



N A R U C
National Association of Regulatory Utility Commissioners

NOTICE VIA ELECTRONIC FILING

February 19, 2015

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

RE: Notice of Oral/Written 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.*

Secretary Dortch:

On February 19, 2014, the undersigned called and left voice mail with **Mr. Matthew S. DelNero, Deputy Bureau Chief, Wireline Competition Bureau** and **Ms. Rebekah Goodheart, Legal Advisor to Commissioner Clyburn** about the pending order in the docket. 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] 47 U.S.C. § 1302:

To the extent the FCC relies on this section, and the Courts uphold that reliance on review, it is clear that States, *at least as a matter of federal law*, necessarily retain a scope of authority similar to that exerted by the Commission relying on this section.

[3] MIXED USE/INSERVERABILITY:

It cannot be questioned that internet access services are used to originate and complete intrastate communications.

To the extent the FCC again classifies Title II services as intrastate, it should be clear that its analysis is based on the fact that the traffic has, in the words of prior FCC orders, a “more than a de minimis amount of Internet traffic is destined for websites in other states or other countries, even though it may not be possible to ascertain the destination of any particular transmission.”

Assuming the inseverability *alleged* by carriers continues to, in the FCC's view, have record support,¹ as the agency's prior analysis of this issue demonstrates, States retain jurisdiction re: service quality, other terms and conditions of service, to the extent that they do not conflict directly with positive FCC rules.

Indeed, even back in 2005, the FCC recognized this prospect in the Wireline Broadband Internet Access order. *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities Universal Serv. Obligations of Broadband Providers Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III & Ona Safeguards & Requirements Conditional Petition of the Verizon Tel. Companies for Forbearance*, 20 F.C.C. Rcd. 14853, 14934, 50 (2005), at ¶ 158, the FCC

[R]ecognize[d] that the states play an important role in ensuring that public safety and consumer protection goals are met. The Commission has recently announced the creation of a federal-state task force on VoIP E911 enforcement, and we believe that this *Notice* may give rise to additional areas in which cooperation between this Commission and the states can achieve the best results. We note in this regard that NARUC has recently advocated for a "functional" approach to questions of federal and state jurisdiction, particularly with respect to consumer protection issues. For example, with respect to CPNI, NARUC recommends that the Commission be primarily responsible for establishing rules, while state or local authorities assume responsibility for enforcing those rules. To the extent that the Commission finds it necessary to impose consumer protection and related regulations on broadband Internet access service providers, we seek comment on how best to harmonize federal regulations with the states' efforts and expertise in these areas. . . In what other ways can the federal and state governments cooperate in order to ensure the best results for consumers.

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,

James Bradford Ramsay,
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cc *Gigi Sohn, Office of the Chairman*
Daniel Alvarez, Office of the Chairman
Rebekah Goodheart, Office of Commissioner Clyburn
Pricilla Argeris and Travis Litman, Office of Commissioner Rosenworcel
Nick Degani, Office of Commissioner Pai
Amy Bender, Office of Commissioner O'Reilly

¹ Given the FCC's own requirements to increase accuracy of E911 for all voice services – whatever the technology or medium used to provide the service, as well as the emerging E911 text services, along with the incredible growth in location-based advertising services (for both fixed wireline and mobile wireless voice and data offerings) the alleged "inseverability" originally proffered by carriers seems at best a questionable proposition. In fact, the record in this proceeding actually provides little in the way of evidence to support such a conclusion. Given the undeniable and rapid growth in technology and applications, relying on prior FCC conclusions, and thus necessarily, very stale records on the facts of "inseverability," presented in FCC decisions from a decade or more ago is unjustified. ***I quoted the 1998 GTE order's use of the word "may" because it is clear, even under the most lenient review, the current record cannot support any stronger statement.***

APPENDIX A

Prior FCC Statements on the “Interstate” Character of Broadband Services.

In the last 2007 order that found mobile wireless broadband services to be interstate, the FCC cited to orders ranging from 1998 – 2005.² There were no factual record cites in any of the orders discussing the alleged inseverability in any of the cited orders - merely unsupported statements that the traffic could not be severed.

The text and citations make clear in all cases that (1) such traffic indisputably includes intrastate communications (2) the FCC assumes for the sake of its analysis that the traffic is not severable, and (3) State jurisdiction is intact, subject to a conflict preemption analysis based on the text of the statute.

The 1999 Broadband over Powerline Order, In the Matter of United Power Line Councils Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Serv. As an Info. Serv., 21 F.C.C. Rcd. 13281, 13291 (2006) actually takes the very same conclusory approach as the 2007 mobile broadband order – a conclusory statement, no record citations/support on the issue of inseverability, and a footnote with the same citations:

Cable Modem Declaratory Ruling, 17 FCC Rcd at 4832, para. 59 (using the end-to-end analysis to determine that cable modem service is jurisdictionally interstate); *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd 14853; *see also GTE Tel. Operating Cos.*, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998) (finding GTE's ADSL service to be properly tariffed as an interstate service), *recon. denied*, 17 FCC Rcd 27409 (1999).

