e., support to two or more carriers to build out the same area. The FCC eliminated the identical support rule in 2011. We offered model-based support to just one carrier per area in both phases of the Connect America Fund as well as in rate-of-return areas. And our reverse auctions are designed to select just one winning bidder to support in each area. The reason is obvious: Paying two carriers to construct duplicative facilities is just a waste of taxpayer funding.

⁵ The overlapping wireless carriers are Arctic Slope Telephone Association Cooperative, Copper Valley Wireless, Cordova Wireless, General Communications Corporation, OTZ Wireless, TelAlaska Cellular, and Windy City Cellular.

⁶ *Order* at para. 94.

⁷ That is \$12 million per year for ten years and five years, respectively.

⁸ *Order* at para. 94 (“[W]e will assess 4G LTE deployment and any overlap in subsidized areas based on deployment at the end of year four (*i.e.*, as of December 31, 2020), as reflected in the March 2021 Form 477 filing. Thereafter, . . . the Commission will implement a process, at the beginning of the sixth year, to eliminate duplicative support to areas where there is more than one provider offering subsidized 4G LTE service.”).

⁹ ATA *Ex Parte* Letter Attach. at 19 (showing that 41.1% of 4G build out will occur by year five and 58.9% by year ten).

¹⁰ *Order* at paras. 109, 111.

¹¹ See *Order* at note 184. The \$4 million eliminated comes entirely from Matanuska Wireless.

¹² That is \$23 million a year for ten years.

¹³ *Universal Service Transformation Order*, 26 FCC Rcd at 17766–67, para. 280.

can be either deployed more efficiently elsewhere or returned to the taxpayer. Earlier this year, for example, the Commission adopted a “phased reduction in disaggregated support for competitive areas” so that rate-of-return carriers would not receive support to build out areas already served by unsubsidized competitors.¹⁴ And yet the *Order* declines to follow that path here, allowing wireless carriers to keep nearly a quarter-billion-dollar windfall without any indication of what we—or more importantly Alaskan consumers—are getting for this money. It’s one thing to let carriers keep their funding where *necessary* to preserve and advanced universal service. It’s another thing entirely to reward those that arbitrage the system.

Third, the *Order* carves out a special funding stream for one carrier with no discernible public policy purpose. Specifically, the Alaska Plan proposed that Alaskan wireless carriers not participating in the plan face a three-year phase down of support. The *Order* adopts that plan for most carriers¹⁵ but delays that phase down for a “12 month period from the release date of the Report and Order” for AT&T and only for AT&T.¹⁶ That delay will cost taxpayers an extra \$15.8 million. The *Order* claims this a “reasonable” accommodation but cannot explain why the nation’s second largest wireless carrier needs “additional transition time to reduce any disruptions.”¹⁷

All together these wasted payments total \$365 million, or about one quarter of the total Alaska Plan pot. That’s \$365 million that could be used to link off-road communities to urban Alaska as requested by the Alaska Federation of Natives, the Bering Straits Native Corporation, the Chugachmiut rural healthcare organization, and many others.¹⁸ That \$365 million is more than eight times the \$44 million grant from the Broadband Initiatives Program that launched the TERRA Southwest middle-mile network that connected 65 off-road communities in 2011.¹⁹ That money could provide real digital opportunities for tens of thousands of rural Americans with just a little more FCC oversight of the Alaska Plan.

That’s why I proposed to my colleagues in early July to correct these problems and set this money aside to fund middle-mile construction in remote Alaska. I am grateful that Commissioner Clyburn—herself an ardent supporter of fixing Alaska’s middle-mile problems—agreed to support my plan and spent the last month working with my office to persuade our colleagues to fix these flaws. Unfortunately, we fell just one vote short.

¹⁴ *Connect America Fund; ETC Annual Reports and Certifications; Developing a Unified Inter-carrier Compensation Regime*, WC Docket Nos. 10-90, 14-58, CC Docket No. 01-92, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3131, para. 116 (2016).

¹⁵ *Order* at para. 98.

¹⁶ *Order* at para. 99.

¹⁷ *Id.*

¹⁸ See Letter from Julie Kitka, President, Alaska Federation of Natives, to the Honorable Lisa Murkowski, the Honorable Daniel Sullivan, and the Honorable Don Young, WC Docket No. 10-90, at 1 (June 15, 2016); Letter from Gail R. Schubert, President & CEO, Bering Straits Native Corporation, to the Honorable Senator Murkowski, the Honorable Senator Sullivan, and the Honorable Congressman Young, WC Docket No. 10-90, at 1 (June 9, 2016); Letter from Angela J. Vanderpool, Executive Director, Chugachmiut, to the Honorable Senator Murkowski, the Honorable Senator Sullivan, and the Honorable Congressman Young, WC Docket No. 10-90, at 2 (June 2, 2016); see also, e.g., Letter from Susan Edwards, Finance Officer, Lake and Peninsula Borough, to the Honorable Senator Murkowski, the Honorable Senator Sullivan, and the Honorable Congressman Young, WC Docket No. 10-90, at 1 (May 27, 2016); Letter from Glen R. Alsworth, Sr., President, Lake Clark Air, Inc. & The Farm Lodge, Inc., to the Honorable Senator Murkowski, WC Docket No. 10-90, at 1 (May 18, 2016); Letter from Cameron Poindexter, Manager, Bristol Bay Development Fund, to the Honorable Senator Murkowski, the Honorable Senator Sullivan, and the Honorable Congressman Young, WC Docket No. 10-90, at 1 (May 17, 2016).

¹⁹ GCI TERRA, <http://terra.gci.com/project> (Aug. 22, 2016).

To put it another way: We had a once-in-a-generation opportunity to solve Alaska's middle-mile problem. But rather than address the real flaws in the Alaska Plan, the FCC has told tens of thousands of rural Alaskans to wait another ten years for another shot at digital opportunities. I cannot support that decision.

For all these reasons, I respectfully dissent.

RECEIVED

By the Regulatory Commission of Alaska on Feb 22, 2013

STATE OF ALASKA

BEFORE THE REGULATORY COMMISSION OF ALASKA

Before Commissioners:

T.W. Patch, Chairman
Paul F. Lisankie
Norman Rokeberg
Robert M. Pickett
Janis W. Wilson

In the Matter of the Petition Filed by
ALASCOM, INC. d/b/a AT&T ALASKA to be
Relieved of its Carrier of Last Resort
Responsibilities in Certain Locations in
Southwest Alaska

Docket No. U-12-127

RURAL COALITION'S OPENING LEGAL BRIEF

The Rural Coalition¹ has grave concerns about AT&T's Petition to be relieved of its carrier of last resort ("COLR") obligations in the TERRA Southwest ("TERRA SW") area.² The record lacks critical information and evidence regarding the implications for granting AT&T's Petition. The Commission and Parties to the docket have not yet fully evaluated the statewide market implications for replacing the IXC COLR if AT&T is allowed to exit this role. The public interest issues raised by

¹ The parties participating in the Rural Coalition include: Arctic Slope Telephone Association Cooperative, Inc.; Bettles Telephone, Inc.; Bristol Bay Telephone Cooperative, Inc.; Bush-Tell, Inc.; Circle Telephone & Electric, LLC; Copper Valley Telephone Cooperative, Inc.; City of Ketchikan, Ketchikan Public Utilities; Matanuska Telephone Association, Inc.; OTZ Telephone Cooperative, Inc.; Interior Telephone Company; Mukluk Telephone Company, Inc.; Alaska Telephone Company; North Country Telephone Inc.; Nushagak Electric and Telephone Company, Inc.; The Summit Telephone and Telegraph Company, Inc. and Yukon Telephone Company, Inc.

² AT&T defines the TERRA Southwest area as "the locations served by the new terrestrial network built by United Utilities, Inc. ("UUI"). In the Matter of the Petition Filed by ALASCOM, INC. d/b/a AT&T ALASKA to be Relieved of its Carrier of Last Resort Responsibilities in Certain Locations in Southwest Alaska, Docket No. U-12-127, before the Regulatory Commission of Alaska, AT&T Alaska's Petition for COLR Relief in 65 Locations in Southwest Alaska (Sept. 7, 2012) ("*AT&T Petition*") at 1.

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AT&T's Petition must be resolved before the Commission considers granting AT&T's requested relief.

AT&T's requested relief has the potential to dramatically alter the shape of Alaska's telecom market and reduce competition in the Terra SW area. The Commission should define the steps necessary to adjudicate AT&T's request while ensuring that the public interest is protected regarding the continued provision of necessary long distance and transport services, not only in the TERRA SW areas in question, but throughout Alaska. It is essential that the Commission maintain the presence of an IXC COLR in the TERRA SW area and ensure regulation of that carrier's rates and terms of service, both to retail customers and on a wholesale basis. The prospect of a large area of the state being served only by an unregulated carrier presents significant questions regarding the future of Alaska's telecom market as a whole.

I. THE IXC COLR PLAYS A VITAL ROLE IN ALASKA AND THE COMMISSION MUST PROTECT IT.

Network infrastructure and regulation have developed quite differently in Alaska than in the Lower 48.³ Telecommunications deployment in the continental United States was driven out by Regional Bell Operating Companies ("RBOCs"), while no RBOC has operated in Alaska. AT&T's Legal Brief fails to explain that the lack of an

³ See In the Matter of the Petition Filed by ALASCOM, INC. d/b/a AT&T ALASKA to be Relieved of its Carrier of Last Resort Responsibilities in Certain Locations in Southwest Alaska, Docket No. U-12-127, before the Regulatory Commission of Alaska, Testimony of David Blessing (Feb. 22, 2013) ("*Blessing Testimony*") at 9-11.

RBOC in the state's telecommunications landscape means that maintaining an IXC COLR, while no longer necessary in the Lower 48, is critical in Alaska.⁴

A. The History of IXC Development in Alaska Supports The Need for Its Current Regulatory Structure.

The legal brief filed by AT&T on January 17, 2013 provided a generic history of the interexchange market in Alaska and the role of the COLR nationwide.⁵ AT&T's analysis offers little context to provide an adequate contrast between the development of IXC regulation in Alaska and in the Lower 48. In light of Dr. Aron and Mr. Grzybicki's hypothesis that an IXC COLR is an unnecessary, "anachronistic" anomaly that the Commission should remove, it is necessary for the Commission to consider a broader understanding of how the IXC market developed in Alaska in comparison to the Lower 48.⁶

⁴ See In the Matter of the Petition Filed by ALASCOM, INC. d/b/a AT&T ALASKA to be Relieved of its Carrier of Last Resort Responsibilities in Certain Locations in Southwest Alaska, Docket No. U-12-127, before the Regulatory Commission of Alaska, AT&T Alaska's Opening Legal Brief (Jan. 17, 2013) ("*AT&T Legal Brief*") at 2-5.

⁵ *Id.* at 5-10.

⁶ In the Matter of the Petition Filed by ALASCOM, INC. d/b/a AT&T ALASKA to be Relieved of its Carrier of Last Resort Responsibilities in Certain Locations in Southwest Alaska, Docket No. U-12-127, before the Regulatory Commission of Alaska, Opening Testimony of Dr. Debra J. Aron on behalf of Alascom, Inc., d/b/a AT&T Alaska (Jan. 17, 2013) ("*Dr. Aron Testimony*") at 8; In the Matter of the Petition Filed by ALASCOM, INC. d/b/a AT&T ALASKA to be Relieved of its Carrier of Last Resort Responsibilities in Certain Locations in Southwest Alaska, Docket No. U-12-127, before the Regulatory Commission of Alaska, Opening Testimony of Mr. Adam Grzybicki on behalf of Alascom, Inc., d/b/a AT&T Alaska (Jan. 17, 2013) ("*Grzybicki Testimony*") at 4.

1. Alaska's Network Development Is Unique.⁷

The differences in history, geography and population between Alaska and the Lower 48 have meant that telecommunications in Alaska developed on a unique path compared to the rest of the nation.⁸ In the Lower 48, AT&T was the sole provider controlling nearly all aspects of the telephone business until the 1980s. AT&T's regional subsidiaries built a regulated monopoly system of local and long distance networks to serve residential and business customers, and held exclusive rights in their service areas. By the 1970s, independent telephone companies emerged, asserting that they could compete with AT&T if granted interconnection access to AT&T's monopoly network.⁹ In 1982, the Department of Justice famously broke up AT&T's monopoly and divided the Lower 48 into seven multistate areas served by designated RBOCs to provide local exchange service.¹⁰

By the 1990s, RBOCs continued to dominate the local telecommunications market in the continental United States. Congress enacted the Telecommunications Act of 1996 ("Telecommunications Act") to "promote competition and reduce regulation in

⁷ This section discusses Judge Wood's question regarding whether there can be an area of the state without a designated IXC COLR. *See* Pre-hearing Conference Transcript at 13 (Dec. 12, 2012).

⁸ *See* Walter B. Parker, Telecommunications and Information System History of Alaska, Institute of the North (Feb. 13, 2008), available via the University of Alaska Broadband Taskforce at <http://www.alaska.edu/oit/bbtaskforce/docs/TELECOMMUNICATIONS%20AND%20INFORMATION%20SYSTEM%20HISTORY%20OF%20ALASKA.pdf>.

⁹ *See* U.S. Department of State, *Deregulating Telecommunications*, available at <http://economics.about.com/od/governmenttheeconomy/a/telecom.htm> (last visited Feb. 20, 2013).

¹⁰ *See U.S. v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982).

order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”¹¹ The Telecommunications Act introduced competitive mandates that forced ILECs to offer access to the telephone network infrastructure to competitors at wholesale prices, on an unbundled basis.¹² The unbundling requirements were primarily directed to the RBOCs, who, despite regulatory and legislative pressure, still maintained a near monopoly of the local telephone market.¹³ The Telecommunications Act offered the ability to enter the lucrative long distance market as incentive to open networks to local telephone competition. In contrast, Alaska relied on independent carriers to build local telephone networks connected by monopoly IXC facilities; which form a fine web of infrastructure linking communities sprinkled through the often remote and rugged terrain of Alaska. These critical IXC facilities include fiber, microwave and satellite connections that other carriers and their customers rely upon to supplement their last mile and wireless networks. Alaska ILECs have always depended on IXC facility based networks like the AT&T facilities at issue in this proceeding to transport calls and data beyond the reaches of their individual service areas.

¹¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in various Sections of 47 U.S.C.).

¹² THE COMMUNICATIONS ACT: A LEGISLATIVE HISTORY OF THE MAJOR AMENDMENTS, 1934-1996 at 31 (Max D. Paglin et al. eds., Pike and Fischer, Inc. 1999); see 47 U.S.C. § 251 (2000) (requiring incumbents to offer network elements to competitors on an unbundled basis.).

¹³ All RBOCs are ILECs, but not all ILECs are RBOCs.

2. IXC COLRs hold critical infrastructure in Alaska.¹⁴

Given the historical development of the interexchange market in Alaska, the IXC COLR plays a fundamentally different role in statewide network architecture in Alaska than it does in the Lower 48. Without the legacy of AT&T and an RBOC to cross-subsidize its local and long distance operations to build an intraLATA network, Alaska became reliant on the IXC to fill the role and construct and maintain a statewide transport network interconnecting smaller carriers' infrastructure across the state.¹⁵ Specifically, the statewide infrastructure built by AT&T and its predecessor and perhaps even more so, the network built by GCI to provide local and long distance service, represent the closest approximation to a RBOC network Alaska can claim. Other Alaska carriers' reliance upon the statewide networks built by AT&T and GCI for transport cannot be understated, and the Commission should exercise caution before reducing the network infrastructure available in the state.¹⁶

¹⁴ This section addresses Judge Wood's question about having a patchwork of different IXC COLRs in the state. *See* Pre-hearing Conference Transcript at 64 (Dec. 12, 2012).

