



N A R U C  
National Association of Regulatory Utility Commissioners

**NOTICE VIA ELECTRONIC FILING**

*July 30, 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 Technology Transitions, GN Docket No. 13-5***

Secretary Dortch:

On Tuesday, July 28, 2015, I spoke with **Gigi B. Sohn**, Counselor to the Chairman, and on Wednesday July 29, I spoke with **Rebekah Goodheart**, Wireline Legal Advisor to Commissioner Clyburn, with **Amy Bender**, Wireline Legal Advisor to Commissioner O'Reilly, with **Nicholas Degani**, Wireline Legal Advisor to Commissioner Pai, and with **Travis Litman**, Wireline Advisor to Commissioner Jessica Rosenworcel.

As a preface to my advocacy, in all cases I noted that:

[1] I was not certain exactly what text was included in the final order on the two Transitions items up for a vote at the next FCC agenda meeting;

[2] The AT&T petition that was the impetus for this proceeding was focused in significant part in making the case that States have no role post transition;<sup>1</sup>

[3] NARUC's interactions with the Commission indicate that the FCC Commissioners and policy staff believe (a) that States continue to play a crucial role, at least with respect to universal service, emergency services, disaster recovery, and service quality oversight/enforcement, and (b) the FCC lacks the resources to handle these tasks for a country the size of the United States alone;

[4] Congress was crystal clear (i) in Section 253 and 254 that States retain a role with respect to universal service, service quality oversight, and protecting public health and welfare, (ii) in Section 706 that States have a continuing role in promoting the deployment of advanced services, and in (iii) Sections 251-2 that States have a continuing role in arbitrating interconnection disputes; and

[5] If the FCC agrees with Congress, that there is a crucial State role, it should specify that fact – rather than allow its silence to be used by clever lawyers to undermine state authority in the Court's and State legislatures.

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<sup>1</sup> See the July 28, 2013 **Comments of the National Association of Regulatory Utility Commissioners**, filed in WC Docket No. 12-353) *In the Matter of AT&T's Petition to Launch A proceeding Concerning the TDM-to-IP Transition*, online at: <http://apps.fcc.gov/ecfs/comment/view?id=6017160737>, pointing out AT&T argued in its petition that the FCC “has clear authority to preempt any state regulatory obligations that would interfere with these experiments or subvert the most important objective on the Commission's agenda: a smooth and rapid transition to the all-IP broadband environment of tomorrow.” NARUC also demonstrated in those comments that “[u]nfortunately, for AT&T, the cited cases do not provide “clear authority to preempt.” Indeed, any rational reading of either suggests preemption cannot be justified.”

On the merits of the items proposed for the next agenda, I noted:

[1] NARUC is on record in this proceeding urging the FCC to support a continued FCC-State partnership to protect consumers *and* competition;

[2] The most efficient way to assure this is to acknowledge the obvious - that IP-based voice and data services – like “Broadband Internet Access Service” – are in fact “telecommunications services” subject to the 1996 Act’s regulatory framework;

[3] *If the August order again fails to make this long-overdue classification, the FCC should review the text of the decision carefully to (a) make certain it does not undermine State authority by omission or foreclose a proper classification of other IP services and (b) make clear that States will continue to have a role with respect to IP-based services – particularly with respect to service quality and universal service; and*

[4] In terms of the Chairman’s fact sheet, NARUC’s February 18, 2015 ***Resolution Urging the FCC to Partner with States to Protect Residential and Business Customers during the Technology Transition***, at: [http://www.naruc.org/Resolutions/Resolution%20Urging%20the%20FCC%20to%20Partner%20with%20States%20to%20Protect%20Residential%20and%20Business%20Consumers%20During%20the%20Technology%20Tr ansition.pdf](http://www.naruc.org/Resolutions/Resolution%20Urging%20the%20FCC%20to%20Partner%20with%20States%20to%20Protect%20Residential%20and%20Business%20Consumers%20During%20the%20Technology%20Transition.pdf) specifically endorses aspects of his proposal that effectively (i) require “all providers of fixed IP-based networks to notify and educate their consumers of any backup power requirements of their services, including battery life” and (ii) preserve “competition. . . regardless of the technology used to provide service.”

