National Association of Regulatory Utility Commissioners

NARUC

NOTICE OF EX PARTE PRESENTATION (47 C.F.R. § 1.1204(10))

October 2, 2008

Marlene H. Dortch - Secretary
Federal Communications Commission
445 12th Street, SW - Room TW B204
Washington, DC 20554

Re: ***In the Matter of Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers Regarding Access Charges and the ESP Exemption,***
CC Docket No. 08-152
In the Matter of IP-Enabled Services,
WC Docket No. 04-36
In the Matter of Developing a Unified Intercarrier Compensation Regime,
CC Docket No. 01-92
In the Matter of Universal Service Contribution Methodology,
WC Docket No. 06-122
In the Matter of Petition for Declaratory Ruling Filed by CTIA,
WT Docket No. 05-194
In the Matter of Jurisdictional Separations & Referral to the Federal-State Joint Board,
CC Docket No. 80-286

Dear Secretary Dortch:

On Tuesday, I met with Greg Orlando and Wayne Leighton – advisors in the office of FCC Commissioner Deborah Taylor Tate. Last Thursday, I also met with Nick Alexander from the office of Commissioner Robert McDowell, Amy Bender from the office of Chairman Kevin Martin, and Scott Bergmann of the office of Commissioner Jonathan Adelstein. I also spoke briefly by phone to Don Stockdale of the Wireline Competition Bureau. I respectfully request any waivers needed to file this notice out-of-time. During all of the meetings, except the one with Mr. Leighton – which focused exclusively on early termination fees, I briefly reviewed NARUC's positions on the following four issues:

I. Preemption & Intercarrier Compensation (IC) Reform:

NARUC has twice filed general principles that should govern IC reform in this proceeding. However, other than commenting on flawed efforts to justify broad preemption, NARUC has not taken *any* position on the relative merits of any of the numerous filed comprehensive IC reform proposals.[1] My ex parte meetings with FCC staff were similarly constrained.

[1] Indeed, as the attached NARUC IC reform principles indicate, the association has recognized that some reform is inevitable but continues to press for an approach that properly reflects State concerns.

On September 12, 2008, Verizon filed with the FCC an IC reform proposal.[2] Unfortunately, that proposal suggests the FCC override Congress' clear reservations of State authority to implement a mandatory uniform, national terminating per minute rate to be charged by all carriers for all traffic, absent negotiation of a commercial agreement offering a different rate.[3] Subsequently, on September 19th, Verizon filed a memorandum purporting to provide legal justification to implement the preemptive aspects of its proposal. Verizon's memo ignores specific Congressional reservations for States to [i] arbitrate interconnection disputes and [2] provide specific recommendations on related and required changes to the FCC's Part 36 separations rules – while also *potentially* destabilizing [i] Congressionally-mandated intrastate funding for up to 23 State universal service programs, and [ii] State retail rate design authority.[4] The proffered legal rationale – which has much in common with its earlier requests for broad preemptive rulings on facilities-based "Voice over Internet Protocol" services[5] – shares those requests' strained readings of the statutory text, inconsistency with controlling judicial precedent, and reliance on inaccurate (or, at a minimum, unsupported) factual statements. I briefly discussed in very general terms the flawed legal reasoning and inaccurate factual premises in the *Verizon White Paper* in most offices. I have outlined the general thrust of those statements below.

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[2] *September 12, 2008 Letter from Verizon's Susan A. Guyer to FCC Commissioners Martin, Tate, McDowell, Copps and Adelstein*, filed in the proceedings captioned: *In the Matters of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, and *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, (*Verizon Letter*). [Available at <http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520067814>]

[3] *Verizon Letter* at 3-4. The proposal provides for a transition to the $.0007 rate over a period of three years. Verizon proposes carriers recover the revenue loss associated with its proposal through higher retail local rates, higher Subscriber Line Charge (SLC) rate caps, and the addition of a new Replacement Mechanism to the federal universal service fund

[4] *September 19, 2008 Letter from Verizon's Donna Epps to Marlene Dortch FCC Secretary* with attached Memorandum captioned: "*The Commission has Legal Authority to Adopt a Single, Default Rate for All Traffic Routed on the PSTN*" filed in the proceedings captioned: *In the Matters of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *and Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, (*Verizon White Paper*), [Available at <http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520169702>]

