



N A R U C
National Association of Regulatory Utility Commissioners

NOTICE VIA ELECTRONIC FILING

November 6, 2014

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

RE: Notice of Oral Ex Parte filed in the proceedings captioned: *In the Matter(s) of Wireless E9-1-1 Location Accuracy Requirements*, PS Docket 07-114; *PSHSB Inquiry Into Circumstances of Major 911 Outage Centered in Washington State April 9-10, 2014*, PS Docket 14-72, *Protecting and Promoting the Open Internet*, GN Docket 14-28; *VCXC Petition for Notice of Inquiry on the Migration to HD Voice*, GN Docket 13-5.

Secretary Dortch:

On Wednesday, November 7, 2014, the undersigned met with **David Strickland** and **Stephen M. Ruckman** of the Federal Communications Commission Enforcement Bureau. The undersigned pointed out that:

[1] *There is a long history of cooperation between the FCC and the States.*

NARUC and the FCC have cooperated on enforcement issues in the past for years engaging in joint audits and under FCC Chairman Bill Kennard joining to create an “opt-in” enforcement mechanism for handling slamming complaints. NARUC even arranged to have several State staff detailed to the FCC during the agencies effort to implement the 1996 amendments to the 1934 Federal Telecommunications Act. Most recently, a lot of information was exchanged in the lead up to the revision of the FCC’s Lifeline rules and the creation of compliance databases.

[2] *States should continue as partners in the consumer protection function.*

The FCC lacks the manpower and resources to handle all consumer (and competition) problems alone. There is no reason to limit or obstruct avenues for consumer relief. NARUC has always taken the position that the FCC should impose minimum standards and specify in any orders that the State retains the authority to impose additional requirements and penalties to inhibit the proscribed behavior.

[3] *There is a linkage between the FCC’s Open Internet Docket and State Consumer Protection efforts.*

There is a linkage between the Open Internet proceeding, the FCC’s repeated failure to specify the classification of VoIP services and State authority. This continued failure to classify VoIP is undermining State Commission’s authority to continue as a partner in the consumer protection function and to help the FCC police competition and interconnection.

Efforts to reduce or eliminate consumer oversight at the State level is clearly facilitated by FCC inaction/ambiguity about the scope of State authority.

There are basically two options available to the FCC to maintain this crucial state function.

[4] The FCC should clarify that VoIP services are indeed “Telecommunications Services.”

NARUC has in numerous pleadings, agreed with the need for the FCC to classify at least voice services, which are provided using IP technology, as the Title II “telecommunications services” they clearly are.

Questions about the scope of a States authority, as well as much wasteful litigation, at ratepayer/taxpayer expense, about State authority to manage/impose 911 and other consumer protection obligations, can be avoided by the simple expedient of clarifying the regulatory status of VoIP.

As NARUC points out in its July 14, 2014 filed *Reply Comments on the VXCX High Definition Voice request for a Notice of Inquiry*, in GN Docket No. 13-5, available online at: <http://www.naruc.org/Filings/14%200707%20NARUC%20VCFX%20HC%20Reply%20comments.pdf>:

The so-called “IP Transition”, including any experiments involving HD voice that the FCC may authorize, cannot rewrite existing statutory law.”¹ Whether or not any service is subject to Title II provisions is a factual inquiry based on parameters specified in the statute. There is no “choice” by the FCC or any service provider if the specified service meets the statutory definitions. Significantly, as the recent D.C. Circuit decision in *Verizon v. Federal Communications Commission* (“Verizon”)² makes very clear, the classification, whether as a “telecommunications service” or an “information service”, sets very real limits on the FCC authority.

According to the statute, and the D.C. Circuit, telecommunications carriers can only be treated as a common carriers under Title II to the extent they provide a telecommunications service.³ So there are only two preliminary questions for the FCC to answer. Neither question requires any examination of the technology used to provide the service.

First, are IP-based voice services, including HD voice, “telecommunications”?

