

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

<i>In the Matter of</i>)	
)	
)	WC Docket No. 17-108
<i>Restoring Internet Freedom</i>)	
)	

**COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

The National Association of Regulatory Utility Commissioners (“NARUC”) respectfully submits these comments to respond to the Federal Communications Commission’s (“FCC” or “Commission”) May 23, 2017 released Notice of Proposed Rulemaking (“NPRM”) purporting for the fourth time to set rules to preserve the openness of the Internet.¹

Since 2002, through a series of four resolutions,² NARUC has supported FCC efforts to preserve net neutrality on broadband access services and related State authority in key areas.

¹ See, *In the Matter of Restoring Internet Freedom*, WC Docket No. 16-108, (Rel. May 23, 2017), Notice of Proposed Rulemaking, FCC 17-60, online at: <https://www.fcc.gov/document/restoring-internet-freedom-notice-proposed-rulemaking>, published at 82 Federal Register 25568 (June 2, 2017), online at: <https://www.federalregister.gov/documents/2017/06/02/2017-11455/restoring-internet-freedom>.

² See, e.g., NARUC’s July 2010 *Resolution Opposing Federal Preemption of States’ Jurisdiction over Broadband Internet Connectivity Service* at: <http://pubs.naruc.org/pub/53A0CFA5-2354-D714-51F8-A10975F79113>. Unlike the attached 2014 resolution, this July declaration *does not* specify what legal theory the FCC should adopt to enforce the NARUC endorsed principles. Instead, it points out that, since 2005, NARUC has consistently endorsed a “functional focus” model of jurisdiction that allocates State and federal regulatory responsibilities based on their core competencies. The resolution specifies if the FCC chooses to adopt the “Third Way” (an indeterminate legal theory ultimately rejected by the Commission),

Clearly Congress anticipated that States would continue to play a crucial role with respect to broadband deployment. Section 1302, 47 U.S. C §1302 (Section 706 of the 1996 Act), specifies that State Commissions “shall encourage the deployment” of “advanced services” using, among other things, “methods that remove barriers to infrastructure investment.” Similarly, Section 254, 47 U.S. C §1302, makes clear Congress anticipated States would play a crucial role in deployment of infrastructure and services.

We continue to support the FCC’s enforcement of net neutrality principles. Indeed, just three years ago, the Association adopted the last of its resolutions, attached as Appendix A, targeting the issues raised by the FCC’s May NPRM.

the agency should also: [1] Use the NARUC “functional focus-core competency” paradigm to analyze the federal State jurisdictional issues raised in the NOI; and [2] Assure nothing prejudices “States’ authority reserved under Section 253 . . . “to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard” consumers’ rights; and [3] Otherwise avoid an unlawful and inefficient application of forbearance authority under 47 U.S.C. §160 to provisions of the Act that reserve State authority. *Compare*, NARUC’s February 2010 ***Resolution on Open Access to the Internet***, at: <http://pubs.naruc.org/pub/53A0CA34-2354-D714-51AF-79C55BE5994E> . This February 2010 resolution supports (A) “the right of all Internet users, including broadband wireline, wireless, cable modem, and application-based users, to have access to and the use of the Internet . . . unrestricted as to viewpoint and . . . provided without unreasonable discrimination as to lawful . . . content; (B) adoption of [the 2009] NPRM principles (1) through (4) and (6);” and (C) adoption of principle (5) as long as it (i) is applied in a “technologically neutral fashion, (ii) recognizes that “there are differences in markets, bandwidth, spectrum resources, and other factors between providers, whether cable, wireless, landline, application-based or otherwise. . .,” (iii) specifies “what constitutes unreasonable restrictions or unreasonable discrimination,” (iv) gives “providers incentive for innovation and a fair return on their investment,” and (v) does not jeopardize “the goals of ensuring that all consumers have access to and use of affordable and reliable broadband services.” *See, also*, NARUC’s 2005 ***Resolution on Responding to FCC NPRM on Broadband Customer Service***, at: <http://pubs.naruc.org/pub/53A12889-2354-D714-511A-A177996ACDB3> and 2002 ***Resolution Regarding Citizen Access to Internet Content***, at: <http://pubs.naruc.org/pub/539EB994-2354-D714-51DA-4F4B002C90F7>

NARUC represents the interests of State commissions that oversee, among other things, telecommunications utilities in the United States and U.S. Territories. The association has been recognized both by Congress in several statutes³ and consistently by Article III courts⁴ as the proper entity to represent the collective interests of the State utility commissions.

