NEW YORK STATE | Department of Public Service

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December 17, 2025

Filed Electronically Via ECFS

Marlene H. Dortch
Office of Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

Re: WC Docket No. 25-253, In the Matter of Build America: Eliminating Barriers to Wireline Deployments.

Dear Secretary Dortch:

The New York State Public Service Commission (PSC) respectfully submits these reply comments in response to the Federal Communications Commission's (FCC or the Commission) September 30, 2025 Notice of Inquiry (NOI) in the above-referenced proceeding.[1] The NOI seeks comment on, among other things, types or categories of state or local requirements that commenters believe "prohibit or effectively prohibit the provision of… next-generation telecommunications networks within the meaning of section 253(a)" of the Telecommunications Act of 1996 (Telecom Act).[2]

America's Communications Association (ACA Connects) filed comments arguing that the FCC should "adopt the presumption that state or local regulation of broadband prices is unlawful" under the Telecom Act, and it specifically identifies New York's Affordable Broadband Act (ABA) as a "rate regulation law" that should be preempted.[3] In support of its arguments against the ABA, ACA Connects attaches years-old declarations from executives of two of its members, Margaretville Telephone Company (Margaretville) and Delhi Telephone Company (Delhi). Notably, ACA Connects was a litigant in a previous challenge to the ABA in federal court. The declarations submitted here are the same declarations Margaretville and Delhi previously submitted in that litigation. Despite pursuing its case to the Supreme Court, ACA Connects and its members lost, and the ABA was affirmed. ACA Connects now seeks through administrative action relief it could not obtain through the courts or the state legislature. Nothing in the Telecom Act authorizes the FCC to grant that request, and the Commission should refrain from using Section 253(a) to suit ACA Connects' purposes now.

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1 Pursuant to New York Public Service Law §12, the General Counsel, under the direction of the Chair, is authorized to file comments on behalf of the PSC.

2 Further Notice of Proposed Rulemaking, WC Docket No. 25-253 (rel. September 30, 2025), ¶53.

3 ACA Connects Comments, WC Docket No. 25-253 (November 18, 2025), p. 28.

Background

On April 16, 2021, New York enacted the ABA, a centerpiece of the State's efforts to ensure affordability for working families and to close the digital divide faced by both rural and urban communities. Among other things, the ABA requires internet service providers (ISPs) operating in New York to offer 25 megabits per second (Mbps) broadband service for $15 per month, inclusive of any recurring taxes and fees, to eligible low-income households.[4]

The ABA also includes important safeguards. ISPs may receive an exemption from the ABA's requirements if those ISPs provide service to no more than 20,000 households and the PSC determines that compliance with such requirements would result in "unreasonable or unsustainable financial impact on the broadband service provider."[5]

Before the statute could take effect, a group of trade associations whose members (including Margaretville and Delhi) provide broadband internet service to New Yorkers filed a complaint, followed by a motion for a preliminary injunction, in the United States District Court for the Eastern District of New York, seeking to enjoin enforcement of the ABA. After the district court granted the plaintiffs' motion for a preliminary injunction,[6] the parties jointly requested that the court enter a stipulated final judgment and permanent injunction without prejudice to file an appeal, which the district court did.[7]

On April 27, 2024, the Second Circuit reversed the district court's permanent injunction.[8] The Second Circuit found explicitly that neither the Telecom Act nor the "federal policy of promoting broadband deployment while preserving an open internet" as expressed in the Commission's orders was sufficient to carry preemptive effect under a theory of either field preemption or conflict preemption.[9] Of particular importance to the Second Circuit's determination was the Commission's classification of broadband internet as a Title I information service under the Telecom Act.[10] This "lightly regulated" regime traditionally allowed rate regulation, and the Second Circuit affirmed that it continued to do so.[11] Notably, a later attempt by the FCC to reclassify broadband as Title II telecommunication services was rejected by the Sixth Circuit, which wrote that Congress had not intended to "shackle" ISPs to "onerous title II

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4 N.Y. Gen. Bus. Law § 399-zzzzz (McKinney 2025). The law also states that any ISP offering service at 200 Mbps for $20 per month, inclusive of any recurring taxes and fees, is also considered in compliance with the ABA. Id.

5 *Id.*, §399-zzzzz(5).

6 *New York State Telecommunications Ass'n, et al. v. James*, 2:21-cv-2389 (DRH) (E.D.N.Y. June 11, 2021), Docket Nos. 25, 26, Memorandum and Order, Preliminary Injunction Order, pp. 24-31.

