



N A R U C
National Association of Regulatory Utility Commissioners

November 30, 2017

Marlene H. Dortch
FCC Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

RE: Notice of Oral (and written) Ex Parte:

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

Ms. Dortch:

On November 28, 2017, during a conversation with **Claude Aiken**, I addressed the issues discussed below. I am providing electronic copies of this document to the other FCC commissioner assistants listed below.

In our initial comments, NARUC did endorse the retention of some version of the transparency rule as per the draft released in this docket last week, but the association is also on record supporting the adoption of all six regulatory principles outline in an FCC 2009 notice as modified and incorporated in the Commissioners 2015 “Title II” Order¹ and urging the FCC to acting in a way that assures nothing prejudices State 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 section titled “Preemption of Inconsistent State and Local Regulations” is both unnecessary and overbroad. So broad in fact, that on its face, it is an invitation to assure that every bad actor will litigate, at taxpayer expense, the validity of absolutely ANY State action to protect consumers.

Even where the order purports to preserve State’s “traditional role in generally policing such matters as fraud, taxation, and general commercial dealings” the order provides an obvious opportunity for any bad actor to allege that - whatever the state law or enforcement action is - its “administration . . . interfere[s] with federal regulatory objectives.” This is a prescription for wasteful and counter-productive litigation at federal and State taxpayers’ expense.

The FCC’s preemptive legal rationale is similarly flawed. Section 230 cannot express Congress’s intent about State oversight over high-speed data services. As the FCC explicitly acknowledges in its 2011 *Transformational Order*, at ¶ 71,² when Section 230(b)(2) was enacted, Congress thought that all broadband

¹ *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).

² *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform Mobility Fund*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135,

services – including those used to access the internet - were “telecommunications services.” And Congress was very careful, in 47 U.S.C. § 253(b) and elsewhere to preserve State authority to “impose, on a competitively neutral basis . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” The reservation is effective even if the cited regulations actually prohibit competitive telecommunications service, Arguments that State rules that do just that – at least with respect to the “telecommunications service” that all prior FCC’s effectively acknowledge are buried within the “combined” BIAS service - are wildly inconsistent with those express Congressional reservations.

The FCC cannot credibly claim that what Congress clearly intended is somehow inconsistent with the goals of the federal legislation.

Moreover, the discussion of the FCC’s forbearance authority cannot, on its face, be squared with these Congressional reservations of authority. The FCC has the power to forbear from application of specific provisions of the 1996 Act – not independent State law. Even if the FCC forbore from ALL federal regulation under its in 47 U.S.C. § 160 power, it would be illogical to assume that that somehow impacts the explicit Congressional reservation allowing States to ““impose, on a competitively neutral basis . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”

I am providing a copy of this ex parte to each of the FCC representatives listed. That includes Mr. Aiken. I have attempted to fairly cover the arguments I presented. If Mr. Aiken points out a deficit in this overview, I will immediately refile an amended letter to cover that deficit.

If you have questions about this ex parte, please do not hesitate to contact NARUC’s General Counsel – Brad Ramsay at 202.898.2207 (w), 202.257.0568(c) or at jramsay@naruc.org.

Respectfully Submitted,

James Bradford Ramsay
NARUC General Counsel

cc **Jay Schwartz**, Wireline Advisor, Office of Chairman Pai
Claude Aiken, Legal Advisor, Wireline, Office of Commissioner Clyburn,
Any Bender, Legal Advisor, Wireline, Office of Commissioner O’Reilly.
Nirali Patel, Acting Legal Advisor for Media, Consumer Protection, and Enforcement
Keven Holmes, Acting Legal Advisor for Wireless and Public Safety, Office of Commissioner Carr
Travis Litman, Chief of Staff/Senior Legal Advisor, Wireline & Public Safety, Office of Commissioner Rosenworcel.