[5] See, *August 6, 2007 Letter from Susanne Guyer and Michael Glover, for Verizon, to FCC Chairman Kevin A. Martin*, filed in the proceeding captioned: *In the Matter of IP-Enabled Services*, WC Docket No. 04-36 [Available at: <http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519609986>]. See also, *August 26, 2008 Letter to FCC Chairman Kevin A. Martin from NARUC General Counsel Brad Ramsay*, filed in the proceedings captioned: *In the Matters of IP-Enabled Services*, WC Docket No. 04-36 WC Docket 04-36 and *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 [Available at: <http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520050484>] See also, *August 6, 2008 Letter from AT&T, CompTIA, CTIA, Global Crossing, Information Technology Industry Council, National Association of Manufacturers, New Global Telecom, PointOne Sprint Nextel Corp., The Telecommunications Industry Association, T-Mobile, Verizon, The VON Coalition, to FCC Commissioners Martin, Copps, McDowell, Adelstein, and Tate*, filed in the proceedings captioned: *In the Matters of IP-Enabled Services*, WC Docket No. 04-36 WC Docket 04-36 and *Developing a Unified Intercarrier Compensation Regime*, CC Docket 01-92 at 2. [Available at: <http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520036915>]

A. RESERVED STATE AUTHORITY TO SET INTRASTATE ACCESS CHARGES[6]

Section 152(b),[7] in tandem with other sections of the 1996 legislation[8] specifically reserves State authority over intrastate access charge regimes. Exceptions to this authority are,[9] and must be express[10] and explicit.[11] No other statutory provision provides the FCC with the authority to preempt State access charge regimes. Verizon asserts that providers are unable to distinguish between intrastate and interstate traffic, or between purely circuit switched and IP traffic, and therefore "all traffic that is routed on the PSTN can no longer be reliably separated and treated differently and is therefore inseverable for jurisdictional purposes."[12] However, the factual predicate for this statement - the purported inseverability of traffic on the networks, is, to be charitable, a gross overstatement.[13]

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[6] NARUC's 2004 Intercarrier compensation principles (attached) specifies that States ". . . should retain a role . . . reflecting their unique insights, as well as substantial discretion in developing retail rates for services provided by providers of last resort." Those principles also note that "a proposal preserving a significant State role that fits within the confines of existing law is preferable." Acceptance of the Verizon rationale necessarily eliminates State input into intrastate access rates and potentially impacts retail rate design issues. Moreover, taken in context, it is clear Verizon is seeking to eliminate virtually all State oversight.

[7] See, 47 USC Sec. 152(b) (1996), which reserves States authority over intrastate rates and services – specifying: "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier."

[8] See, 47 USC Sec. 251(d)(3) (1996): "Preservation of State Access Regulation: In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that (a) establishes access and interconnection obligations of local exchange carriers; (b) is consistent with the requirements of this section . . ."

[9] 47 USC Sec. 223 – 227 (1996)

[10] See, Section 601(c)(1) [note to 47 USC Sec. 153 (1996)] entitled "Effect on Other Laws", states "[t]his Act and the amendments made by this Act shall not be used to modify, impair or supersede or authorize the modification, impairment, or supersede Federal, State, or local law unless *expressly so provided* in such acts or amendment." {Emphasis added}

[11] See, *Louisiana Public Service Commission v. FCC*, 106 S.Ct. 1890, 476 U.S. 355, 90 L.Ed.2d 369, n.4 (1986) (*Louisiana*). Agency attempts to achieve a policy goal via an unsupported reading of other statutory provisions to expand preemptive authority has been a feature of several FCC orders. In *Louisiana*, the Supreme Court considered and fully rejected the argument that the Commission should be able to preempt state authority in order to foster federal policy:

> "While it is certainly true, and a basic underpinning of our federal system, that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, *Hines*, 312 U.S., at 67, 61 S.Ct., at 404, it is also true that *a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority.* This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency. Section 152(b) constitutes, as we have explained above, a congressional *denial* of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate ratemaking purposes. ***Thus, we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy.*** An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do ***Louisiana*** at pp. 374-375. {emphasis added}.

[12] Verizon White Paper at 2. {emphasis added}.