¹⁵ *See AT&T Legal Brief* at 6-7 (noting the history of AT&T's predecessor Alascom: "Following its certification as the only intrastate IXC in Alaska, Alascom was regulated as a monopoly carrier with statewide averaged rates and an authorized rate of return.").

¹⁶ In other dockets before the Commission, AT&T has recognized the vital interdependence between local ILECs and IXCs in Alaska. *See* In the Matter of the Application Filed by ALASKA TELEPHONE COMPANY to Discontinue Local Exchange Telecommunications Service in Chisana and Healy Lake, Alaska, Docket No. U-12-091, In the Matter of the Application Filed by ALASKA POWER COMPANY to Discontinue Electric Service in Healy Lake, Alaska, Docket No. U-12-092, In the Matter of the Application Filed by ALASCOM, INC. d/b/a AT&T ALASKA to Discontinue Interexchange Service in Chisana and Healy Lake, Alaska, Docket No. U-12-116, before the Regulatory Commission of Alaska, AT&T Alaska's Brief In Compliance With Order No. 4 (Feb. 19, 2013) at 1-2. "If the Commission were to grant AP&T's request, AT&T Alaska would be unable to continue providing interexchange

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B. The Evolution of Alaska's IXC COLR Definition Is Tied to the Commission's Regulatory Relationship with AT&T.

AT&T's discussion of the evolution of Alaska's definition of an IXC COLR omitted some pertinent information about the scope of the Commission's consideration of the role.¹⁷ The Commission has always considered the transport of data as included in the role of the IXC COLR and its statewide network.¹⁸

In 1995 when considering AT&T's acquisition of Alascom, the Commission's predecessor, the APUC, considered data communications part of Alascom's COLR obligations.¹⁹ Although the Commission characterized AT&T's position on the issue "ambiguous," it did require follow up reports regarding capital expenditures made to fulfill data communications obligations.²⁰ The Rural Coalition believes this historic consideration of data transport provides an important foundation for the Commission's

carrier ("IXC") service in these two locations. AT&T Alaska is co-located with AP&T in both communities and depends on AP&T for space and power. As with many locations, AT&T Alaska contracts with the local exchange carrier ("LEC") for central office space in which to place its equipment, and electric power to run its equipment. *In addition, as an interexchange carrier, AT&T Alaska relies on the LEC for local switching and connectivity over the "last mile" to our customers.* *Id.* (emphasis added).

¹⁷ *AT&T Legal Brief* at 8-16.

¹⁸ Regulatory Commission of Alaska, In the Matter of the Application by AT&T CORP. To Acquire a Controlling Interest in ALAS COM, INC., Holder of Certificate of Public Convenience and Necessity No. 98 Authorizing the Provision of Telecommunications (Intrastate Interexchange) Public Utility Service, Docket No. U-94-113, Order No. 3 (June 13, 1995).

¹⁹ Alaska Public Utilities Commission, In the Matter of the Limited Investigation Into the Practices and Procedures of ALASCOM, INC., and Companies of PACIFIC TELECOM, INC., in Alaska, Docket No. U-95-26, Order No. 2 (June 15, 1995) at 3.

²⁰ *Id.*

current consideration of the role played by IXC COLR's network and the appropriate responsibilities that must be transitioned if a new IXC COLR is appointed.

When approving AT&T's purchase of Alascom, the Commission found that AT&T has committed to "assume Alascom's obligations to serve the Alaska Bush with intrastate and interstate telecommunications," to "assume Alascom's current tariffs and contracts (including wholesale service tariffs for carrier customers)" and to "inherit Alascom's responsibility to replace the current Alaska satellite when necessary, thus assuring continued long distance services to rural Alaska."²¹ These obligations must be maintained, if not by AT&T, then by GCI.

The Rural Coalition concurs with AT&T that the Alaska market has changed significantly in recent years.²² With the rising dominance of the GCI network statewide, funded in significant part by federal funds, the essential nature of the role of the AT&T network has waned to a certain degree. The RCA's past consideration of an IXC COLR network always focused on the AT&T network and its regulatory status. GCI's insistence that its network, particularly TERRA SW, is beyond regulation and oversight raises significant issues about the appropriate role it may play in the state. GCI has leveraged its ability to build a statewide network with local and wireless networks to become an unregulated monopoly market player reminiscent of pre-divestiture AT&T in the Lower 48.²³

21 *Id.*

22 *AT&T Legal Brief* at 25-28.

23 *See Burke Testimony* at Q/A Nos. 28-29, 36-37.

As the Commission considers a change to its IXC COLR designation, it must keep the door open to considering what the statewide network should look like and what obligations are appropriately placed on it. The Rural Coalition respectfully submits that no IXC COLR network can be considered unregulated or strictly interstate.²⁴ This docket provides an opportunity for the Commission to clarify its understanding of the existing regulation and appropriate role of the IXC COLR in Alaska.²⁵

C. The AT&T Petition Fails to Articulate Ramifications for 65 Affected Communities.

The Rural Coalition does not dispute that AT&T could potentially be granted the relief it requests upon a full record, but the record provided to date by AT&T is inadequate to meet AT&T's burden of proof for relief. There is little data in the record regarding AT&T's intentions regarding its facilities if the Commission relieves it of IXC COLR obligations.²⁶ AT&T has not articulated the specific impacts to each of the 65 communities affected by its Petition. These impacts may be difficult to determine without determining the nature and scope of regulation appropriate for GCI's facilities if GCI is designated as the COLR in place of AT&T.

²⁴ *Comments of the Alaska Rural Coalition Concerning the Remote Areas Fund*, WC Docket No. 10-90, before the FCC (Feb. 19, 2013) ("*ARC RAF Comments*") at 8 ("Virtually every ARC member's first mile and most second mile infrastructures are capable of providing high speed broadband service, but middle mile networks between that legacy infrastructure and the internet backbone are few and far between in rural Alaska.").

²⁵ The Commission has used U dockets to clarify the obligations of the IXC COLR in the past. There is no reason the Commission cannot exercise the same discretion in this docket.

²⁶ See Burke Testimony at Q/A Nos. 7, 9-12.

AT&T asserts that its IXC COLR obligation is only to end user consumers.²⁷

The Rural Coalition believes that the IXC COLR obligation is broader in scope. As a matter of practice, the provision of wholesale long distance minutes and access to a statewide transport network also fall within the obligation of an IXC COLR.

Relieving AT&T of its IXC COLR obligation has real implications for the Rural Coalition members who currently purchase wholesale long distance minutes from AT&T. There is inadequate information in the record to indicate what might happen to the existing contractual relationships between AT&T and the companies it provides this service to. Likewise, given the growing importance of the transport capacity of the IXC network in Alaska, the implications of AT&T's surrendering facilities capable of providing transport must be weighed by the Commission. For example, the record does not reflect what the implications may be going forward for available wholesale capacity in the TERRA SW area if AT&T's satellite capacity is relinquished.

II. THE IXC COLR MUST BE A FACILITIES BASED CARRIER.²⁸

The Rural Coalition believes the IXC COLR must be a facilities based carrier. The regulatory structure of both the Local Exchange COLR and the IXC COLR have been based on carrier ownership of facilities.²⁹ In order to properly fulfill the

²⁷ *AT&T Legal Brief* at 18-21.

²⁸ This section discusses Judge Wood's question regarding whether a COLR must provide service exclusively over its own facilities. *See* Pre-hearing Conference Transcript at 13 (Dec. 12, 2012).

²⁹ *See, e.g.*, 3 AAC 53.265(a)(1), (a)(2); 3 AAC 52.350(c); 3 AAC 52.358; 3 AAC 52.365(a); 3 AAC 52.367; 3 AAC 52.370; 3 AAC 52.375; 3 AAC 52.390(c).

obligations of an IXC COLR, the carrier must control adequate facilities to provide services on both a wholesale and retail basis.

A. An IXC COLR Is Historically Facilities Based.

As reflected in AT&T's Legal Brief, the IXC COLR has historically been a facilities based carrier in Alaska.³⁰ Facilities take the form of fiber, microwave or satellite transmission, usually in a combination, to connect broad geographic areas served by local exchange carriers. Alaska's limited population and extremely high costs of network construction and maintenance mean that, in contrast to those in the Lower 48, there is limited duplication of telecommunications facilities in Alaska. In fact, many of the parties in this proceeding are currently actively lobbying the FCC to apportion funding for broadband fiber buildout in Alaska due to the currently limited availability of affordable and reliable high-speed broadband in remote and rural areas.³¹

³⁰ See *AT&T Legal Brief* at 8-12.

³¹ See *Comments of Alaska Rural Coalition in the matter of Connect America Fund*, WC Docket No. 10-90, 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, before the FCC (Jan. 18, 2012) (“*ARC USF Comments*”) at 4-5 (“Access to Affordable Middle Mile is Critical to Extend Broadband into Remote Areas of Alaska... The CAF Order recognizes that many areas of Alaska lack the viable backhaul options necessary to provide broadband services.”); *Comments of Alaska Communications Systems, Inc. in the matter of Connect America Fund*, WC Docket No. 10-90, 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, before the FCC (Jan. 18, 2012) at 8 (“The Commission’s model ignores the costs of extremely long haul middle mile transport in Alaska, especially by satellite and undersea cable, which are necessary to support delivery of the broadband speeds mandated by the Commission.”); *Comments of General Communication, Inc. in the matter of Connect America Fund*, WC Docket No. 10-90, 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, before the FCC (Jan. 18, 2012) at 28 (“As discussed above, middle-mile costs will be a significant (but not the only) component of the high costs of delivering any type of broadband – whether fixed or mobile – to Remote Alaska... middle mile is an essential component of providing

Without the presence of regulated IXC COLR facilities, telecommunications throughout Alaska could be severely jeopardized. Unless third-party carriers have wholesale access to these facilities at reasonable rates bearing some rational relationship to costs, competition in Alaska's telecommunications market could collapse. If small, rural carriers lose the ability to purchase wholesale transport throughout the TERRA SW area at reasonable rates, the results will be felt most by Alaska's remotest, most rural communities, which depend on telecommunications service the most.³²

B. The Facilities Based Requirement Is Consistent with ILEC COLR Obligations.

The obligations of the Local Exchange Carriers to provide services to their end users require access to facilities based networks.³³ As discussed by Robert Dunn, Regulatory Director for TelAlaska, in his testimony, the Rural Coalition companies rely

affordable and reasonably comparable broadband services to rural Alaska, and of creating a communications infrastructure that can support critical public health, education and safety needs.”).

³² See, e.g., Kim Severson, *Digital Age is Slow To Arrive in Rural America*, N.Y. TIMES, (Feb. 17, 2011) available at http://www.nytimes.com/2011/02/18/us/18broadband.html?pagewanted=all&_moc.sem it (“In rural America, only 60 percent of households use broadband Internet service.”); see also *Alaska Rural Telehealth Network*, <http://www.nrtrc.org/about/network-profiles/artn/> (last visited Feb. 20, 2013) “In Alaska, the healthcare workers practicing in hospitals, clinics, and community health centers are essential to the delivery of acute and primary care services to small, rural, and remote communities. Although the majority of Alaska’s population is located outside the greater Anchorage area, the majority of healthcare providers in Alaska (e.g., physicians, PAs, RNs, physical therapists) are located in its three largest cities. As a result, rural clinicians practice in a generalist’s environment, but where they often need to have specialty knowledge and expertise. This dichotomy is further complicated when you consider the limited opportunities for continuing education and access to specialty consultations available because of travel costs, geographical and weather restrictions, and a general lack of or inability to arrange for clinical coverage during absences.” *Id.*

³³ 3 AAC 53.265(a).

on the operator services offered by AT&T.³⁴ Without a reliable source of the services, local exchange companies like TelAlaska and other Rural Coalition members could be left unable to fulfill their own COLR obligations to their customers.³⁵

Local Exchange Carrier COLRs like many Rural Coalition members have the obligation to “provide and maintain adequate, efficient, and safe facilities-based essential retail and carrier-to-carrier telecommunication services of similar quality throughout its carrier of last resort area;” “ may not allow any diminution of quality or availability of essential retail and carrier-to-carrier telecommunication services throughout its carrier of last resort area.”³⁶ This includes the obligation to offer both intrastate access services and interstate access services, as well as to offer resale of retail services.³⁷ The Rural Coalition is concerned that for the Commission to grant AT&T’s requested relief without designating an adequately rate-regulated substitute IXC COLR would directly create “diminution of quality or availability of essential retail and carrier-to-carrier” services in their local service areas.³⁸ Without the ability to purchase reasonably priced wholesale transport from an IXC COLR in the TERRA SW area,

³⁴ Dunn Testimony at Q/A Nos. 15, 18-21.

³⁵ See 3 AAC 53.265; see also In the Matter of Designating Carriers of Last Resort in Study Areas that Do Not Include a Competitive Local Exchange Market in Accordance with 3 AAC 52.265(c), Docket No. U-11-79, before the Regulatory Commission of Alaska, Order Designating Permanent Carriers of Last Resort in Non-Competitive Local Exchange Markets, Designating Temporary Carriers of Last Resort in Competitive Local Exchange Markets, Inviting Notices of Intent to File Petitions Seeking Carrier of Last Resort Status, Designating Commission Panel, and Appointing Administrative Law Judge (July 22, 2011).

³⁶ 3 AAC 53.265(a)(1), (a)(2).

³⁷ *Id.* at (j)(2), (j)(3).

³⁸ See *id.* at (a)(2).

these local exchange carriers will be unable to meet their obligations to their own customers.

The Commission must carefully weigh the interdependence of Alaska's ILEC and IXC networks into its decision. Fundamentally, the Commission must ensure the ongoing availability of wholesale access to IXC COLR facilities and services in the TERRA SW area at reasonable rates. Currently there is little in the record to assist the Commission to evaluate the implications for these facilities and services in the communities where AT&T seeks relief of its IXC COLR obligations.

C. The IXC COLR Must Be Able to Provide Essential Connections.

AT&T argues that as the IXC COLR it must only provide service to end users.³⁹ According to AT&T, "[The COLR] obligation requires the IXC COLR to provide toll service only to end-user customers; it does not encompass any obligation to provide service to other carriers for resale."⁴⁰ This view of an IXC COLR's responsibilities is too narrow and fails to capture the changes in the marketplace and federal obligations that require access to transport facilities across Alaska.⁴¹ However, AT&T acknowledges the general obligation of *all* IXC carriers to provide service for resale

³⁹ *AT&T Legal Brief* at 18.

⁴⁰ *Id.* at 18-19.

⁴¹ See Connect America Fund, WC Docket No. 10-90, A National Broadband Plan for our Future, GN Docket No. 09-51, Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135, High-Cost Universal Service Support, WC Docket No. 05-337, Developing an Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Lifeline and Link-Up, WC Docket No. 03-109, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) ("*Transformation Order*").

under 3 AAC 52.375(a).⁴² The Rural Coalition believes that the Commission considers wholesale resale obligations to be central to the role of an IXC COLR.

Consumers now demand broadband with sufficient capacity, latency, and speed to support videoconferencing, video streaming, and other web applications that require a stable and fast connection.⁴³ These new technologies have the potential to revolutionize life in remote and Rural Alaska.⁴⁴ The Commission has recognized that high-speed broadband access is even more important in Alaska than in the Lower 48 because of many communities' remote, isolated nature.⁴⁵ Broadband has the potential to bring

⁴² 3 AAC 52.375(a); *AT&T Legal Brief* at 19.

