



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

October 24, 2008

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

**RE: Filed in the proceedings captioned: *In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, 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 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***

Ms. Dortch:

On October 21, 2008, NARUC filed a motion in the above-captioned proceeding. That motion specifically requested the FCC put the comprehensive universal service and intercarrier compensation reform draft order and further notice of proposed rulemaking out for comment (*DRAFT ORDER*), noting that:

“... in the wake of the credit crisis still reverberating throughout the U.S. economy, the FCC is rushing to resolve a thirteen billion dollar problem [] based on insufficient information, an inadequate record, and an incredibly compressed deliberative period. There is no need to do so. The FCC can easily respond to the Core remand on November 4<sup>th</sup> separately and then later address broader issues after [creating] a proper record for action.” [footnote omitted]

On October 23, 2008, NARUC leadership, and other commissioners that signed the October 21 letter, spoke for a little over an hour by conference call with FCC Chairman Kevin Martin and his staff – FCC Chief of Staff Dan Gonzalez, Wireline Competition Bureau Advisor Amy Bender, and Wireline Competition Bureau Chief Dana Shaffer. NARUC members present on the call included:

Ray Baum (OR)	Chair, NARUC Telecommunications Committee <i>State Chair – Federal State Joint Board on Universal Service</i> <i>Former Chair – NARUC Task Force on Intercarrier Compensation</i>
Maureen Harris (NY)	CoVice Chair – NARUC Telecommunications Committee
Daryl Bassett (AR)	CoVice Chair – NARUC Telecommunications Committee
Anne C. Boyle (NE)	Chair, NARUC Consumer Affairs Committee
Eddie Roberson (TN)	Vice Chair – NARUC Consumer Affairs Committee
Larry S. Landis (IN)	<i>State Chair, Federal State Joint Conference on Advanced Services</i> <i>Member, Federal State Joint Board on Universal Service</i> <i>Former Vice Chair – NARUC Task Force on Intercarrier Compensation</i>
Mark K. Johnson (AK)	<i>State Chair, Federal State Joint Board on Separations</i>
Philip B. Jones (WA)	Chair, Legislative Subgroup, NARUC Telecommunications Committee <i>Alumnus – NARUC Task Force on Intercarrier Compensation</i>

Tony Clark (ND)	Former Chair, NARUC Telecommunications Committee <i>Alumnus – NARUC Task Force on Intercarrier Compensation</i>
Steve Kolbeck (SD)	<i>Member, Federal State Joint Board on Separations</i>
Lisa Edgar (FL)	<i>Member - Federal State Joint Board on Universal Service</i>
Krista Tanner (IA)	Telecommunications Committee

Also on the call, several experts from the staff of several commissions - Lori Kenyon(AK), Mike Hyble(NE), Sue Vanicheck(NE), Rolayne Wiest (SD), John Ridgeway (IA), and Frank Bodien(IA), along with - from NARUC - Executive Director Charles Gray and the undersigned, General Counsel, Brad Ramsay.

During the call, Chairman Martin broadly described the *DRAFT ORDER* and responded to a number of concerns raised about some descriptions and some apparent deficits. The Chairman was gracious and very generous with his time, *but a myriad of questions about key details of the decision remain opaque and “un-elucidated”, e.g.,* the rumored “edge proposal”, the scope of preemption proposed, the broad impact and details of the underlying legal rationale, the details of the proposed methodology that reportedly will guide State ratemaking for reciprocal compensation in later years (while apparently severely constraining retail ratemaking authority), the economic analysis underlying the chosen methodology, etc.

### *The Pre-Requisite For a Legally Sustainable And Properly Vetted Commission Decision: ADDITIONAL COMMENT*

NARUC advocacy on the call was limited to (1) the propriety of preemption and (2) the consequences of proceeding without creating a proper record and allowing adequate deliberation. Individual commissioners raised specific concerns about the potential impact of the order and States’ inability to both (i) divine the scope and details of the proposal – including a new methodology proposed for ALL intercarrier compensation, and (ii) simultaneously provide any useful record input on the possible impact of the order. This task was (and is) impossible given:

[i] Continuing conflicting rumors of what the order does and how it may be changing; and

[ii] The incredibly compressed deliberative period during which advocacy was/is permitted, *i.e.*, the 9 business days between when the order was circulated on October 10 at midnight and October 28 - the day additional advocacy is prohibited by under FCC rules;<sup>1</sup> and

[iii] The fact that many FCC Commissioners were/are on official travel – for – in some cases over a week, during the nine days when advocacy by NARUC members was/is permitted.<sup>2</sup> This is a new and complex

<sup>1</sup> See, 47 C.F.R. § 1.1203 (“(a) With respect to any Commission proceeding, all presentations to decision-makers concerning matters listed on a Sunshine Agenda, whether ex parte or not, are prohibited during the period prescribed in paragraph (b) . . .(b).The prohibition set forth in paragraph (a) . . .applies from the release of a public notice that a matter has been placed on the Sunshine Agenda until . . .”) Available at: [http://www.fcc.gov/ogc/admain/ex\\_parte\\_current.pdf](http://www.fcc.gov/ogc/admain/ex_parte_current.pdf).