[13] Verizon argues that if nomadic VoIP and wireless services are growing *economically* inseverable from other traffic, and not subject to State economic jurisdiction, *Verizon White Paper* at 5-7, 15 then it must also be concluded that "***all* traffic routed over the PSTN is inseverable for jurisdictional purposes**." *Id*. at 4, 7 {emphasis added}. However Verizon's own statistics indicate that by December 2008 a majority of households (64%) will still rely on circuit-switched based telephone service – which is severable. *Id*. at

B. RESERVED STATE AUTHORITY TO FACILITATE INTERCONNECTION VIA §251 & §252.

NARUC has consistently endorsed a technology neutral approach to oversight. Our 2004 intercarrier compensation principles specify that charges should not be based on "the architecture or protocols of the requested carrier's network or equipment." In July, we passed a "*Resolution Regarding the Interconnection of New Voice Telecommunications Services Networks"* (attached) that logically extends this concept to the default regime Congress specified to assure fair interconnection agreements when arms-length negotiations break down. That resolution directs NARUC to "protect[] the authority, under Sections 251 and 252, of State commissions and the preservation of telecommunications carriers' interconnection rights and traffic exchange obligations, under Sections 251 and 252, in a technologically neutral manner." Recognizing that networks are evolving away from circuit-switched architectures, the resolution clarifies that evolution cannot change the Congressionally-mandated Section 251-2 process to facilitate interconnection. While the Verizon proposal is ambiguous in some respects, it is, on its face, inconsistent with that scheme. According to Verizon, the *default* interconnection arrangements – including the specified point of interconnection - outlined in the *Verizon Letter* at page 7-8 are limited to circuit switched network equipment.[14] It appears that all other interconnection arrangements would be effectively deregulated. If a carrier wishes to interconnect using any other technology (which would necessarily be at a place other than specified in Verizon's current proposal), the discussions must be on a commercial basis – outside the scope of the fall-back arbitration procedures (and the effective requirement for a technology neutral approach to interconnection)[15] in Section 251 or 252.[16] *If this is an accurate reading of Verizon's proposal*, it eviscerates the Acts oversight regime

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8. Indeed, use of the inaccurate (or at best - unsupported) adjective – "economically" – to describe inseverable – necessarily concedes that all traffic is severable. Moreover, businesses in particular, and some private users will continue to insist on call detail, E911 services that work, and necessarily severability. Indeed, there is no question it is possible to separate intrastate *non-nomadic* facilities-based VoIP calls from interstate calls, and recently, the FCC has required some measure of severability for even *nomadic* VoIP providers – pointing out – accurately – *that under controlling precedent*, if a nomadic VoIP provider does sever (track) its traffic – whatever the FCC's particular goals are for oversight of VoIP providers generally – that provider, by law, becomes subject to the full range of state oversight. See, *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570 (8th Cir. 2007) slip op. at 22 [Available at: <http://www.ca8.uscourts.gov/opns/opFrame.html>] The court cites to a 2006 FCC decision which specifies 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." 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). {emphasis added} [Available at: <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-94A1.pdf>.]

14 Both Verizon and AT&T agree that their circuit-switched networks are being replaced by next generation networks. This means the "default rules" advocated by Verizon (and, in an earlier filing, AT&T), would rapidly be obsolete. See, *Verizon Letter* at 1: "Today, new, next-generation platforms based on Internet protocol ("IP") are offering incredible new opportunities for consumers and businesses." See also, AT&T July 17 Ex Parte, page 1: "The Commission's current rules focus entirely on a rapidly obsolescing POTS network architecture and business model and, in so doing, retard the inevitable transition from a narrow-band, voice-centric infrastructure to the broadband, any-application infrastructure of the 21st century."

15 By allowing interconnection at "any technically feasible point" via Section 251(c)(2)(B), the Act expressly contemplates that as technology evolves, the scope of what is "feasible" also will evolve. As the FCC stated in its initial order implementing the Act, "successful interconnection *** at a particular point in a network, using particular facilities, is substantial evidence that interconnection or access is technically feasible at that point, or at substantially similar points in networks employing substantially similar facilities. In comparing networks for this purpose, the substantial similarity of network facilities may be evidenced, for example, by their adherence to the same interface or protocol standards." *First Report and Order, Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15606 (1996) (emphasis added). Internet Protocol (IP) was adopted (and named) precisely because it was designed to be a standard that multiple networks could share in common.

16 See *Verizon White Paper* at 29, arguing "[A]greements with other carriers, as such negotiated agreements could encompass *all* of the traffic they exchange, rather than having one agreement (subject to state commission approval) for § 251(b)(5) traffic and another agreement (entirely outside of the §§ 251 and 252 process) for all other traffic."

designed to prevent discriminatory practices and abuse of market power, e.g., eliminates the fall-back of neutral arbitration of conditions of interconnection where negotiations fail, etc.