In particular, the cited resolution urges the FCC to:

- (i) reaffirm its commitment to a collaborative, joint approach with the States to further the goals and directives in the NPRM regarding consumer protection and public safety;
- (ii) adopt rules that respect and do not diminish, impede or otherwise infringe upon State authority in these areas;
- (iii) ensure that competition, and current consumer protections, including privacy, complaint resolution, basic service, and service quality, remain in effect regardless of the technology used to provide service;
- (iv) endorse the States’ continued enforcement of these protections where they exist under State law;
- (v) require all providers of fixed IP-based networks to notify and educate their consumers of any backup power requirements of their services, including battery life spans and procedures for ordering, installing, replacing, and disposing of batteries, as well as actions consumers may take to extend battery life during a power outage; and
- (vi) partner with the States to ensure that consumers are fully informed on the backup power requirements of their IP-based services, regardless of the technology used by the consumer, and to advance the FCC’s and States’ mutual goals for consumer protection and public safety.

#### ***Additional Discussion***

*For well over ten years, NARUC has been filing comments in this and related proceedings pointing out that from a policy perspective, it makes absolutely no sense for the FCC to continue to favor “one competitor over another – based on the technology used to provide a service.”*

NARUC is not the only organization to come to this conclusion. Earlier in a related docket, **AARP, Common Cause, Consumer Federation of America, Consumers Union, Free Press, Public Knowledge, the National Consumer Law Center** and the **National Association of State Consumer Advocates** joined NARUC in comments that remain relevant here. They state:

Assigning telephone numbers to providers who are not State-certificated telecommunications carriers undermines the Congressionally-established structure of the Telecom Act. **State and Federal roles on consumer protection, interconnection, and number management are clearly defined in the Act specifically for “telecommunications carriers”, which would be circumvented by lack of a defined legal authority over providers that have chosen not to be “telecommunications carriers.”** The signatories to this letter are concerned that signaling its intent to allow direct assignment of numbers to non-carriers would trigger a “Race To the Bottom” in the American communications market - **where providers of all kinds race to self-define their regulatory status to obtain desired privileges or avoid unwanted burdens of regulations** (e.g. – number spoofing, harassing or fraudulent calling and the consumer complaints and enforcement that follow).<sup>2</sup> {emphasis added}

NARUC comments have also pointed out at length that the express terms of the statute require VoIP services to be classified as telecommunications services.<sup>3</sup> The FCC’s continued recalcitrance to make this finding explicit only further erodes States’ ability to effectively support the FCC’s policy goals.

***The FCC’s Net Neutrality Order eliminates any argument that VoIP offered to the public for a fee is not a Telecommunications Service<sup>4</sup>***

The FCC analysis of broadband Internet access service in the *Open Internet Order*<sup>5</sup> eliminates any argument that VoIP is not a *telecommunications service*. While the order attempts to limit its determination to

<sup>2</sup> See April 11, 2013 *Ex Parte Letter to Chairman Genachowski, Commissioner McDowell, Commissioner Clyburn, Commissioner Pai, and Commissioner Rosenworcel, from AARP, Common Cause, CFA, Free Press, Consumers Union, Public Knowledge, National Consumer Law Center, NASUCA and NARUC, addressing the Orders on Circulation in Docket CC No. 99-200 – “Vonage Waiver Petition” – in the proceedings captioned: In the Matter of Administration of the North American Numbering Plan, CC Docket 99-200; Corecomm-Voyager, Inc., Dialpad Communications, Inc., Enhanced Services d/b/a Pointone, Frontier Communications of America, Inc., Nuvio Corporation, Qwest Communications Corporation, RNK, Inc. d/b/a RNK Telecom, Inc., Unipoint, Voex, Inc., Vonage Holdings Corp., & Wiltel Communications, LLC Petitions for Limited Waiver of Section 52.15(G)(2)(I) of the Commission’s Rules Regarding Access to Numbering Resources*, available online at: <http://apps.fcc.gov/ecfs/document/view?id=7022269120>