⁴³ See *Reply Comments of the Regulatory Commission of Alaska in re Connect America Fund*, WC Docket No. 10-90, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, WC Docket No. 03-10, (Sept. 6, 2011), at 17-18 (“The inherent latency [of satellite] causes problems for real time applications such as telemedicine, videoconferencing, and distance learning.”); Severson, *supra* note 32 (“Affordable broadband service through hard wiring and or cellular phone coverage could revolutionize life in rural parts of the country. People could pay bills, shop and visit doctors online. They could work from home and take college classes. Increasingly, interacting with certain branches of government can be done only online. And sometimes, a lack of cellphone or e-mail access can have serious consequences. Emergency alerts regarding severe weather, for example, are often sent only through text or e-mail.”).

⁴⁴ *Comments of the Alaska Rural Coalition*, GN Docket No. 12-228, before the FCC (Sept. 20, 2012) (“*ARC Broadband Standards Comments*”) at 3 (“The remote nature of these unserved locations in Alaska means that their residents have the greatest need for advanced telecommunications, especially regarding vital services like emergency response, telemedicine and distance learning.”).

⁴⁵ *Comments of the Regulatory Commission of Alaska, in the matter of Connect America Fund*, et. al., WC Docket No. 10-90, 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, before the FCC (Jan. 18, 2012) (“*RCA Comments*”) at 5 (“Yet there is no place in America that can benefit more from the promise of advanced telecommunications. Broadband can make a difference to the remote parts of Alaska beyond what it can anywhere else in the country. Broadband is the modern thoroughfare of Alaska’s future. It will allow a medical doctor to traverse the wilderness between Anchorage and Kotzebue in moments. It will allow an Alaska

telemedicine, distance learning, and teleworking to customers in these remote communities, but not without the terrestrial facilities necessary to support robust and reliable high-speed connections.⁴⁶

Regulators and consumers alike now take for granted the Telecommunications Act's goal of universal voice service across America.⁴⁷ In its landmark 2011 *Transformation Order*, the FCC fundamentally revised the Telecommunications Act's definition of "universal service" to include the provision of high-speed broadband at 4 Mbps downstream/1 Mbps upstream.⁴⁸ While carriers in the rest of the nation largely have access to the terrestrial facilities necessary to provide services at these speeds, large parts of Alaska continue to lack the internet fiber necessary for this level of

Native to work for a California high technology firm without ever leaving his subsistence lifestyle behind. It will allow economic development to flow freely between the world outside and our rural communities.”).

⁴⁶ See Severson, *supra* note 32 (“In rural America, only 60 percent of households use broadband Internet service.”); ALASKA RURAL TELEHEALTH NETWORK, *supra* note 32 (“In Alaska, the healthcare workers practicing in hospitals, clinics, and community health centers are essential to the delivery of acute and primary care services to small, rural, and remote communities. Although the majority of Alaska’s population is located outside the greater Anchorage area, the majority of healthcare providers in Alaska (e.g., physicians, PAs, RNs, physical therapists) are located in its three largest cities. As a result, rural clinicians practice in a generalist’s environment, but where they often need to have specialty knowledge and expertise. This dichotomy is further complicated when you consider the limited opportunities for continuing education and access to specialty consultations available because of travel costs, geographical and weather restrictions, and a general lack of or inability to arrange for clinical coverage during absences.”).

⁴⁷ Newton’s Telecom Dictionary defines “universal service” commonly understood today as “a telephone in every home.” NEWTON’S TELECOM DICTIONARY 1205 (26th ed. 2011). Newton’s Telecom Dictionary goes on to state that the “Telecommunication Act of 1996 expanded the definition of ‘universal service’ to include ‘access to advanced telecommunications and information service . . . in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas . . . reasonably comparable to those services . . . and those rates . . . for similar services in urban areas.’” *Id.* at 1206.

⁴⁸ *Transformation Order* at paras. 22, 26.

service. The Rural Coalition is gravely concerned at the possibilities of reduced capacity for Alaska or of losing wholesale access to transport facilities at reasonable rates in the face of these new federal service obligations. Alaska needs as much available capacity as possible in order for its carriers to meet federal standards.

The *Transformation Order* also fundamentally restructured federal high cost support for telecommunications maintenance and deployment in areas where the cost of providing service greatly exceeds the cost of providing services in urban areas (“high cost areas”). All of the Alaska parties in this proceeding who have provided comment to the FCC on the *Transformation Order* have acknowledged that Alaska is one of the nation’s highest-cost areas to serve. Many aspects of the new federal high cost support programs remain yet to be determined, and Alaska carriers other than GCI have not fared especially well in securing federal high cost support thus far.⁴⁹ The Rural Coalition urges the Commission to factor in the overall regulatory and economic uncertainty that Alaska carriers face when weighing AT&T’s petition and the prospect of replacing a regulated IXC COLR with an unregulated monopoly facility provided by GCI.

⁴⁹ See *Comments of Alaska Communications Systems Group, Inc., in the matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, before the FCC, GN Docket No. 12-228 (Sept. 20, 2012) (“*ACS GN Comments*”) at 4 (“Among the 51 percent of rural Alaskans who are believed to have some form of broadband access, many are underserved, with access to a form of broadband deemed a bare minimum under the Commission’s standards—nothing close to the 4 Mbps the Commission wants incumbent local exchange carriers (“ILECs”) to deploy in exchange for CAF support, not to mention the 10 Mbps to 100 Mbps that is available to most urban Americans.”).

The Rural Coalition believes that Commission precedent supports the conclusion that IXC COLR obligations extend beyond retail service to the end user.⁵⁰ The Commission indicated in 1995 when approving AT&T's purchase of Alascom that data transport obligations are part of the COLR obligations that AT&T must fulfill in its service area.⁵¹ The Rural Coalition urges the Commission to carefully consider how these IXC COLR data transport obligations would be met if AT&T's Petition were to be granted without a cost-based, regulated replacement in place to provide data transport services throughout the state.

III. THE IXC COLR HAS ESSENTIAL WHOLESALE OBLIGATIONS.⁵²

A. General Obligations of IXCs.

Alaska IXCs must offer services according to a number of affirmative regulatory obligations. The Commission enacted IXC regulations to facilitate competition among companies offering intrastate interexchange service while still ensuring universal interexchange service at geographically averaged rates.⁵³ Most fundamentally, interexchange carriers' rates for service are subject to Commission jurisdiction, must be just and reasonable, and must be set forth in a tariff available to the public online.⁵⁴

⁵⁰ Alaska Public Utilities Commission, In the Matter of the Limited Investigation Into the Practices and Procedures of ALASCOM, INC., and Companies of PACIFIC TELECOM, INC., in Alaska, Docket No. U-95-26, Order No. 2 (June 15, 1995) at 3-6 (requiring Alascom to "include in its capital plan a description of its expected future and its current data transmission capabilities (including any limitations on baud rate)").

⁵¹ *Id.*

⁵² This section addresses Judge Wood's question about COLR obligations to other carriers. See Pre-hearing Conference Transcript at 64 (Dec. 12, 2012).

⁵³ 3 AAC 52.350(c); 3 AAC 52.370(a),(b).

⁵⁴ 3 AAC 52.358; 3 AAC 52.370(d); 3 AAC 52.367.

Whether a COLR or not, an IXC may not “discontinue, suspend, or abandon telecommunication service” without approval from the Commission, and an IXC must file that request and provide written notice consistent with regulation.⁵⁵ In addition to reasonable retail rates, all IXCs must offer their services for resale to other carriers at resale or wholesale rates.⁵⁶ These rates, like IXC retail rates, must be “just and reasonable” and set forth in a tariff.⁵⁷ The Rural Coalition views the standard IXC obligations to provide wholesale access at just and reasonable rates according to a tariff as warranting the Commission’s regulatory oversight of GCI’s IXC TERRA SW facility regardless of whether or not GCI is designated as AT&T’s replacement as COLR in the TERRA SW area.

B. Enhanced Obligations For COLRs.⁵⁸

Since it first articulated the need for IXC COLRs in Alaska in 1990, the Commission has set forth a number of enhanced obligations for carriers that serve as COLRs in their service area.⁵⁹ The Commission has continued to articulate those requirements in subsequent Orders addressing various aspects of COLR and IXC

⁵⁵ 3 AAC 52.365(a).

⁵⁶ 3 AAC 52.375(a).

⁵⁷ 3 AAC 52.375(b), (d).

⁵⁸ This section discusses Judge Wood’s question regarding the obligations of a COLR. *See* Pre-hearing Conference Transcript at 12 (Dec. 12, 2012).

⁵⁹ Regulatory Commission of Alaska, *In re Consideration of Regulations Governing the Market Structure for Intrastate Interexchange Telecommunications Service*, Order No. R-90-001(1) (Mar. 14, 1990) at Appendix A, p. 12 (proposing that the dominant carrier [would be] responsible for providing intrastate interexchange telephone service as the carrier of last resort.”).

service.⁶⁰ Importantly for this proceeding, in 1995 the Commission indicated, regarding AT&T's services to Alaska, that data transport obligations are part of the obligations that AT&T must fulfill as COLR in its service area.⁶¹

AT&T's unique, facilities based role in Alaska over the last seventeen years has shaped a market in which Alaska ILECs rely on the transport and backhaul services AT&T currently provides as COLR in its service area. Through its conduct as Alaska's IXC COLR, AT&T has created the expectation by other Alaska carriers that an IXC COLR in Alaska must provide wholesale access to its facilities at reasonable rates. As discussed above, and in the Testimony of Mr. Robert Dunn, these carriers rely on this expectation to continue providing services to their customers and fulfill their own local exchange COLR obligations.⁶²

Alaska's telecommunications marketplace is currently in a state of extreme flux due to rapidly evolving federal service standards and uncertainty of future high cost support to carriers. The Rural Coalition urges the Commission to keep an open mind, remain flexible, and proceed carefully and deliberately as it evaluates AT&T's Petition. The Commission must not grant AT&T's Petition without ensuring that the wholesale

⁶⁰ See, e.g., Regulatory Commission of Alaska, *In re Commission Review of Rules and Regulations Governing Telecommunications Rates, Charges Between Competing Telecommunications Companies and Competition in Telecommunications*, Order No. R-03-003 (14) at Appendix A, p. 13 (revising 3 AAC 52.390(c), the regulation containing the IXC COLR requirement).

⁶¹ Alaska Public Utilities Commission, *In the Matter of the Limited Investigation Into the Practices and Procedures of ALASCOM, INC., and Companies of PACIFIC TELECOM, INC.*, in Alaska, Docket No. U-95-26, Order No. 2 (June 15, 1995) at 3-6 (requiring Alascom to "include in its capital plan a description of its expected future and its current data transmission capabilities (including any limitations on baud rate)").

⁶² Dunn Testimony at Q/A Nos. 11, 16.

transport and backhaul services currently provided wholesale by AT&T to other carriers continue to be available at reasonable prices. This will likely require the Commission to explore, clarify and further explicitly articulate the regulatory obligations of an Alaska IXC COLR *before* designating GCI as a replacement COLR for AT&T in the TERRA SW service area.

IV. THE AT&T PETITION HAS BROAD IMPLICATIONS FOR A RAPIDLY CHANGING ALASKA MARKET

This is a case of first impression of the Commission. Although the regulations anticipate the IXC COLR may change, the Commission has not gone through the process of investigating the change and considering the potential implications for the market. As a case of first impression, the stakes are high for the statewide market as the Commission will be establishing the precedent for future withdrawal by AT&T as IXC COLR.

The Commission and all of the carriers involved owe it to Alaska consumers to ensure that any change in the IXC COLR is done with deliberation and clarity. The burden of proof rests with AT&T and it must present adequate information to allow the Commission to assess the ramifications of granting AT&T's Petition. The Rural Coalition respectfully submits that the record contains inadequate evidence for the Commission or the Parties participating in the proceeding to accurately evaluate whether or not AT&T's Petition should be granted.

A. The Record Contains Precious Little Detail Regarding AT&T Intentions.

AT&T filed its Petition on September 7, 2012. The Petition stated that AT&T sought relief from its IXC COLR obligations in the TERRA SW area.⁶³ The Petition further indicated that approximately 65 communities in that area would be affected by granting AT&T the requested relief.⁶⁴ Other than listing the 65 communities in Exhibit A to the Petition, AT&T offers little specific information about its intentions in each of those communities.⁶⁵ The Rural Coalition submits that AT&T must present the Commission detailed information on the implications for these communities before the Petition can be granted.

The record is devoid of information about which AT&T earth stations may be retired or how the joint ownership of the earth stations between AT&T and UII might affect those earth stations. Although the Rural Coalition raised the issue of needing clarity about AT&T's intentions in its Prehearing Brief, AT&T continued to decline to provide the information.⁶⁶ The Rural Coalition sought additional information regarding AT&T's intentions through discovery, but AT&T declined to provide any substantive

⁶³ *AT&T Petition* at 1-2.

⁶⁴ *AT&T Petition* at 9-11.

⁶⁵ *See AT&T Petition* at Exhibit A.

⁶⁶ In the Matter of the Petition Filed by ALASCOM, INC. d/b/a AT&T ALASKA to be Relieved of its Carrier of Last Resort Responsibilities in Certain Locations in Southwest Alaska, Docket No. U-12-127, before the Regulatory Commission of Alaska, Rural Coalition's Prehearing Brief (Dec. 10, 2012) ("*Rural Coalition's Prehearing Brief*") at 5 n.8. "At this point it is unclear what AT&T's long term plans are for eventual replacement of its dedicated satellite capacity for Alaska, and the factual record for this proceeding should include an investigation of that capacity and if it will be replaced, or how the lifting of COLR obligations will impact the decision making process for satellite capacity." *Id.*

information.⁶⁷ “AT&T Alaska does not have any specific plans at this time regarding the retirement of its earth stations in the TERRA SW area.”⁶⁸ AT&T likewise declined to offer details to GCI when it posed a similar question in discovery.⁶⁹

The record does not include sufficient information to determine what plans AT&T may have to transition its traffic to the TERRA SW network. It is difficult for the Commission to consider the regulatory implications of a transition if there is no basis to even begin the discussion. ACS and the Rural Coalition queried AT&T about the status of its conversation with GCI about moving intrastate interexchange traffic to the TERRA SW network, but AT&T declined to provide details about any potential discussions it might have had with GCI to transition traffic from its satellite network to GCI’s terrestrial network.⁷⁰ AT&T cited the TERRA SW price sheet and stated that “[p]rior to this posting, AT&T Alaska received quotes with similar pricing from GCI.”⁷¹ This lack of foundation makes it difficult to formulate a reasoned understanding of what the future may hold if the Petition is granted.

⁶⁷ AT&T Response to ACS and Rural Coalition First Set of Discovery at ACS/RC-3.

⁶⁸ AT&T Response to ACS and Rural Coalition First Set of Discovery at ACS/RC-3.

⁶⁹ AT&T Response to GCI’s First Set of Discovery at GCI-3(a).

⁷⁰ AT&T Response to ACS and Rural Coalition First Set of Discovery at ACS/RC-5.

⁷¹ AT&T Response to ACS and Rural Coalition First Set of Discovery at ACS/RC-5.

B. Moving All Intrastate Interexchange Traffic to TERRA SW Is Not In the Public Interest.

AT&T's Petition fails to make a sound argument that its proposal to move traffic from its existing network to the TERRA SW network serves the public interest. AT&T discusses at length in its Legal Brief and the testimony of Dr. Aron that AT&T's network is expensive and the TERRA SW network serves the same function, but there is no analysis about what that means for the affected communities.⁷² The Rural Coalition believes that the Commission will be unable to grant AT&T's Petition without a stronger foundation to support the requested relief.

1. The Commission must consider whether there is sufficient capacity on TERRA SW to Serve Alaska Communities Today and in the Long Term.