C. POSSIBLE IMPACT ON STATE UNIVERSAL SERVICE PROGRAMS

At least twenty-two States have high cost universal service programs. At least thirty-three have low income programs. Others have programs to promote the deployment of advanced services generally and/or rural health care/schools and library programs.[17] All advance the Congress' goals to promote universal service and deployment of advanced infrastructure.[18] Severability is a key issue when it comes to accessing carriers for State programs. In 47 U.S.C. § 254 (f), Congress mandates that every provider of INTRAstate telecommunications "shall" contribute to a State's program. Courts have found this section does not permit States to assess against INTERstate revenues. It is not clear how Verizon's broad claims of inseverability are sustainable in the current environment when most facilities-based wireline carriers (including those that use VoIP technology on their networks) have no difficulties with discerning the proper quantum to be remitted to each jurisdiction. However, if the Commission chooses to take a preemptive approach to IC reform based on the purported inseverability of the bulk of system traffic, while awaiting the results of the inevitable appeal, the FCC should also check to quantify the potential disruption of support to State programs that might accompany a reclassification of intrastate traffic to the interstate jurisdiction.

D. SEPARATIONS CONCERNS

As NARUC's IC Principles confirm, the FCC should not act on any of these requests without creating a detailed factual record on both severability and related cost allocation issues which can justify the anticipated action. This would include receiving a recommendation from the Separations Joint Board on any revisions to the current frozen allocators.

II. Comprehensive Reform of Separations

The latest extension of the separations freeze ends on Jun 30, 2009.[19] The freeze was originally intended to remain in place from July 1, 2001 to June 30, 2006, but was later extended by the Commission for an additional three years. As a result, since 2001, carriers have applied separations allocation factors and, for some carriers, category relationship factors based on data from calendar-year 2000 separations studies. It is obvious that these factors require adjustment – even if another freeze extension is require for the FCC to

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[17] Jing Liu & Edwin Rosenberg, *State Universal Service Funding Mechanisms: Results of the NRRI's 2005–2006 Survey*, National Regulatory Research Institute (July 2006). ("[T]wenty two jurisdictions, or 43 percent, currently have either a functioning high-cost USF, a functioning high-cost USF under revision, or an approved but not functioning fund . . . All but five . . . require Commercial Mobile Radio Service providers to contribute . . . two . . . require Voice over Internet Protocol service providers to contribute . . . Thirty-three commissions . . . have a state low-income program, which provides a subsidy to basic local residential telephone services . . . Nine . . . have a subsidy program for schools and libraries. Seven . . . have a subsidy program for rural health care facilities . . . five . . . have a subsidy program for advanced telecommunication services [separate from] other subsidy programs for schools, libraries . . ."

[18] Congressional intent could not be clearer. In section after section of the Act, Congress recognizes and supports the critical role State commissions must play to advance universal service and the deployment of advanced services. For example, in Section 706, Congress specifies that States (and the FCC) "***SHALL*** encourage the deployment…of advanced telecommunications capability." In 47 U.S.C. § 254 (b), the linkage between Congress's desire for States to promote advanced services and universal service is explicit. It *mandates* that the FCC explicitly base its policies to advance universal service (which includes both "advanced" and "information" services) on the existence of STATE mechanisms.

[19] On May 22, 2001, the Federal Communications Commission ("Commission" or "FCC") imposed an *interim* freeze of the Part 36 category relationships and jurisdictional cost allocation factors for price cap carriers and of the allocation factors for rate-of-return carriers. *Jurisdictional Separations and Referral to the Federal-State Joint Board,* CC Docket No. 80-286, Report and Order, FCC 01-162, (2001) (*2001 Separations Freeze Order*), released May 16, 2006, at 2, 9.

complete comprehensive review. When the FCC extended the freeze, it specified that it (1) would be of limited duration and (2) would be extended "no longer than three years . . . or until such comprehensive [separations] reform can be completed, whichever is sooner." [20] There is only a limited time available if even interim adjustments are to be made to the existing factors.