<sup>2</sup> The Chairman released the draft midnight October 14, 2008. Sunshine drops October 28. *Excluding transit time*, all 5 FCC Commissioners were in Nashville, TN for an agenda meeting Oct. 15th, Mr. Copps was in Denver and Mr. Martin was in Charlotte, NC Oct. 16, Mr. Copps stayed in Denver Oct 17, Mr. Adelstein was in Portland, OR, Oct. 20, Yakima, WA, Oct 21, Spokane, WA, Oct 22, and Seattle, WA, Oct 23, Ms. Tate was in Greece (& the Chairman was scheduled to speak) at least Oct 21-22, and finally, Mr. Copps is in Baltimore, MD Oct 27. See, FCC Press Releases (1) *FCC to Hold Open Commission Meeting, October 15<sup>th</sup> in Nashville, Tennessee.* (10/8/08) at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-285962A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-285962A1.pdf); (2) *Commissioner Copps to Visit Denver, CO, for DTV Outreach* (10/10/08) at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-286009A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-286009A1.pdf); (3) *Chairman Martin to Visit Charlotte, NC for DTV Outreach.*(10/15/08); (4) *Commissioner Copps' Remarks* October 17 at the Cable Center, Key Issues Series in Denver (10/17/08) at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-286130A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-286130A1.pdf); (5) *Commissioner Adelstein to Visit Portland, Yakima, Spokane and Seattle for DTV Outreach* (10/10/08) at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-286023A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-286023A1.pdf); (5) *Commissioner Tate's Remarks at the Global Forum 2008* (10/21/08) at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-286177A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-286177A1.pdf); (The Chairman was

proposal. Because of the travel, FCC Commissioners have had significantly less time than usual to focus on, much less assimilate, the DRAFT ORDER. For the first week after release, no one had confirmed official details on the rumored approach taken in the draft. Even now, one business day before sunshine – critical details remain unknown. Indeed, in an October 17<sup>th</sup> speech (in Denver) – seven days after the *DRAFT ORDER* was circulated and six and ½ days before “Sunshine”, FCC Commissioner Copps said, referring to the four complex and controversial items on the November 4 official agenda: “Talk about top heavy.... Seriously, we’re just beginning to see some of these items, they are obviously deep in the weeds, *and I don’t think most of my colleagues feel comfortable yet in saying much about them.*”<sup>3</sup> Under these conditions, it was (and is) impossible for the FCC’s State colleagues – including those on the Joint Boards impacted by this proposal – to discover and address Mr. Copps’ and other decision-makers’ questions and concerns, much less present directly cogent and relevant evidence on the proposals for the record.

### *The Deadlines (or lack thereof)*

During this exchange, the Chairman remained resolute that an additional comment period is not possible because of the Court’s deadline on the Core remand – and the statutory requirement to act on the Universal Service Joint Board members’ recommendation within one year of its release (by November 21).

However, as noted in NARUC’s October 21 motion – and reiterated above - the FCC can easily respond to the Core remand on November 4<sup>th</sup> separately and then later address broader intercarrier compensation issues. **There is no deadline for action on comprehensive intercarrier compensation reform.**

As for the Section 254(a)(2) requirement to “complete” proceedings on the Universal Service Joint Board’s recommendation – if the Commission seeks comment on this combined proposal as requested, it seems unlikely any mandamus would lie before the FCC could complete the comment cycle and proceed to an order. A Court is unlikely to be able to act before the commission can seek comment and act on the resulting record.<sup>4</sup> Moreover, there are exigent factors that excuse a short extension, and, more significantly, a majority – and perhaps a supermajority - of the Joint Board members that made the original recommendation – are likely to concur that a short delay is critical to assure the FCC has a proper basis on which to proceed. Indeed, *three of the four State commission members have already asked for this extension* (by signing the Oct 21 motion) - in part to assure that they have an actual opportunity to exercise their right – as mandated by Congress - to:

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also scheduled to speak Oct. 22 there, see <http://www.cawa.fr/global-forum-shaping-the-futur-2008-article002281.html>); (7) *Commissioner Copps to Visit Baltimore, Maryland for DTV Outreach* (10/22/08) at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-286219A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-286219A1.pdf).

<sup>3</sup> FCC Press Release: *Commissioner Copps’ Remarks October 17 at the Cable Center, Key Issues Series in Denver, Colorado* (10/17/08). (“Next up is our Commission meeting on Election Day, November 4. I can hardly wait for that one. Let’s see—for openers we have Universal Service reform. Then the tangled web of Intercarrier Compensation. A couple of little transactions involving Sprint-Clearwire and Verizon-Alltel. And a non-controversial spectrum issue about something called “white spaces.” Talk about top-heavy! I’ve put in for my absentee Presidential ballot for that day, as I think Commissioners will all be trapped on the 8th floor all day and night on the 3rd and I frankly wonder if we’ll be able to convene on the 4th before the polls close in California. Seriously, we’re just beginning to see some of these items, they are obviously deep in the weeds, and I don’t think most of my colleagues feel comfortable yet in saying much about them.”) Available at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-286130A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-286130A1.pdf).