AT&T's Legal Brief suggests that GCI may be an acceptable IXC COLR based on its terrestrial network.⁷³ The Rural Coalition firmly believes that there must be a smooth transition between the IXC COLRs to preserve stability in the marketplace and ensure there is no disruption for consumers. To grant AT&T's Petition, the Commission must be ready to transfer the obligations to a new IXC COLR. Significant questions remain regarding how GCI would function as the IXC COLR and the appropriate regulatory oversight for its network. Both ACS and the Rural Coalition have expressed concern that about GCI's potential role as IXC COLR in light of its argument that its network is solely interstate and not subject to Commission

⁷² See *AT&T Legal Brief* at 12-18, 24-28; *Dr. Aron Testimony* at 4-6, 12-34.

⁷³ *AT&T Legal Brief* at 28.

jurisdiction.⁷⁴ To transition the IXC COLR responsibilities to GCI, the Commission must address these issues and determine that GCI and its network are suited to accept the obligations.

The Rural Coalition is very concerned about the available capacity on the TERRA SW network. Before the Commission consents to allowing AT&T to dismantle its network capacity in the TERRA SW area, there must be an adequate record regarding how much capacity is needed, how much capacity is needed to meet that need today and how capacity might be needed in the future as broadband needs grow. The Rural Coalition sought further information about the capacity on the TERRA SW network through discovery, but the information provided did little to assuage the concern that TERRA SW will run out of capacity and carriers and their customers currently reliant on the capacity provided by the AT&T network will be shut out of access to the only transport network in the area.

GCI indicates in its discovery responses that it plans to decommission C-band earth stations in a number of areas, but does not provide information regarding its plans

⁷⁴ See General Communication, Inc., Reply Comments of General Communication, Inc. on Section XVII.L-R of the CAF/ICC Further Notice of Proposed Rulemaking, before the FCC, WC Docket No. 10-90 (Mar. 30, 2012) (“*GCI FCC Comments*”) at 7-8; In the Matter of the Petition Filed by ALASCOM, INC. d/b/a AT&T ALASKA to be Relieved of its Carrier of Last Resort Responsibilities in Certain Locations in Southwest Alaska, Docket No. U-12-127, before the Regulatory Commission of Alaska, Comments of GCI (Oct. 19, 2012) (“*GCI Opening Comments*”) at 3; In the Matter of the Petition Filed by ALASCOM, INC. d/b/a/ AT&T ALASKA to be Relieved of its Carrier of Last Resort Responsibilities in Certain Locations in Southwest Alaska, Docket No. U-12-127, before the Regulatory Commission of Alaska, Brief of CGI (Dec. 10, 2012) (“*Brief of CGI*”) at 7-8.

for the earth stations jointly owned by UUI and AT&T.⁷⁵ Instead, GCI simply asserts that “Evaluation of the need for earth stations is a continuing project.”⁷⁶ Shrinking satellite capacity in the region should raise significant red flags for the Commission. Until the record is developed on these issues, it will be difficult to determine the full impact to Alaska of AT&T’s requested relief. As Mr. Michael C. Burke asserts in his Testimony, the Commission must determine that sufficient network capacity exists to meet future customer and carrier requirements in each community in the TERRA SW area.⁷⁷ If AT&T plans to decommission an earth station and shift its traffic to the GCI network, the Commission must first determine if the TERRA SW network has sufficient capacity to carry the AT&T traffic as well as handle other future needs of the community, both now and in the future.⁷⁸

It is well documented that carriers in the area have already had problems gaining access to the TERRA SW network.⁷⁹ The regulatory stance of GCI in conjunction with the capacity issues of TERRA SW raise significant concerns for the Rural Coalition regarding the future of accessibility in the future. The Commission should closely

⁷⁵ GCI’s Responses to AT&T Alaska’s First Set of Discovery Requests at 3 (Jan. 2, 2013).

⁷⁶ *Id.*

⁷⁷ Burke Testimony at Q/A No. 16.

⁷⁸ *Id.*

⁷⁹ *Comments of the Alaska Rural Coalition Concerning the Remote Areas Fund*, WC Docket No. 10-90, before the FCC (Feb. 19, 2013) (“*ARC RAF Comments*”) 8-9; In the Matter of the Petition Filed by ALASCOM, INC. d/b/a/ AT&T ALASKA to be Relieved of its Carrier of Last Resort Responsibilities in Certain Locations in Southwest Alaska, Docket No. U-12-127, before the Regulatory Commission of Alaska, Comments of ACS on AT&T Alaska’s Petition (Oct. 19, 2012) (“*Comments of ACS*”) at 5-6.

consider these issues before relieving AT&T of its IXC COLR obligations and transferring them to GCI.

An important part of the TERRA SW network is the community links that connect villages to the backbone of the system.⁸⁰ The individual links vary in capacity and represent a potential bottleneck to the backbone of the TERRA SW network. There is no evidence in the record about the available capacity in the community links. Given that they represent a vital part of the system, it is essential that the Commission collect adequate information to assess whether or not the TERRA SW network, including the community links to the villages can accept additional traffic in each community affected by AT&T's exist as IXC COLR.

2. Blurring Intrastate and Interstate traffic on an allegedly wholly interstate facility creates regulatory uncertainty.

GCI has consistently asserted that the TERRA SW is a wholly interstate facility and as such is not subject to the jurisdiction of the Commission.⁸¹ The Rural Coalition vehemently disagrees with GCI's assessment of the regulatory oversight the Commission could and should exercise.⁸² Even absent the introduction of known intrastate interexchange traffic onto the TERRA SW network if GCI became the IXC

⁸⁰ See *Project Details*, GCI TERRA, <http://terra.gci.com/project> (last visited Feb. 22, 2012).

⁸¹ See *GCI FCC Comments at 7-8*; *GCI Opening Comments at 3*; *Brief of GCI at 7-8*.

⁸² See *ARC RAF Comments at 13* ("If the Commission required terrestrial backhaul to be priced at a fair and nondiscriminatory price in light of the requirement to purchase it, carriers would know that they could afford access and it would improve the penetration rates of broadband in rural areas.").

COLR, the Rural Coalition believes that the Commission is well within its right to assert jurisdiction over intrastate facilities like TERRA SW.⁸³

The TERRA SW network is completely contained within the State of Alaska.⁸⁴ GCI appears to base its position on the fact that the majority of traffic carried by TERRA SW is interstate in nature.⁸⁵ GCI's position is that "GCI does not own the TERRA Southwest Network facilities. Instead, those facilities are owned by UUI, which sells exclusively INTERstate service and does not have a certificate of public convenience and necessity to provide INTRAstate interexchange service. Designating GCI as COLR in this situation would require that GCI be allowed to fulfill the responsibility by resale, which is the same underlying goal AT&T asserts it is seeking."⁸⁶ The segregation of traffic between intrastate and interstate is relevant to cost allocations, but it is not dispositive of regulatory jurisdiction.⁸⁷

There is ample precedent for the Commission to assert jurisdiction over a terrestrial network located within Alaska. The Commission considered an analogous

⁸³ Regulatory Commission of Alaska, In the Matter of the Request Filed by Alaska Fiber Start, LLC to Discontinue Providing Intrastate Interexchange Telecommunications Service Within Alaska and Revoke Certificate of Public Convenience and Necessity No. 539, Docket No. U-02-101, Order No. 2 (Nov. 20, 2003) ("*Alaska Fiber Star*") at 4.

⁸⁴ See *Maps and Locations*, GCI TERRA, <http://terra.gci.com/maps-locations> (last visited Feb. 22, 2012).

⁸⁵ *Brief of GCI* at 7 ("The lines that ACS seeks on TERRA Southwest are all INTERstate lines that are not regulated by this Commission."). GCI believes not only that TERRA SW is "not regulated by this Commission," but also that all Internet fiber is beyond the Commission's regulation. *Id.* This position flies in the face of the Commission's fundamental purpose and function.

⁸⁶ *GCI Opening Comments* at 3 (emphasis in original).

⁸⁷ See *Transformation Order* at para. 64.

situation in the case *In re Alaska Fiber Star LLC* (“*Alaska Fiber Star*”), Docket U-02-101. Alaska Fiber Star, which owned a fiber network connecting Alaska communities, sought to discontinue intrastate services and be excused from the jurisdiction of the Commission.⁸⁸ Alaska Fiber Star relied upon the doctrine of “inseparability” to argue that FCC regulation preempts state regulation of the facilities.⁸⁹

The inseparability doctrine allows the FCC to preempt conflicting state rules where it cannot separate the interstate and the intrastate components of its asserted regulation. However, the doctrine has been limited in application to situations where the FCC cannot achieve its federal policy without encroaching in the state’s regulation of intrastate service.⁹⁰

The Commission rejected the argument and found that even mixed-use facilities are subject to state jurisdiction when the state regulation and federal regulation can coexist.⁹¹ The Commission concluded “[o]ur continued regulation of this network is important because a failure in the AFS network can have a significant impact on intrastate voice services provided over the AFS network.”⁹² The same rationale applies to the TERRA SW network, except that regulatory oversight of that network is even more critical given its potentially monopoly position in the region.

⁸⁸ See generally Docket No. U-02-101.

⁸⁹ *Alaska Fiber Star* at 3. The inseparability doctrine originated in *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355 (1986) (“*La. Pub. Serv. Comm’n*”) (rejecting “the intimation . . . that the FCC cannot help by pre-empt state depreciation regulation of a joint plant . . . that it makes no sense to depreciate one piece of property two ways.”).

⁹⁰ *Alaska Fiber Star* at 4.

⁹¹ *Id.* at 3.

⁹² *Id.* at 4.

The Commission's decision in *Alaska Fiber Star* is well supported by federal law.⁹³ Even when interstate and intrastate traffic is inseparable, regulation may coexist between the state and federal authorities.⁹⁴ Instead of a default position of preemption by the FCC, "the FCC must limit its regulation to the interstate aspects if it can do so."⁹⁵ If the FCC wishes to preempt state regulation, it must show that regulation of a specific portion of inseparable interstate and intrastate traffic is sufficiently narrow.⁹⁶ Specifically, courts have found that FCC may preempt a state's regulation only in circumstances where allowing state regulation "negates the exercise by the FCC of its own lawful authority over interstate communication."⁹⁷ Without such a showing, "the FCC may not use its preemptive powers in a manner that would negate the lawful exercise of state authority over intrastate service."⁹⁸

The Rural Coalition believes the Commission exercises jurisdiction over TERRA SW as an intrastate transport network. Given the importance of the TERRA SW network in the region and GCI's potential role of IXC COLR it is important for the Commission to assert its jurisdiction. Doing so not only follows established precedent, but it serves the public interest.

⁹³ *National Ass'n of Reg. Util. Comm'rs v. FCC*, 880 F.2d 422 (D.C.Cir.1989) ("NARUC"); *Pub. Util. Comm'n of Tex. v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989) ("PUC of Tex."); *La. Pub. Serv. Comm'n*, 476 U.S. 355.

⁹⁴ *See NARUC*, 880 F.2d at 430-31.

⁹⁵ *PUC of Tex.*, 886 F.2d at 1333.

⁹⁶ *Id.*

⁹⁷ *NARUC*, 880 F.2d at 429.

⁹⁸ *Id.*

C. The Role of IXC COLR Must Evolve Given Recent Federal Regulatory Changes.

The letter of the regulations governing the IXC COLR does not clearly articulate the inherent obligations.⁹⁹ They have been defined over the years by the Commission as necessary. The Commission, carriers and consumers all find themselves at a crossroads of an industry evolving to meet the needs of an increasingly technologically sophisticated public.

The FCC's reform of high cost support underscores the broader scope of telecommunications networks.¹⁰⁰ According to the FCC,

[f]ixed and mobile broadband have become crucial to our nation's economic growth, global competitiveness, and civic life. Businesses need broadband to attract customers and employees, job-seekers need broadband to find jobs and training, and children need broadband to get a world-class education. Broadband also helps lower the costs and improve the quality of health care, and enables people with disabilities and Americans of all income levels to participate more fully in society. Community anchor institutions, including schools and libraries, cannot achieve their critical purposes without access to robust broadband. Broadband-enabled jobs are critical to our nation's economic recovery and long-term economic health, particularly in small towns, rural and insular areas, and Tribal lands."¹⁰¹

The transition of support to IP networks capable of providing broadband services signals the need for carriers to access those robust networks to provide the bundle of services demanded by consumers.

⁹⁹ Alaska Public Utilities Commission, In the Matter of the Limited Investigation Into the Practices and Procedures of ALASCOM, INC., and Companies of PACIFIC TELECOM, INC., in Alaska, Docket No. U-95-26, Order No. 2 (June 15, 1995) at 3-6 (requiring Alascom to "include in its capital plan a description of its expected future and its current data transmission capabilities (including any limitations on baud rate)").

¹⁰⁰ *Transformation Order* at paras. 3-5.

¹⁰¹ *Transformation Order* at para. 4.

IP networks do not distinguish between voice traffic and data traffic. All traffic, regardless of function or destination is broken down into indistinguishable packets of information. Federal regulation is evolving to reflect this changing reality and state regulation must also or it will lose the ability to protect consumers and serve the public interest. The Rural Coalition urges the Commission to retain its flexibility in defining the obligations of the IXC COLR so that it can provide the market oversight needed.

D. If GCI Assumes the IXC COLR Responsibility, It Will Control a Monopoly Facility Deserving Regulation.

The RCA clearly has jurisdiction to regulate a monopoly intrastate facility such as the TERRA SW network. The Rural Coalition believes that the RCA's authority to ensure that IXCs provide wholesale services to other carriers at "just and reasonable rates" already includes the authority to regulate the wholesale rates offered by GCI/UUI for third-party carrier access to TERRA SW's terrestrial transport.¹⁰² However, if AT&T's Petition is granted and TERRA SW becomes the sole available facility for transport and backhaul in the TERRA SW area, then the stakes of Commission regulation will rise dramatically.

The Rural Coalition fears a situation in which AT&T turns down its earth stations or entertains the possibility of decommissioning its Alaska satellite without Commission oversight and regulation of the TERRA SW facility replacing AT&T's transport. Not only does this scenario have the potential to fundamentally reduce the availability of precious middle mile transport when Alaska desperately needs expanded

¹⁰² 3 AAC 52.375(b).

middle mile facilities and capacity, but also, AT&T's exit from the market would leave the TERRA SW facility as a monopoly facility in its service area.¹⁰³ This would create the opportunity for GCI/UUI to further increase the price of TERRA SW's capacity to wholesale customers and effectively control the prices that ILECS are able to charge their end-user customers for long-distance and broadband services. This, in turn, has the potential to devastate the future of competition in Alaska's telecommunications market. The Rural Coalition wishes to emphasize to the Commission that GCI cannot be designated as a replacement COLR for AT&T unless the Commission is willing to ensure that TERRA SW does not become a monopoly facility that drives smaller carriers out of the long-distance and broadband business due to monopoly pricing.

V. CONCLUSION.

The Rural Coalition supports the expedient resolution of the issues raised by AT&T's Petition. These are important issues affecting the entirety of Alaska's telecommunications market. However, the underlying public interest issues must be addressed before the Commission considers granting AT&T any relief of its COLR obligations.

¹⁰³ See, e.g., Fireweed Communications, LLC, and Jeremy Lansman, Petition to Deny Pending Applications of General Communication Inc. for Transfer of Control of Licenses, before the FCC, in the matter of ACS Wireless License Sub, Inc., The Alaska Wireless Network, LLC, GCI, Communication Corp. Unicom Inc. For Consent to Transfer Control of Wireless Licenses and Authorizations and Media Authorizations for KTVA (TV), KATH-LD and KSCT LP, WT Docket No. 12-187 (Feb. 19, 2013) at 10 ("Alaskan companies having subscribers in 2% or more of Alaskan homes are DISH, Matanuska Telephone, DirectTV, GCI. Of these, GCI has a greater than 64% market share. In Alaskan multi channel video delivery alone we learn GCI is almost prima facie a monopolist. However, based upon their own declaration that they have 70% of the ISP market, and Department of Justice standards, they already have monopoly power.").