NARUC is on record specifically:

- *Supporting the adoption of all six regulatory principles outlined in an FCC 2009 notice as modified and incorporated in the Commission’s 2015 “Title II” Order;*⁵
- *Encouraging the FCC to “support the adoption of open Internet rules . . . supplemented by authority provided by Titles I, II and III of the Communications Act, subject to reasonable forbearance where conditions warrant;”*

³ See 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of concern to both the Federal Communications Commission and State regulators with respect to universal service, separations, and related concerns; Cf. 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). Cf. NARUC, et al. v. ICC, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains “...Carriers, to get the cards, applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system.).

⁴ See, e.g., United States v. Southern Motor Carrier Rate Conference, Inc., 467 F. Supp. 471 (N.D. Ga. 1979), aff’d 672 F.2d 469 (5th Cir. 1982), aff’d en banc on reh’g, 702 F.2d 532 (5th Cir. 1983), rev’d on other grounds, 471 U.S. 48 (1985) (The Supreme Court noted: “[t]he District Court permitted . . . (NARUC), an organization composed of State agencies, to intervene as a defendant. Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate.” 471 U.S. 52, n. 10. See also NARUC v. DOE, 851 F.2d 1424 (D.C. Cir. 1988), where, although standing was not specifically addressed, NARUC was the lead petitioner in a successful appeal involving DOE and the nuclear waste program; Indianapolis Power and Light Co. v. ICC, 587 F.2d 1098 (7th Cir. 1982); Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1976); Compare, NARUC v. Federal Energy Regulatory Commission, 475 F.3d 1277 (D.C. Cir. 2007); NARUC v. Federal Communications Commission, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985).

⁵ *In the Matter of Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*Title II Order*).

- *Urging the FCC to use a “functional focus-core competency” paradigm to analyze the federal-State jurisdictional issues raised by this NPRM;*
- *Specifying if the FCC utilizes Title II in tandem with “reasonable forbearance where conditions warrant,” that the agency must avoid an unlawful and inefficient application of forbearance authority to provisions that reserve State authority; and*
- *Urging the FCC to act in a way that assures nothing prejudices “States’ authority reserved under Section 253 . . . “to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard” consumers’ rights,” with respect to these services.*

The proposals in this NPRM explicitly provide no legal basis for the FCC to impose several key net neutrality principles that NARUC supports⁶ and does not address the impact of reclassification on State authority more generally.

Although NARUC has not taken a specific position on Congressional action, at some point it might be more efficient for Congress to step in and mandate principles and enforcement, while re-affirming State authority to address service quality, fraud, issues of public health and safety/reliability, and universal service with respect to these services.

⁶ In addition to Title II, the 2015 reclassification order relied on Section 706 to establish no-blocking and no-unreasonable-discrimination rules as well as the transparency rule. The NPRM, in ¶ 101 asks if the FCC should reverse its finding that Section 706 constitutes an independent delegation of regulatory authority elsewhere, at ¶ 90-91 questions whether the transparency rule should remain in place. Whatever the FCC does with respect to reclassification, the FCC should defer to the analysis of Section 706 by the D.C. Circuit in *Verizon v. FCC*, 740 F.3d 623, 655–58 (D.C. Cir. 2014) and retain transparency provisions.

Based on our resolution, NARUC explicitly endorses any legal theory contained in any initial comments filed in this proceeding that will permit the FCC to continue to enforce net neutrality principles.

Conclusion

NARUC requests that any final rules in this proceeding reflect the foregoing comments.