<sup>3</sup> See, July 14, 2014 filed *Reply Comments on the VXCX High Definition Voice request for a Notice of Inquiry*, in GN Docket No. 13-5, at: <http://www.naruc.org/Filings/14%200707%20NARUC%20VCFX%20HC%20Reply%20comments.pdf>. See July 17, 2013 *NARUC Notice of Oral Ex Parte filed In the Matter(s) of Wireless E911 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; *VXCX Petition for Notice of Inquiry on the Migration to HD Voice*, GN Docket 13-5, available online at: <http://apps.fcc.gov/ecfs/comment/view?id=6018211438>. NARUC respectfully requests that both comments, and the arguments they contain, be incorporated by reference in the docket of this proceeding.

<sup>4</sup> Indeed, as NARUC has pointed out elsewhere, the 10<sup>th</sup> Circuit effectively confirmed *prior to the reclassification of broadband earlier this year*, that the FCC, by permitting carriers providing only broadband and IP-based voice services access to federal universal service funds, funds only available under 47 U.S.C. § 214 to carriers providing telecommunications services, categorized VoIP services as telecommunications services. See, *Amicus Curiae Brief of the National Association of Regulatory Utility Commissioners in Support of the Michigan Public Service Commission*, filed August 19, 2014, in *Michigan Bell Telephone Company, et al. v. John D Quackenbush, Greg R. White, and Sally A. Talbert*, Case No. 1:14-cv-00416 U.S. District Court, W.D. Michigan, at 8-13, available at: <http://www.naruc.org/Filings/18%200819%20Michigan%20IP%20Interconnection%20NARUC%20Amicus%20Brief%20final%20final.pdf>. Note also the arguments at 8-13 that the Act’s function approach requires fee-based real time voice services to be classified as telecommunications services.

<sup>5</sup> *In the Matter of Protecting and Promoting the Open Internet*; GN Docket No. 14-28; Report and Order on Remand, Declaratory Ruling, and Order (rel. Mar. 12, 2015) (*Open Internet Order*).

broadband Internet access service, there are no factual differences or flexibility in the statutory scheme that allows the Commission to do so.

In finding broadband Internet access service (*BIAS*) is a *telecommunications service*, the FCC examined in detail the exact arguments that have heretofore been used to *claim* that VoIP is not a telecommunications service.

Specifically, the FCC

- stated unequivocally “IP conversion functionality is akin to traditional adjunct to basic services, which fall under the telecommunications systems management exception;”<sup>6</sup>
- examined carefully the use of DNS and caching and determined that both fall within the telecommunications systems management exception and are not inextricably intertwined with telecommunications;<sup>7</sup>
- specifically found it was not necessary for users to know the geographic location of the end points of the communication and that the addition of packet headers to enable transmission does nothing to alter the form or content of the user’s information;<sup>8</sup>
- rejected arguments that “Internet-based services” could not be “adjunct-to-basic services” that the Commission had a long history of including under the telecommunications system management exception.<sup>9</sup>

Far more than the FCC’s reclassified *BIAS* service, fee-based VoIP services are the archetype telecommunications service. The primary service provided by VoIP is real-time voice communications between two parties. It is the functional equivalent of telephone service that has been regulated as a common carrier service since the Communications Act was first adopted in 1934 and as a “telecommunications service” since that definition (which is itself “functional” and does not reference any technology) was added by Congress in the Telecommunications Act of 1996. Both broadband Internet access service and VoIP are terms that have been defined by the Commission without reference to the statutory terms adopted by Congress in the Communications Act.<sup>10</sup>

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<sup>6</sup> *Open Internet Order* at ¶ 375. The phrase “telecommunications systems management exception” refers to the Congressional exclusion of information processing and storage used for certain purposes from the definition of “information service”. *Id.* at n. 974.

<sup>7</sup> *Id.* at ¶¶ 366 – 371 (DNS) and ¶ 372 (caching).

