Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Eliminating *Ex Ante* Pricing Regulation and	)	WC Docket No. 20-71
Tariffing of Telephone Access Charges	)	

COMMENTS OF NTCA–THE RURAL BROADBAND ASSOCIATION

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July 6, 2020

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Executive Summary

The Commission should decline to mandate detariffing of subscriber line charges ("SLCs") and access recovery charges ("ARCs") for RLECs, and instead should grant operators interested in obtaining greater flexibility in recovering their costs an opportunity to do so through a permissive detariffing regime. As demonstrated herein, the tariffing regime in question serves a valuable purpose in promoting universal service in RLECs' service areas. Mandatory detariffing will only produce substantial customer confusion and undermine the regulatory certainty that is critical to the successful operation of providers operating in high-cost rural areas by adopting barriers (in some cases insurmountable) to their recovery of costs going forward.

As an initial matter, prior to discussing the policy and legal reasons for rejecting mandatory detariffing, it is important to urge the Commission to consider that the NPRM's proposal threatens to undermine much of the certainty that is so critical to RLECs operating in high-cost rural areas, *certainty that the agency has gone to great lengths recently to instill*. At a time when RLECs are expanding the quality and reach of their broadband networks through recent welcome changes to support mechanisms, the Commission's injection of uncertainty and additional hurdles to much needed cost recovery, while also causing customer confusion, seems nonsensical. Moreover, at a time when providers are already struggling to sustain services in the midst of economic upheaval caused by a global health crisis – with NTCA members reporting on average approximately $80,000 in unpaid voice and broadband bills since the pandemic started – the notion of injecting more confusion and disruption through charges that disappear in one place only to reappear in another on invoices is imprudent at best and harmful at worst to customer relationships. It also presents substantial challenges for the operators themselves, who are already losing these revenues and now face the prospect of losing more as interstate charges are

eliminated without the automatic capability to shift recovery of those revenues over to local voice rates.

With respect to the customer confusion and cost recovery (or lack thereof) likely to ensue here, the NPRM vastly underestimates the hurdles RLECs will face as they attempt to recover lost revenue associated with SLCs and ARCs by raising local service rates. Contrary to the NPRM's assertion, many RLECs do not enjoy significant "rate flexibility" at the state level – many in fact face the prospect of rate cases or similarly burdensome proceedings as part of any effort to increase local service rates to recover the costs that will be shifted from the interstate jurisdiction under this proposal. In some other states, ratchets on rates are ensconced within state legislative codes and state commission rules, and thus rate increases can only come in a "phased-in" manner (which will lead to denied cost recovery for a period of years). Moreover, these hurdles, even if fully surmountable and surmounted, will generate significant disruption and questions from customers seeing changes on their bills (sometimes on a yearly basis in states that only allow rate increases up to a certain point per year).

The NPRM also fails to fully consider that, for RLECs, e*x ante* price regulation, such as SLCs and ARCs, helps to ensure their reasonable opportunity to recover costs and to promote universal service. A pulling apart the tariffing provisions even as costs have been assigned to the interstate jurisdiction by regulatory mandate and without providing a reasonable opportunity for recovery of those costs elsewhere, will in fact *undermine* universal service. It would also violate the *Smith v. Illinois Bell Telephone Co* principle that the Commission cannot simply eliminate recovery of the interstate costs at issue here through an interstate rate element under the *assumption* that the difference will be made up by intrastate rates. Moreover, while the Commission could enable RLECs to recover lost ARC revenue through the CAF-ICC

mechanism and (for cost carriers) lost SLC revenue through the CAF-BLS mechanism, these options would only place significant pressure on the USF budget. This fact highlights the complexities involved in trying to pull apart and reconstruct established means of recovering the costs at issue here. Moreover, if the Commission moves forward with detariffing but fails to provide additional universal service support or a new interstate rate element to recover these costs, *the only way carriers can then recover these interstate costs is through an intrastate rate increase* – and the agency is required to follow the separations process as set forth by the Communications Act of 1934, as amended.

Finally, the NPRM's analysis of forbearance misses the mark – these interstate rate elements are a critical part of ensuring that RLECs can recover their costs and make investments in advanced networks and maintain universal service. The NPRM threatens to undermine this cost recovery and place in jeopardy these operator's ability to continue devoting resources to improve their networks, a result entirely at odds with the public interest. The Commission cannot cure this defect by asserting that the benefits of deregulation "likely" outweigh the costs. Moreover, the fact that the Commission fails to account for the "considerable variation among states" in terms of RLECs' ability to shift these lost revenues to the intrastate jurisdiction is a generalized approach to forbearance that is inconsistent with the agency's obligation to undertake a specific market analysis when considering the public interest. Finally, the NPRM fails to make the case that the tariffing regime is not necessary – to the contrary, as NTCA demonstrates, the tariffed rate elements at issue here remain the only means to ensure that rates are just and reasonable and are not unjustly or unreasonably discriminatory, to protect consumers, and to protect the public interest.

Fortunately, for the Commission, the road to satisfying its desire to move away from unnecessary regulation (in a manner that does not have the negative repercussions noted herein) is found in and readily available through a permissive detariffing framework. This surgical approach to reforming the tariffing regime would grant RLECs the ability to choose detariffing to the extent their own assessments of the costs and benefits determines that this option fits their needs.

