NTCA THE RURAL BROADBAND ASSOCIATION

June 4, 2024

***Ex Parte* Notice**

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
45 L Street, N.E.
Washington, D.C., 20554

**RE: Facilitating Implementation of Next Generation 911 Services (NG911)
PS Docket No. 21-479**

Dear Ms. Dortch:

On Friday, May 31, 2024, the undersigned on behalf of NTCA–The Rural Broadband Association ("NTCA")[1] and various representatives of the "RLEC Parties" met with Edyael Casaperalta Legal Advisor for Wireless, Public Safety and Consumer Protection to Commissioner Anna M. Gomez of the Federal Communications Commission (the "Commission"). NTCA and the RLEC Parties attendees are listed in Appendix A. The parties discussed the Notice of Proposed Rulemaking ("NPRM") that proposes, as part of the transition to Next Generation 911 ("NG911"), to require all voice service providers to transmit 911 calls to points of interconnection ("POIs") as designated by NG911 network providers (the "*Proposed NPRM NG911 Default Framework*" or the "*Proposed Framework*")[2] as well as the consequences of any effort to adopt that *Proposed Framework*.

From the outset, NTCA and the RLEC Parties made clear that they support the transition to NG911 because of the benefits this service can bring to rural communities. Thus, there can be no insinuation that NTCA and the RLEC Parties are impediments to that transition. Rather, their overarching concern is how the *Proposed Framework* disregards long-standing and fact-based network transport obligations applicable to Rural Incumbent Local Exchange Carriers ("RLECs") and the resulting allocation of those transport obligations (and costs) among those parties directly involved in traffic exchange agreements that will make the transition possible. NTCA and the RLEC Parties also made clear that the factual, legal and public policy errors in the NPRM and injected into the record can all be avoided with the adoption of the *RLEC Alternative Proposal* submitted in this proceeding.[3]

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[1] NTCA represents approximately 850 providers of high-quality voice and broadband services in the most rural parts of the United States. In addition to voice and broadband, many NTCA members provide wireless, video, and other advanced services in their communities. The RLEC Parties include the Rural Telephone Company Consortium (the "RTCC"), the South Carolina Telephone Coalition (the "SC Coalition"), the South Dakota Telecommunications Association ("SDTA"), the Pennsylvania Telephone Association ("PTA"), the Kansas RLECs ("KS RLECs"); the Iowa Communications Alliance; and Home Telephone ILEC, LLC.

[2] *Facilitating Implementation of Next Generation 911 Services (NG911)*, PS Docket No. 21-479, Notice of Proposed Rulemaking, FCC 23-47 (rel. Jun. 9, 2023) ("NPRM"), ¶ 2.

[3] *See* Ex parte letter, NTCA and the RLEC Parties, PS Docket No. 21-479 (fil. Feb. 6. 2024) ("NTCA/RLEC Parties Feb. 6 ex parte"); Ex parte letter, NTCA and the RLEC Parties, PS Docket No. 21-479 (fil. Mar. 6. 2024).

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While the specifics of the factual and legal errors found in the NPRM are among the items noted in detail in the attachment hereto (incorporated by reference in its entirety into this cover letter and discussed during the meeting), NTCA and the RLEC Parties' position can be summarized as follows:

1. To move forward with the NPRM, the FCC must possess the legal authority to prescribe its *Proposed NPRM NG911 Default Framework* – and that authority cannot be found in:

    a. the purported legal authority asserted by the NPRM;

    b. misguided/unsupported attempts to label NG911 network providers as anything other than "telecommunications carriers" or attempts to do so based on a factual error;

    c. misapplied Commission precedent; *or*

    d. attempts to misconstrue RLECs' current duties with respect to the provision of 911 service.

2. Assuming that such authority can be demonstrated, the NPRM and the record is rife with factual errors that lead to erroneous legal conclusions, both of which would, in turn, lead to arbitrary and capricious decision making should the Commission adopt the *Proposed NPRM NG911 Default Framework*.

3. Compounding these infirmities is a lack of inquiry into a material fact, that is, whether the transport-related costs at issue here have already been considered or will be recovered by NG911 network providers in a state's award of an NG911 service contract.

As demonstrated in the attachment hereto, these infirmities can be addressed, and the transition can move forward with a time certain end point for connecting carrier transport agreements, should the Commission take the alternative paths forward discussed by NTCA and the RLEC Parties in their February and March ex parte submissions in this proceeding. In addition, this would preserve states' ability to address the transport costs at issue after consideration based on the specific circumstances presented in that jurisdiction. This is preferable to a "one-size-fits-all" approach the NPRM takes and that preempts the states' ability to consider whether these costs have in fact been recovered by the NG911 network provider and whether that provider is in fact operating as a "telecommunications carrier."