<sup>8</sup> *Id.* at ¶¶ 361 – 362.

<sup>9</sup> *Id.* at ¶ 369.

<sup>10</sup> See 47 C.F.R. § 8.11(a) (definition of broadband Internet access service, which is redesignated as 47 C.F.R. § 8.2 by the *Open Internet Order*) and 47 C.F.R. § 9.3 (definition of interconnected Voice over Internet Protocol). The 2010 amendments to the Communications Act which added “interconnected VoIP service” and “non-interconnected VoIP service” to the definitions in section 3 of the Communications Act both refer back to the Commission’s regulatory definition at 47 C.F.R. § 9.3. Unlike the definition of “telecommunications carrier” however, Congress in 2010 did not include any language excluding “interconnected VoIP service” or “non-interconnected VoIP service” from the other statutory definitions or from being treated as a common carrier. See 47 U.S.C. §§ 153(25) and (36). Further, section 716(f) of the Communications Act makes clear that “interconnected VoIP service” can be a “telecommunications service” subject to section 255 of the Act. 47 U.S.C. § 617(f).

The Commission has been using these administratively crafted definitions to avoid applying the statutory definitions, but the courts have long been clear that they are not at liberty to do so. A 1976 D.C. Circuit decision, cited repeatedly by the FCC in the *Open Internet Order*, specifies:

[W]Further, we 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 on the regulatory goals it seeks to achieve... A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so. Thus we affirm the Commission's classification not because it has any significant discretion in determining who is a common carrier, but because we find nothing in the record or the common carrier definition to cast doubt on its conclusions that SMRS are not common carriers. If practice and experience show the SMRS to be common carriers, then the Commission must determine its responsibilities from the language of the Title II common carrier provisions.<sup>11</sup>

There is nothing in the statutory definitions of “telecommunications, “telecommunications service” or “telecommunications carrier” in the Communications Act that grants or implies that the Commission has discretion to apply or not apply those definitions. In fact, the definition of “telecommunications carrier” directly addresses the issue by stating that the term means “any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226).” The definition continues “[a] telecommunications carrier shall be treated as a common carrier under this Act... except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.”<sup>12</sup> As the Commission noted repeatedly in the *Open Internet Order* an offering is a telecommunications service “by virtue of its functions.”<sup>13</sup> The function of VoIP is voice communications in real time – i.e. the transmission of the user’s information without change in the form or content – the very definition of “telecommunications.” Anyone offering VoIP to the public is offering telecommunications to the public – the definition of “telecommunications service” is therefore a “telecommunications carrier.”

***The FCC must assure that VoIP providers have the incentive and obligation to cooperate fully with impacted NARUC member commissions.***

As NARUC’s February resolution points out, (i) State commissions and other State agencies (States) share responsibility, statutory authority and oversight with the FCC regarding consumer protection, competition and access to 911/E911 public safety services, using different regimes and approaches to network reliability and public safety; (ii) several States are examining the intrastate impacts of battery backup and copper retirement or transition, within the States’ regulatory and legal parameters including any State basic services, or other, rules and laws.

If the FCC again does not choose to specify the regulatory status of IP-based voice services, it should use this order as a vehicle to reaffirm its commitment to a collaborative, joint approach with the States to further the goals and directives contained in the NPRM regarding consumer protection and public safety.

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<sup>11</sup> *National Ass’n of Regulatory Utility Com’rs. v. F.C.C.*, 525 F.2d 630, 643-4 (D.C. Circuit 1976) (footnotes omitted).

<sup>12</sup> 47 U.S.C. § 153(51).

<sup>13</sup> *Open Internet Order* at ¶¶ 363 and 384.

*Note, I have copied each person contacted with this letter via e-mail. I have attempted to cover all advocacy raised during our conversations. If either alert me of an issue brought up during those conversations that I failed to address in this ex parte, I will immediately refile a corrected notice that covers the identified lapse. If anyone has 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](mailto:jramsay@naruc.org).*

Respectfully Submitted,

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