<sup>4</sup> See, e.g., *In re Center for Auto Safety*, 793 F.2d 1346 (D.C. Circuit 1986) (In this case, the Center for Auto Safety filed its petition for a writ of mandamus in JUNE 1985. The National Highway Traffic Safety Administration (NHTSA) prescribed final light truck CAFE standards for model year 1987, 1988, and issued an NPRM for model year 1989 before the court managed to issue a decision in JUNE 1987 – *one year after the petition was filed*. Petitioners filed to compel to immediately promulgate 1987 model year standards and to comply with the deadline under 15 U.S.C.S § 2002(b) in the future. The NHTSA was required to promulgate fuel economy standards for light trucks 18 months before the start of each model year, but missed the deadline several years in a row. After the action was filed, the NHTSA acted as noted, supra. The court declined to issue the writ, but did retain jurisdiction until the NHTSA published the 1989 standards.)

“participate in the deliberations, but not vote, when [the commission] has under consideration the recommended decision of the Joint Board or any further decisional action that may be required in the proceeding.” 47 U.S.C. § 410(c)(1978)

*Obviously, none of the Universal Service Joint Board commissioners have been able to exercise this Congressionally mandated – and critical safeguard – because even now they lack critical details about how the intercarrier compensation reform intersects with universal service policy. This right to participate in deliberations cannot be exercised without access to the same level of detail as other commissioners involved in the process.*

NASUCA, which nominates the fifth State member to the Joint Board, has already endorsed, on the record, NARUC’s October 21 motion. Moreover, the undersigned believes a minimum of four – if not all five – State members who signed the original UNANIMOUS recommendation – currently support either action on the original November 21, 2008 joint board proposal *in toto* – or the October 1, 2008 proposed extension to seek comment.

*If the Chairman, or any other of the three federal members of the USF Joint Board concur in seeking additional time on the recommendation (i.e., a supermajority of the board),* it is difficult to conceive of that any court would choose impose a mandamus and cut short a measured, and by any standards more prudent, examination of the *DRAFT ORDER* – particularly given:

- (1) the large sums involved,
- (2) the broad and far reaching impact on a host of business operations across the country,
- (3) the potential impact on broadband rollout (and universal service) in rural areas and existing State programs,
- (4) the breathtaking shift in regulatory responsibilities between federal and state regulators, and finally,
- (5) the fragile state of global credit markets and the U.S. economy.

### *Other Concerns*

Yesterday’s call with the Chairman was the first opportunity for those on the call to confirm at least some of the rumors about the broad contours of the FCC *DRAFT ORDER*. NARUC has not taken any position on how we believe the *DRAFT ORDER* – as described - may treat mid-size carriers. Nor has NARUC taken any position on how we believe that draft, or the Federal State Joint Board’s November 21, 2007 Recommended Decision, treats broadband rollout in areas served by the large Bell Operating Companies.

However, the FCC’s *ex parte* rules require any statements to an FCC decision maker that may be construed to support or oppose any particular position must be disclosed via a written *ex parte*. The Chairman is clearly an FCC decision maker. There were some exchanges between the individual commissioners and the Chairman that had clear advocacy overtones about the treatment of mid-size carriers and broadband rollout in areas served by large Bell Operating Companies.

### *The Commission’s Analysis of The Potential of Overearnings for Mid-size Carriers.*

It became apparent during the conversation, that the Chairman’s general descriptions of how some carriers are treated – indicated FCC has concerns about mid-size carriers and alleged but unspecified overearnings. It was also apparent that several commissioners, based on information available to them as State regulators, were skeptical of those concerns. Those commissioners asked questions and made statements that suggested the impact of the approach of the draft - as generally described - might not be in the public interest. Some NARUC members wished to identify the sources for the data examined by the FCC that raised those concerns, and wished to discover if the FCC had in fact compiled any specific data to quantify alleged overearnings and/or included such evidence in the record as a basis for the differential treatment.

*Concerns That the Draft Order Does Not address Broadband Rollout in Areas Served by the Large Bell Operating Companies.*

If the FCC adopted the Joint Board's 2007 Recommended Decision, States would be able to use funds to support broadband in underserved areas regardless of the carrier involved or the technology deployed. There were some exchanges between the Chairman and individual commissioners that indicated the *DRAFT ORDER* may have serious deficits on build out in key underserved areas. This is because, apparently, the draft order does not have any provisions that would promote roll out of broadband in the significant areas of the country served by certain large carriers. The *DRAFT ORDER* apparently compounds that deficit by assuring those same carriers will realize significant cost savings if its' proposed framework is adopted.

If you have any questions about this letter, please do not hesitate to contact any of the undersigned or J. Bradford Ramsay at 202.898.2207 or [jramsay@naruc.org](mailto:jramsay@naruc.org).

**Respectfully Submitted,**

**/s/ James Bradford Ramsay**

**James Bradford Ramsay  
NARUC General Counsel**

cc: Chairman Kevin Martin  
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