Finally, NTCA and the RLEC Parties stated that a recently issued decision by the Pennsylvania Public Utility Commission ("PA PUC")[4] is instructive here, specifically as it demonstrates the ability of state commissions to properly address the process – interconnection negotiations between two telecommunications carriers – by which the transition to NG911 should proceed. Addressing a dispute between Originating Service Providers ("OSPs") and the state's chosen NG911 network provider (NextGen, a subsidiary of Comtech) as to the terms and conditions of the interconnection

[4] *Citizens Telephone Company of Kecksburg, et al. v NextGen Communications, Inc.*, Order, P-2024-3045797, Pennsylvania Public Utility Commission (rel. May. 23, 2024).

necessary for the exchange of 911 traffic, the PA PUC made clear that the state's administrative law judges should resolve the issue by the end of August 2024. Recognizing that the state is set to transition to the new NG911 network at the end of 2024, the PA PUC established a framework based on the specific facts and circumstance before it for the NG911 transition to move forward. The PA PUC's action undermines claims that the NPRM's proposed *Default Framework*, that eliminates state commissions' ability to address these issues, is necessary to "end disputes" between OSPs and NG911 providers and avoid delaying the transition.[5] In fact, this Order shows that the consistent application of the Section 251 and 252 interconnection principles would advance the policy objective to expedite NG911 service by minimizing disputes between an RLEC and the NG911 network provider. This would also avoid the improper notion underlying the *Default Framework* that a "one-size-fits-all" approach to addressing interconnection is appropriate (even assuming, which cannot be done here, that the Commission could otherwise demonstrate the legal authority to do so).

Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS.

By: /s/ Brian Ford
Brian Ford
Vice President – Federal Regulatory
bford@ntca.org

cc: Edyael Casaperalta

[5] *See* NPRM ¶ 18.

Appendix A

Attendees for NTCA and the RLEC Parties[6]

NTCA
Brian Ford

The Rural Telephone Company Consortium
Thomas J. Moorman

The South Carolina Telephone Coalition
Margaret M. Fox

The South Dakota Telecommunications Association
Kara Semmler

The Pennsylvania Telephone Association
Steve Samara

The Kansas Rural Local Exchange Carriers
Anthony K. Veach

JSI
Douglas Meredith

Home Telephone ILEC LLC
Keith Oliver

[6] The companies represented by the RLEC Parties are listed in Attachments A to E of the NTCA/RLEC Parties Feb. 6 ex parte.

I. The Commission Does Not Have the Legal Authority to Move Forward with the *Proposed NPRM NG911 Default Framework*.

It is axiomatic that an administrative agency must have congressionally granted authority to promulgate rules.[1] As discussed herein, the Commission does not have the legal authority to require a Rural Local Exchange Carrier ("RLEC") as an Originating Service Provider ("OSP") to incur all of the costs associated with the transport of originated 911 calls to a point outside of the RLEC's network.[2] Such authority cannot be found in attempts to: (1) expand the legal provisions cited by the NPRM; (2) label NG911 network providers as anything other than "telecommunications carriers"; *or* (3) rely on factual errors, misapplied Commission precedent, or misconstruing of RLECs' current duties with respect to the provision of 911 service.

A. Legal authority cited by the NPRM is insufficient.

Among other things, the NPRM asserts that the Commission may enact the *Proposed Framework* based on its "general jurisdictional grant [that] includes the responsibility to set up and maintain a comprehensive and effective 911 system."[3] Yet at no point does the NPRM demonstrate or even discuss how requiring OSPs to bear such costs – rather than the NG911 network providers that are non-governmental actors contracted (and compensated) to deploy NG911 capabilities after holding themselves out as being able to facilitate the routing and completion of such calls – is in any way linked to a "comprehensive and effective 911 system." The controversy over the *Proposed Framework* is not about *how* the NG911 network will operate or whether the transition to such a network will indeed take place. It is, rather, about which party – OSPs or NG911 network providers – will assume financial responsibility for a certain category of costs (transport) resulting from this transition. The Commission need not require any OSPs to assume these costs to ensure the NG911 network is "comprehensive and effective," and no demonstration has been made otherwise.