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COMMENTS OF
NTCA–THE RURAL BROADBAND ASSOCIATION

NTCA–The Rural Broadband Association ("NTCA")[1] hereby submits these comments in response to the Notice of Proposed Rulemaking ("*NPRM*") adopted by the Federal Communications Commission ("Commission" or "FCC") in the above-captioned proceeding eliminating *ex ante* pricing regulation and tariffing of Telephone Access Charges.[2] As described below, while NTCA appreciates the Commission's ongoing interest in removing regulatory burdens generally and eliminating outdated rules, in the instant case, the rules in question serve a valuable purpose in promoting universal service, avoiding customer confusion, providing certainty to providers operating in high-cost rural areas, and reducing burdens associated with recovery of regulated costs. Particularly at a time when providers are already struggling to sustain services in the midst of economic upheaval caused by a global health crisis – with NTCA members reporting on average approximately $80,000 in unpaid voice and broadband bills since the pandemic started – the notion of injecting more confusion and disruption through charges that disappear in one place only to reappear in another on invoices is imprudent at best and

[1] NTCA represents approximately 850 rural local exchange carriers ("RLECs"). All of NTCA's members are voice and broadband providers, and many of its members provide wireless, cable, satellite, and other competitive services to their communities.

[2] *In re Eliminating Ex Ante Pricing Regulation and Tariffing of Telephone Access Charges*, Notice of Proposed Rulemaking, 35 FCC Rcd 3165 (2020) ("*NPRM*").

harmful at worst to customer relationships. It also presents substantial challenges for the operators themselves, who are already losing these revenues and now face the prospect of losing more as interstate charges are eliminated without the automatic capability to shift recovery of those revenues over to local voice rates. For these reasons, the Commission should decline to mandate detariffing of subscriber line charges ("SLCs") and access recovery charges ("ARCs"), and instead provide those operators interested in obtaining greater flexibility in recovering their costs an opportunity to do so through a permissive detariffing regime.

I. MANDATORY DETARIFFING WILL REDUCE RLEC REVENUES AND INTRODUCE REGULATORY UNCERTAINTY AT A TIME WHEN THESE OPERATORS FACE MANY OTHER CHALLENGES AND NEED TO FOCUS FIRST AND FOREMOST ON NETWORK DEPLOYMENT.

NTCA generally supports deregulatory efforts and eliminating unnecessary and outdated rules, but certain tariffed charges help to simplify cost recovery, minimize customer confusion and uncertainty, and reduce burdens for NTCA members. Mandatory detariffing would introduce unnecessary complexity and create a number of uncertainties regarding how, and even whether, carriers can recover these interstate costs. The impact of the proposed changes is not insignificant—using projected data for the 2020-2021 tariff cycle, NTCA estimates that RLECs recover nearly $290 million annually from SLCs and ARCs.

Moreover, this proceeding is not occurring in a vacuum. While the Commission's stated goal of reducing unnecessary regulation is generally beneficial, the Commission must consider the current climate and the effects of the uncertainty this detariffing will cause. Carriers are navigating completely novel issues related to the COVID-19 pandemic, as well as undertaking the effort to comply with buildout obligations under various universal service programs. Chairman Pai and this Commission have taken substantial steps to combat regulatory uncertainty and restore a greater sense of predictability in the deployment and operation of rural networks,

and the proposed changes in some respects threaten to pull the rug back out. Indeed, unexpectedly cutting revenues while providing no reasonable assurance of the ability to offset these losses through increased intrastate rates risks reintroducing the uncertainty this Commission has gone to great lengths to dispel. It is not in the public interest, would engender substantial consumer confusion and disruption, and is antithetical to the Commission's recent efforts to promote regulatory certainty. Moreover, the mistaken premise that service providers can increase intrastate local voice rates as they see fit to recover interstate costs for which tariffed charges are eliminated is not only wrong but will contribute to this consumer disruption and undermining of regulatory certainty.

A. The NPRM Ignores the Consumer Impacts of Mandatory Detariffing and the Substantial Barriers to Increasing Local Rates to Recover the Revenues that Would Be Lost Through Mandatory Elimination of Interstate Surcharges.

The *NPRM* asserts that service providers enjoy significant "rate flexibility" as part of what it portrays as a widespread deregulatory trend at the state level,[3] leading to the conclusion that "federal deregulation and detariffing of Telephone Access Charges should not result in any material change in the total rates customers pay for voice service in these states."[4] This implies that mandatory detariffing will essentially be revenue neutral for service providers, and that the Commission believes service providers can simply "make up" any lost revenue associated with SLCs and ARCs by raising local service rates. Putting aside for the moment (*i.e.*, until Section II *infra*) the important questions of whether the Commission can legally compel this kind of shift of interstate costs to the intrastate jurisdiction under basic cost recovery principles or separations

[3] *Id*., 35 FCC Rcd at 3181-82 ¶¶ 46-49.

[4] *Id*. at 3181 ¶ 46.

requirements, the belief that providers can simply "move charges from column A to column B" on customers' bills and still recover those revenues has no basis in fact.

As an initial matter, even where full and unfettered deregulation exists, substantial customer confusion is almost certain to ensue as charges swing wildly across bills from one category to another. Indeed, even if providers are entirely free to increase rates from month-to-month however they see fit under service contracts or other arrangements—and depending on the terms of service and term commitments, this may be not always be the case—there can be no doubt as a practical matter that disruption will occur and questions will arise as customers see changes on their bills.