III. Early Termination Fees (ETF)

In August, Chairman Martin announced he would not be bringing up – a previously announced – draft order on ETFs. It is unclear when or if the FCC might act on the CTIA petition to determine such fees are rates. NARUC generally agrees with Chairman Martin: ETFs are not rates.[21] If the FCC made such a finding, industry attorneys will argue that the FCC is the only possible venue for customers with complaints to seek resolution. From a policy perspective, basing any FCC ETF rule on a legal finding that ETFs are Section 332 "rates" makes no sense. There is no possible justification to limit the number of State "cops" on the beat that can enforce the federal standard.[22] The federal government will *always* lack the manpower to help *all* consumers in *every* State. Moreover, in many cases, whatever assistance they may provide will be complicated by distance and time zones. As the FCC has acknowledged in other contexts, this means that even where federal standards may be appropriate, State/local governments must be allowed to enforce the federal standards using existing procedures and remedies – including perhaps more punitive measures for violations.[23] If the FCC chooses to establish a rule (without a finding that ETFs are "rates" within the meaning of 47 U.S.C. § 332), it is black letter law that that rule would be a de facto national *minimum* standard. It might even be possible to construct a rule that would be a federal ceiling. However, in either case, *there is no possible rationale for the FCC to limit consumer access to State remedies or penalties for federally defined inappropriate or abusive conduct*. Indeed, if the FCC chooses to establish such a standard, to avoid unnecessary and wasteful litigation at taxpayer expense, it should clarify both that ETFs are NOT Section 332 "rates" and that State enforcement of the federal standards using existing State enforcement

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[20] Id. at 16.

[21] See Kirby, Paul, "MARTIN INDICATES FCC WON'T RULE ETFs ARE PART OF WIRELESS RATE STRUCTURE" TR Daily, 13 December, 2007 ("FCC Chairman Kevin J. Martin told a Senate panel today that he doesn't think the FCC will rule that early termination fees (ETFs) imposed by wireless carriers are part of the rate structure, and thus exempt from oversight by states. He also indicated he doesn't think ETFs should be considered rates, as the wireless industry has urged.")

[22] Note, strictly speaking, it is black letter law that States can only do what their authorizing statutes allow. Technically, in the case of a national rule, States would be enforcing State law up to the federal standard.

[23] The FCC has frequently recognized States' core competency with respect to consumer protection. For example, a May 3, 2000 FCC order recognized, at ¶¶ 24-6, the clear benefits of leveraged enforcement, noting:

> Joint State-federal activities have been very effective in protecting consumers against *various types* of telecommunications fraud. It is imperative that the States and the FCC continue to cooperate, and expand their interaction, in order to eradicate slamming . . . the States are particularly well-equipped to handle complaints because they are close to the consumers and familiar with carrier trends in their region. . . .[E]stablishing the State commissions as the primary administrators of slamming liability issues will ensure that "consumers have realistic access to the full panoply of relief options available under both State and federal law." . . .Moreover, State commissions have extensive experience in handling and resolving consumer complaints against carriers . . . we conclude that State commissions have the ability and desire to provide prompt and appropriate resolution of slamming disputes . . . in a manner consistent with the rules adopted by this Commission. In most situations, State commissions will be able to provide consumers with a single point of contact for each State, thereby enabling slammed consumers to rectify their situations, receive refunds, and get appropriate relief with one phone call. State commissions also will be able to provide consumers and carriers with timely processing of slamming disputes. Finally, but of critical importance, States will provide a neutral forum." [emphasis added] *In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, CC Docket No. 94-129, FIRST ORDER ON RECONSIDERATION, 15 FCC Rcd 8158 (Rel. April 13, 2000).

mechanisms, including variable penalties/fines, as well as laws of general applicability, continues to be permissible.

IV. Universal Service Contribution Reform

It is rumored that Chairman Martin will circulate a draft order revising the contribution method for the federal universal service fund. Verizon has proposed the revenues be collected on the basis of phone numbers. Should the Commission adopt this proposal – it should also specify that State Universal Service fund assessments that mirror the Federal contribution mechanism do not "burden" the federal program within the meaning of 47 U.S.C. § 254.

If you have questions about this, or any other NARUC position, please to do not hesitate to contact me at 202.898.2207 or jramsay@naruc.org.

Sincerely,

James Bradford Ramsay
NARUC General Counsel

Appendix A

Resolution Regarding the Interconnection of New Voice Telecommunications Services Networks

WHEREAS, The benefits of competition can be measured by the continuous delivery of voice and advanced services to market from numerous types of telecommunications carriers as defined by the Telecommunications Act of 1996 (the Act) 47 U.S.C. 153 (44). These benefits are largely being realized across the United States due to innovations in technology guided by the principles set forth in the Act; *and*

WHEREAS, NARUC applauds the numerous advances in technology achieved by the telecommunications industry to enable the efficient transmission of voice telecommunications traffic and the continued successes in developing innovative means to deliver voice telecommunications services to consumers across the nation; *and*

