N A R U C

National Association of Regulatory Utility Commissioners

NOTICE VIA ELECTRONIC FILING

February 13, 2015

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 Protecting and Promoting the Open Internet, GN Docket No. 14-28; Framework for Broadband Internet Service, GN Docket No. 10-127.***

Misleading text in the Feb. 4 Fact Sheet can be read to suggest that the FCC is re-classifying VoIP/other classic "telecommunications services" as "information services."

At a minimum, the FCC should clarify here, as it has in similar circumstances, that it is NOT in this order reclassifying VoIP as an information service or changing the application of Title II – which was effectively required by the November, 2011 so-called Transformational Order, and all but specified by prior orders.

Secretary Dortch:

On February 11, 2014 the undersigned met with **Mr. Matthew S. DelNero, Deputy Bureau Chief, Wireline Competition Bureau**, and **Mr. Claude Aiken, Deputy Division Chief, Competition Policy Division, Wireline Competition Bureau** at the FCC. As noted, *infra*, I am forwarding this with an e-mail asking the FCC decisional personnel listed below to read it.

During the meeting, based on widely publicized projections that the FCC will rely on Title II and forbearance to impose Net Neutrality rules – generally supported by NARUC by resolution - the undersigned made the following points:

[1] NARUC SUPPORT:

Based on our resolution, NARUC will support whatever legal rationale the Commission adopts to support imposition of net neutrality principles. NARUC is also on record supporting the FCC's net neutrality principles generally.

[2] REQUESTED CLARIFICATION OF MISLEADING "FACT" SHEET TEXT:

The February 4, 2015 released "Fact Sheet" from the Chairman, on the proposed Net Neutrality order, includes the following text:

> "Some data services do not go over the public Internet, and therefore are not "broadband Internet access" services subject to Title II oversight (VoIP from a cable system is an example, as is a dedicated heart-monitoring service)."

Industry has been adamant and . . . disingenuous, arguing the FCC has already classified "VoIP" services as an "information service." This is true even though the only FCC order statements are crystal clear that is not the case. See, e.g., *Connect America Fund et al*., WC Docket No. 10-90 et al., Report and Order, FCC 11-161, 26 FCC Rcd 17663, at n. 1906 (2011) (rel. Nov. 18, 2011) ("Transformational Order" ("As in prior Orders, we use the term "traditional telephone service" here colloquially as distinct from VoIP service ***without reaching any conclusions regarding the classification of VoIP services***." (emphasis added)).

Both of the services cited in the FACT SHEET are *textbook* examples of telecommunications services. 47 USC §153(50) defines "telecommunications" as "the 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." 47 USC § 153(53) points out that if "the service 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," it is a telecommunications service.

Both cited services mean all the applicable criteria.

It is true, as the Fact Sheet specifies, that, however classified, both VoIP and a dedicated heart monitoring service, are not in any sense "broadband internet access."

However, it is also clear that both are Title II services.

Unfortunately, an opposite inference can be drawn from the cited text.

As the attached pleading explains, at pp 8-13, the FCC conceded on brief in theappeal of the Transformational Order, and the 10th Circuit Court effectively confirmed, that VoIP services are in fact telecommunications services.[1]

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[1] Similarly, any arguments that VoIP is an exclusively "interstate" "information service" is inconsistent with existing Court and FCC precedent on even nomadic/over-the-top VoIP services. The 8th Circuit has pointed out that "the FCC has indicated (that) VOIP providers who *can track the geographic endpoints of their calls* do not qualify for the preemptive effects of the Vonage order." *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007). Citing the FCC clarification that a VoIP provider "with the 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." {emphasis added} See, *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, FCC 06-94, 21 FCC Rcd 7518, 7546, ¶ 56 (rel. June 27, 2006), aff'd in part, vacated in part, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007). Working E911 service, which locates the State of the caller, even with wireless services, means this is no longer an issue.

Accordingly, NARUC respectfully request the FCC to clarify – what it has conceded in 2006 and in 2011 – that a *telecommunications service* – remains a *telecommunications service* regardless of the technology used to provide the service. That is, changing the packet protocol from Time Division Multiplexing to Internet Protocol packet, doesn't change either the functional characteristics or the classification, of a service.

Failing that, the FCC should clarify the cited text to make clear that the Agency is not attempting to change the classification of VoIP services to information services.