Moreover, there are of course a number of jurisdictions where providers do *not* have full and unfettered discretion to increase local service rates as they may want. In fact, many NTCA members must confront and navigate complex state-level processes (such as rate cases or proceedings that are not so named but are similar in many respects nonetheless) to have any hope of recovering via local rates the costs that will be shifted from the interstate jurisdiction should this *NPRM's* proposals be adopted. In other states still, as discussed *infra*, providers may in theory have a "path" toward such recovery (putting aside the practical considerations noted above and the legal cost recovery and separations considerations noted below), but it is a prolonged one in the face of statutory or regulatory provisions that limit the magnitude of rate increases within a certain period. In short, the picture painted by the *NPRM* of the "trend" toward deregulation is incomplete, and a closer look reveals the persistent and substantial barriers to implementing the contemplated vision of mandatory detariffing.

The state of California represents a logical place to begin this discussion. While the *NPRM* asserts that California "eliminated pricing regulation for all local exchange services that

do not receive state high-cost support,"[5] this is not a complete picture. Specifically, and as applicable to NTCA members and similarly situated operators, as the California Public Utilities Commission recently stated,[6] approval would in fact be required as a matter of state law for small local exchange carriers ("LECs") to raise local rates in response to the *NPRM's* proposals. NTCA members in the states of Arizona,[7] Georgia,[8] and Kentucky[9] likewise report that *formal* rate cases would be required to carry out the kinds of rate increases necessary to achieve the revenue neutral impact implied by the *NPRM*. Nevada requires a rate case for increases above a certain amount,[10] and in New York, most small incumbent LECs are at, or are near, a state benchmark rate, and thus the *NPRM* proposal if adopted would force them to endure a rate case seeking state universal service support from a fund that is set to expire in 2020 if not renewed.[11] In Kansas, RLECs would be required to endure a rate-case like procedure in order to increase local service rates above a statewide average rate – and those successful would be awarded state universal service funds from a fund that is already capped.[12] In none of these proceedings would there be any assurance whatsoever that at the end of these prolonged processes the amount of revenue lost from the elimination of SLCs and ARCs will be authorized for recovery at the state

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[5] *Id*.

[6] Memorandum, State of California, Public Utilities Commission Staff, Item 38 (Agenda ID #18322) (Jun. 5, 2020), p. 4.

[7] Ariz. Admin. Code § 14-2-103, *et seq*.

[8] Ga. Code § 46-2-25.

[9] Ky. Rev. Stat. §§ 278.180 & 278.192.

[10] Nev. Admin. Code § 703.2501.

[11] *See Proceeding on Motion of the Commission to Review the State Universal Service Fund*, Order Adopting Joint Proposal, CASE 15-M-0742, 2016 WL 5340326 (N.Y. Pub. Serv. Comm'n Sept. 16, 2016).

[12] K.S.A. § 66-2005.

level. In addition to these examples, it should also be noted that Alabama precludes local rates increase in most cases absent carriers' agreements to waive their 251(f)(1)(A) rural exemption.[13]

In addition to misjudging the *extent* of supposed deregulatory trends, the *NPRM* fails to account for the significant *burden* that a rate case or other state-level process to increase local rates would impose on small, rural carriers. Such proceedings typically take place over several months (and in some cases years), requiring small carriers to divert internal staff resources for preparation before, during, and after the process plays out. Moreover, because most small rural carriers lack the in-house expertise to navigate the complicated issues that are at the heart of these proceedings, they typically must rely on outside consulting, legal, and accounting firms for representation and witness testimony. A rate case or similar state proceeding invoking novel questions about the propriety of raising local rates to enable recovery of costs "falling down" from the interstate jurisdiction will almost certainly require such experts and result in significant amounts of work.

Perhaps worse, as noted above, for all of this work and the significant new burdens created by these regulatory processes, the end result may be that costs are not fully recovered or recovered at all, on either a short-term or permanent basis. Indeed, the *NPRM* does not seem to acknowledge even just the potential for such an outcome or to consider what happens next if small rural carriers cannot shift SLCs and ARCs into local rates. Simply put, *the outcome of these state proceedings is not guaranteed*—state public utility commissions are hardly "rubber stamps" by any means and they have other policy priorities that may limit service providers' ability to shift interstate costs to the intrastate jurisdiction and increase local rates. In short,

[13] Ala. Code § 37-2A-1, *et seq*. *See also Incumbent Local Exchange Carriers Petitioner*, Order, Docket No. 28590, 2016 WL 1180517 (Ala. Pub. Serv. Comm'n Mar. 23, 2016) (updating the Alabama Telecommunications Regulation Plan).

small rural carriers already facing high costs to provide communications services may not be granted the authority to raise local rates to the extent necessary to fully recover costs (or raise them at all) and achieve the revenue neutrality that the *NPRM* seems to take as a given outcome.

These issues are not limited to those states that require formal rate cases to increase local voice service rates. In some other states, ratchets on rates are ensconced within state legislative codes and state commission rules. Thus, rate increases will come in a "phased-in" manner (which will lead to denied recovery for a period of years). Vermont,[14] South Carolina,[15] Ohio,[16] Mississippi,[17] and Idaho,[18] all set limits on annual increases to local service rates – in these cases, service providers will see SLC and ARC revenue dissipate with the only prospect of recovery coming in the form of a disruptive and almost certainly unpopular "death by a thousand cuts" set of rate increases coming over a series of years that will only frustrate customers and deny cost recovery to the operators in the meantime.

