

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of	)	
	)	
NARUC Petition for Clarification	)	
or Declaratory Ruling That No	)	WC Docket 09-193
FCC Order or Rule Limits State	)	
Authority to Collect Broadband Data	)	
_____	)	

**Comments of the United States Telecom Association**

In response to the Petition filed by the National Association of Regulatory Utility Commissioners (*NARUC Petition*) on September 25, 2009, the United States Telecom Association (USTelecom) files the following brief comments.<sup>1</sup>

**Background**

Over the past several years, USTelecom member companies have worked hand-in-hand with agencies representing numerous states to support successful public-private cooperative broadband mapping efforts. As the *NARUC Petition* itself points out (although while failing to note the voluntary nature of these efforts), both the Commission and Congress have recognized the success of these public-private partnerships, such as Connect Kentucky.

Additionally, USTelecom member companies are currently providing data to state-designated awardees approved by the Commerce Department's National Telecommunications &

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<sup>1</sup> USTelecom's comments are necessarily brief given the unusually short comment period provided by the Commission for thoughtful consideration of this item. On October 22, 2009, nearly four weeks after the *NARUC Petition* was filed, the Commission released a *Public Notice* providing 7 business days for interested parties to submit comments and another 5 business days for submission of reply comments. *See Comments Sought on NARUC Petition for Clarification or Declaratory Ruling Regarding State Authority to Obtain Broadband-Related Data*, DA 09-2286 (October 22, 2009) (*Public Notice*).

Information Administration (NTIA) pursuant to the Broadband Data Improvement Act (BDIA). Following cooperative discussions with the agency, USTelecom has pledged to encourage its member companies to cooperate with the efforts of state mapping awardees in gathering the data designated by NTIA. We are unaware of any specific claims from any of these state awardees that broadband providers have been refusing to cooperate with requests that are consistent with the NTIA requirements. This broadband data, which will be collected twice a year, will be shared with the States subject to appropriate confidentiality safeguards.

And, of course, USTelecom member companies are providing a separate set of broadband data to the Commission twice a year via their Form 477 filings. The Commission recently completed its second bi-annual collection pursuant to the new, more granular requirements adopted last year.

### **NARUC's Petition**

The *NARUC Petition* asks the very broad and open-ended question of whether any “*FCC-issued order or regulation limits State authority to collect any data from any broadband infrastructure or service provider.*”<sup>2</sup> (italics in original). In the *Public Notice*, however, the Commission chose to reformulate the issue as whether “the Commission has *preempted* state-mandated collection of data regarding broadband infrastructure and services.”<sup>3</sup> These are potentially very different questions with potentially different answers. In particular, the Commission’s re-write of the question posed by NARUC could be interpreted as excluding the fundamental inquiry of whether any particular state commission has the regulatory jurisdiction that would be a necessary prerequisite to a mandatory data collection.

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<sup>2</sup> *NARUC Petition* at p. 1.

<sup>3</sup> *Public Notice* at 1 (italics added)

Adding to the confusion is the reference in the *Public Notice* to the *preamble* of the Broadband Data Improvement Act in a manner that would suggest the Commission has pre-determined the answer to its own question. To the extent the question being presented is whether the Commission has done anything that would bar further *voluntary public-private partnerships* to develop broadband mapping data, this conclusion makes sense given the BDIA’s positive reference to such cooperative efforts.<sup>4</sup> But to the extent the question is whether the BDIA grants or supports any state jurisdiction to *mandate* such data collections, the conclusion is completely counter-intuitive. Such a leap of logic would entirely ignore the rest of that legislation, which establishes a detailed *federally-run* program by which *U.S. Department of Commerce* determines what data is appropriate and the manner in which it is to be collected—and then shares that data with the States subject to conditions established by the *federal government*.<sup>5</sup>

Finally, to the extent the question presented is whether states have authority to mandate broadband data from providers or others, any reliance on BDIA would ignore the fact that both NTIA and NARUC itself have acknowledged that the BDIA does not create any authority under which NTIA can require broadband providers to submit data—let alone giving States such authority.<sup>6</sup> While BDIA recognizes a State rule in broadband mapping, it is a very narrowly

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<sup>4</sup> BDIA Section 102(4).

<sup>5</sup> Indeed, the references in the applicable footnote in the Public Notice are all to parts of the BDIA that impose tasks on federal agencies, either NTIA or the Commission. *Public Notice* at n. 2.