Respectfully submitted,

James Bradford Ramsay

GENERAL COUNSEL

Jennifer Murphy

ASSISTANT GENERAL COUNSEL

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS

1101 VERMONT AVENUE, N.W., SUITE 200

WASHINGTON, DC 20005

(202) 898-2207

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Appendix A - Resolution to Ensure Jurisdictional Bases for Open Internet Rules

WHEREAS, In a Resolution adopted at its 2010 Winter Meeting in Washington, D.C., the National Association of Regulatory Utility Commissioners (NARUC) stated that broadband access to the Internet profoundly affects the lives of Americans and that limiting, or otherwise degrading broadband access for users of the Internet, such as by blocking Voice-over-Internet-Protocol (VoIP) applications, denying access to political content, or implementing technical measures that degrade the performance of peer-to-peer software distributing lawful content has become widely agreed upon as an unfair practice and may reduce the Internet's value to consumers; *and*

WHEREAS, In a Resolution adopted at its 2002 Annual Convention in Chicago, Illinois, NARUC concluded that the restriction of user access to the Internet and its effect on an informed public is an issue of real significance to Americans; *and*

WHEREAS, In the 2002 Resolution, NARUC endorsed the right of all Internet users, including broadband, Wireline, and cable modem users to (1) have access to the Internet that is unrestricted as to viewpoint and that is provided without unreasonable discrimination as to lawful choice of content (including software applications); and (2) receive meaningful information regarding the technical limitations of their broadband service; *and*

WHEREAS, On May 15, 2014, the Federal Communications Commission (Commission) released a "Notice of Proposed Rulemaking" (NPRM) (In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28, Rel. May 15, 2014, FCC 14-61, ¶¶ 1, 3, at 3), in which the Commission commented that these benefits of the Internet "flow, in large part, from the open, end-to-end architecture of the Internet, which is characterized by low barriers to entry for developers of new content, applications, services, and devices and a consumer-demand-driven marketplace for their products," but also stating that "there are no legally enforceable rules by which the Commission can stop broadband providers from limiting Internet openness;" *and*

WHEREAS, In the NPRM, the Commission proposed rules that it states are intended to preserve an open Internet; *and*

WHEREAS, The Commission also proposed to enhance transparency rules that require providers of broadband Internet access service to publicly disclose accurate information regarding network management practices, performance, and commercial terms of the service, which would include information related to blocking, throttling, and pay-for-priority arrangements; *and*

WHEREAS, In the NPRM, the Commission solicited comments upon the nature and extent of the Commission's authority to adopt open Internet rules, including the scope of the jurisdiction under Title II of the Communications Act and Section 706 of the Telecommunications Act of 1996 , 47 U.S.C. § 1301 et seq. ; *and*

WHEREAS, The Commission previously found that Title II provides the Commission express authority to implement, for telecommunications services, rules furthering universal service, privacy, access for persons with disabilities, and basic consumer protection (Framework for

Broadband Internet Service, GN Docket No. 10 - 127, Notice of Inquiry at ¶52); *now, therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its 2014 Summer Committee Meetings in Dallas, Texas , continues to support adoption of rules that protect an open Internet, consistent with NARUC's 2002 and 2010 Resolutions, particularly since business and residential consumers, public safety, and government are relying more heavily on access to the Internet today and such access to an open Internet supports more competitive choices for those consumers; *and be it further*

RESOLVED, That NARUC supports the expansion of the transparency rules proposed by the Federal Communications Commission as full disclosure of accurate information to the public and providers of Internet access service is necessary to enable all consumers to make informed choices and to enable all market participants to understand service limitations; *and be it further*

RESOLVED, That NARUC encourages the Commission to rely strongly upon the authority conveyed by Section 706 of the Telecommunications Act of 1996 to support the adoption of open Internet rules that promote enhanced competition for broadband Internet access service and address potential market abuses, supplemented by authority provided by Titles I, II and III of the Communications Act, subject to reasonable forbearance where conditions warrant.

Passed by the Committee on Telecommunications.

Adopted by the NARUC Board of Directors, July 16 , 2014