Individual statutory provisions cited in the NPRM fare no better. The NPRM fails to point to any statute or any other legislation mandating that telecommunications network operators provide free service to entities awarded government contracts. Any reliance on the "preamble" to the NET 911

[1] *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2607-08 (2022) (Proper statutory construction requires "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" and if "the statute at issue is one that confers authority upon an administrative agency, that inquiry must be shaped, at least in some measure, by the nature of the question presented—whether Congress in fact meant to confer the power the agency has asserted.") (internal citations omitted).

[2] *Facilitating Implementation of Next Generation 911 Services (NG911)*, PS Docket No. 21-479, Notice of Proposed Rulemaking, FCC 23-47 (rel. Jun. 9, 2023) ("NPRM"), ¶ 2. NTCA and the RLEC Parties refer to this proposal as the "*Proposed NPRM NG911 Default Framework*" or the "*Proposed Framework*." Pursuant to the *Proposed Framework*, NG911 network providers would be empowered to dictate destination points to which all OSPs would be required to route 911 calls in Internet Protocol ("IP"). Of particular interest to NTCA members and the RLEC Parties is that the NPRM would require, by default, that OSPs assume, entirely, the financial responsibility for the routing of such calls to points of interconnection ("POIs") as designated unilaterally by a NG911 network provider. The NPRM proposes to allow this despite the fact that NG911 network providers voluntarily assumed the contractual obligations to establish and operate the entire NG911 system for a given state and are receiving renumeration from the state.

[3] NPRM, ¶ 60.

Act[4] to justify such "free" transport service to NG911 network providers is, at best, misplaced.[5] Beyond the fact that a "preamble" to a law is not law,[6] the NPRM fails to cite a single provision of the NET 911 Act's operative provisions to establish the authority that justifies imposition of "free" NG911-related transport service. The Commission has already found, in implementing the NET 911 Act, that this legislation was intended by Congress to ensure "that providers of [interconnected VoIP] service provide 911 and enhanced 911 (E911) service in full compliance with [the Commission's 911] rules."[7] The Commission further found that this statutory goal could be accomplished by allowing these providers access to 911 facilities owned by other classes of carriers.[8] Yet the issue in this proceeding is *not* whether any given party will have access to 911 traffic generated by an OSP or to facilities owned by OSPs as part of the provision of 911. Rather, the critical issue is ultimately who pays for the transport of such traffic beyond the OSP's network. The NET 911 Act is thus inapplicable to the instant controversy.

The NPRM's reliance on the "RAY BAUM'S Act"[9] and the 21st Century Communications and Video Accessibility Act (the "CVAA")[10] misses the mark as well. No connection has been made that the NG911-related transport costs are relevant to a statutory provision directing the adoption of rules to ensure that dispatchable location information is conveyed within 911 calls "regardless of the technological platform used."[11] Nor does the NPRM demonstrate that the allocation of

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[4] New and Emerging Technologies 911 Improvement Act of 2008, Pub. L. No. 110-283, 122 Stat. 2620 (2008) ("NET 911 Act") (amending Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286 (1999) (Wireless 911 Act)).

[5] NPRM, ¶ 60.

[6] *See Association of American Railroads v. Costle*, 562 F.2d 1310, 1316 (1977) ("A preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers.") (internal citations omitted); *White v. Investors Management Corp*., 888 F.2d 1036, 1042 (1989) ("It is hornbook law, however, that recitals or preambles in statutes, ordinances, or corporate resolutions are to be looked at at best only when the language of the enacting language is unclear or ambiguous. The preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers.") (internal quotations and citations omitted). In addition, even should the Commission proceed based on the notion that the preamble to a law is legal authority, no demonstration has been made that accomplishing the goal set forth in the preamble to the NET 911 Act requires adoption of the *Proposed Framework*. The preamble expresses congressional support for "the rapid deployment of IP-enabled 911 and E-911 services, encourage the Nation's transition to a national IP-enabled emergency network, and improve the 911 and E-911 access to those with disabilities." NPRM, ¶ 60, citing NET 911 Act, preamble. The NPRM at no point establishes or discusses how requiring OSPs to assume the category of costs at issue herein will advance this goal that is, again, only a preamble to a statute.

[7] *Implementation of the NET 911 Improvement Act of 2008*, WC Docket No. 08-171, Report and Order, FCC 08-249 (rel. Oct. 21, 2008), ¶ 1.

[8] *Id*., ¶¶ 14-19.

[9] Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, Division P, Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018 (RAY BAUM'S Act) § 506(a), (c)(1) (codified at 47 U.S.C. § 615).

[10] Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat 2751 § 106(g) (2010) (CVAA) (codified at 47 U.S.C. § 615c(g)).