The answer could not be clearer.

The statute defines “telecommunications” as the transmission, between or among points specified by the user, of information of the users choosing, without change in form or content of the information as sent and received.

Voice over Internet Protocol (“VoIP”) ‘voice’ services, whether HD or not, like voice services using older packet technologies, transmit voice in real time to points specified by the user without change in form or content. HD just provides more of the original frequencies than existing IP services. Voice traffic has been multiplexed/packetized for years before the invention of the “IP” protocol. Indeed, VoIP services provided by Vonage, AT&T, Verizon, and others

¹ See, e.g., March 31, 2014 *Comments of the Pennsylvania Public Utility Commission*, at 2, filed in GN Dockets Nos. 13-5 & 12-353, at: <http://apps.fcc.gov/ecfs/document/view?id=7521096406>.

² *Verizon v. Federal Communications Commission*, D.C. Circuit Case 11-1355 (Jan. 14, 2014), at: [http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/\\$file/11-1355-1474943.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/$file/11-1355-1474943.pdf).

³ 47 U.S.C. § 153(51) “A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent it is providing telecommunications services.”

compete directly with and substitute for functionally equivalent “telecommunications services.” A new arrangement of “zeroes and ones” in a packetized programming language does not change the nature of the service being offered to the public.

Second, are IP-based voice services of all kinds “telecommunications services”?

Again the answer is evident on the face of the statute.

VOIP service, including HD voice, exactly like the current voice services it is replacing, is both “offered for a fee” and offered “directly to the public or to such classes of users as to be effectively available to the public” significantly – in the only – although oblique, reference to technology - “regardless of the facilities used.”⁴

VoIP point-to-point voice services, which competes directly against existing TDM technology-based voice services, are being offered as a direct (and indistinguishable to end-users) substitutes for older technology services.

In fact, the FCC has already, albeit implicitly, decided that VoIP service must be “telecommunications services.” NARUC recently filed comments pointing out that recent court decisions prohibit the FCC from providing numbering resources to entities that do not qualify as “telecommunications service” providers under the statute.⁵

This should not be difficult, but the quite a few FCC Chairman have avoided this classification issue.

Why? Because in one order, the FCC has all but confirmed that VoIP service is a “telecommunications service” and in another, the FCC has specified that States have authority over VoIP providers that can “sever” their traffic. And yet as recently as 2011, the FCC again *claimed* in the so-called *CAF Order*, that it has not decided the regulatory classification of Voice-over-Internet Protocol (VoIP) services. It is not, however, accurate to say that claim is true. The FCC’s statement that it had not decided VoIP’s classification is directly at odds with its simultaneous specification – in the same order - that *VoIP services* can be the sole basis for qualifying for federal universal service subsidies. *CAF Order* at 24, ¶80. The Act is crystal clear that only a provider of *telecommunications services* can qualify for subsidy.

This conflict was one reason NARUC appealed the *CAF Order*. The *CAF Order* claims the FCC has not decided VoIP is a *telecommunications service*, while simultaneously specifying that VoIP can be used to as the *telecommunications service* required by 47 U.S.C. §214(e) for qualification.

⁴ 47 U.S.C. § 153(53): “The term ‘telecommunications service’ means the offering of telecommunications 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.” Note –that “information services” by contrast are a catch-all carrier that only include “information services” that are not used to provide a “telecommunications service.” See, 47 U.S.C. § 153(24), excluding from the definition of information services “any use of any such capability for the management, control, or operation of a telecommunication system or the management of a telecommunications service.”

⁵ See, March 4, 2014 *Comments of the National Association of Regulatory Utility Commissioners on the Report on the Six-Month Trial of Direct Assignment of Number Resources to Interconnected Voice Over Internet Protocol Providers*, online at: <http://apps.fcc.gov/ecfs/document/view?id=7521088290> and filed in the proceedings captioned: *In the Matter(s) of Numbering Policies for Modern Communications*, WC Docket No. 13-97, *IP-Enabled Services*, WC Docket No. 04-36); *Telephone Number Requirements for IP-Enabled Services Providers*, WC Docket No. 07-243; *Telephone Number Portability*, CC Docket No. 95-116; *Developing a Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92; *Connect America Fund*, WC Docket No. 10-90; *Numbering Resource Optimization*, CC Docket No. 99-200.