7 *New York State Telecommunications Ass'n, Inc. v. James, 101 F.4th 135(2d Cir.)*, *cert. denied*, 145 S. Ct. 984, 220 L. Ed. 2d 361 (2024), *reh'g denied*, 145 S. Ct. 1229, 221 L. Ed. 2d 286 (2025).

8 *Id.,* 152.

9 *Id.*, 154.

10 *Id.*, 148-49.

11 *Id.* Two other federal circuits, the D.C. Circuit and the 9th Circuit, had previously ruled that Title I did not give the Commission "the statutory authority to enact (or preempt) common carrier-style regulations of broadband." *Id.* at 155; *see Mozilla Corp. v. Fed. Commc'ns Comm'n*, 940 F.3d 1 (D.C. Cir. 2019); *see also ACA Connects v. Bonta*, 24 F.4th 1233, 1241 (9th Cir. 2022).

regulation."[12] The Supreme Court subsequently denied certiorari for the Second Circuit's ABA decision,[13] and the Sixth Circuit's decision was not appealed. It is currently the law of the land that ISPs are subject to Title I classification under the Telecom Act, that states may rate regulate them, and that the FCC has no authority to preempt that regulation.

ACA Connects' Comments

ACA Connects argues that the ABA is preempted under Section 253 of the Telecom Act. The argument proceeds along two lines. First, regulation of rates discourages investment in expansion of telecommunication networks, especially for small customers. Second, this is "prohibitive" within the meaning of Section 253(a), such that the FCC can preempt state law.

Section 253 does not Apply

Taking these comments in reverse order, the ABA is not a prohibitive restriction in the sense of Section 253(a). The commenter's first error is structural and fatal: Section 253 applies only to Title II telecommunication services, not to Title I information services.[14] As the Sixth Circuit stated, broadband service is a Title I service, not a Title II service, a determination the FCC acquiesced to by not appealing.[15] In its NOI, the FCC recognizes that Section 253 applies only to Title II telecommunication services, writing that it "articulates a reasonably broad limitation on state and local governments' authority to regulate *telecommunications providers.*"[16] (Emphasis added). ACA Connects would have the Commission use Title II authority to preempt state regulation of a Title I service. But the Commission cannot "completely disavow Title II with one hand while still clinging to Title II forbearance authority with the other."[17] Section 253 authority, therefore, does not extend to the ABA.

Moreover, even if Section 253 could be applied beyond the confines of Title II, ACA Connects' recommendation is foreclosed by the Second Circuit's decision in *New York State Telecommunications Association, Inc. v. James*, a case specifically challenging the ABA on federal preemption grounds based on the Telecom Act. The Second Circuit ruled that the Telecom Act did "not wholly preempt states from regulating the rates charged for interstate communications services, because [it] does not establish a framework of rate regulation that is sufficiently comprehensive to imply that Congress intended to exclude the states from entering this field."[18] After a thorough review, the court explained that "neither the text and structure of

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12 *In re MCP No. 185*, 124 F.4th 993, 1004 (6th Cir. 2025). In making that determination, the Sixth Circuit accorded the Commission no *Chevron* deference. *Id.*, 997. The implication, of course, is that this Commission may not reconsider the Title I/ Title II status of broadband ISPs.

13 *New York State Telecommunications Ass'n, Inc. v. James*, 145 S. Ct. 984, 220 L. Ed. 2d 361 (2024), *reh'g denied*, 145 S. Ct. 1229, 221 L. Ed. 2d 286 (2025).

14 Section 253(a), by its own terms, applies only to "any interstate or intrastate telecommunication service," in addition to the structural implication of its place in Title II of the original Telecommunications Act of 1934. 57 U.S.C. 253(a) (June 19, 1934, ch. 652, title II, §253, as added Pub. L. 104–104, title I, §101(a), Feb. 8, 1996, 110 Stat. 70.) Courts have recognized that section 253 only applies to Title II services. *See, e.g., Mozilla n*, 940 F.3d at 80 (D.C. Cir. 2019); *Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216, 224 (1st Cir. 2005).

15 *In re MCP No. 185*, 124 F.4th at 1004.

16 NOI ¶4 (emphasis added).

17 *Mozilla*, 940 F.3d at 80.

18 *New York State Telecommunications Ass'n*, 101 F.4th at 140.

the Communications Act, the history of this type of regulation, nor relevant precedent" supported field preemption.[19] The Court also considered and rejected a claim of conflict preemption. Although ACA Connects is correct that Section 253 was not raised in that litigation, the plaintiffs in that case (including ACA Connects) did argue that it posed an obstacle to the "federal policy of broadband deployment,"[20]—the same underlying policy argument ACA Connects makes here. Yet the Second Circuit ruled that "the mere fact of tension between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power."[21] Here, the same general federal policy is allegedly in the same general tension with the same state law. The result should be the same.