[11] RAY BAUM'S Act, § 506(a).

transport costs is relevant to fulfilling the CVAA direction to "achieve reliable, interoperable communication that ensures access by individuals with disabilities to an Internet protocol-enabled emergency network."[12] Rather, both the RAY BAUMs' Act and the CVAA were intended to address very specific issues related to emergency services separate and apart from how the costs of the emergency services network are allocated. As such, both of these pieces of legislation are inapplicable to efforts to impose "free" transport services upon an RLEC.

Finally, the NRPM fails to demonstrate how any of these statutory provisions, standing alone or cobbled together, grant legal authority to create a default recovery mechanism associated with the costs for an intrastate call.[13] These being intrastate calls, any recovery mechanism – default or otherwise – should be left to the states to determine as this raises financial implications associated with expanding RLECs' intrastate transport obligation beyond their network boundaries for these calls. Yet the Commission takes that decision for itself while, at the same time, stressing that the "power to regulate 911 is shared between the Commission and the states, and our proposals in this Notice of Proposed Rulemaking are premised on that assumption."[14] No such sharing of regulatory oversight regarding intrastate transport has been demonstrated to be vested in the Commission. In addition to an assertion of such broad authority reflected in the default recovery mechanism noted above, the Commission fails entirely to address whether it, or the states, will exercise jurisdiction over service quality issues that are so critical to 911 service. Although the NPRM fails to establish the Commission's authority in the area of intrastate transport, at the very least, the Commission should make clear that state commissions are not hindered in their effort to care for the critical quality of service issue even as the effort is being made to push states aside on the allocation of costs and the implications of the *Default Framework* for consumers.[15]

B. Attempts to label NG911 network providers as anything other than "telecommunications carriers" are insufficient to set aside Sections 251 and 252 or to otherwise adopt the *Default Framework*.

The NPRM incorrectly concludes that Sections 251 and 252 of the Communications Act of 1934, as amended (the "Act"), do not apply because 911 authorities (or Public Safety Answering Points ("PSAPs")) are not "commercial telecommunications carriers" but are, instead, "government entities."[16] Yet, the governmental entities are not parties to the network interconnection

[12] 47 U.S. Code § 615c(g).

[13] Recently, the State of Nebraska passed LB1031 that reflects a state's role in advancing the transition of NG911 services, while reflecting state-specific solutions for that transition based on the policies and facts that carriers within that state must addressed. In Pennsylvania, the PA PUC established a framework based on the specific facts and circumstance before it for the NG911 transition to move forward and made clear that the state's administrative law judges should resolve the issue by the end of August 2024 in recognition of the fact that the state is set to transition to the new NG911 network at the end of 2024. *Citizens Telephone Company of Kecksburg, et al. v NextGen Communications, Inc.*, Order, P-2024-3045797, Pennsylvania Public Utility Commission (rel. May. 23, 2024). *See also* Section III, *infra.*

[14] NPRM, ¶ 62.

[15] *See* Section III, *infra*, noting that the *Default Framework* leaves RLECs little choice but to recover the costs they will incur from rural end-users.

[16] NPRM, ¶ 56.

arrangements between NG911 network providers and the RLECs. The governmental entities are customers of the NG911 network provider, and the NG911 network provider is a non-governmental actor serving as a government contractor. The interconnection agreements required for delivery of RLEC-originated traffic to the NG911 network provider are solely between these two parties. Thus, the conclusion arising from this factual error – that Sections 251 and 252 of the Act are inapplicable because the NG911 network provider somehow becomes an extension of state government merely by signing a contract – has no merit.

Turning to the statute, a 911 emergency call placed today or in the future when NG911 is deployed is "telecommunications" as defined by the Act, as it is "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[17] This "telecommunications," in turn, is offered "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used"[18] by a "telecommunications carrier." The record is clear (1) that the customers of the NG911 network provider are the PSAPs[19] and (2) that the NG911 network providers have ***both*** been certificated as and have requested the status of "telecommunications carriers."[20] Thus, it would be baseless for any inference to be made that the NG911 network providers are "private carriers" and that such status means that Sections 251 and 252 are inapplicable.

The Commission also cannot sidestep the Sections 251 and 252 provisions by accepting unsubstantiated claims that NG911 service is an "information service."[21] No factual demonstration of such status has been based. For example, the presence of "location data" and "reformatting information for display" in the call path to the PSAP has not been shown to transform the underlying call into an information service. These are merely "add-on" features inserted into the call path and delivered to the PSAP in addition to the connectivity that the NG911 network provider requires from an OSP, such as the RLEC, to enable the NG911 network provider to fulfill its contractual service commitments to the state. Indeed, these add-on services are analogous to a service such as caller ID – and the attachment of caller name has never been interpreted to negate the fact that the underlying call remains a telecommunication service.