Dated this 22nd day of February, 2013.

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DOCKET U-12-127; RURAL COALITION'S LEGAL BRIEF
February 22, 2013
Page 35 of 35

RECEIVED

By the Regulatory Commission of Alaska on Dec 10, 2012

STATE OF ALASKA
THE REGULATORY COMMISSION OF ALASKA

Before Commissioners:

T.W. Patch, Chairman
Kate Giard
Paul F. Lisankie
Robert M. Pickett
Janis W. Wilson

In the Matter of the Petition Filed by ALASCOM, INC.)
d/b/a AT&T ALASKA to be relieved of Its Interexchange) U-12-127
Carrier of Last Resort Responsibilities in Certain)
Locations in Southwest Alaska)

BRIEF OF ACS ADDRESSING QUESTIONS IN ORDER NO. 2

I. Introduction

ACS of the Northland, Inc., ACS Wireless, Inc., ACS Internet, and ACS Long Distance, Inc. (together, "ACS") file this brief to address questions that the RCA raised in Order No. 2¹ regarding AT&T's Petition for COLR Relief in 65 Locations in Southwest Alaska;² whether additional proceedings are necessary to address issues raised in parties' comments; and if so, whether the proceedings should be utility or rulemaking.³ The Commission should investigate the following issues in U-12-127:

- 1) Whether a COLR is still needed in the TERRA-SW area; and if so,

¹ *In the Matter of the Petition filed by Alascom, Inc. d/b/a AT&T Alaska to be Relieved of its Interexchange Carrier of Last Resort Responsibilities in Certain Locations in Southwest Alaska; Order Designating Parties, Inviting Participation by the Attorney General and Petitions for Intervention and Scheduling Prehearing Conference, U-12-127(2), dated Nov. 21, 2012 ("Order No. 2"). ACS consents to a 120 day extension of the statutory deadline.*

² *AT&T Alaska's Petition for COLR Relief in 65 Locations in Southwest Alaska, U-12-127, dated Sept. 7, 2012. ("AT&T Petition")*

³ Order No. 2, p. 4.

- 2) Whether AT&T has justified shifting COLR responsibilities to GCI, which includes investigating whether designating GCI as COLR is in the public interest, and whether GCI is capable of serving in that role.⁴

To comply with statutory timeline issues, the Commission can investigate the specifics of GCI's intrastate wholesale tariff (or other specific rate and access issues that may arise) in an additional "utility" proceeding.

Under the Section 390(c) framework, the Commission should investigate whether the TERRA-SW area still needs a COLR, although there appears to be little doubt that it does. The Commission's predecessor decided that an interexchange COLR was needed to serve in high-cost Alaska conditions and that precedent still holds. The TERRA-SW area's facilities and service characteristics are still very similar to conditions existing in 1995 when AT&T assumed COLR duties, except for the construction of the new, publicly funded TERRA-SW. Interexchange facilities still are scarce, and GCI/UUI has a monopoly on terrestrial transport. Indeed, the federal government gave GCI/UUI loan and grant funding to support construction of TERRA-SW precisely because of the lack of adequate facilities in the region.

Because the area still likely needs a COLR, the Commission should focus its investigation on whether AT&T has justified shifting those responsibilities to GCI. That investigation should include whether GCI is capable of serving as COLR and whether designating it as COLR is in the public interest. The issue that ACS raises in its comments, whether GCI is actually making TERRA-SW capacity available at reasonable rates and under non-discriminatory terms, goes to the heart of the U-12-127 investigation.

⁴ GCI acquired controlling interest in UUI's interexchange carrier affiliate, UNICOM, Inc. in U-07-149(5), dated May 7, 2008. References here to transferring COLR responsibilities to GCI are intended to encompass UNICOM. The RCA can investigate in U-12-127 which specific GCI affiliate should be designated as COLR for the TERRA-SW area.

The Commission can conduct an additional “utility” proceeding to update GCI’s wholesale tariff for service in the TERRA-SW area, to ensure that GCI offers: (a) non-discriminatory access, (b) at reasonable rates, (c) to sufficient capacity on its TERRA-SW facilities, such that the public interest will be protected if it were to assume AT&T’s COLR obligations.⁵ The Commission should condition any decision formally shifting AT&T’s responsibilities on satisfactory resolution of that case.

II. The Commission Should Investigate Whether AT&T Has Justified Shifting COLR Duties to GCI

Section 390(c) of the rules gives the Commission discretion to change AT&T’s COLR responsibilities, but also sets up a process for it to decide whether to reassign those duties to another facilities-based carrier. It provides a standard for reassigning COLR duties: whether the alternate facilities-based carrier is capable of serving as COLR and whether it is in the public interest to designate that carrier as a COLR.⁶ The Commission should focus its U-12-127 investigation on whether AT&T has adequately justified shifting COLR responsibilities to GCI and whether designating GCI is consistent with the rule’s standard for reassigning COLR duties.

ACS agrees that GCI would be better able to fulfill the COLR obligation since GCI now has the primary facilities reaching TERRA-SW communities, if the Commission finds that

⁵ Other options for making TERRA-SW facilities available may be developed in U-12-127 and ACS will address those as they arise.

⁶ 3 AAC 52.390(c). The Commission may designate a COLR for an unserved area based on the public interest and the carrier’s capability to serve. Applying this standard in U-12-127 is reasonable because, for all practical purposes, the TERRA-Southwest area will be “unserved” by a COLR if AT&T’s duties are terminated. Also, the standard contains basic public interest and fitness criteria that the Commission generally applies in other cases where it evaluates whether the public convenience and necessity warrants the service. *See* 42.05.221(a); 241.

GCI can make sufficient capacity available on TERRA-SW on a non-discriminatory basis at reasonable rates. AT&T's Petition merely **assumes**, though, that GCI has sufficient capacity in TERRA-SW to substitute for AT&T's facilities,⁷ and that it will make that capacity available in a non-discriminatory manner under a reasonable rate structure.⁸ The Commission should investigate whether those assumptions are true in U-12-127 and not accept them at face value.

This case arises in a unique context, because the federal government gave GCI/UII \$88 million in federal grants and loans to serve a public interest need: installing facilities to serve communities where adequate telecommunications facilities are sorely lacking. TERRA-SW is a substantially publicly-funded project, conceived and funded for the express purpose of providing access to customers in these communities. TERRA-SW's public interest purpose underscores that the facilities should be made available in a non-discriminatory manner. **While GCI's LEC affiliate may own TERRA-SW and the facility has local exchange capabilities, TERRA-SW also includes an inherent interexchange transport capability that has been no less funded through federal grants and loans.** The savings realized from federal grants and loans should be passed through and shared with customers.

III. Issues Related to GCI's Actual Practices in Providing Service Through TERRA-SW Are Within the Scope of U-12-127

ACS' comments addressed GCI's actual practices in providing service and capacity over the TERRA-SW facilities. GCI is making only small amounts of capacity available to other providers for resale to residential customers.⁹ It has refused to make capacity available at rates and terms that would be sufficient to provide service to health care providers, schools and

⁷ AT&T Petition, p. 3.

⁸ *Id.* pp. 13, fn. 28; 14; 25.

⁹ ACS Comments, p. 5.

other anchor institutions.¹⁰ GCI's TERRA-SW prices far exceed reasonable levels, especially since the network was funded in substantial part through federal grants and loans.¹¹ If the rates that UUI is quoting to unaffiliated parties were imputed to GCI, then long distance rates would undoubtedly need to rise.¹²

Examination of these issues should inform the Commission's decision as to whether GCI has the capacity in TERRA-SW to provide adequate substitute facilities, and whether GCI is providing non-discriminatory access at reasonable rates, as the public interest requires. For example, other IXCs will not be able to provide service in the TERRA-SW area, if GCI does not have adequate facilities (commercial quantities) to offer and AT&T's facilities are turned down. Also, even if GCI offers to make some limited facilities available, IXCs will be effectively denied service if GCI offers only exorbitantly priced wholesale/resale arrangements.

GCI is obligated to provide non-discriminatory access and reasonable rates for intrastate service under the RCA's statute and regulations. Just like other certificated public utilities, GCI must offer access to its services in a non-discriminatory manner and may not grant unreasonable preferences or advantages to any person or customer class, or subject a customer class to unreasonable disadvantages.¹³ Its rates must be fair, reasonable and non-discriminatory.¹⁴ These rules apply to GCI whether or not it serves as COLR. If the Commission considers designating GCI as COLR for TERRA-SW though, it should know

¹⁰ *Id.*

¹¹ *Id.* pp. 5-6.

¹² *Id.* p.11.

¹³ AS 42.05.301. UUI and UNICOM have this obligation as well. Public utilities are specifically barred from having preferential arrangements with affiliates. Under AS 42.05.511(c), prices charged by affiliates for services rendered to a public utility must be based on cost.

¹⁴ AS 42.05.381(a); 391(a).

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whether GCI's practices in offering service through TERRA-SW will serve the public interest. Because TERRA-SW was funded with a public purpose to supply facilities in a remote area where adequate telecommunications facilities are lacking, GCI's duty to provide non-discriminatory access for IXCs who use TERRA-SW transport is even more essential.

Although AT&T's Petition assumes that GCI's facilities will be available as: 1) adequate substitute COLR facilities, 2) on a non-discriminatory basis, and 3) at reasonable rates, the record so far contains no evidence that such would be the case. To the contrary, GCI to date has failed to meet any of these three basic criteria. The GCI companies offer preferential capacity access to their own affiliates, and the small amount of capacity they offer to IXC customers is priced at exorbitant rates.¹⁵ If AT&T's predictions are not realistic under the current market conditions, then granting its Petition will not be in the public interest.

IV. The Commission Should Conduct an Additional "Utility" Proceeding to Update GCI's Wholesale Tariff, and Condition Any Order Ending AT&T's COLR Duties on Satisfactory Resolution of that Case

The Commission should conduct an additional proceeding to update GCI's wholesale rates for TERRA-SW and verify that GCI operates under non-preferential access rules. The proceeding will be a "utility" proceeding because it will address GCI's specific tariff.

In the additional proceeding, the Commission can set specific rates and terms of service for GCI's provision of service over TERRA-SW.¹⁶ GCI's wholesale tariff rates for switched

¹⁵ ACS Comments, pp.5-6.

¹⁶ The Commission may determine that non-discriminatory access to TERRA-SW at reasonable rates should also be provided in other ways, based on the results of the U-12-127 case.

and dedicated service are dated May 14, 1991.¹⁷ Sheets No. 3 and 5, showing the location of GCI's facilities, are dated February 8, 1997.

The Commission should update GCI's rates applicable to TERRA-SW to pass on the savings from federal grants and loans. Also, it should ensure that GCI follows rules that give IXC customers reasonable non-discriminatory access to TERRA-SW transport and other services, consistent with the public purpose of the facilities. TERRA-SW provides much needed higher quality middle mile transport for the area that will enable carriers using the facility to provide improved service. Under its statute, the Commission has a policy role to play here, to ensure competition is fair to competitors and consumers.¹⁸

The Commission should make any order ending AT&T's COLR responsibilities conditioned on satisfactory resolution of the additional proceeding. It should not terminate AT&T's COLR duties until it can determine that customers can buy comparable service over TERRA-SW facilities at reasonable rates under non-preferential terms. Only then can TERRA-SW serve as substitute COLR facilities in the public interest.

V. Conclusion

Very likely, a COLR is still needed in the TERRA-SW area. Consequently, the Commission should focus its U-12-127 investigation on whether AT&T has justified shifting COLR duties to GCI. The issues that ACS raised in comments related to GCI's actual practices in administering TERRA-SW capacity are within the scope of U-12-127. The Commission's investigation of these issues should inform its decision as to whether shifting COLR duties to GCI is in the public interest and whether GCI is capable of serving as COLR.

¹⁷ See e.g. GCI Communication Corp. Tariff No. 419, Sheets 130-138.

¹⁸ AS 42.05.800(5).

If it decides to shift COLR responsibilities to GCI, the RCA can conduct an additional proceeding to update GCI's wholesale tariff related to its service over TERRA-SW. It should condition any order terminating AT&T COLR responsibilities on GCI's assumption of COLR duties under terms where it offers non-discriminatory access to sufficient TERRA-SW capacity at reasonable rates.

Dated this 10th day of December, 2012.

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Christine O'Connor
Executive Director

March 29, 2018

The Honorable Sam Kito III
Chair, House Labor and Commerce Committee
State Capitol, Barnes 124
Juneau, AK 99801

RE: HB 384 An Act relating to the Regulatory Commission of Alaska and broadband Internet regulations

Dear Chairman Kito and Members of the Committee,

We are writing to express our opposition to HB384 and provide information regarding the authority federal and state regulators have over broadband service.

Support for an Open Internet

ATA member companies have been steadfast in their commitment to an open internet. We do not and will not impair our customers' access to lawful internet services or content. The Federal Communications Commission recently restored the light-touch regulation that allowed the internet to flourish for over 20 years. To the extent additional rules are needed to guarantee that customers will continue to be in charge of their online experience, we support bi-partisan federal legislation and will continue to work with Alaska's delegation to achieve this result.

Federal Preemption

Under Democratic and Republican leadership, the FCC has unequivocally asserted its jurisdiction over broadband internet access service, noting that "it is well-settled that Internet access is a jurisdictionally interstate service." The FCC expressly prohibits state and local governments from adopting their own separate requirements, including specifically preempting, "any so-called 'economic' or 'public utility-type' regulations."¹ HB384 directly conflicts with this federal preemption by defining providers of broadband internet access as public utilities for purposes of the Regulatory Commission of Alaska, the body which imposes public utility-type regulation on Alaska's utilities.

States' Role

States have a role in oversight of broadband internet access service under existing law. The FCC describes that role as a valued partnership, stating, "We appreciate the many important functions served by our state and local partners, and we fully expect that the states will 'continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints' within the framework of this order."² The states are also expressly authorized to continue to designate eligible telecommunications carriers, administer rights-of-way, and adopt state universal service policies.

¹ See Restoring Internet Freedom Order at paragraphs 194-204.

² Id.

The state already has an important role in broadband oversight. The RCA has authority to protect consumers and participate in the broadband landscape under existing federal law and regulation. Attempting to expand that role to broad-based, utility-style regulation is clearly preempted.

Cost of Expanded RCA Regulation

Disregarding federal preemption for a moment, expanding state authority by imposing traditional, utility-style regulation on broadband service would still be inadvisable due to the cost. HB384 would add a new layer of regulatory activity and unavoidable cost to both the state and Alaska's broadband providers. The RCA would require additional staff and expertise to develop initial rules and support ongoing regulation. And broadband providers would find themselves grappling with a substantially increased burden of regulatory cost, uncertainty, and delay; all of which deter investment in broadband infrastructure.

ATA members currently support a significant burden of regulatory oversight from both federal and state regulators. We comply with hundreds of regulatory requirements annually touching virtually every aspect of our businesses and diverting resources away from investment in networks. Adding a new layer of regulation would only exacerbate that burden and further divert scarce resources away from serving Alaskans.

Federal law and regulation clearly defines an important role for the Regulatory Commission of Alaska regarding broadband internet access and also clearly preempts state action to impose utility-style regulation as HB384 attempts to do. Adding new layers of regulatory obligation and burden to the state and industry during difficult economic times is inadvisable. We respectfully express our opposition to this bill.

Respectfully submitted,

A handwritten signature in cursive script that reads "Christine O'Connor".