Note the Act’s functional definition of a telecommunications service either applies to VoIP offered to the public for a fee, or it does not. Carriers are either offering a service that matches the characteristics of the definitions or they are not.

Congress specifies in §214(e) that only *common carriers* designated as *eligible telecommunications carriers* can receive federal universal service support.⁶ Congress also specified that States should, in the first instance, make such designations. Classification of the qualifying service – which the FCC specifies in the CAF Order can be VoIP – must be a *telecommunications service* – for two reasons. First, qualifying carriers, under §214, are designated eligible *telecommunications carriers*. The term *telecommunications carriers* is defined at 47 U.S.C. §153 (51) as “any provider of *telecommunications services*.” {emphasis added} Second, 47 U.S.C. §153(51) specifies that a carrier “shall be treated as a common carrier under this chapter only to the extent it is engaged in providing telecommunications services.” Section 214(e) is in “this chapter.” Necessarily, therefore, common carriers can only be treated as having that status under §214(e) “to the extent they are engaged in providing telecommunications services.”

In the *CAF Order*, the FCC specifies, in ¶80, *mimeo at 38*, that carriers are only required to provide one service to qualify to be designated to receive federal universal service support:

As a condition of receiving support, we require ETCs to offer voice telephony as a standalone service throughout their designated service area. 117 As indicated above, ETCs may use any technology in the provision of voice telephony service. (Note 117 With respect to “standalone service,” we mean that consumers must not be required to purchase any other services (*e.g.*, broadband) in order to purchase voice service.)” {emphasis added}⁷

IP/VoIP is “any technology.” The Petitioners, including NARUC, pointed out in our reply in that 10th Circuit appeal of the *CAF Order*:

Petitioners argued that by adding “voice telephony service” to the list of supported services under section 254(c)(1), without limiting the definition of that service to “telecommunications services,” the *Order* violates §254(c)(1). USF Br. 17-18. Respondents denounce this argument as “wrong,” FCC Br. 24, but then concede virtually all its premises. They agree that “only ‘eligible telecommunications carriers’ are eligible for subsidies under section 254,” and that an ETC must be a “common carrier” that offers supported services. FCC Br. 26, *citing* 47 U.S.C. §214(e)(1)(A). They also agree that an entity can be designated as an ETC under the statute only if it “complies with appropriate federal and state requirements” applicable to telecommunications carriers under Title II of the Act. *Id.*, *quoting IP-Enabled Services*, 20 F.C.C.R. 10245, 10268 (2005) (subsequent history omitted). This concession was not apparent on the face of the *Order*, as the FCC specifically included VoIP in the definition of “voice telephony service” without classifying VoIP as a telecommunications service. *Order*, ¶63 (JA at 412); FCC Br. 26.⁸

⁶ See, 47 U.S.C. §214(e)(1): “A common carrier designated as an eligible telecommunications carrier...shall be eligible to receive universal service support...”

⁷ There is no requirement in the *CAF Order* to provide broadband as a *telecommunications service*, *i.e.* separate from internet access services (or any other *telecommunications service* to qualify. Indeed, ¶71 of the *CAF Order* concedes that FCC “determinations that broadband services may be offered as *information services* have had the effect of removing such services from the scope of the explicit reference to “universal service” in section 254(c).”

⁸ *Joint Universal Service Fund Reply Brief*, at 11-12, filed July 30, 2013, In Re: FCC11-161, 10th Circuit Case No. 11-9900.