Moreover, even if NG911 service were an "information service" (or, for that matter, even if it could be demonstrated that the NG911 network operator is some form of "private carrier"),

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[17] 47 U.S.C. § 153(50).

[18] 47 U.S.C. § 153(53).

[19] Ex parte letter, NTCA and the RLEC Parties, PS Docket No. 21-479 (fil. Mar. 6. 2024) ("NTCA/RLEC Parties Mar. 6 ex parte"), p. 6.

[20] Ex parte letter, South Carolina Telephone Coalition, PS Docket No. 21-479 (Apr. 24, 2024) ("SC Coalition Apr. 24 ex parte"), pp. 1-3; Ex parte letter, Pennsylvania Telephone Association, PS Docket No. 21-479 (Apr. 11, 2024) ("PTA Apr. 11 ex parte"), p. 3. That such state commission certifications and actions can be relied upon to establish an entity's "telecommunications carrier" status has already been confirmed in FCC-issued decisions. *See In the matter of Fiber Technologies Networks, L.L.C., Complainant, v. North Pittsburgh Telephone Company, Respondent*, *Memorandum Opinion And Order,* File No. EB-05-MD-014, DA 07-486 (rel. Feb. 23, 2007), pp. 4-6.

[21] Reply comments of Comtech Telecommunications Corp., PS Docket No. 21-479 (fil. Sep. 8, 2023) ("Comtech Sep. 8, 2023 Reply"), p. 10.

nowhere has it been shown that a provider with that classification has the right to demand interconnection at a location of its choosing. Precisely because it is not a carrier in such fact patterns, such a provider is necessarily a customer of the RLEC in this context and must pay for the transport service it requests.[22] *Ultimately, if a NG911 network provider is not a "telecommunications carrier," then the only classification left is that the NG911 network provider is a "customer" of the RLEC*. In this case the NG911 network provider is *purchasing a* service from the RLEC, specifically connectivity to the RLEC's network for the receipt of RLEC-originated 911 rural end user traffic. *As shown in Section I. A, supra, the Commission lacks the legal authority to require OSPs to offer NG911 network providers that service for free*. Moreover, looking at the record, it is telling that no party making the claim that NG911 Network Providers are not "telecommunications carriers"[23] addresses the Commission's authority to allow these operators to purchase this service for free.

C. Misapplied Commission precedent cannot form the basis of amending RLECs' duties with respect to the provision of 911 service.

The NPRM also errs in suggesting that the *King County Decisions*[24] should apply to wireline OSPs, and that the costs at issue are "required costs" for providers to continue offering 911.[25] The record exposes the obvious errors in these suggestions.

First, the issue presented in those decisions – the costs of mobile wireless network upgrades and trunking facilities on mobile wireless operators' networks within their licensed service areas – is a materially different proposition than the issue in this proceeding. In this proceeding, RLECs are being directed to build or otherwise procure connectivity or services that will extend far beyond their existing networks, a distinction the NPRM overlooks. Thus, the Commission cannot look to the *King County Decisions* as precedent with this critical factual distinction made clear by the

[22] Assuming, *arguendo*, that any credence is given to the assertion that the provision of NG911 service is an "information service," that suggestion is in irreconcilable conflict with the statements made within the NPRM concerning advancing of state jurisdiction in this area. *See* NPRM ¶ 62 (stating that the "power to regulate 911 is shared between the Commission and the states, and our proposals in this Notice of Proposed Rulemaking are premised on that assumption"); *see also* SC Coalition Apr. 24 ex parte, p. 5 (stating that "the Commission has repeatedly expressed the need for states to be involved and administer and operate NG9-1-1 systems. If NG9-1-1 features were functionally integrated into basic local exchange service, then a change in 9-1-1 call classification to information service would improperly deny states jurisdiction over local services, as basic service would be considered information service regulated by the Commission.") (Internal citation omitted).

[23] *See* Comtech Sep. 8, 2023 Reply, p. 10.

[24] NPRM, ¶ 7, fns. 21 and 22 referencing Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC, to Marlys R. Davis, E911 Program Manager, King County E-911 Program Office, Department of Information and Administrative Services, King County, Washington, 2001 WL 491934, at *1 (WTB May 7, 2001) and Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Request of King County, Washington, CC Docket No. 94-102, Order on Reconsideration, 17 FCC Rcd 14789 (2002) (King County Order on Reconsideration) (collectively the "*King County Decisions*").