Christine O'Connor
Executive Director



March 29, 2018

The Honorable Sam Kito III
Chair, House Labor and Commerce Committee
State Capitol, Barnes 124
Juneau, Alaska 99801

RE: HB384 An Act relating to the Regulatory Commission of Alaska and broadband Internet regulations

Dear Chairman Kito and Members of the Committee,

Thank you for the opportunity to comment on HB384. I am writing to express Alaska Communications' opposition to the bill. It is not sound public policy for the following reasons.

HB384 would amend AS 42.05.990(6) to classify as a "public utility" any entity furnishing "telecommunications service, including broadband Internet access, to the public for compensation." This amendment to permit state regulation of broadband Internet access service (BIAS) directly contradicts existing law and public policy in a number of respects:

The Federal Communications Commission (FCC) has ruled that BIAS is not a "telecommunications service" but rather is an "information service" within the meaning of the federal Communications Act.¹ The FCC concluded that this is the best reading of the definitions set forth in the statute, and public policy considerations strongly weigh in favor of the information service classification as well.² In so doing, the FCC returned BIAS to the status it originally had when the FCC classified it as an information service in 2002 (BIAS provided by cable television operators),³ 2005 (BIAS provided by wireline telecommunications providers),⁴ 2006 (BIA provided over power lines),⁵ and 2007 (BIAS provided by mobile wireless service providers).⁶ Through these FCC decisions, all BIAS effectively was classified as "information services" regardless of the technology platform. The FCC's reading of the statute was affirmed by the U.S. courts of appeals up to and including the U.S. Supreme Court.

As a policy matter, the FCC has found that, from the outset, Congress intended for BIAS to be free from regulation as a "telecommunications service" and the costs imposed by such regulation. As early as 1998 the FCC concluded that applying common carrier or "telecommunications service" regulation to BIAS would "seriously curtail" the regulatory

¹ *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018) ("Internet Freedom Order").

² *Id.* ¶20.

³ 17 FCC Rcd 4798 (2002), *aff'd Nat'l Cable & Telecom's Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

⁴ 20 FCC Rcd 14583 (2005), *aff'd Time Warner Telecom v. FCC*, 507 F.3d 205 (3d Cir. 2007).

⁵ 21 FCC Rcd 13281 (2006).

⁶ 22 FCC Rcd 5901 (2007).

freedom deemed necessary to the development of “enhanced services,” as information services formerly were known.⁷

The FCC continues to interpret federal law as requiring preservation of a “vibrant and competitive free market” for BIAS “unfettered by Federal or State regulation” such as existed for Internet services when Congress first incorporated mention of them in the Communications Act, in 1996.⁸

The FCC has determined that, through nearly 20 years of development as a non-telecommunications service, BIAS providers invested heavily in U.S. networks extending some 355 million fixed and mobile Internet connections to the American public, resulting in roughly 91 percent of U.S. household having access to high-capacity broadband capability as of 2016.⁹ Those numbers continue to grow as service providers extend broadband to unserved locations using FCC “Connect America Fund” support. Indeed, the FCC expressly concluded that classification as an “information service” will help incentivize BIAS providers “to expand coverage to underserved areas” such as rural parts of the nation.¹⁰

In contrast, the FCC concluded that imposing “telecommunications service” regulation on BIAS would impose “considerable social cost, in terms of foregone investment and innovation,” without delivering any discernable benefit to the public.¹¹

While FCC policy favored more heavy-handed “telecommunications” regulation of BIAS for a brief period from mid-2015 to 2017, the FCC recently ended this experiment, concluding that the claims of harm alleged by proponents of such regulation often had been “exaggerated,” and actual occurrences of harm had proven to be “sparse.”¹² In general the FCC takes a dim view of prophylactic regulation imposed in the absence of evidence that such regulation is justified as serving the public interest, the benefits outweighing the costs.¹³ Further, the FCC noted that any potential bad actors may be dealt with under existing antitrust and consumer protection laws, further obviating the need for heavy-handed telecommunications utility regulation.¹⁴

The FCC has concluded that preemptory regulation of BIAS as a “telecommunications service” categorically is not justified. The FCC calls such regulation “a solution in search of a

⁷ *Internet Freedom Order*, ¶9, citing FCC Report to Congress, 13 FCC Rcd 11501 (1998) (“Stevens Report”).

⁸ *See Internet Freedom Order*, ¶¶58, 63.

⁹ *See id.* ¶86.

¹⁰ *Id.* ¶106.

¹¹ *Id.* ¶87.

¹² *Id.* ¶¶87, 116.

¹³ *See, e.g., id.* ¶116 (telecommunications regulation is intrusive, and therefore requires a showing of “actual harms”).

¹⁴ *Id.* ¶¶87, 116. The FCC also requires BIAS providers to comply with Internet disclosure rules.

problem.”¹⁵ In the *Internet Freedom Order*, the FCC therefore preempted state regulation of the type proposed in HB384:

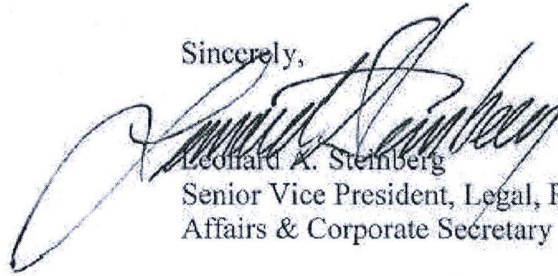
We therefore preempt any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order.¹⁶

Without limitation, the FCC specifically preempted “public utility-type” regulation at the state or local level, finding such regulation could “pose an obstacle to or place undue burden on the provision of broadband Internet access service.”¹⁷ Because intrastate and interstate communications travel over the same Internet connection, state “telecommunications service” regulation cannot be applied to intrastate Internet traffic without also affecting interstate traffic.¹⁸ It would be impossible or impracticable for a BIAS provider to comply different rules to interstate or intrastate communications over the Internet.¹⁹ Moreover, nothing in the federal law suggests that Congress intended states to have independent authority over BIAS or have the ability to countermand federal policy.²⁰

In addition, please note that unlike most states, there is no internet access point in Alaska. Rather, the nearest internet access point for Alaska internet traffic is Seattle. Consequently, there can be no doubt that internet access is interstate in nature, and therefore subject to federal jurisdiction, not state jurisdiction.

In short, the state may not impose regulation that is inconsistent with the FCC’s policy classifying BIAS as an information service and not a telecommunications service. Nor may the state regulate interstate broadband internet access service.

Sincerely,



Leonard A. Steinberg
Senior Vice President, Legal, Regulatory & Government
Affairs & Corporate Secretary

15 *Id.* ¶¶87, 109.
16 *Id.* ¶195.
17 *Id.*
18 *Id.* ¶200.
19 *Id.* ¶198.
20 *Id.* ¶204

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

In the Matter of)
)
Restoring Internet Freedom) WC Docket No. 17-108

DECLARATORY RULING, REPORT AND ORDER, AND ORDER

Adopted: December 14, 2017

Released: January 4, 2018

By the Commission: Chairman Pai and Commissioners O’Rielly and Carr issuing separate statements;
Commissioners Clyburn and Rosenworcel dissenting and issuing separate statements.

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I. INTRODUCTION

1. Over twenty years ago, in the Telecommunications Act of 1996, President Clinton and a Republican Congress established the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.”¹ Today, we honor that bipartisan commitment to a free and open Internet by rejecting government control of the Internet. We reverse the Commission’s abrupt shift two years ago to heavy-handed utility-style regulation of broadband Internet access service and return to the light-touch framework under which a free and open Internet underwent rapid and unprecedented growth for almost two decades. We eliminate burdensome regulation that stifles innovation and deters investment, and empower Americans to choose the broadband Internet access service that best fits their needs.

2. We take several actions in this Order to restore Internet freedom. First, we end utility-style regulation of the Internet in favor of the market-based policies necessary to preserve the future of Internet freedom. In the 2015 *Title II Order*, the Commission abandoned almost twenty years of precedent and reclassified broadband Internet access service as a telecommunications service subject to myriad regulatory obligations under Title II of the Communications Act of 1934, as amended (the Act).² We reverse this misguided and legally flawed approach and restore broadband Internet access service to its Title I information service classification. We find that reclassification as an information service best comports with the text and structure of the Act, Commission precedent, and our policy objectives. We thus return to the approach to broadband Internet access service affirmed as reasonable by the U.S. Supreme Court.³ We also reinstate the private mobile service classification of mobile broadband Internet access service and return to the Commission’s definition of “interconnected service” that existed prior to 2015. We determine that this light-touch information service framework will promote investment and innovation better than applying costly and restrictive laws of a bygone era to broadband Internet access service. Our balanced approach also restores the authority of the nation’s most experienced cop on the privacy beat—the Federal Trade Commission—to police the privacy practices of Internet Service Providers (ISPs).

¹ 47 U.S.C. § 230(b)(2). See generally Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*) (1996 Act).

² See *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*Title II Order*).

³ See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*).

3. Next, we require ISPs to be transparent. Disclosure of network management practices, performance, and commercial terms of service is important for Internet freedom because it helps consumers choose what works best for them and enables entrepreneurs and other small businesses to get technical information needed to innovate. Individual consumers, not the government, decide what Internet access service best meets their individualized needs. We return to the transparency rule the Commission adopted in 2010⁴ with certain limited modifications to promote additional transparency, and we eliminate certain reporting requirements adopted in the *Title II Order* that we find to be unnecessary and unduly burdensome.

4. Finally, we eliminate the Commission's conduct rules. The record evidence, including our cost-benefit analysis, demonstrates that the costs of these rules to innovation and investment outweigh any benefits they may have. In addition, we have not identified any sources of legal authority that could justify the comprehensive conduct rules governing ISPs adopted in the *Title II Order*. Lastly, we find that the conduct rules are unnecessary because the transparency requirement we adopt, together with antitrust and consumer protection laws, ensures that consumers have means to take remedial action if an ISP engages in behavior inconsistent with an open Internet.

5. Through these actions, we advance our critical work to promote broadband deployment in rural America and infrastructure investment throughout the nation, brighten the future of innovation both within networks and at their edge, and move closer to the goal of eliminating the digital divide.

II. BACKGROUND

6. Since long before the commercialization of the Internet, federal law has drawn a line between the more heavily-regulated common carrier services like traditional telephone service and more lightly-regulated services that offer more than mere transmission. More than fifty years ago, the Commission decided *Computer I*, the first of a series of decisions known as the *Computer Inquiries*,⁵ which, in combination, created a dichotomy between "basic" and "enhanced" services.⁶ In 1980's *Second Computer Inquiry*, the Commission established that basic services offered "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information"⁷ and were "regulated under Title II of the [Communications] Act."⁸ Enhanced services, by contrast, were "any offering over the telecommunications network which is more than a basic transmission service. In an enhanced service, for example, computer processing applications are used to act on the content, code, protocol, and other aspects of the subscriber's information."⁹ Unlike basic services, the Commission found that "enhanced services should not be regulated under the Act."¹⁰

7. Just two years later, the federal courts would draw a similar line in resolving the government's antitrust case against AT&T. The Modification of Final Judgment (MFJ) of 1982 distinguished between "telecommunications services," which Bell Operating Companies could offer when

⁴ See *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17972-80, 17981, paras. 124-35, 137 (2010) (*Open Internet Order*).

⁵ *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services*, Notice of Inquiry, 7 FCC 2d 11 (1966).

⁶ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC 2d 384, 420, para. 97 (1980) (*Computer II Final Decision*).

⁷ *Id.* at 420, para. 96.

⁸ *Id.* at 428, para. 114.

⁹ *Id.* at 420, para. 97.

¹⁰ *Id.* at 428, para. 114.

“actually regulated by tariff,”¹¹ and “information services,” including “data processing and other computer-related services”¹² and “electronic publishing services,”¹³ which Bell Operating Companies (BOCs) were prohibited from offering under the terms of that court decision.¹⁴ The Telecommunications Act of 1996’s (the 1996 Act) “information service” definition is based on the definition of that same term used in the MFJ, which governed the Bell Operating Companies after the breakup of the Bell system.¹⁵

8. In the 1996 Act, intended to “promote competition and reduce regulation,”¹⁶ Congress drew a line between lightly regulated “information services” and more heavily regulated “telecommunications services.”¹⁷ It also found that the “Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation”¹⁸ and declared it the policy of the United States to “promote the continued development of the Internet and other interactive computer services and other interactive media” and “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”¹⁹ The 1996 Act went on to define “interactive computer service” to include “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet”²⁰

9. For the next 16 years, the Commission repeatedly adopted a light-touch approach to the Internet that favored discrete and targeted actions over pre-emptive, sweeping regulation of Internet service providers. In the 1998 *Stevens Report*, the Commission comprehensively reviewed the Act’s definitions as they applied to the emerging technology of the Internet and concluded that Internet access service was properly classified as an information service.²¹ The *Stevens Report* also found that subjecting Internet service providers and other information service providers to “the broad range of Title II constraints,” would “seriously curtail the regulatory freedom that the Commission concluded in *Computer II* was important to the healthy and competitive development of the enhanced-services industry.”²²

¹¹ *U.S. v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 228-29 (D.D.C. 1982) (*MFJ Initial Decision*), *aff’d sub nom. Maryland v. U.S.*, 460 U.S. 1001 (1983).

¹² *Id.* at 179.

¹³ *Id.* at 180.

¹⁴ *Id.* at 228.

¹⁵ *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21954, para. 99 (1996) (*Non-Accounting Safeguards Order*); *see also, e.g.*, H.R. Conf. Rep. No. 104-458 at 126 (Jan. 31, 1996) (“‘Information service’ and ‘telecommunications’ are defined based on the definition used in the Modification of Final Judgment.”); *see also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11514, para. 28 (1998) (*Stevens Report*) (citing *MFJ Initial Decision*, 552 F. Supp. at 226-32).

¹⁶ Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

¹⁷ 47 U.S.C. § 153(24), (53).

¹⁸ 47 U.S.C. § 230(a)(4).

¹⁹ 47 U.S.C. § 230(b)(1), (2).

²⁰ 47 U.S.C. § 230(f)(2).

²¹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11536, para. 73 (1998) (*Stevens Report*).

²² *Id.* at 11524, para. 46.

7. Preemption of Inconsistent State and Local Regulations

194. We conclude that regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements. Our order today establishes a calibrated federal regulatory regime based on the pro-competitive, deregulatory goals of the 1996 Act. Allowing state and local governments to adopt their own separate requirements, which could impose far greater burdens than the federal regulatory regime, could significantly disrupt the balance we strike here. Federal courts have uniformly held that an affirmative federal policy of deregulation is entitled to the same preemptive effect as a federal policy of regulation.⁷²⁶ In addition, allowing state or local regulation of broadband Internet access service could impair the provision of such service by requiring each ISP to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates.⁷²⁷ Just as the *Title II Order* promised to “exercise our preemption authority to preclude states from imposing

⁷²⁶ Cf., e.g., *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 383 (1983) (“[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate.”); *Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 774 (1947) (state regulation precluded “where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute”); *Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570, 580-81 (8th Cir. 2007) (*Minn. PUC*) (“[D]eregulation” is a “valid federal interest[] the FCC may protect through preemption of state regulation.”).