[3] LANGUAGE TO INCLUDE WITH ANY FORBEARANCE PROVISIONS IN THE ORDER:

If the FCC does use Title II in combination with forbearance, there are a few points the FCC should actually specify in the forbearance portion of any final order:

[i] "47 U.S.C § 160 can only be used to forbear from "applying any regulation or any provision of this chapter to a telecommunications carrier." The provision, on its face, allows forbearance to be used only on provisions that apply to carriers. It cannot be used to forbear from provisions that specifically reserve State Commission authority."

[ii] "The most preemptive provision added by the 1996 Act – 47 U.S.C. §253(c) – *specifically* protects State authority "to impose on a competitively neutral basis and consistent with section 254…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 statute is clear and explicit. The FCC cannot use forbearance authority to eliminate these components of State authority, even if we were so inclined. Indeed, it is difficult to construct a circumstance where such preemption would be permissible given Congress' specifications in §253."

[4] IF THE FCC WANTS STATE HELP WITH ENFORCEMENT/CONSUMER ISSUES/UNIVERSAL SERVICE POLICY – IF THE FCC WANTS TO AVOID WASTING FEDERAL AND STATE TAXPAYER DOLLARS ON UNNECESSARY LITIGATION ABOUT ENFORCEMENT/COMPLAINT HANDLING, THEN FCC ORDERS MUST SPECIFY THAT IS WHAT THE LAW REQUIRES.

*PLEASE SAY WHAT YOU MEAN - SPECIFICIALLY – IN YOUR ORDERS***:** If policy makers at the FCC believe that the agency cannot handle enforcement for the entire country and want State assistance to promote Universal Service it needs to "plow the field." Earlier commissions successfully "plowed the field" to diminish State enforcement and constrain consumer remedies – even for obvious abuses - by simply refusing to classify VoIP services as what they clearly are – telecommunications services. This has unquestionably allowed industry to successfully press for preemptive legislation with State legislatures. If the FCC is interested in having some enforcement capability at the State level – by either a State A.G. or a State commission – it needs to "plow the field" by letting both Courts and State legislatures know that continued service quality oversight is permissible. Generally, some in industry argue that A.G. oversight remains even where the State commissions are preempted. But in practice, in litigation, they cite every possible provision of the Act to argue all State authorities have no jurisdiction. If federal policy makers want consumers to have the benefit of State remedies for service quality – they need to send the right signals. No State wants to 'buy a lawsuit." And policy makers should not want taxpayers funding unnecessary lawsuits to settle the scope of State authority under federal law.

By the same token, if the FCC really is interested in States having vibrant USF policies, they need to make certain the incentives are there for States to have a policy apparatus to support such programs. The current environment, fostered by FCC actions over the last ten years, has diminished the resources States allocate to the telecommunications sector. This undermines State authority to engage in USF policy and support. The FCC should be explicit that Section 254 anticipates that States will have universal service policies, and that the FCC and Section 254, ***make clear that that States have the jurisdiction they need to effectuate those policies across a range of services.*** This order is the perfect vehicle to specify the baseline role federal policy makers expect State's to play. See, text under [3] *supra*.

[5] ANY FORBEARANCE GRANTED SHOULD BE NARROWLY TAILORED TO MEET THE FCC'S GOALS.

NARUC has NOT recently taken a position on the application of 251-2 to broadband interconnection. We have recently endorsed application of those sections (and the arbitration provisions) to arrangements involving IP voice services.

The undersigned at this point referenced NARUC's "Interconnection White Paper" filed with the House last year on a possible re-write of the Act. A copy of that white paper is available online at: http://www.naruc.org/Testimony/14-0808-NARUC-response-House-wp-4-Interconnection-FINAL.pdf.

If broadband becomes a Title II service, Sections 251-2 apply by their express terms. The FCC is not free to forbear from 251(c) until it determines that "those requirements have been fully implemented." It is not clear that the agency has compiled an adequate record to forbear, but if that is the case, and the agency wishes to engage in additional proceedings to determine if those sections apply, it can examine past orders for examples where the FCC has taken different approaches that, in practice, defer challenges until the agency take final action.

The undersigned has attempted to cover all the key advocacy points raised during this meeting. I am copying Mr. DelNero and Mr. Aiken 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 in any additional docket.

NOTE – I AM SENDING A COPY OF THIS NOTICE OF ORAL EX PARTE VIA E-MAIL TO KEY STAFF ON THE EIGHTH FLOOR as listed in the "cc" line *infra*. 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,

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National Association of Regulatory Utility Commissioners

cc *Gigi Sohn, Office of the Chairman*
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