[25] NPRM, ¶ 36.

record.[26] Indeed, the NPRM's assertion that these are "required" costs for wireline providers today was specifically demonstrated to be incorrect as to RLECs as OSPs since 911 service today is typically a "jointly provided" service arrangement under which the RLEC's routing and cost responsibilities end at a meet point that is within the RLEC network boundary.[27] The NPRM's attempt to rely upon the *King County Decisions*, in an effort to expand RLECs' network transport responsibility, is without merit and should be rejected.

D. Factual errors that misconstrue RLECs' existing duties with respect to the provision of 911 service cannot form the legal basis for the *Default Framework*.

Equally disturbing would be any inference that there exists an obligation today for an RLEC to deliver, entirely at its own cost, 911 calls to destination points outside its state-certificated service area. Any such obligation cannot be grounded in the applicable Eligible Telecommunications Carrier ("ETC") obligations of an RLEC with respect to the provision of voice telephony.[28] The ETC designation relates to the geographic area of that designation which is typically the RLEC's "Study Area."[29] At no point does the NPRM seek comment on whether the Commission has the authority to (much less whether it should) expand an RLEC's certificated area directly or allow the same by enabling a NG911 network provider to set a POI. Yet, this would be the direct consequence of approving the *Proposed Framework*. Nor can the Commission point to Section 9.4 of its rules to assert that any OSPs are responsible for these transport costs today. As noted in Section I.C., *supra* and as the record reflects,[30] RLECs' provision of end-users' access to 911 service is accomplished today via "jointly provided" service arrangement under which these operators' routing and cost responsibilities end at a meet point that is within the RLEC network boundary.

II. Assuming that legal authority can be demonstrated, the NPRM and the record are rife with factual errors that lead to erroneous legal conclusions that, in turn, would lead to arbitrary and capricious decision making should the Commission adopt the *Proposed Framework*.

The NRPM contains several factual errors that lead to erroneous conclusions and the improper setting aside of applicable law. As a result of these material errors, the Commission cannot move forward with the *Default Framework* based on the record.[31] For example:

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[26] Comments of NTCA–The Rural Broadband Association ("NTCA"), PS Docket No. 21-479 (fil. Aug. 9, 2023) ("NTCA Aug. 9, 2023 comments"), pp. 10-11; Comments of the Rural Telephone Company Consortium ("RTCC"), PS Docket No. 21-479 (fil. Aug. 9, 2023) ("RTCC Aug. 9, 2023 comments"), pp. 20-22.

[27] NTCA/RLEC Parties Mar. 6 ex parte, p. 6.

[28] *See* 47 U.S.C. § 214(e); 47 C.F.R. § 51.101.

[29] *See* 47 U.S.C. § 214(e)(5); 47 U.S.C. § 251(h).

[30] NTCA/RLEC Parties Mar. 6 ex parte, p. 6.

[31] A Recent ex parte submitted by the PTA confirms that purported assertions of fact made in the post-comment phase continue and that such unsubstantiated assertions provide no basis for the adoption of the *Proposed Framework*, the

- The NPRM conflates two *separate network functions* – Internet protocol ("IP") switching and IP transport. This factual error results in the erroneous tentative conclusion that an RLEC utilizing IP switching will incur minimal costs to transport calls to points far beyond its network boundary. The evidence in the record corrects the NPRM's mistake. The record demonstrates that despite the presence of IP switching within an RLEC's network, *that same provider will incur substantial, ongoing costs for IP transport of 911 traffic if required to deliver such traffic beyond its network boundary* as proposed by the NPRM.[32]

- The NRPM states incorrectly that RLECs have in place today "peering" arrangements that can be leveraged to route NG911 traffic as the NPRM proposes and can thus minimize the ongoing transport costs that RLECs will incur should the *Proposed Framework* be adopted.[33] This is simply incorrect. Most RLECs' transport obligations for 911-originated calls end at their side of a meet point with upstream, third-party tandem operators.[34]

- As noted in Section I. C, *infra*, the NPRM erroneously suggests that 911-related network upgrades and trunking facilities within a mobile wireless operators' licensed service area is akin to the RLECs being asked in this proceeding to build or otherwise procure connectivity or services that will extend far beyond the RLECs' existing network. In doing so it misapplies the *King County Decisions*.