In the resulting decision, the 10th Circuit confirmed that carriers must be designated as an eligible telecommunications carrier and have common carrier status to access funds. See, IN RE: FCC11-161, 753 F.3d 1015, at 1048-1049 (10th Cir. 2014):

The fact remains, however, that in order to obtain USF funds, a provider must be designated by the FCC or a state commission as an “eligible telecommunications carrier” under 47 U.S.C. § 214(e). See 47 U.S.C. § 254(e) (“only an eligible telecommunications carrier designated under section 214(e) . . . shall be eligible to receive specific Federal universal service support.”). And, under the existing statutory framework, only “common carriers,” defined as “any person engaged as a common carrier for hire . . . in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy,” 47 U.S.C. §153(10), are eligible to be designated as “eligible telecommunications carriers,” 47 U.S.C. §214(e). Thus, under the current statutory regime, only ETCs can receive USF funds that could be used for VoIP support. Consequently, there is *no imminent possibility that broadband-only providers will receive USF support under the FCC’s Order, since they cannot be designated as “eligible telecommunications carriers.”* {emphasis added}

Here, the 10th Circuit makes clear that there is “no imminent possibility that broadband-only providers” (or to the 10th Circuit – an entity that *ONLY provides an information service*) will receive USF support. This is true, because, according to the statute (and the 10th Circuit) “they CANNOT be designated as eligible *telecommunications carriers*” if they are only providing an information service. They must be providing a *telecommunications service*.

Translation: The FCC has required VoIP service to be classified as a *telecommunications service*.

States and carriers have taken the FCC at its word. For example, New Mexico, based on record evidence, approved a VoIP-only provider as an eligible *telecommunications carrier* in February 2013, finding:

Based upon its common carrier regulation as an interconnected-VoIP provider, TransWorld meets the requirement of being a common carrier for purposes of ETC designation.⁹

Similarly, the Georgia Commission, on March 20, 2014, found:

Public Service Wireless asserts that it meets all the requirements of the . . . [FCC] for designation as an ETC. Federal regulations require ETCs to provide the following services. . . minutes of use for local service provided at no additional charge to end users; access to the emergency services provided by local government...such as 911., and toll limitation services. . . 47 C.F.R Section 54.101(a). Public Service Wireless’s basic service offering is wireless Voice over the Internet Protocol, or VoIP service, which includes unlimited local and long-distance, starting at \$10.70, after application of the \$9.25 Lifeline Discount.¹⁰

⁹ *In The Matter of Transworld Network, Corp. Petition For Designation as an Eligible Telecommunications Carrier Pursuant to § 214(E)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 214(E)(2), and 17.11.10.24 NMAC, Before the New Mexico Public Regulation Commission, Case No. 11-00486-UT, FINAL ORDER (issued 20 February 2013) quote is from Exhibit 1, the ALJ’s Recommended Decision, (issued 28 December 2012), upon which the Final Order is based, at 16.*

¹⁰ *In Re: Application of Public Service Wireless, Inc. for Designation as an Eligible Telecommunications Carrier in the State of Georgia, Docket No. 35999, Document #152453 Order on Application for Designation as an ETC (March 20, 2014), at 1-3, : <http://www.psc.state.ga.us/factsv2/Document.aspx?documentNumber=152453>.*

There is no mention of any other service offering in the Georgia decision.¹¹ If the required voice telephony service in these and related State designations, which is provided using IP technology, is not a *telecommunications service*, then query if the FCC's 2011 ruling necessarily allows carrier to illegally access funds Congress reserved to *common carriers*, i.e., §214's essential *telecommunications carriers* – which by definition are offering *telecommunications services*, and can be treated as *common carriers* under that section only to the extent they provide *telecommunications services*.