Finally, even if the FCC rejects the applicability of *New York State Telecommunications Association*, ACA Connects' argument would run head-long into the clear statement rule. As the Supreme Court has explained, Congress must be "unmistakably clear in the language of the statute" if it intends to preempt state law in a way that would upset the "usual constitutional balance" between states and the federal government.[22] The FCC itself has invoked that doctrine when interpreting Section 253,[23] and so have the courts.[24] Protecting New York consumers is a core duty and power of New York's state government.[25] Here, the Commission should not grant ACA Connects' request to preempt a duly adopted state law without a "clear statement" from Congress.

The ABA is not Prohibitive

Even if the FCC were to find that Section 253 could be applied to preempt the ABA, ACA Connects' claims fail because they are not prohibitive. From a textual perspective, the ABA's requirements do not facially "prohibit… the ability of any entity to provide interstate or intrastate telecommunication service."[26] Nor do they "have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunication service."[27] As explained above, broadband internet service (the subject of the ABA) is not a telecommunication service at all—it is an information service. And in any event, the ABA's requirements pertaining to ISPs do not have any direct impact on telecommunication systems. Instead, any potential impact (including the ones identified by ACA Connects) are incidental. Section 253 is no more triggered by this incidental contact than it would be by state minimum wage laws, state construction safety laws, or state anti-discrimination laws. At least as much as the ABA, such state enactments might "tend[] to favor incumbents – who incurred the cost of regulation when there were fewer competitors – over new entrants; larger providers – who can better absorb the cost of regulation – over smaller providers; and providers operating in lower-cost, more populous

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19 *Id.*, 154.
20 *Id.*
21 *Id.*, *quoting In re MTBE Prods. Liab. Litig.*, 725 F.3d 65, 101–02 (2d Cir. 2013).
22 *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (*quoting Atascadero State Hosp. v. Scanion*, 473 U.S. 234, 242 (1985)).
23 *Mo. Mun. League*, 16 FCC Rcd. 1157, 1162, ¶ 9 (2001).
24 *Tennessee v. Federal Comc'ns Comm'n*, 832 F.3d 597 (6th Cir. 2016).
25 *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41–42 (2d Cir. 1990) ("Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area.")
26 47 U.S.C. § 253(a).
27 *Id.*

areas over providers operating in higher-cost rural areas."[28] Yet no one would claim these laws are preempted by Section 253. Although they might incidentally burden telecommunication services, they do not "effectively prohibit" their operation. This may be contrasted with the sort of state or local statutes, regulations, or practices that expressly prevented or suspended the acceptance or processing of permits necessary for deploying telecommunication services dealt with in the FCC's *Moratoria* order.[29] The commenter's request would represent a new and expansive reinterpretation of Section 253 that would threaten the concept of dual federalism.

Yet even taking ACA Connects' concerns about potential impact on telecommunications services on their merits, its comments fare no better. While the commenter has characterized the ABA as "broadband price regulation" that "was a hallmark of the monopoly era,"[30] the PSC rejects this characterization. The ABA does not impose across-the-board price controls. It is a targeted consumer protection regulation designed to ensure affordable access for low-income households. This limited intervention in the competitive market bears no resemblance to the regimented rate structures applicable to natural monopoly utilities, like electric corporations. For that reason alone, the commenter's general concerns that the ABA will make network deployment and buildout infeasible are incorrect.

ACA Connects' particular concerns about the ABA as they relate to Margaretville and Delhi, which submit declarations from their executives as part of ACA Connects' comments, are also misplaced. As the commenter admits,[31] both companies have received exemptions from the PSC for the ABA's low-income requirements, as did many other companies serving fewer than 20,000 subscribing households.[32] They fail to mention that those same companies received temporary exemptions while the merits of their exemption requests were being considered.[33] In other words, the declarants have never been subject to the ABA's low-income requirements. Under no circumstance could the prohibitory effects ACA Connects fears for itself and its members come to pass so long as the ABA does not bring them within its ambit.

Consumer Impact and State Expertise

Beyond the legal deficiencies in ACA Connects' arguments, its proposal would undermine the consumer-focused objectives that both Congress and the FCC have repeatedly emphasized. Broadband affordability remains a primary barrier to adoption, particularly for low-income households.

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28 ACA Connects Comments, WC Docket No. 25-253 (November 18, 2025), p. 28.