Ultimately, the primary assumption underpinning mandatory detariffing – that service providers can make themselves whole with minimal effort or state oversight by increasing intrastate local voice rates as they see fit to recover interstate costs for which tariffed charges are eliminated – is simply wrong. The practical implications of moving charges around on customer bills are daunting and utterly unnecessary, and the obstacles in many states to increasing local rates are significant even as the outcomes of such processes are not guaranteed. And any

[14] Vt. Stat. Ann. tit. 30, § 227d.

[15] S.C. Code Ann. § 58-9-576.

[16] Ohio Admin. Code § 4901:1-6-14.

[17] *In re Notice of Intent of the Mississippi Rural Incumbent Local Exchange Companies To Modify Their Form of Regulation and To Adopt a Price Cap Regulation Plan*, Order Approving and Adopting Stipulation and Agreement To Modify Certain Provisions Contained In the Price Regulation Plan of the Mississippi Rural Incumbent Local Exchange Companies, 2007-UN-123, 2018 WL 2218974 (Miss. Pub. Serv. Comm'n May 8, 2018).

[18] 62 Idaho Code § 605(5)(c).

requirement that providers impute for purposes of certain federal USF receipts as if they *have* nonetheless received these sums would be punitive, creating a "heads I win, tails you lose" aspect to these reforms that, at best, leaves RLECs back precisely where they were (if they can shift every penny to intrastate rates) or, at worst (in the many cases where local rates cannot be increased at will and by whim), results in a reduction of revenues at a time when they are needed most. In light of the significant consumer and carrier impacts, the Commission should decline to mandate detariffing and, as discussed *infra*, adopt instead a permissive detariffing approach that enables those service providers that *do* enjoy rate flexibility or otherwise want to navigate the state processes necessary to increase local rates the capability to do so. This option would come without imposing barriers, burdens, disruptions, confusion, and uncertainty arising out of a mandatory detariffing regime on unwilling carriers and unwitting consumers.

II. MANDATORY DETARIFFING IS UNNECESSARY AND IS NOT IN THE PUBLIC INTEREST.

The Commission explains that the "primary objective" of *ex ante* price regulation is to ensure that rates are just and reasonable.[19] While accurate, this explanation is incomplete. *Ex ante* price regulation, such as SLCs and ARCs, helps to ensure that carriers have a reasonable opportunity to recover their costs and to promote universal service. Mandatory detariffing without a realistic alternative path for potential recovery puts these goals at serious risk.

In proposing nationwide mandatory detariffing, the Commission does not adequately consider the ways in which many RLECs differ from larger price cap carriers that may seek and benefit from such deregulation. When the Commission transitioned these larger operators from rate-of-return regulation to price cap regulation, the agency recognized that RLECs have

[19] *NPRM*, 35 FCC Rcd at 3177 ¶ 38.

fundamental differences from large carriers and permitted RLECs to remain subject to rate-of-return regulation.[20] Indeed, even as more RLECs have transitioned to model-based universal service support over time and RLECs have been afforded an opportunity to elect incentive regulation for business data services, the Commission has specifically declined to compel conversion to price cap regulation for these smaller rural operators— and it noted repeatedly the distinctions between larger price cap carriers and RLECs in doing so.[21]

The same differences that result in price cap regulation being inappropriate for RLECs pose unique problems in the context of detariffing. Rate-of-return regulation operates on the basic premise that, in exchange for a commitment to maintain continuous service, the incumbent LEC should be provided with a reasonable opportunity to recover its costs, plus a reasonable return that enables the company to raise necessary capital.[22] Pulling apart the strands of tariffing now, even as costs have been assigned to the interstate jurisdiction by regulatory mandate and without providing a reasonable opportunity for recovery of those costs elsewhere, will undermine universal service, present an unnecessary and harmful disruption for those operators that represent the sole provider in many rural areas, and confuse consumers watching line items fluctuate on their bill due to nothing more than arcane regulatory reforms.

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[20] *See In re Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, 6818 ¶¶ 257-259 (1990) (limiting mandatory price cap regulation to "the eight largest LECs").

[21] *In re Connect America Fund*, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087 (2016); *In re Business Data Services in an Internet Protocol Environment*, Report and Order, 32 FCC Rcd 3459 (2017), *vacated in part by Citizens Telecomms. Co. of Minn., LLC v. FCC*, 901 F.3d 991 (8th Cir. 2018).

[22] *See, e.g.*, J. Gregory Sidaka & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. Rev. 851, 857-58 (1996).