The very same voice service, offered in exactly the same way by other carriers, cannot – in any circumstances – be considered as providing an “information” service. *Confirming the classification will also simplify many outstanding proceedings as well as any NOI on the VCXC petition.*

As NARUC pointed out at page 4, in our January 2013 comments filed to respond to an AT&T pleading filed earlier in this Docket 1305 proceedings, a pleading that asked the FCC to consider “IP Transition” trials:

The approach suggested . . . particularly the novel idea of imposing exclusive federal jurisdiction over phone service provided using VoIP technology by classifying it as an “information service,” is not only flawed from a policy perspective, but it is also a prescription for wasteful litigation as the petition nowhere outlines in any detail an adequate legal basis for, or provides empirical evidence to support, preemptive FCC action. Moreover, the approach AT&T asks the Commission to “trial” will unquestionably require a dramatic change to

¹¹ Compare, In re: Application of Cox California Telcom, LLC (U5684C) for Designation as an ETC, Application 12-09-014, Decision 12-10-002 (10/3/2013), Decision Approving Settlement (rel. 10/07/2013), at 8-9, 11, finding: “Cox does not distinguish between circuit-switched and packet-switched telephone services. The customer is merely ordering telephone service,” and (ii) Cox asserts by offering a “service that utilize[s] VoIP to the public on a nondiscriminatory basis, Cox fulfills the role of common carrier,” online at: <http://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=78144856> {emphasis added}; See also: *Application of Cox Nevada Telcom, LLC For Designation As ETC in the State of Nevada*, Docket 12-09907, Order (Nov. 15, 2012.), approving an application, that notes, at 6-7(http://pucweb1.state.nv.us/PDF/AxImages/DOCKETS_2010_THRU_PRESENT/2012-9/19778.pdf),

In the [CAF Order], the FCC adopted a new definition for supported services . . . it modified the definition of services supported by federal universal support as described in 47 C.F.R. §54.101 [which now states]. . . (b) An eligible telecommunications carrier must offer voice telephony service as set forth in paragraph (a) of this section in order to receive federal universal service support.” In adopting its revised definition, the FCC noted that the revisions were intended to shift to a technologically neutral approach. Specifically, the FCC stated: “Rather, the modified definition simply shifts to a technologically neutral approach, allowing companies to provision voice service over any platform, including the PSTN and IP networks. This modification will benefit both providers (as they may invest in new infrastructure and services) and consumers (who reap the benefits of the new technology and service offerings).” First, while other states have already determined that the service . . . meets the requirements for support, this latest statement by the FCC further clarifies that Cox's VoIP-based, voice telephony service is eligible for support.” {emphasis added}

the FCC's Part 36 rules. Such changes cannot be considered without a recommended decision from the Federal-State Joint Board on Separations. 47 U.S.C. § 410(c).¹²

And later in the same pleading, at pages 11-12:

Other than the FCC's inexplicable reticence to classify any VoIP services, without exception, since Computer II, the FCC has always treated all voice service that utilizes the public switched network as common carrier services – whatever protocols were utilized – because, as the definitions in the Act specify, the voice communication from the end-user's standpoint undergoes no change in the form or content of the information as sent and received. See, e.g., Computer and Communications Industry Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983). See also, NARUC v. FCC, 525 F.2d 630, 643 (D.C. Circuit 1976) “[W]e reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve . . . A particular system is a common carrier by virtue of its functions.” {emphasis added}

The FCC should state explicitly what it has necessarily already found as a matter of law - by allowing VoIP provider access to federal universal service funds: Fee-based voice services (whether “HD” or not) offered to the public, whether they use TDM or VoIP, are “telecommunications services.