⁷²⁷ Cf. *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22427, para. 37 (2004) (*Vonage Order*) (“Allowing Minnesota’s order to stand would invite similar imposition of 50 or more additional sets of different economic regulations”); *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3323, para. 25 (2004) (*Pulver Order*) (“[I]f Pulver were subject to state regulation, it would have to satisfy the requirements of more than 50 states and other jurisdictions”). Many commenters express concern that allowing every state and local government to impose separate regulatory requirements on ISPs would create a patchwork of inconsistent rules that may conflict with one another or with federal regulatory objectives, and that this would impose an undue burden on ISPs that could inhibit broadband investment and deployment and would increase costs for consumers. See, e.g., Cox Comments at 35 (ISPs “rel[y] on . . . uniform national policies to provide service on a consistent basis across [their] footprint without being subject to a patchwork of inconsistent state regulation”); CTIA Comments at 55-56 (“A patchwork quilt of state regulation of the Internet would be unworkable and deeply harmful to consumer interests.”); NCTA Comments at 64, 67 (arguing that “inconsistent state regulation undermines ‘the efficient utilization and full exploitation’ of Internet services” and that ISPs “would be forced to comply with a patchwork of overlapping and potentially conflicting obligations absent federal preemption”); T-Mobile Comments at 26 (“A patchwork quilt of state-by-state regulation would impair providers’ ability to offer nationwide service plans and to engage in uniform practices, undermining consumer welfare. It adds operational and financial burdens without corresponding benefit.”); WIA Comments at 10 n.39 (“[A] patchwork of state and local requirements . . . can reduce carriers’ incentives to invest and hamper their ability to make large scale deployments.”); CTIA Reply at 20 (“[Permitting state regulation] will result in obligations that differ in their particulars from those imposed by the federal government or other states. The resulting patchwork will either balkanize a service provider’s offerings or force the provider to conform all its offerings to the requirements of the most stringent state.”); Verizon Reply at 16 (“[T]he substantial burdens of piecemeal regulation by states would frustrate the federal policy to promote broadband development through light-touch, federal regulation.”); Letter from Anand Vadapalli, President & CEO, Alaska Communications Systems, et al., to The Honorable Ajit Pai, Chairman, The Honorable Mignon Clyburn, Commissioner, The Honorable Michael O’Rielly, Commissioner, FCC, WC Docket No. 17-108, at 2 (filed Nov. 17, 2017) (Letter from Rural ISPs) (“[I]t is important that states and localities not be allowed to impose common carrier-like regulations, including economic regulations, on broadband providers.”); McDowell Testimony at 12-15. see also Letter from William H. Johnson, Senior Vice President Federal Regulatory and Legal Affairs, Verizon, to Marlene Dortch, Secretary, FCC, at 11 (filed Oct. 25, 2017) (“The possibility of 50 different sets of rules . . . would impose costly requirements, hamstring technological innovations, and create severe regulatory uncertainty; these costs would inevitably hinder investment in broadband Internet.”) (Verizon FCC Preemption White Paper).

regulations on broadband service that are inconsistent” with the federal regulatory scheme, we conclude that we should exercise our authority to preempt any state or local requirements that are inconsistent with the federal deregulatory approach we adopt today.⁷²⁸

195. We therefore preempt any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order.⁷²⁹ Among other things, we thereby preempt any so-called “economic” or “public utility-type” regulations,⁷³⁰ including common-carriage requirements akin to those found in Title II of the Act and its implementing rules, as well as other rules or requirements that we repeal or refrain from imposing today because they could pose an obstacle to or place an undue burden on the provision of broadband Internet access service and conflict with the deregulatory approach we adopt today.⁷³¹

196. Although we preempt state and local laws that interfere with the federal deregulatory policy restored in this order, we do not disturb or displace the states’ traditional role in generally policing such matters as fraud, taxation, and general commercial dealings, so long as the administration of such general state laws does not interfere with federal regulatory objectives.⁷³² Indeed, the continued

(Continued from previous page)

⁷²⁸ See *Title II Order*, 30 FCC Rcd at 5804, para. 433.

⁷²⁹ This includes any state laws that would require the disclosure of broadband Internet access service performance information, commercial terms, or network management practices in any way inconsistent with the transparency rule we adopt herein. Our transparency rule is carefully calibrated to reflect the information that consumers, entrepreneurs, small businesses, and the Commission needs to ensure a functioning market for broadband Internet access services and to ensure the Commission has sufficient information to identify market-entry barriers—all without unduly burdening ISPs with disclosure requirements that would raise the cost of service or otherwise deter innovation within the network.

⁷³⁰ The terms “economic regulation” and “public utility-type regulation,” as used here, are terms of art that the Commission has used to include, among other things, requirements that all rates and practices be just and reasonable; prohibitions on unjust or unreasonable discrimination; tariffing requirements; accounting requirements; entry and exit restrictions; interconnection obligations; and unbundling or network-access requirements. See, e.g., *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4911-13, paras. 73-74 (2004) (*IP-Enabled Services NPRM*); *Policy and Rules Concerning Rates for Dominant Carriers*, Notice of Proposed Rulemaking, 2 FCC Rcd 5208, 5222, para. 4 n.5 (1987); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Further Notice of Proposed Rulemaking, 84 FCC 2d 445, 525, para. 19 (1981).

⁷³¹ We are not persuaded that preemption is contrary to section 706(a) of the 1996 Act, 47 U.S.C. § 1302(a), insofar as that provision directs state commissions (as well as this Commission) to promote the deployment of advanced telecommunications capability. See, e.g., NARUC Comments at 2; Public Knowledge Reply at 27. For one thing, as discussed *infra*, we conclude that section 706 does not constitute an affirmative grant of regulatory authority, but instead simply provides guidance to this Commission and the state commissions on how to use any authority conferred by other provisions of federal and state law. See *infra* Part IV.B.3.a. For another, nothing in this order forecloses state regulatory commissions from promoting the goals set forth in section 706(a) through measures that we do not preempt here, such as by promoting access to rights-of-way under state law, encouraging broadband investment and deployment through state tax policy, and administering other generally applicable state laws. Finally, insofar as we conclude that section 706’s goals of encouraging broadband deployment and removing barriers to infrastructure investment are best served by preempting state regulation, we find that section 706 supports (rather than prohibits) the use of preemption here.

⁷³² Cf. *Vonage Order*, 19 FCC Rcd at 22405, para. 1; see also *National Association of Regulatory Utility Commissioners Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data*, Memorandum Opinion and Order, 25 FCC Rcd 5051, 5054, para. 9 (2010) (*NARUC Broadband Data Order*) (“Classifying broadband Internet access service as an information service . . . does not by itself preclude” all state measures, such as “[s]tate data-gathering efforts” that do not impose an undue burden or conflict with any federal policy, particularly where the Broadband Data Improvement Act acknowledged such state data collection). We thus conclude that our preemption determination is not contrary to section 414 of the Act,

(continued....)

applicability of these general state laws is one of the considerations that persuade us that ISP conduct regulation is unnecessary here.⁷³³ Nor do we deprive the states of any functions expressly reserved to them under the Act, such as responsibility for designating eligible telecommunications carriers under section 214(e);⁷³⁴ exclusive jurisdiction over poles, ducts, conduits, and rights-of-way when a state certifies that it has adopted effective rules and regulations over those matters under section 224(c);⁷³⁵ or authority to adopt state universal service policies not inconsistent with the Commission's rules under section 254.⁷³⁶ We appreciate the many important functions served by our state and local partners, and we fully expect that the states will "continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints" within the framework of this order.⁷³⁷

197. *Legal Authority.* We conclude that the Commission has legal authority to preempt inconsistent state and local regulation of broadband Internet access service on several distinct grounds.

198. First, the U.S. Supreme Court and other courts have recognized that, under what is known as the impossibility exception to state jurisdiction, the FCC may preempt state law when (1) it is impossible or impracticable to regulate the intrastate aspects of a service without affecting interstate communications and (2) the Commission determines that such regulation would interfere with federal regulatory objectives.⁷³⁸ Here, both conditions are satisfied. Indeed, because state and local regulation of

which states that "[n]othing in [the Act] shall in any way abridge or alter the remedies now existing at common law or by statute." 47 U.S.C. § 414; *see, e.g.*, Public Knowledge Reply at 27. Under this order, states retain their traditional role in policing and remedying violations of a wide variety of general state laws. *See Operator Service Providers of America Petition for Expedited Declaratory Ruling*, Memorandum Opinion and Order, 6 FCC Rcd 4475, 4477, para. 12 (1991) ("Section 414 of the Act preserves the availability against interstate carriers of such preexisting state remedies as tort, breach of contract, negligence, fraud, and misrepresentation—remedies generally applicable to all corporations operating in the state, not just telecommunications carriers." (footnote omitted)). The record does not reveal how our preemption here would deprive states of their ability to enforce any remedies that fall within the purview of section 414. In any case, a general savings clause like section 414 "do[es] not preclude preemption where allowing state remedies would lead to a conflict with or frustration of statutory purposes." *Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, As Amended*, Declaratory Ruling, 6 FCC Rcd 7511, 7513, para. 20 (1991).

⁷³³ *See supra* Part C.3.

⁷³⁴ *See* 47 U.S.C. § 214(e).

⁷³⁵ *See* 47 U.S.C. § 224(c). We find no basis in the record to conclude that our preemption determination would interfere with states' authority to address rights-of-way safety issues. *See, e.g.*, CPUC Comments at 4-5 (discussing electrical safety requirements).

⁷³⁶ *See* 47 U.S.C. § 254(h). We note that we continue to preempt any state from imposing any new state universal service fund contributions on broadband Internet access service. *See Title II Order*, 30 FCC Rcd at 5836-37, para. 490 n.1477.

⁷³⁷ *Vonage Order*, 19 FCC Rcd at 22405, para. 1. *Cf.* ALEC Comments at 2-4 (discussing the role of state consumer protection laws); NARUC Comments at 4 (discussing "[s]tate authority to address service quality, fraud, issues of public health and safety/reliability, and universal service"); CPUC Reply at 13 (urging the Commission to preserve state authority to "advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, [and] safeguard[] consumers' rights").

⁷³⁸ *See, e.g., Vonage Order*, 19 FCC Rcd at 22413-15, 22418-24, paras. 17-19, 23-32; *Minn. PUC*, 483 F.3d at 578-81. The "impossibility exception" was recognized by the Supreme Court in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 375 n.4 (1986) ("FCC pre-emption of state regulation [has been] upheld where it was not possible to separate the interstate and intrastate components of the asserted FCC regulation."), and has been applied in circumstances analogous to those here, *e.g., Minn. PUC*, 483 F.3d at 578-81; *California v. FCC*, 39 F.3d 919, 932-33 (9th Cir. 1994) (*California III*).

the aspects of broadband Internet access service that we identify would interfere with the balanced federal regulatory scheme we adopt today, they are plainly preempted.

199. As a preliminary matter, it is well-settled that Internet access is a jurisdictionally interstate service because “a substantial portion of Internet traffic involves accessing interstate or foreign websites.”⁷³⁹ Thus, when the Commission first classified a form of broadband Internet access service in the *Cable Modem Order*, it recognized that cable Internet service is an “interstate information service.”⁷⁴⁰ Five years later, the Commission reaffirmed the jurisdictionally interstate nature of broadband Internet access service in the *Wireless Broadband Internet Access Order*.⁷⁴¹ And even when the *Title II Order* reclassified broadband Internet access service as a telecommunications service, the Commission continued to recognize that “broadband Internet access service is jurisdictionally interstate for regulatory purposes.”⁷⁴² The record continues to show that broadband Internet access service is predominantly interstate because a substantial amount of Internet traffic begins and ends across state lines.⁷⁴³

200. Because both interstate and intrastate communications can travel over the same Internet connection (and indeed may do so in response to a single query from a consumer), it is impossible or impracticable for ISPs to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance. Accordingly, an ISP generally could not comply with state or local rules for intrastate communications without applying the same rules to interstate communications.⁷⁴⁴ Thus, because any effort by states to regulate intrastate traffic would interfere with the Commission’s treatment of interstate traffic, the first condition for conflict preemption is satisfied.⁷⁴⁵

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⁷³⁹ *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000) (quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, 14 FCC Rcd 3689, 3701-02, para. 18 (1999)); see also *NARUC Broadband Data Order*, 25 FCC Rcd at 5054 n.24 (“Although the Commission has acknowledged that broadband Internet access service traffic may include an intrastate component, it has concluded that broadband Internet access service is properly considered jurisdictionally interstate for regulatory purposes.”); *High-Cost Universal Service Support et al.*, Order on Remand, 24 FCC Rcd 6475, 6496 n.69 (2008) (“[S]ervices that offer access to the Internet are jurisdictionally interstate services. . . . [T]he Commission has reaffirmed this ruling for a variety of broadband Internet access services.”) (collecting authorities).

⁷⁴⁰ *Cable Modem Order*, 17 FCC Rcd at 4832, para. 59.

⁷⁴¹ *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5911, para. 28.

⁷⁴² *Title II Order*, 30 FCC Rcd at 5803, para. 431.

⁷⁴³ See, e.g., Cox Comments at 35-37; Comcast Comments at 78-82; CTIA Comments at 54-55; NCTA Comments at 65; T-Mobile Comments at 25-26; Mobile Future Reply at 15.

⁷⁴⁴ Cf. *California III*, 39 F.3d at 932 (upholding preemption where “the FCC determined that it would not be economically feasible . . . to offer the interstate portion of [enhanced] services on an integrated basis while maintaining separate facilities and personnel for the intrastate portion”); *Vonage Order*, 19 FCC Rcd at 22419-21, para. 25 (discussing the difficulty of distinguishing intrastate and interstate communications over IP-based services); see also CTIA Comments at 57 (“While there likely are some slivers of broadband communications that do not cross state boundaries, it would be impossible to apply state regulation to those bits without affecting interstate traffic and thereby interfering with federal aims.”); T-Mobile Comments at 26 (“During the course of a [single] fixed broadband connection, a user in one state will almost surely interact many times with information stored in other states and other nations. A mobile broadband communication involves that as well, [and] adds the possibility that the user herself will transit between or among states during the course of a single session.”); CTIA Reply at 17 (“[F]ederal preemption is appropriate where, as here, it would be impossible to apply state regulation to this interstate offering without interfering with federal aims.”); USTelecom Reply at 22 (“[T]he architecture of the Internet makes it impossible to separate the interstate and intrastate aspects of broadband service. . . . [O]ne could not plausibly offer a separate intrastate broadband internet access service.”). We therefore reject the view that the impossibility exception to state jurisdiction does not apply because some aspects of broadband Internet access service could theoretically be regulated differently in different states. Cf. Public Knowledge Comments, CG Docket

(continued....)

201. The second condition for the impossibility exception to state jurisdiction is also satisfied. For the reasons explained above, we find that state and local regulation of the aspects of broadband Internet access service that we identify would interfere with the balanced federal regulatory scheme we adopt today.⁷⁴⁶

202. Second, the Commission has independent authority to displace state and local regulations in accordance with the longstanding federal policy of nonregulation for information services.⁷⁴⁷ For more than a decade prior to the 1996 Act, the Commission consistently preempted state regulation of information services (which were then known as “enhanced services”).⁷⁴⁸ When Congress adopted the

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No. 17-131, at 3 (June 16, 2017). Even if it were possible for New York to regulate aspects of broadband service differently from New Jersey, for example, it would not be possible for New York to regulate the use of a broadband Internet connection for *intrastate communications* without also affecting the use of that same connection for *interstate communications*. The relevant question under the impossibility exception is not whether it would be possible to have separate rules in separate states, but instead whether it would be feasible to allow separate state rules for intrastate communications while maintaining uniform federal rules for interstate communications.