A. Mandatory Detariffing of the ARC Undermines RLECs' Ability to Recover Eligible Costs.

In its *2011 USF/ICC Transformation Order*, the Commission established a recovery mechanism "designed to provide predictability to incumbent carriers that had been receiving implicit [intercarrier compensation] subsidies, to mitigate marketplace disruption during the reform transition, and to ensure [its] intercarrier compensation reforms do not unintentionally undermine [its] objectives for universal service reform."[23] This predictable, stable recovery mechanism, which allows carriers to recover a portion of their intercarrier compensation revenues through a combination of consumer charges (ARCs) and, where necessary, explicit replacement support through Connect America Fund-Intercarrier Compensation ("CAF-ICC"), has effectively allowed carriers to obtain their "Eligible Recovery."[24]

ARCs are a necessary component of an RLEC's Eligible Recovery for switched access. As the *NPRM* notes, when the Commission required incumbent LECs to reduce many of their switched access charges, the Commission defined a portion of the revenues that RLECs lost due to reduced access charges as "Eligible Recovery" and allowed eligible carriers to use a combination of a new limited end-user charge—the ARC—and universal service support to recover these amounts.[25] Detariffing the ARC without addressing the underlying issue the ARC was explicitly created to address risks undermining the stable, predictable recovery mechanism the Commission created. Put another way, mandatory detariffing would sever the compact always contemplated in access reform—the notion of moving cost recovery from implicit charges to a mix of explicit universal service support and recovery from the customer through

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[23] *In re Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17962-63 ¶ 858 (2011).

[24] 47 C.F.R. § 51.917(d).

[25] *NPRM*, 35 FCC Rcd at 3168 ¶ 9.

reasonably comparable rates. Instead, the ability to recover a portion of those costs from the customer would now be placed in serious question, particularly without any increase in universal service support to address the likely ensuing shortfalls.

Moreover, the proposed mandatory detariffing of these costs almost certainly violates *Smith v. Illinois Bell Telephone Co*.[26] In *Smith*, the state set rates below cost for service provided within the city of Chicago on the theory that the interstate revenue of the company "could be increased to make good the loss."[27] The Supreme Court rejected this proposition and found that "[a] regulator may not impose confiscatory rates, assuming that a regulator in another jurisdiction will exercise its unilateral independent authority to allow a fair recovery."[28] Yet this is exactly what the *NPRM* contemplates in detariffing ARCs (and, as explained below, SLCs) and then assuming that carriers will be able to recover these costs through state rates, which may or may not occur. To deny recovery of these interstate costs through an interstate rate element under the assumption that the difference will be made up by intrastate rates violates *Smith.*

Indeed, in upholding the creation of the ARCs, the U.S. Court of Appeals for the Tenth Circuit expressly found that the recovery mechanism did not violate the apportionment requirement set forth by the Supreme Court in *Smith* precisely because the Commission was "appropriately allow[ing] recovery of lost intrastate revenues through a federal recovery mechanism."[29] Undoing that and assuming these costs will be made up through intrastate rates thus runs afoul of the Tenth Circuit's reasoning and violates the protection established in *Smith.*

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[26] *Smith v. Ill. Bell Tel. Co.*, 282 U.S. 133 (1930); *see also Direct Commc'ns Cedar Valley, Ltd. Liability Co. v. FCC*, 753 F.3d 1015, 1133 (10th Cir. 2014) (citing *Smith*, 282 U.S. at 148-149).

[27] 282 U.S. at 148-49.

[28] *Direct Commc'ns*, 753 F.3d at 1133 (citing *Smith*, 282 U.S. at 150-51).

[29] *Id*. at 1134.

Further, as discussed at length in Section I, *supra*, the ability of carriers to shift recovery to intrastate rates varies considerably throughout the country. The *NPRM* acknowledges such concerns arising out of a sweeping national detariffing mandate and thus seeks comment, in the alternative, on deregulation and detariffing only in certain areas where specific criteria indicate that rate regulation is unnecessary.[30] The nature and variability of state regulation, and the fact that detariffing would affect telecom companies differently, would result in an incredibly complex analysis to determine which areas and which companies should be included or excluded. In fact, adopting a patchwork system that compels detariffing in certain areas but permits continued tariffing in others would fly in the face of a purported goal of streamlining and simplifying regulations. Such a mechanism would ironically *increase* regulatory compliance burdens as compared to the *status quo* rather than mitigate them.

Finally, much as with the potential elimination of SLCs and the need for a Connect America Fund Broadband Loop Support ("CAF-BLS") "backstop," as described below, if the Commission removes tariffed ARCs to avoid violating *Smith*, rather than compelling RLECs to impute as if they received the full amount of the ARCs despite the shift, it should allow RLECs to recoup the remaining costs previously recovered via ARCs from CAF-ICC if providers are unable to recover their Eligible Recovery through some other means. Referencing projected data for the 2020-2021 tariff cycle, NTCA estimates that ARCs will generate over $55 million in revenue that reduces the need for CAF-ICC support. If these amounts cannot be recovered otherwise from consumers, this would unnecessarily place greater strain on the USF budget. Thus, given the serious risk presented to recovery of costs assigned by Commission rule to the interstate jurisdiction and the complexities and uncertainties that would be exacerbated in trying

[30] *NPRM*, 35 FCC Rcd at 3164 ¶ 2 and 3183-85 ¶ 53-60.

to pull apart and reconstruct the means of recovering those costs – and the potential universal service impacts associated with the loss of these rate elements – the Commission should reject a mandatory detariffing regime.

B. Removal of the SLC Undermines RLECs' Ability to Recover Interstate Common Line Revenue Requirements.

An issue that the *NPRM* does not sufficiently consider is the fact that many RLECs are still rate-of-return regulated. For RLECs that continue to recover their costs based on a rate of return, they must be given the reasonable opportunity to recover costs and earn their approved return.[31] A portion of rate-of-return regulated LECs' interstate costs are recovered through the interstate common line revenue requirement. In rural areas and areas of low density, these costs may be higher than urban areas. Both Congress and the Commission have repeatedly acknowledged the impact these high costs can have on the Commission's universal service goals and created programs—such as the Universal Service Fund—to ensure that consumers in rural, insular, and high-cost areas have access to modern communications networks capable of providing services that are reasonably comparable in price and quality to those available in urban areas. The SLC is a flat monthly charge on incumbent LECs' lines designed to recover a portion of the common line revenue requirement allocated to the interstate jurisdiction.