Whatever the merits of the quoted NARUC reply comment arguments, to the extent the traffic can be positively identified as intrastate, as is already definitively the case with facilities-based IP voice services provided by AT&T, Verizon, and Cable companies, the FCC has already specified that States have jurisdiction regardless of how the traffic is classified for the purposes of the federal act.¹³ As the 8th Circuit recognized in its March 21, 2007 Minnesota PUC v. FCC decision, available online at <http://media.ca8.uscourts.gov/opndir/07/03/051069P.pdf>, *mimeo* at 16-17, quoting the FCC:

Moreover, subsequent to issuing the order we are reviewing, the FCC recognized the potentially limited temporal scope of its preemption of state regulation in this area in the event technology is developed to identify the geographic location of nomadic VoIP communications. In proceedings to address VoIP service providers' responsibility to contribute to the universal service fund, the FCC indicated:

¹² See, Comments of the National Association of Regulatory Utility Commissioners, filed January 13, 2013, in the proceeding captioned: In the Matter(s) of AT&T's Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, WC Docket No. 12-353, online at: <http://apps.fcc.gov/ecfs/document/view?id=7022113735>.

¹³ Compare, California PUC v. FCC, 905 F.2d 1217 (9th Cir. 1990) In this pre-1996 Act case, the Ninth Circuit acknowledged that if an enhanced service was identifiably intrastate, States could regulate them/the FCC could not oust State oversight of them. The definition of "information services" in the 1996 legislation is taken directly from the pre-act definition of "enhanced services" that was the heart of this case. Note the FCC language quoted by the Court in the Minnesota case, is also consistent with the structure of the Act. Congress specifically granted the FCC almost unlimited authority to preempt any State law that prohibits or has the effect of prohibiting any telecommunications carrier from providing any telecommunications service in 47 U.S.C. § 253. Even there, Congress reserved State authority to impose universal service and service quality obligations on those carrier services. There IS NO ANALOGUE or indeed any other provision of the 1996 legislation that purports to provide the FCC with authority to preempt State oversight of information services. Indeed, the DC Circuit's recent interpretation of § 706 in the Net Neutrality proceeding, certainly at least implies States have concurrent and explicit jurisdiction, regardless of severability, to take at least the listed specific actions, which are quite broad, with respect to advanced services, whether severable into intrastate and interstate components or not.

an interconnected VoIP provider with a capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the Vonage Order would no longer be applicable to such an interconnected VoIP provider.

Universal Serv. Contribution Methodology, 21 F.C.C.R. 7518 at 7546 ¶ 56 (2006), 2006 WL 1765838.

Similarly, we emphasize the limited scope of our review of the FCC's decision. Our review is limited to the issue whether the FCC's determination was reasonable based on the record existing before it at the time. If, in the future, advances in technology undermine the central rationale of the FCC's decision, its preemptive effect may be reexamined.

[5] The FCC should actively specify it will support any State action to enforce or require completion of or enhance the reliability of E-9-1-1 calls/communications or other Consumer protection measures.

Short of, or in addition to, finally classifying I-P based voice services, the FCC can take other action. NARUC has not passed a resolution on this specific point. However, logic suggests that if the FCC interest is to assure maximum pressure and oversight on carriers to provide working and reliable E 9-1-1 service, at least one option is to make crystal clear to all carriers that if a State asserts jurisdiction over or imposes rules to ensure the reliability of E9-1-1 service, the FCC will strongly support the State action.

In other areas where coordinated enforcement will deter unwanted behavior, the FCC should make similar statements in its orders.

Such statements can only discourage all but the most recalcitrant from initiating wasteful litigation to delay compliance.

However, statements that the FCC is taking no position on the scope of State authority historically has proven to be nothing more than an incentive for litigation by bad actors and a disincentive for State enforcement action.

I have attempted to cover all the key advocacy points raised during the meeting that might impact any open FCC proceeding. I am copying Mr. Strickland and Mr. Ruckman with this notice. If either indicates I have inadvertently left out some advocacy, or have not filed this letter in a relevant docket, I will immediately refile a corrected notice that includes the omitted discussions/proceedings.

If you have questions about this or any other NARUC advocacy, please do not hesitate to contact me at 202.898.2207 (w), 202.257.0568(c) or at jramsay@naruc.org.

Respectfully Submitted,

JAMES BRADFORD RAMSAY,
GENERAL COUNSEL
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
1101 VERMONT AVENUE, SUITE 200
WASHINGTON, DC 20005