Beyond these factual errors and the resulting erroneous conclusions, the NRPM fails to inquire at all as to a question of material fact. The NPRM at no point inquires as to whether the transport costs it proposes to foist on OSPs may have already been recovered pursuant to the terms of the contract between the state governmental entity and the NG911 network provider. At the very least, the Commission should be concerned about the windfall prospect of double recovery – at the expense of the ratepayer *and* the taxpayer – if these costs are already being recovered by NG911 network providers. These concerns have been raised in the record[35] but, to date, no state party or NG911 network provider has provided any response. It is telling and concerning that the parties in this proceeding with the best access to such material facts have remained silent in responding on

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most egregious of which are included in the submissions of Comtech. PTA Apr. 11 ex parte, p. 2 (stating that "[nor is it true that '911 authorities [are] forced to maintain two 911 networks'" as Comtech has claimed).

[32] NTCA Aug. 9, 2023 comments, pp. 7-8 ("Simply because a RLEC in a rural Kansas town has IP switching facilities within its own network (and thus has "transition[ed] to IP" as NASNA describes it), this has no bearing on its ability to deliver traffic (or certainly the economics of doing so) outside of its network and/or its rural service area, much less to a neighboring state or across country at a point that is distinct and likely geographically disparate from the points to which it routes all other voice and broadband traffic today."); Ex parte notice, South Carolina Telephone Coalition, PS Docket No. 21-479 (fil. Nov. 17, 2023) ("SC Coalition Nov. 17, 2023 ex parte"), pp. 1-2; RTCC Aug. 9, 2023 comments, p. 25.

[33] NPRM, ¶ 74.

[34] NTCA Aug. 9, 2023 comments, p. 6.

[35] Ex parte letter, NTCA and the RLEC Parties, PS Docket No. 21-479 (fil. Feb. 6. 2024) ("NTCA/RLEC Parties Feb. 6 ex parte"), p. 6; Reply Comments of South Carolina Telephone Coalition, PS Docket No. 21-479 (fil. Aug. 9, 2023), p. 6, fn. 9; NTCA Aug. 9, 2023 comments, p. 15.

this point. However, that silence does not alter the conclusion that such inquiry is necessary for the Commission to ensure "reasoned decision making."[36]

Certainly, the Commission should avoid compounding the factual errors and lack of inquiry into relevant facts by relying on unsupported "cost estimates" found in the record.[37] Neither industry standards nor relevant pricing data are cited to support attempts to undermine the good faith pricing estimates provided by RLECs that show cost variations that could be based on mileage.[38] More importantly, these assertions that the IP-based transport at issue herein is "not distance sensitive" are irrelevant – even if IP transport is not "distant sensitive," the record (and common sense) confirms that transport procured from another provider is not "free" or a "relatively small" cost for an RLEC. The transport at issue in this proceeding is redundant dedicated IP transport paths from an RLEC's central office to the NG911 network provider-designated POIs. These POIs will be not only outside RLECs' network footprint, but the transport costs that RLECs will assume to get to these POIs are for routes RLECs do not arrange for or pay for today for any purpose. Whether these are priced based on distance or "by the byte" is irrelevant – costs are costs regardless of the unit by which they are charged – and this red herring is seemingly aimed at diverting attention from the real-world costs that the *Proposed Framework* would imposes on RLECs and, ultimately, the rural end users they serve.

Section 706 of the Administrative Procedure Act directs a reviewing court to set aside agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[39] With respect to the factual basis of an agency's rulemaking, the agency must be able to explain a "rational connection between the facts found and the choice made."[40] The Commission cannot do so here. Neither (1) the presence of erroneous factual assertions in the NPRM and corrected by the record or (2) additional irrelevant and unsupported factual assertions can support the cost allocation proposal within the *Proposed Framework*. Nor can these be used to set aside applicable law.

III. A Default Cost Allocation Rule that Limits RLECs' Transport Responsibility to their "Network Edge" would Ensure that the Financial Burden of the NG911 Transition is Not Disproportionately Paid by Rural Consumers and would be Consistent with Commission Precedent.

Lost in the NPRM's discussion of the supposed benefits of its *Proposed Framework* is the disproportionate impact the proposed default cost allocation rule would have on rural end users.

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[36] *Home Box Office Inc. v. F.C.C.*, 567 F.2d 9, 35 (D.C. Cir. 1997) (The review of the underlying record "must be 'searching and careful,'" ensuring "both that the Commission has adequately considered all relevant factors" and that it has demonstrated a "'rational connection between the facts found and the choice made.'") (internal citations omitted).

[37] *See, e.g.* Ex Parte letter, Intrado Life & Safety, Inc., PS Docket No. 21-479 (fil. Mar. 25, 2024), p. 2 ("IP circuits are priced based on capacity/bandwidth versus Time Division Multiplexing (TDM) circuits, which are priced based on distance/capacity.")