If the SLC is eliminated as a tariffed interstate cost recovery mechanism, rate-of-return-regulated RLECs will still need an opportunity to recover these interstate costs to meet their interstate revenue requirements. Even if some of these costs might in theory be recoverable through increased intrastate local voice rates—notwithstanding the substantial practical and state regulatory hurdles described in Section I, *supra*, the jurisdictional issue discussed in Section

[31] *United States v. FCC*, 707 F.2d 610, 612 (D.C. Cir. 1983) (citing *Federal Power Comm'n v. Hope Natural Gas Co*., 320 U.S. 591, 603 (1944)).

II.A, *supra*, or the significant separations concerns discussed in Section II.D, *infra*—the Commission would still need to modify its rules to allow cost carriers to recover the remaining interstate common line revenue requirement that cannot be recovered elsewhere through the CAF-BLS. Doing so—without penalizing providers by requiring that SLC revenues going forward be imputed regardless of whether those costs can be and are recovered anywhere else—would unnecessarily increase the size of the universal service fund. Indeed, shifting costs to USF when they can be recovered from end users through reasonably comparable rates is in tension with the Commission's goal of being "responsible stewards of public funds." To be clear, NTCA is not asking for additional universal service support for this purpose (or for CAF-ICC, as noted above) in highlighting this logical outgrowth of a mandatory detariffing order; rather, what NTCA wishes to make clear is that there is no need to place such pressure on the universal service fund or leave providers with unrecovered costs by changing the current structure.

In short, in the absence of a CAF-BLS "backstop" or the creation of yet another new rate element to replace the SLC, the regulatory construct contemplated in the *NPRM* poses serious risk of rendering cost carriers unable to recover their interstate common line revenue requirements from the interstate jurisdiction. In the context of rate-of-return ratemaking for telecommunications companies, "[r]egulated utilities are entitled to earn enough revenue […] to cover operating expenses…."[32] The revenue requirement is exactly as it sounds: the amount of revenue *required* for the company to operate. And the proposed mandatory detariffing puts this recovery at risk.

[32] *United States v. FCC*, 707 F.2d 610, 612 (D.C. Cir. 1983).

As with the detariffing of ARCs, described above, the inconsistent ability of carriers to shift recovery to intrastate rates poses a serious concern for the detariffing of SLCs and violates *Smith* for the reasons explained above. A nationwide mandate would result in varied results from jurisdiction to jurisdiction, and a mechanism tailored to certain jurisdictions would result in more regulatory burdens and red tape, rather than eliminate burdens as the Commission intends.

C. The Commission Must Conduct a Cost-Benefit Analysis.

Although the *NPRM* states generally that "the Commission has found that the high costs of regulation likely outweigh the benefits, even in less-than-fully-competitive markets" and seeks comments to quantify both the costs and the benefits of its proposal, it does not perform or initiate a cost-benefit analysis.[33] The Commission has indicated in recent years the importance of cost-benefit analysis, and, indeed recently established an Office of Economics and Analytics.[34] However, the complex issue of how detariffing will increase costs and burdens for NTCA members—costs which will be incurred just to maintain current revenues—is essentially unaddressed.

Any analysis of costs incurred as a result of mandatory detariffing must include the costs that will be incurred by carriers to implement cost recovery through state rates, including state commission approvals where necessary as described in Section I, and continuing costs that will be incurred by carriers to effectuate recovery through intrastate rates. Impacts of consumer disruption and confusion must also be considered, as users watch their local voice bills fall by up

[33] *NPRM*, 35 FCC Rcd at 3181 ¶ 45.

[34] *In re Establishment of the Office of Economics and Analytics*, Order, 33 FCC Rcd 1539 (2018). The Commission explained that the creation of this office is consistent with President Trump's Executive Order 13771, which stresses the importance of economic analysis of regulations.

to $9.50 in one place but then increase by the same amount (or perhaps less, depending upon what a given State permits) in other places.

Given the variety of issues associated with the proposed detariffing, the Commission should consider whether the costs resulting from this change outweigh its benefits. The Commission has previously indicated that the public interest is served by the integration of economic and data analysis, including cost-benefit analyses, in the Commission's rulemaking processes.[35] As Chairman Pai stated, "[…] the alternative to trying to quantify costs and benefits is far worse: It's essentially putting your finger in the wind and making it up as you go along."[36] In the instant case, it is not clear what "high costs of regulation" the current SLC and ARC frameworks create; from the perspective of those providers that employ them, they are a relatively straightforward and seamless means of recovering costs that *other* Commission rules assign to the interstate jurisdiction and thus must be recovered somewhere. By and large, carriers today tend to devote little to no time "managing" these charges, as the systems are fully implemented and well-understood. By contrast, it is clear that mandatory detariffing will create a number of new burdens, especially for RLECs. At the end of the day, carriers will incur tremendous costs just to maintain the *status quo* in terms of recovering their interstate revenue requirements and Eligible Recovery, rendering any benefits in the cost-benefit analysis dubious at best.