⁷⁴⁵ OTI insists that broadband service “can easily be separated into interstate and intrastate” communications based on “the location of the ISP.” Letter from Chris Laughlin, Counsel for New America’s Open Technology Institute, et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-108, at 3 (filed Dec. 7, 2017) (OTI Dec. 7 *Ex Parte* Letter). In OTI’s view, if “the closest ISP headend, tower, or other facility to the customer” is in the same state as the customer, then the customer’s Internet communications are all intrastate. *Id.* This view misapprehends the end-to-end analysis employed by the Communications Act to distinguish interstate and intrastate communications, which looks to where a communication ultimately originates and terminates—such as the server which hosts the content the consumer is requesting—rather than to intermediate steps along the way (such as the location of the ISP). See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, 14 FCC Rcd 3689, 3697-98, para. 12 (1999) (“Consistent with [our] precedents, we conclude . . . that the communications at issue here do not terminate at the ISP’s local server, . . . but continue to the ultimate destination or destinations, specifically at a[n] Internet website that is often located in another state. The fact that the facilities and apparatus used to deliver traffic to the ISP’s local servers may be located within a single state does not affect . . . jurisdiction. . . . Thus, we reject [the] assertion that the . . . facilities used to deliver traffic to ISPs must cross state boundaries for such traffic to be classified as interstate.” (footnotes omitted)). Indeed, OTI’s view that a communication is intrastate whenever the “last mile” facilities between the customer and the communications carrier are within the same state would improperly deem virtually all communications to be intrastate, including interstate telephone calls, contrary to long-settled precedent. See *id.* at 3696-97, para. 11 (discussing *Teleconnect Co. v. Bell Tel. Co. of Pa.*, Memorandum Opinion and Order, 10 FCC Rcd 1626, 1628-30, paras. 9-15 (1995), *pets. for review denied*, *Sw. Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997)).

⁷⁴⁶ See *supra* para. 194.

⁷⁴⁷ See generally *Pulver Order*, 19 FCC Rcd at 3316-23, paras. 15-25 (discussing the federal policy of nonregulation for information services).

⁷⁴⁸ *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Memorandum Opinion and Order on Further Reconsideration, 88 F.C.C.2d 512, 541 n.34 (1981) (“[W]e have . . . preempted the states in two respects. . . . [W]e have determined that the provision of enhanced services is not a common carrier public utility offering and that efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if these services are free from public utility-type regulation. . . . States, therefore, may not impose common carrier tariff regulation on a carrier’s provision of enhanced services.”), *pets. for review denied*, *Comput. & Commc’ns Indus. Ass’n v. FCC*, 693 F.2d 198, 206-07, 209, 214-18 (D.C. Cir. 1982) (*CCLA*); *Computer III Phase I Order*, 104 FCC 2d at 1125, para. 343 (“In the *Computer II* proceeding . . . we preemptively deregulated enhanced services, foreclosing the possibility of state regulation of such offerings.”), *as modified*, *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, Report and Order, 6 FCC Rcd 7571, 7625-37, paras. 110-131 (1991), *pets. for review denied*, *California III*, 39 F.3d at 931-33; see also *Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry) et al.*, Memorandum Opinion and Order on Reconsideration, 2 FCC Rcd 3035, 3061 n.374 (1987) (“State public utility regulation of entry and service terms and conditions (including rates (continued....)

Commission's regulatory framework and its deregulatory approach to information services in the 1996 Act, it thus embraced our longstanding policy of preempting state laws that interfere with our federal policy of nonregulation.⁷⁴⁹

203. Multiple provisions enacted by the 1996 Act confirm Congress's approval of our preemptive federal policy of nonregulation for information services. Section 230(b)(2) of the Act, as added by the 1996 Act, declares it to be "the policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services"—including "any information service"—"unfettered by Federal or State regulation."⁷⁵⁰ The Commission has observed that this provision makes clear that "federal authority [is] preeminent in the area of information services" and that information services "should remain free of regulation."⁷⁵¹ To this same end, by directing that a communications service provider "shall be treated as a common carrier under [this Act] only to the extent that it is engaged in providing telecommunications services," section 3(51)—also added by the 1996 Act—forbids any common-carriage regulation, whether federal or state, of information services.⁷⁵²

204. Finally, our preemption authority finds further support in the Act's forbearance provision. Under Section 10(e) of the Act, Commission forbearance determinations expressly preempt any contrary state regulatory efforts.⁷⁵³ It would be incongruous if state and local regulation were preempted when the Commission decides to forbear from a provision that would otherwise apply, or if the Commission adopts a regulation and then forbears from it, but not preempted when the Commission determines that a requirement does not apply in the first place. Nothing in the Act suggests that Congress intended for state

and feature availability), ostensibly applied to 'intrastate' enhanced services, would have a severe impact on, and would effectively negate, federal policies promoting competition and open entry in the interstate markets for such services."); *CCIA*, 693 F.2d at 214 ("Courts have consistently held that when state regulation of [communications] equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulation must necessarily yield to the federal regulatory scheme.") (footnotes omitted).

⁷⁴⁹ See *City of New York v. FCC*, 486 U.S. 57, 66-70 (1988) (holding that because the Commission had preempted all state and local regulation of cable television signal quality for 10 years before the passage of the Cable Communications Policy Act of 1984, and the Cable Act generally adopted the same regulatory framework that the Commission had been following, Congress implicitly approved the Commission's authority to preempt these laws). Contrary to the suggestions of some commenters, the Supreme Court has held, in cases involving the Communications Act, that no express authorization or other specific statutory language is required for the Commission to preempt state law. See *id.* at 64 ("[A] pre-emptive regulation's force does not depend on express congressional authorization to displace state law. . . . [I]f the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute, [it] should not [be] disturb[ed] . . . unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." (internal quotation marks omitted)); *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 375 n.4 (recognizing implicit FCC preemption authority under the impossibility exception to state jurisdiction). And because the Supreme Court has interpreted the Communications Act to authorize the Commission to supersede state law in many respects, we reject the contention that any presumption against preemption controls here. See *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (once Congress has decided to preempt state law, "we do not invoke any presumption against pre-emption" in disputes over the *scope* of preemption); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 743-44 (1996) (distinguishing "the question of the substantive (as opposed to pre-emptive) meaning of a statute" from "the question whether a statute is pre-emptive" and rejecting the view that a presumption against preemption "in effect trumps *Chevron*").

⁷⁵⁰ 47 U.S.C. § 230(b)(2), (f)(2).

⁷⁵¹ *Pulver Order*, 19 FCC Rcd at 316, para. 16; see also *Vonage Order*, 19 FCC Rcd at 22425-26, paras. 34-35.

⁷⁵² 47 U.S.C. § 153(51)

⁷⁵³ 47 U.S.C. § 160(e).

or local governments to be able to countermand a federal policy of nonregulation or to possess any greater authority over broadband Internet access service than that exercised by the federal government.⁷⁵⁴

8. Disability Access Provisions

205. The Communications Act provides the Commission with authority to ensure that consumers with disabilities can access broadband networks regardless of whether broadband Internet access service is classified as telecommunications service or information service. The Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA)⁷⁵⁵ already applies a variety of accessibility requirements to broadband Internet access service.⁷⁵⁶ In particular, to ensure that people with disabilities have access to the communications technologies of the Twenty-First Century, the CVAA added several provisions to the Communications Act, including Section 716 of the Act,⁷⁵⁷ which requires that providers of advanced communications services (ACS)⁷⁵⁸ and manufacturers of equipment used for ACS make their services and products accessible to people with disabilities, unless it is not achievable to do so.⁷⁵⁹ These mandates already apply according to their terms in the context of broadband Internet access service.⁷⁶⁰ The CVAA also adopted a requirement, in section 718, that ensures access to Internet browsers in wireless phones for people who are blind and visually impaired.⁷⁶¹ In addition, the CVAA directed the Commission to enact regulations to prescribe, among other things, that networks used to provide ACS “may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through . . . networks used to provide [ACS].”⁷⁶² Finally, new section 717 creates new enforcement and recordkeeping requirements applicable to sections 255, 716, and 718.⁷⁶³ Section 710 of the Act addressing hearing aid compatibility and implementing rules

⁷⁵⁴ Some commenters note that section 253(c), 47 U.S.C. § 253(c), preserves certain state authority over telecommunications services. But that provision has no relevance here, given our finding that broadband Internet access service is an information service. Although section 253(c) recognizes that states have historically played a role in regulating telecommunications services, there is no such tradition of state regulation of information services, which have long been governed by a federal policy of nonregulation.

⁷⁵⁵ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (codified in various sections of Title 47) (CVAA), *amended by* Pub. L. No. 111-265, 124 Stat. 2795 (2010) (technical corrections).

⁷⁵⁶ *Title II Order*, 30 FCC Rcd at 5828, para. 473. Congress adopted the CVAA after recognizing that “Internet-based and digital technologies . . . driven by growth in broadband . . . are now pervasive, offering innovative and exciting ways to communicate and share information.” S. Rep. No. 111-386, at 1 (2010); H.R. Rep. No. 111-563, at 19 (2010). Congress thus clearly had Internet-based communications technologies in mind when enacting the accessibility provisions of Section 716 (as well as the related provisions of sections 717-718) and in providing important protections with respect to advanced communications services (ACS).

⁷⁵⁷ 47 U.S.C. § 617(f) (“The requirements of this section shall not apply to any equipment or services, including interconnected VoIP service, that are subject to the requirements of section 255 of this title on the day before October 8, 2010. Such services and equipment shall remain subject to the requirements of section 255 of this title.”).

⁷⁵⁸ ACS means: “(A) interconnected VoIP service; (B) non-interconnected VoIP service; (C) electronic messaging service; and (D) interoperable video conferencing service.” 47 U.S.C. § 153(1).

⁷⁵⁹ *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010 et al.*, CG Docket No. 10-213 et al., Second Report and Order, 28 FCC Rcd 5957, para. 1 (2013) (*Section 716 Implementation Order*).

⁷⁶⁰ *Section 716 Implementation Order*, 28 FCC Rcd at 5960-61, para. 7.

⁷⁶¹ 47 U.S.C. §§ 617, 619.

⁷⁶² 47 U.S.C. § 617(e)(1)(B); *see also* 47 CFR § 14.20(c).

⁷⁶³ 47 U.S.C. § 618.

enacted thereunder also apply regardless of any action taken in this Order.⁷⁶⁴ To the extent that other accessibility issues arise,⁷⁶⁵ we will address those issues in separate proceedings in furtherance of our statutory authority to ensure that broadband networks are accessible to and usable by individuals with disabilities.⁷⁶⁶

9. Continued Applicability of Title III Licensing Provisions

206. We also note that our decision today to classify wireless broadband Internet access service as an information service does not affect the general applicability of the spectrum allocation and licensing provisions of Title III and the Commission's rules to this service.⁷⁶⁷ Title III generally provides the Commission with authority to regulate "radio communications" and "transmission of energy by radio."⁷⁶⁸ Among other provisions, Title III gives the Commission the authority to adopt rules preventing interference and allows it to classify radio stations.⁷⁶⁹ It also establishes the basic licensing scheme for radio stations, allowing the Commission to grant, revoke, or modify licenses.⁷⁷⁰ Title III further allows the Commission to make such rules and regulations and prescribe such restrictions and conditions as may be necessary to carry out the provisions of the Act.⁷⁷¹ Provisions governing access to and use of spectrum (and their corresponding Commission rules) do not depend on whether the service using the spectrum is classified as a telecommunications or information service under the Act.

IV. A LIGHT-TOUCH FRAMEWORK TO RESTORE INTERNET FREEDOM

207. For decades, the lodestar of the Commission's approach to preserving Internet freedom was a light-touch, market-based approach. This approach debuted at the dawn of the commercial Internet during the Clinton Administration, when an overwhelming bipartisan consensus made it national policy to preserve a digital free market "unfettered by Federal or State regulation."⁷⁷² It continued during the Bush Administration, as reflected in the "Four Freedoms" articulated by Chairman Powell in 2004 and was then formally adopted by a unanimous Commission in 2005 as well as in a series of classification decisions reviewed above.⁷⁷³ And it continued for the first six years of the Obama Administration. We reaffirm and

⁷⁶⁴ See generally 47 U.S.C. § 610; see also *Improvements to Benchmarks and Related Requirements Governing Hearing Aid-Compatible Mobile Handsets; Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets*, Fourth Report and Order and Notice of Proposed Rulemaking, 15 FCC Rcd 13845, 13846, para. 2 (2015).

⁷⁶⁵ See, e.g., CPUC Comments at 25-26; CTAB Comments at 8; TDI et al. Comments at 2-7; Public Knowledge Comments at 95.

⁷⁶⁶ See CenturyLink Comments at 60; ACA Reply at 30.

⁷⁶⁷ *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5914-15, paras. 35-37. These provisions and rules continue to apply because the service is using radio spectrum.

⁷⁶⁸ See Title III - Provisions Relating to Radio, 47 U.S.C. § 301 et seq.; see also *IP-Enabled Services NPRM*, 19 FCC Rcd at 4918.

⁷⁶⁹ 47 U.S.C. §§ 302, 303.

⁷⁷⁰ 47 U.S.C. §§ 307-309, 312, 316.

⁷⁷¹ 47 U.S.C. § 303(r). See, e.g., *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 16340, 16452, para. 27 (1999).

⁷⁷² 47 U.S.C. § 230(b)(2).

⁷⁷³ These include the freedoms for consumers to (1) "access the lawful Internet content of their choice"; (2) "run applications and use services of their choice, subject to the needs of law enforcement"; (3) "connect their choice of legal devices that do not harm the network"; and (4) "enjoy competition among network providers, application and service providers, and content providers." *Internet Policy Statement*, 20 FCC Rcd at 14988, para. 5; see also *Powell Speech* (announcing four principles for Internet freedom to further ensure that the Internet would remain a place for free and open innovation with minimal regulation).

the RCA hopes the Legislature will keep in mind when approaching the very complicated issue of spurring broadband Internet deployment.

Definitions

Broadband: The FCC defines broadband as “high speed Internet access that is always on and faster than traditional dial-up access.” Broadband speed requirements imposed by the FCC change as technology improves and faster access methods become available. The 2016 FCC Broadband Progress Report sets a minimum benchmark speed for broadband at 25 Mbps download/3 Mbps upload (25Mbps/3Mbps) for fixed services, up from 10Mbps/1Mbps in 2015.

Last Mile: Connection between your home (or wireless device) and your broadband service provider.

Second Mile/Middle Mile: The connections between your broadband service provider and the Internet.

RCA Enabling Statutes

AS 42.05.145(a) provides that “[a] utility that provides local exchange or interexchange telecommunications service in the state affects the public interest. Regulation of these utilities shall, consistent with this chapter, seek to maintain and further the efficiency, availability, and affordability of universal basic telecommunications service.”

AS 42.05.990(6)(B) states that “public utility” or “utility” “includes every corporation . . . that owns, operates, manages, or controls any plant, pipeline, or system for . . . furnishing telecommunications to the public for compensation.”

AS 42.05.990(13) defines “telecommunications” as “the transmission and reception of messages, impressions, pictures, and signals by means of electricity, electromagnetic waves, and any other kind of energy, force variations, and impulses whether conveyed by cable, wire, radiated through space, or transmitted through other media within a designated area or between designated points.”

AS 42.05.830 provides that “[i]n providing for competition under AS 42.05.800 to AS 42.05.890 [*Competitive Intrastate Long Distance Telephone Service*], the [RCA] shall establish a system of access charges to be paid by long distance carriers to compensate local exchange carriers for the costs of originating and terminating long distance services.”

AS 42.05.840 provides “[t]he [RCA] may establish a universal service fund or other mechanism to be used to ensure the provision of long distance telephone service at reasonable rates throughout the state and otherwise preserve universal service.”

AS 42.05.296(a) provides “[t]he [RCA] shall adopt regulations to require telephone utilities to provide service to deaf, hard of hearing, and speech impaired subscribers that permits the subscriber to communicate by telephone with persons of normal hearing and that makes available reasonable access of all phases of public telephone service to deaf, hard of hearing, and speech impaired telephone subscribers. The regulations must provide for cost recovery through surcharges added to the basic local exchange rate. The [RCA] shall hold hearings to determine the most cost-effective method of providing this service.”