[38] NTCA/RLEC Parties Feb. 6 ex parte, pp. 12-13. *See also* SC Coalition Nov. 17, 2023 ex parte, pp. 1-2.

[39] 5 U.S. Code § 706(2).

[40] *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co*. 463 U.S. 29, 43 (1983).

NTCA's RLEC members operate in some of the nation's lowest-density, highest-cost-to-serve rural areas, meaning operating costs generally must be recovered from either higher rates charged to the relatively few rural consumers living in such sparsely populated areas and/or from High Cost Universal Service Fund ("USF") disbursements. Yet these operating costs at issue – significant new transport costs for the delivery of 911 traffic to far flung POIs – will not be recoverable via USF.[41]

Even worse, under the proposed default rule,[42] the Commission would foreclose any other option other than increased end-user rates. This is a reasonable conclusion because it is difficult to envision why a state would have an incentive to establish (or keep in place should one exist now) any NG911 cost recovery mechanism that eliminates or limits these end-user rate increases in the wake of a Commission order requiring OSPs to absorb these costs if a recovery mechanism is not in place. Thus, the proposed default rule poses substantial risk to the Commission's statutory mission of universal service.

Thus, the better approach would be the adoption of a default rule for the apportionment of interconnection costs along the lines outlined in the *RLEC Alternative Proposal* at least for smaller providers operating in the most rural high-cost areas of the country.[43] The five main points of this proposal are as follows:

1. The POI for NG911 connections would be at a technically feasible point within the RLEC's network;

2. The RLEC's transport and cost responsibility would be to provide the connectivity to its side of the POI, and NG911 providers would assume the transport costs associated with delivering NG911 calls beyond those POIs;

3. The NG911 network provider (as a telecommunications carrier) and the RLEC would utilize the Section 251 and 252 framework established under the Act to establish the terms and conditions for such NG911 connectivity;

4. A state, consistent with its own authority, would be free to establish a NG911 cost recovery mechanism should it wish, even as the *RLEC Alternative Proposal* would operate as a default should the state not do so; and

5. No liability or responsibility would exist for the RLEC for NG911 traffic once it delivers such traffic to the POI.

This approach would be consistent with past Commission action under which care was taken to ensure that policy changes being enacted to address broader systemic issues did not harm rural

[41] *See* 47 CFR § 54.901, et seq. and 54.1301, *et seq*.

[42] NPRM, ¶ 2 ("Under this proposal, states and localities would remain free to establish alternative cost allocation arrangements with providers. However, in the absence of such arrangements, providers would be presumptively responsible for the costs associated with delivering traffic to the destination point(s) identified by the appropriate 911 authority.").

[43] NTCA/RLEC Parties Feb 6 ex parte, cover letter p. 1.

consumers by shifting transport charges directly onto rural carriers and the customers they serve. Specifically, recognizing that a move to "bill and keep" for a certain category of traffic exchange could impose significant transport costs onto RLECs (resulting in end-user rate increases not consistent with the universal service goal of affordable rates) the Commission adopted a "rural transport rule."[44] This provision limited RLECs' transport responsibilities to the boundary of their ILEC network, i.e., their "network edge." The Commission could take a similar approach here, recognizing that the broader and worthy goal of advancing the NG911 transition could disproportionately harm certain classes of consumers – and here, the limiting principle that is a "network edge" rule would protect rural consumers from bearing the brunt of this transition.

Moreover, RLECs (with respect to the provision of 911 service) would continue to bear the same well-known and well-understood responsibilities as they do today for the exchange of public safety traffic, in contrast to the NPRM's approach that would upend the "shared" nature of 911 costs. In addition, this preservation of existing well-known and well-defined constructs should expedite the NG911 transition and end the cost allocation disputes to which the NPRM refers and that NG911 providers cite as a reason to move forward with the NPRM's approach.

Finally, preservation of a state's ability to establish a NG911 cost recovery mechanism, should it wish, would be a consideration based on the specific circumstances presented in that jurisdiction. In considering these circumstances, the state could take into account whether and to what extent the transport costs at issue here are already being recovered by the NG911 network provider as part of its contractual agreement with the state (either explicitly or pursuant to the state's expectation that it was purchasing a "finished service" that included the NG911 provider assuming all costs). Should the state not so find, it could then determine if cost recovery for the NG911 network provider is warranted.

[44] *Connect America Fund*, WC Docket No. 10-90, et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011), ¶ 998.