D. Shifting Costs to the Intrastate Jurisdiction Raises Separations Issues.

As a practical matter, the Commission's proposal would shift costs from the interstate jurisdiction to the intrastate jurisdiction because there is nowhere else from which to recover

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[35] *In re Establishment of the Office of Economics and Analytics*, Order, 33 FCC Rcd 1539 ¶¶ 1-3.

[36] *Id*., 33 FCC Rcd at 1549, Statement of Chairman Ajit Pai.

them. For cost carriers, the SLC recovers portions of the interstate common line revenue requirement, with the remainder being funded by CAF-BLS. For all RLECs, the ARC recovers, at least in part, interstate costs associated with switched access services that were frozen in 2011 and placed on a transition schedule downward over time. But if the Commission does not provide additional universal service support or a new interstate rate element to recover these costs, and if the only way cost carriers can then recover these *interstate* costs is through an *intrastate* rate increase, the *NPRM* is shifting costs to the intrastate jurisdiction in violation of the separations process.

If the Commission wants to shift interstate costs to the intrastate jurisdiction, it should follow the procedures set forth by statute. The Communications Act of 1934, as amended (the "Act"), requires that the Commission first refer separations proceedings to the Federal-State Joint Board, and the Joint Board then "shall prepare a recommended decision for prompt review and action by the Commission."[37] After a referral to the Joint Board in 1997, the Commission adopted an interim freeze on separations allocation in 2001, and has thereafter extended the freeze multiple times.[38] The freeze is currently set to expire at the end of 2024.[39]

The jurisdictional separations rules require that a carrier separate the regulated costs and revenues between the interstate and intrastate jurisdictions using the jurisdictional separations rules.[40] The purpose of jurisdictional separations is to prevent carriers from recovering the same costs in both the intrastate and interstate jurisdictions, and revenues must be attributed to those costs. Once costs are separated between the jurisdictions, carriers can then apportion their

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[37] *See* 47 U.S.C. § 410(c).

[38] *See generally In re Jurisdictional Separations & Referral to the Federal-State Joint Board*, Report and Order and Waiver, 33 FCC Rcd 12743, 12760-61 ¶¶48-49 (2018).

[39] *Id.* at 12761 ¶ 49.

[40] 47 C.F.R. Part 36.

interstate regulated costs among their interexchange services and their intrastate costs among intrastate services for purposes of recovering them through revenues. Absent a change to the current process, the SLC and ARC costs remain in the federal jurisdiction, yet the *NPRM* proposes that recovery be effectively shifted to the intrastate jurisdiction. As set forth above, this is not only violative of the separations process but goes against the apportionment requirement established in *Smith.*[41]

In failing to provide either a new set of interstate rate elements or an increase in the support associated with either CAF-BLS or CAF-ICC, the Commission proposes to fundamentally shift recovery of SLC and ARC costs from the interstate to the intrastate jurisdiction without engaging in the review processes that exist expressly for this purpose. In addition to the numerous substantive reasons the proposed detariffing should not be imposed as described otherwise herein, the proposed rule is procedurally unsound for this reason.

E. The Standard for Forbearance Is Not Met.

The Commission proposes to forbear on its own motion from Section 203 of the Act, to the extent necessary to require the mandatory detariffing of Telephone Access Charges on a nationwide basis.[42] However, given the implications that it would have on both consumers and the regulatory and cost recovery mechanisms that apply to RLECs, the Commission does not satisfy the statutory requirements to deregulate these tariffed rate elements as it proposes.

Under Section 10(a) of the Act, the Commission shall forbear from applying any regulation to a telecommunications carrier, in any or some of its geographic markets, if the Commission determines that "(1) enforcement of such regulation or provision is not necessary to

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[41] *Smith*, 282 U.S. at 150-51.

[42] *NPRM*, 35 FCC Rcd at 3192-93 ¶ 90.

ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest."[43] "The three conditions of § 10(a) are conjunctive and the Commission can properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied."[44] In the *Qwest Phoenix Forbearance Order*, the Commission rejected "generalized claims" as a means to satisfy its public interest obligation.[45] Instead, the Commission concluded that it must analyze the impact of forbearance in specific product and geographic markets.[46]

The continued tariffing of SLCs and ARCs helps ensure that certain RLECs can recover their costs and make investments in advanced networks, which supports the public interest. The SLC enables RLECs to recoup the high costs of connecting customers to the local network, allowing them to better plan how to devote limited resources to improve their networks, especially as they continue the IP transition. Requiring mandatory detariffing of the SLC will introduce unnecessary complexity and uncertainty with respect to how these costs are recovered, jeopardizing how RLECs will be able to fund capital investments and upsetting the delicate balance the Commission struck when creating the existing system of cost recovery. As explained above, eliminating the SLC will likely result in unnecessary burdens on the USF.[47]

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[43] 47 U.S.C. § 160(a).

[44] *Verizon v. FCC*, 770 F.3d 961, 964 (D.C. Cir. 2014) (internal quotation marks omitted).

[45] *See In re Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8635 ¶ 28 (2010) ("*Qwest Phoenix Forbearance Order*").

[46] *Id.* at 8635 ¶ 28 n.82.

[47] *See supra* II.B.1.