WHEREAS, Interconnection of telecommunications carriers' networks for the exchange of voice traffic is essential to ensure that consumers continue to enjoy the benefits of robust competition and to receive voice services that are universally connected, reliable, secure, and of high quality; *and*

WHEREAS, Section 251 of the Act requires all telecommunications carriers to interconnect with the facilities and equipment of other telecommunications carriers; *and*

WHEREAS, The Act, in its imposition of interconnection requirements is technologically neutral and does not distinguish between circuit switched facilities and other network facilities that may be used to exchange voice telecommunications traffic; *and*

WHEREAS, Telecommunications carriers are substituting Next Generation Network technology in their networks in place of circuit switched technology in order to reduce the costs of providing voice telecommunications services and for other network management purposes; *and*

WHEREAS, The Federal Communications Commission (FCC) has determined that the exchange of voice telecommunications traffic between telecommunications carriers is subject to the interconnection obligations under Section 251 irrespective of the regulatory classification of the retail service provided to the ultimate end user; *and*

WHEREAS, NARUC recognizes that this resolution does not address the regulatory classification of telecommunications carriers, nor is it intended to influence any proposals to change said classification; *and*

WHEREAS, Section 252 of the Act provides State commissions with the primary responsibility to mediate, arbitrate and approve interconnection agreements between incumbent local exchange carriers and other telecommunications carriers; *and*

WHEREAS, NARUC recognizes that State commissions and the FCC will continue to work together to evaluate what rules, guidelines or performance standards are needed to ensure that telecommunications carriers are able to compete fairly with incumbent local exchange carriers; *and*

WHEREAS, NARUC recognizes that in emerging and competitive markets, incumbent and competitive telecommunications carriers each benefit from appropriate technologically neutral policies; *and*

WHEREAS, NARUC supports technical standards that allow all telecommunications carriers to interconnect with each other as the "network of networks" develops and that do not mandate the use of a particular technology or a specific network configuration; *and*

WHEREAS, Congress has clearly intended and NARUC has consistently advocated that the State commissions have a clear role to exercise their explicit authority under Sections 251 and 252; *and*

WHEREAS, NARUC recognizes that it is in the public interest for telecommunications carriers to interconnect their networks to exchange traffic in a technologically neutral manner, as provided for under Sections 251 and 252; *and*

WHEREAS, Insofar as State commissions have been at the forefront of implementing and enforcing the open market requirements of the Act and in working with the incumbent local exchange carriers and competitive telecommunications carriers alike to advance local exchange competition; *now, therefore, be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened at its 2008 Summer Meetings in Portland, Oregon, recognizes that State commissions should continue their active role in ensuring that consumers enjoy the full and unconstrained benefits of local competition for voice telecommunications services; *and be it further*

RESOLVED, That the NARUC General Counsel be directed to take any appropriate actions which protects the authority, under Sections 251 and 252, of State commissions and the preservation of telecommunications carriers' interconnection rights and traffic exchange obligations, under Sections 251 and 252, in a technologically neutral manner.

Sponsored by the Committee on Telecommunications
Adopted by the Board of Directors July 23, 2008

Appendix B

February 16, 2005 Resolution on the NARUC Intercarrier Compensation Task Force

WHEREAS, The Federal Communications Commission has issued a Further Notice of Proposed Rulemaking on numerous broad questions relating to intercarrier compensation; *and*

WHEREAS, A NARUC Task Force has been at work for more than a year evaluating the proposals of several industry groups and seeking consensus among those groups; *and*

WHEREAS, Pursuant to the recommendations of the Task Force, NARUC adopted a statement of policy principles for intercarrier compensation on May 5, 2004; *and*

WHEREAS, At the summer NARUC meeting in Salt Lake City, the Task Force sponsored a NARUC Meeting panel discussion of intercarrier compensation issues; *and*

WHEREAS, In the following months, the NARUC Task Force has conducted four additional multi-day meetings, in Missoula, Nashville, and Washington D.C. (twice), in each case meeting with from 20 to 40 plus stakeholders from the full range of telecommunications industries; *and*

WHEREAS, The NARUC Task Force has carefully reviewed and discussed a range of intercarrier compensation plans, including those proposed by interexchange carriers, rural local exchange companies and public advocates, as well as less formal input from the cable and wireless industries as well as individual companies; *and*

WHEREAS, The NARUC Task Force has published for comment "The Task Force" proposal for intercarrier compensation; *and*

WHEREAS, The Task Force proposal draws elements from several plans proposed by industry groups, but also proposes some new ideas; *and*