<sup>6</sup> As the resolution attached to the NARUC Petition acknowledges, other than those which voluntarily commit to submitting data as a condition for receiving stimulus funds pursuant to the ARRA, there is no obligation in the BDIA that requires broadband service providers to submit mapping data to the States. *See NARUC Petition* at Attachment A, p. 8. Recognizing the lack of such authority either itself or the State mapping agents, NTIA explained that it reserved the right to “request that the *FCC* exercise its authority to compel data production from any broadband services provider subject to its jurisdiction.” NTIA Mapping NoFA at p. 39 (italics added).

tailored role that is limited to facilitating the efforts assigned to NTIA and pursuant to the rules set forth by NTIA's in its mapping Notice of Funds Availability.

In similar fashion, the *NARUC Petition* points to a Commission order citing with approval an existing state data collection effort as supporting its position while failing to note that *in that very same paragraph upon which it relies*, the Commission emphasized that the benefits derived from the Connect Kentucky project were a testament to the voluntary “public-private partnership” approach it utilized—rather than any mandatory data collection.<sup>7</sup> And, of course, the Commission tentatively concluded in the following paragraph of that order that *it – not the States – should collect broadband data* and, specifically, asks for comment on ways it might share this data with others, including States, while maintaining the confidentiality of such information.<sup>8</sup> Contrary to NARUC's apparent argument, this can hardly be read as any sort of acknowledgement on the part of the Commission that states have the authority to undertake their own mandatory broadband data collection efforts.

### **Discussion**

To the extent that the Commission is asking whether any act or order it has issued would bar cooperative voluntary broadband data efforts between states and providers, the answer is certainly no. Indeed, all of the authority referenced in the *NARUC Petition* encourages precisely those types of voluntary public-private efforts. Moreover, USTelecom's member companies have supported these efforts and will continue to do so provided they involve requests that are not unduly broad or burdensome.

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<sup>7</sup> *In re Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriber Data, and Development of Data on Interconnected Voice Over Internet Protocol Subscriber Data*, Report and Order and Further Notice of Proposed Rulemaking, 23 F.C.C.R 9691, para. 34 (March 19, 2008).

<sup>8</sup> *Id.* at para. 35.

However, the breadth of the *NARUC Petition* – “limits State authority to collect *any* data from *any* broadband infrastructure or service provider”— appears to be asking the Commission to jump over the gating question of the extent to which state commissions possess such jurisdiction in the first place. The Commission has repeatedly concluded that broadband internet access service is an interstate information service, irrespective of the platform over which it is offered.<sup>9</sup> Accordingly, such services, whether delivered over wireless, wireline, or other platforms, are subject to the sole regulatory jurisdiction of this Commission. Moreover, the question would appear to encompass other entities over which state commissions typically have no or limited jurisdiction, including not only broadband providers, but also private networks and manufacturers of broadband infrastructure. In contrast, state commission jurisdiction is typically limited to intrastate telecommunications services and in many case they are expressly prohibited from regulating broadband services.

The Commission is not empowered to expand the state statutory limits on state commission jurisdiction. Nor is there any good policy reason here for the Commission to ignore these jurisdictional limits. Huge amounts of data on broadband deployment and adoption are already being gathered by appropriate decision-makers through the Commission’s Form 477 submissions and NTIA’s broadband mapping efforts. Each of these will be collecting different data sets twice a year, already imposing significant cost and resource burdens on broadband

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<sup>9</sup> See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005); *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, FCC 06-165 (2006).

providers submitting data.<sup>10</sup> Layering 50+ state utility commission mandates—potentially each requiring different data sets in different formats—serves only to divert tremendous resources from the efforts of broadband providers to actually deploy broadband facilities and adds to the costs that consumers must pay for broadband.

Beyond these collections, there are innumerable third-party sources that are continually gathering and updating databases on such information as broadband availability, speeds and prices—all available to States for purchase or on publicly accessible web sites. And much of the information sought by states can be obtained through consumer surveys or other sources more readily than it can be obtained by broadband service providers. Indeed, NARUC identified a single piece of information a state might need that is different from that already being collected or available from other sources—and if it can, it is entitled to raise such concerns with the federal agencies.

In conclusion, if the Commission chooses to use its discretionary authority to address the NARUC Petition, it must emphasize that any state authority to compel information is limited to the state commission's jurisdiction.

Respectfully submitted,



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November 2, 2009

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<sup>10</sup> It should be noted that while, NTIA will be awarding up to \$350 million to States and state awardees to support these mapping efforts, we are unaware that any offers from the states to defray the significant costs incurred by broadband providers in providing this data.