Similarly, continued tariffing of the ARC is also in the public interest because it provides stability and predictability for carriers to recoup their Eligible Recovery totals as established by Commission rule. There is a risk that if the Commission adopts its proposals and eliminates the ARC, RLECs will be left unable to fully recover their costs, as detariffing will fundamentally alter the nature of and ability to obtain Eligible Recovery.[48] Even if RLECs are able to pursue alternative means to recover their costs,[49] this will nonetheless create substantial unpredictability about their revenues,[50] which could in turn affect the ability of carriers to timely deploy broadband and other critical services. These results are not consistent with the public interest. By introducing this uncertainty with respect to how RLECs sustain their operations, the Commission does not ensure that the public interest remains protected; in fact, by forbearing, the Commission would do the opposite.

Moreover, the Commission's proposed finding that the benefits of deregulation "likely" outweigh their costs is insufficient to prove that mandatory detariffing is in the public interest.[51] The Commission has held repeatedly that the provision of universal service is not only in the public interest, but it is the agency's mandate from Congress.[52] The Commission is also required by the Act to ensure that the universal service support is specific, predictable, and sufficient.[53]

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[48] *See supra* II.B.2. It is also worth noting that this effective change to Eligible Recovery – establishing the amount to be received but then compelling carriers to "go chase it elsewhere" in the hope of finding it – would have been implemented without sufficient (or any, really) notice of a change to that particular rule.

[49] *See NPRM*, 35 FCC Rcd at 3188-91 ¶¶ 77-84.

[50] *In re Connect America Fund*, Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, 33 FCC Rcd 11893, 11918 ¶ 82 (2018) (noting that increasing budget predictability for legacy carriers is in the public interest).

[51] *NPRM*, 35 FCC Rcd at 3180-82 ¶¶ 45, 47-48.

[52] *In re Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4557-58 ¶ 10 (2011).

[53] 47 U.S.C. § 254; *see also In re High-Cost Universal Serv. Support*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475 (2008).

In support of this mandate, the Commission has created and refined universal service support to establish a system that is stable and predictable. To unravel this system is a step backward in ensuring that the Commission's universal service mandate is accomplished. Injecting uncertainty and unpredictability in the revenue stream also risks investment necessary to close the digital divide.

The Commission cites one report that says 41 states have "significantly" deregulated intrastate telephone rates, at least in certain parts of those states.[54] As the Commission acknowledges, however, this means that a significant number of states have not deregulated the charges for the intrastate portion of these rates, noting that there remains "considerable variation among states."[55] And, Section I, *supra*, demonstrates the considerable complexity within that picture once the layers are peeled back. Moreover, adopting this type of a generalized approach to the statutory requirements is inconsistent with the obligation to undertake a specific market analysis.

It is the Commission's obligation to show that continued tariffing is *not necessary*.[56] Yet tariffed rate elements, including both the SLC and the ARC, remain the only means to ensure that rates are just and reasonable and are not unjustly or unreasonably discriminatory, to protect consumers, and to protect the public interest. Accordingly, to mandate nationwide detariffing is inconsistent with the provisions of Section 10. To the extent that the Commission nonetheless believes that Section 203's requirements "may impede carriers' flexibility to react to competition

[54] *See NPRM*, 35 FCC Rcd at 3181 ¶ 47.

[55] *See Id.*, 35 FCC Rcd at 3182 ¶ 49.

[56] 47 U.S.C. § 160(a)(1), (2).

and may harm customers in some circumstances,"[57] this conclusion supports permissive detariffing by select providers, not mandatory detariffing by all.

Even if the standard for forbearance is met, which it is not, detariffing adds unnecessary complexity and injects uncertainty for rural carriers. As explained above, the proposals will inject a lack of predictability and create uncertainty, which is in tension with USF goals. There is no need to open this can of worms after the Commission has worked to create certainty and predictability for investment.

III. THE COMMISSION SHOULD ADOPT A PERMISSIVE DETARIFFING REGIME IN LIEU OF MANDATING DETARIFFING.

Notwithstanding the substantial legal and practical complications associated with a mandatory detariffing regime as described above, this is not to say that detariffing should be avoided as an absolute matter in rethinking policy. To the contrary, even if conditions make it such that a sweeping national mandate for detariffing would be ill-fitting in some places and potentially calamitous in others, there may also be markets and circumstances for which detariffing makes good sense for a given carrier and its customers. To this end, recognizing that one-size-fits-all solutions often do not work in determining how best to build networks and sustain services in rural areas, and recognizing further that individual operators are best positioned to determine what regulatory constructs may or may not work well based upon localized conditions, the Commission should provide options with respect to detariffing. Specifically, even as it should reject a detariffing mandate, the Commission should adopt a permissive detariffing framework that would allow RLECs to make their own assessments of the costs and benefits of such an approach and elect the option that works best for their respective

[57] *NPRM*, 35 FCC Rcd at 3180 ¶ 44.

areas. Such optionality would be fully consistent with the Commission's deregulatory approach, while avoiding the negative consequences of a mandatory detariffing regime.

IV. CONCLUSION.

For the reasons described above, the Commission should decline to adopt its proposal for mandatory nationwide detariffing of access charges. Doing so introduces unnecessary complexity for RLECs, creates regulatory uncertainty at a time when RLECs are finally able to focus more on the business of deploying networks and delivering services, risks RLECs' ability to recover interstate costs, and is not in the public interest. Permissive detariffing would mitigate these concerns, while allowing carriers that want to elect such an option based upon localized conditions to do so.

Respectfully submitted,

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July 6, 2020