WHEREAS, The NARUC Task Force met in Washington, D.C., in January of this year with the stakeholder group of forty plus members to discuss the proposal and has reviewed and considered numerous oral and written comments from the stakeholders prior to and subsequent to the meeting in modifying the Task Force proposal; *and*

WHEREAS, The Task Force proposal would unify compensation by jurisdiction, by paying carrier, and by technology, would allow States to opt into a new national system of uniform rates, and would propose substantial reform of universal service mechanisms; *and*

WHEREAS, There are still key issues under active discussion and evaluation by the States and by NARUC, as well as by stakeholders that have participated in this process; *now therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened at its February 2005 Winter Meetings in Washington, D.C., asks the FCC to carefully consider the Task Force proposal as discussions continue on the Task Force proposal in an attempt to reach a still broader consensus on key issues; *and be it further*

RESOLVED, That the intercarrier compensation reform proposal that NARUC might ultimately endorse should adhere to the policy principles adopted on May 5, 2004, to the extent possible, and should seek support among all industry, consumer, and governmental stakeholders; *and be it further*

RESOLVED, That NARUC's General Counsel shall file comments at the FCC to that effect.

Sponsored by the Telecommunications Committee
Adopted by the NARUC Board of Directors February 16, 2005

Appendix C

THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS STUDY COMMITTEE ON INTERCARRIER COMPENSATION GOALS FOR A NEW INTERCARRIER COMPENSATION SYSTEM

May 5, 2004

I. INTRODUCTION:

Portions of the current intercarrier compensation system are rapidly becoming unsustainable. There is disagreement among stakeholders over the appropriate solutions. Various industry groups have been working separately to develop intercarrier compensation proposals. The proposals are reportedly designed to replace some or all of the existing intercarrier compensation mechanisms, and are expected to be submitted to the FCC. "Intercarrier compensation" controls how various carriers compensate one another for handling calls or for leasing dedicated circuits. "Reciprocal compensation," the fee for handling local traffic, has increasingly flowed from the Incumbent Local Exchange Carriers ("ILECs")[24] to the CLECs by virtue of such

24 A "local exchange carrier" is defined generally by the Telecommunications At of 1996 as any entity engaged in the provision of telephone exchange service or exchange access. In this document, it refers to both the traditional local providers of wire-line telephone service, referenced as the Incumbent Local Exchange Carriers or ILECs, and their competitors/any competing service, referenced in this document as Competing Local Exchange Carriers or CLECs.

developments as CLECs terminating an increasing share of ISP traffic. "Access charges" are intercarrier fees for handling toll traffic. "Long distance" or toll compensation between carriers existed for decades under the old AT&T Bell System monopoly, and it supported a portion of the cost of common wires and facilities. Following divestiture, "access charges" were created for toll traffic. The emergence of new communications technologies has placed stress on the current compensation system. Because it was assembled piecemeal over time, the current intercarrier compensation system has inconsistencies that can result in discriminatory practices, arbitrage or "gaming" of the current system, and other unintended outcomes. In hopes of leading to a balanced solution, a group of the NARUC's commissioners and staff has drafted this set of guiding principles against which the various proposals can be measured and evaluated. These principles address the design and functioning of, and the prerequisites to, a new intercarrier compensation plan. They do not address the amount or appropriateness of costs recovered by particular carriers through intercarrier compensation.

II. APPLICABILITY:

A. An integrated intercarrier compensation plan should encompass rates for interconnecting CLEC and ILEC local traffic as well as access charges paid by interexchange carriers.

B. CLECs, IXCs, ISPs, VoIP, wireless, and any other companies exchanging traffic over the Public Switched Telecommunications Network should be covered ("Covered Entities").

C. No Covered Entity should be entitled to purchase a service or function at local rates as a substitute for paying intercarrier compensation.

III. ECONOMICALLY SOUND:

A. The compensation plan should minimize arbitrage opportunities and be resistant to gaming.

B. Intercarrier compensation should be designed to recover an appropriate portion of the requested carrier's [25] applicable network costs. At a minimum, this will require compliance with the jurisdictional separations and cost allocation rules, applicable case law in effect at any point in time, and 47 U.S.C. §254(k).

C. A carrier that provides a particular service or function should charge the same amount to all Covered Entities to whom the service or function is being provided. Charges should not discriminate among carriers based on:
1. the classification of the requesting carrier;[26]
2. the classification of the requesting carrier's customers;
3. the location of the requesting carrier's customer;
4. the geographic location of any of the end-users who are parties to the communication; or,
5. the architecture or protocols of the requested carrier's network or equipment.