Both the 1999 BPL and 2007 Wireless declaratory rulings cite the Cable Modem decision, *In Re Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities*, 17 F.C.C. Rcd. 4798, 4860 (2002), which concedes, as it must, that INTRA state transactions occur with data services:

59. *Commission Authority*. Having concluded that cable modem service is an information service, we clarify that it is an interstate information service. The Commission has found that “traffic bound for information service providers (including Internet access traffic) often has an interstate component.” The Commission concluded that although such traffic is both interstate and intrastate in nature, it “is properly classified as interstate and it falls under the Commission's ... jurisdiction.” 221 The jurisdictional analysis rests on an end-to-end analysis, in this case on an examination of the location of the points among which cable modem service communications travel. These points are often in different states and countries. Accordingly,

² See, In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, Declaratory Ruling, WT Docket No. 07-53, (rel March 23, 2007) , and available online at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-07-30A1.pdf. Rather than relying on or citing to factual evidence in the record on inseverability, the FCC merely cites to prior analysis in ¶ 28 and the accompanying footnote 72, which simply state:

Having concluded that wireless broadband Internet access service is an information service, we also find that the service is jurisdictionally interstate. (citing note 72 “*See e.g., Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4832, para. 59 (using the end-to-end analysis to determine that cable modem Internet access service is jurisdictionally interstate); *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14853; *BPL-Enabled Internet Access Services Order* 21 FCC Rcd at 13288, para. 11; *see also GTE Tel. Operating Cos.*, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998) (finding GTE’s ADSL service to be properly tariffed as an interstate service), *recon. denied*, 17 FCC Rcd 27409 (1999).”

cable modem service is an interstate information service. {emphasis added - multiple Footnotes omitted}

See also note 221, to this section:

Intercarrier Compensation Order, *supra* note 220 at ¶ 52 (footnote omitted). See also *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998) (**affirming the jurisdictionally mixed nature of ISP-bound traffic**); *GTE ADSL*, 13 FCC Rcd at 22466 ¶ 1 (concluding “that [GTE’s ADSL service], which permits Internet Service Providers (ISPs) to provide their end user customers with high-speed access to the Internet, is an interstate service and is properly tariffed at the federal level”).

Both the 1999 and the 2007 order also cite the 1998 “DSL order,” *In the Matter of Gte Tel. Operating Cos. Gtoc Tariff No. 1 Gtoc Transmittal No. 1148*, 13 F.C.C. Rcd. 22466 (1998), where the FCC concludes:

26. We are not persuaded by ALTS’s argument that ADSL service does not fall within the definition of special access because it does not constitute “interstate telecommunications.”⁹³ As stated above, we disagree with ALTS’s suggestion that the “telecommunications” service ends where the “information service” begins.⁹⁴ Furthermore, as discussed above, we conclude that more than a *de minimis* amount of Internet traffic is destined for websites in other states or other countries, even though it may not be possible to ascertain the destination of any particular transmission. For these reasons, we conclude that GTE’s ADSL service is subject to federal jurisdiction under the Commission’s mixed-use facilities rule. {emphasis added}

On the same page, the FCC also noted:

27. We emphasize that we believe federal tariffing of ADSL service is appropriate where the service will carry more than a *de minimis* amount of inseparable interstate traffic. Should GTE or any other incumbent LEC offer an xDSL service that is intrastate in nature, for example, a “work-at-home” application where a subscriber could connect to a corporate local area network, that service should be tariffed at the state level.

The 2007 order also cited the *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14853. Westlaw only shows one sentence on page 14853. But my review failed to locate any actual analysis of whether wireline Broadband is “interstate” (or citations to *facts* in the record supporting the conclusions that is both mixed and inseparable). There is a statement that it is interstate. Other parts of the order demonstrate the *mixed use* rationale underlies the claim that the services are “interstate.” For example, in ¶ 130, the FCC says: “[W]e allow the non-common carrier provision of wireline broadband Internet access transmission that we previously have treated as regulated, interstate special access service, **but we do not preemptively deregulate any service currently regulated by any state.**” {emphasis added} If there was no intrastate traffic included, no State can have jurisdiction and the FCC would necessarily preempt ALL State oversight. Again in ¶ 158, quoted in the *ex parte, supra*, the FCC suggests a possible cooperative enforcement approach on service quality that is impossible if the traffic is only interstate – as the States would have no jurisdictional hook for action. The fact that high speed data services/broadband have always been “mixed use” and, where the traffic is demonstrated to be inseparable, States can be preempted to the extent their actions are inconsistent with Congressional intent, is underscored by the FCC’s action/analysis in the 2010 *Memorandum Opinion and Order*, released *In the Matter of Nat’l Ass’n of Regulatory Util. Commissioners Petition for Clarification or Declaratory Ruling That No Fcc Order or Rule Limits State Auth. to Collect Broadband Data*, 25 F.C.C. Rcd. 5051, 5055 (2010).