29 See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, WT Docket No. 17-79, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) (Moratoria Order), *aff'd City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020).

30 *Id.*

31 *Id.*, p.28 n. 64.

32 *See* Order Approving Requests for Further Exemptions Subject to Conditions*, In the Matter of the Affordable Broadband Act*, Case No. 24-M-0255, Matter No. 24- 00993, New York State Department of Public Service (November 14, 2025).

33 *See* Order Reopening Proceeding and Reinstating Temporary Exemptions Subject to Conditions, *supra* n. 27, Case No. 24-M-0255, Matter No. 24-00993 (January 9, 2025).

The federal government recognized this challenge recently when it established the Affordable Connectivity Program (ACP) through the Infrastructure and Jobs Act,[34] which was managed by the FCC and helped over 23 million low-income households afford internet service between 2021 and 2024 by lowering monthly costs.[35] While the ACP provided a means for many Americans to access broadband service, the law expired on June 1, 2024, leaving affordability gaps that states are now left to address.

Congress has continued to engage directly with broadband affordability issues, holding hearings on "*The Future of Broadband Affordability*" to examine the impact of the ACP and other affordability programs on access to broadband service.[36] Moreover, bipartisan coalitions in the United States House and Senate have introduced legislation to extend and strengthen ACP funding, a reflection of federal acknowledgment that affordability is critical to achieve the goal of universal broadband service, including co-sponsorship of ACP extension legislation by then-Senator J.D. Vance of Ohio.[37] Other candidates and officials have acknowledged affordability concerns and committed to reducing prices.[38]

States are uniquely well-positioned to understand and respond to the specific needs of their residents, the geographic and weather differences among their various communities, the distribution of population, educational, medical, commercial resources, as well as access and affordability challenges. Through consumer complaints, eligibility determinations, and direct engagement with affected communities, states possess granular, real-time insight into affordability challenges that cannot be replicated at the federal level. The ABA reflects this expertise. It was adopted in response to documented affordability gaps in New York, and it incorporates exemptions and safeguards to ensure that ISPs are not subject to unreasonable or unsustainable obligations.[39]

Preempting such state consumer-protection measures would not remove a barrier to deployment; it would remove one of the most effective tools for addressing non-deployment barriers: the inability of households to afford service even where networks exist. A regulatory

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[34] The Affordable Connectivity Program was established by Congress in the Infrastructure Investment and Jobs Act, Public Law 117-58 (2021), Division F, Title V, Section 60502(c), 135 Stat. 429, which appropriated approximately $14.2 billion to expand and modify the Emergency Broadband Benefit Program into a longer-term broadband affordability program.

[35] FCC, Affordable Connectivity Program Has Ended Frequently Asked Questions (FAQ), https://www.fcc.gov/sites/default/files/ACP-FAQs-Post-ACP-Ending.pdf (last visited December 16, 2025).

[36] *The Future of Broadband Affordability*, S. Comm. on Commerce, Sci. & Transp., 118th Congress (2024), https://www.commerce.senate.gov/2024/5/the-future-of-broadband-affordability.

[37] S. 4317, 118th Congress (2024).

[38] As President Trump has stated, "I have no higher priority than making America affordable again." Nandita Bose and Jarrett Renshaw, Trump Defends Economic Record at Pennsylvania Rally Amid Frustration Over Rising Prices, Reuters (Dec. 9, 2025, 1:45AM), https://www.reuters.com/world/us/trump-tout-economic-gains-pennsylvania-amid-voter-cost-concerns-2025-12-09/; Olivia Trusty, Statement at Senate Commerce Committee Hearing on Her Nomination (Apr. 9, 2025), https://www.commerce.senate.gov/services/files/85026418-7E16-4087-AA58-087AF726EC14 (committing to "expand[ing] access to affordable high-speed internet service for all Americans.") (last visited December 16, 2025).

[39] Office of the N.Y. State Comptroller, *Availability, Access and Affordability: Understanding Broadband Challenges in New York State* (Sept. 2021), https://www.osc.ny.gov/files/reports/pdf/broadband-availability.pdf (last visited December 16, 2025).

framework that prioritizes network construction while ignoring affordability risks perpetuating a digital divide defined not by access, but by exclusion.

Conclusion

The ABA is a lawful exercise of New York's traditional authority to promote accessibility and protect consumers. Congress has not clearly authorized the FCC to abrogate New York's sovereign enactments in this field, and the FCC should not act to upset the constitutional order by adopting ACA Connects' interpretation of Section 253.

Respectfully submitted,

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