D. Intercarrier compensation charges should be competitively and technologically neutral and reflect underlying economic cost.

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25 "Requested carrier" means a carrier that receives a request for telecommunications service. An example would be a LEC that receives traffic for termination on the loop of one of the LEC's customers.

26 "Requesting carrier" means a carrier that requests another carrier to transport, switch, or process its traffic.

E. The intercarrier compensation system should encourage competition by ensuring that requested carriers have an economic incentive to interconnect, to carry the traffic, and to provide high-quality service to requesting carriers. In limited circumstances, carriers may voluntarily enter into a bill and keep arrangement.

F. Volume of use should be considered when setting intercarrier compensation rates. Available capacity may be used as a surrogate for volume of use.

G. Any intercarrier compensation system should be simple and inexpensive to administer.

IV. **COMPETITIVE INTERCARRIER MARKETS NOT PRICE-REGULATED:**

Market-based rates should be used where the market is determined to be competitive. A rigorous definition of "competitive market" is needed in order to prevent abuses.[27]

V. NON-COMPETITIVE INTERCARRIER MARKETS PRICE-REGULATED:

A. An intercarrier compensation system should ensure that telecommunications providers have an opportunity to earn a reasonable return and that they maintain high-quality service. It should also encourage innovation and promote development of competitive markets.

B. Government should limit the ability of carriers with market power to impose excessive charges.

C. Where charges are restricted by government action, carriers have the protections of due process, and confiscation is not permitted.

D. If any ILEC property or operations in the future could give rise to a confiscation claim, in a rate case or otherwise, then a practical way should be defined to exclude property and operations that are in competitive markets.

VI. APPROPRIATE FEDERALISM:

A. The reciprocal compensation system should ensure that revenues, cost assignment, and the risk of confiscation are jurisdictionally consistent for all classes of traffic.

B. State commissions should continue to have a significant role in establishing rates and protecting and communicating with consumers.

C. To avoid creating harmful economic incentives to de-average toll rates by some interexchange carriers, the FCC should have the authority to pool costs within its defined jurisdiction whenever intercarrier compensation rates are high in some areas.

D. State commissions should retain a role in this process reflecting their unique insights, as well as substantial discretion in developing retail rates for services provided by providers of last resort, whether a dual or unified compensation solution is adopted.

E. A proposal preserving a significant State role that fits within the confines of existing law is preferable.

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27 Markets that have been competitive can become non-competitive, requiring the re-imposition of regulation to protect consumers.

VII. UNIVERSAL SERVICE AND CONSUMER PROTECTION:

A. The transition to a new intercarrier compensation system should ensure continuity of existing services and prevent significant rate shock to end-users. Penetration rates for basic service should not be jeopardized.

B. A new intercarrier compensation system should recognize that areas served by some rural local exchange carriers are significantly more difficult to serve and have much higher costs than other areas.

C. Rural customers should continue to have rates comparable to those paid by urban customers. End-user basic local exchange rates should not be increased above just, reasonable, and affordable levels.

D. Any intercarrier compensation plan should be designed to minimize the cost impact on both federal and State universal service support programs.

VIII. ACHIEVABILITY AND DURABILITY:

A new intercarrier compensation system should not only recognize existing circumstances but should also anticipate changes at least over the intermediate term, and should provide solutions that are appropriately resilient in the face of change.

IX. PREREQUISITES FOR PLAN IMPLEMENTATION:

A. The estimated cost impact on a carrier-by-carrier basis, by State, must be computed before a decision is made whether to adopt a new intercarrier compensation plan.

B. The FCC should identify, quantify, and evaluate the total of all federal high cost universal service fund payments received by each company today. The federal universal service support mechanisms should be revisited as an intercarrier compensation plan is implemented to ensure that telecommunications services remain accessible and affordable to all Americans.

C. The FCC should be required to regularly revisit its cost allocation rules for regulated/nonregulated services. Costs that should not be recovered through regulated rates ought to be excluded from the computation of intercarrier compensation rates.

D. Before any new intercarrier compensation plan is implemented, the effect of the plan on local exchange rates, including both interstate and intrastate SLCs, should be computed.

E. Even when a referral to a Joint Board is not mandated by law, in order to ensure State input the FCC should make a referral, and the Joint Board should act on that referral, in an expedited manner. Similarly, referrals to Joint Conferences should be handled on an expedited basis.