

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

National Association of Regulatory Utility)	WC Docket No. 09-193
Commissioners Petition for Clarification or)	
Declaratory Ruling that No FCC Order or Rule)	
Limits State Authority to Collect Broadband Data)	
)	

**REPLY COMMENTS OF THE
PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA**

The Public Service Commission of the District of Columbia (“DC PSC”) hereby submits these Reply Comments in the above-captioned proceeding, a Petition for Clarification or Declaratory Ruling filed by the National Association of Regulatory Utility Commissioners (“NARUC”) on September 25, 2009.¹ The *NARUC Petition* asks the Federal Communications Commission (“FCC” or “Commission”) to clarify or declare “that no FCC-issued order or regulation limits State authority to collect any data from any broadband infrastructure or service provider.”²

BACKGROUND

The *NARUC Petition* was inspired by the frustration of state officials in their efforts to begin preparing for the National Telecommunications and Information Administration (“NTIA”) State Broadband Data and Development Grant Program. That Program funds projects that collect state-level broadband mapping data, develop state-level broadband maps, aid in the development and maintenance of a national broadband

¹ *Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data*, September 25, 2009, WC Docket No. 09-193 (“*NARUC Petition*”); Public Notice, DA 09-2286 (October 22, 2009) (“*Public Notice*”)

² *NARUC Petition* at 1.

map and fund statewide initiatives aimed at broadband planning activities.³ It was established by the American Recovery and Reinvestment Act of 2009⁴ and the Broadband Data Improvement Act.⁵ Nevertheless, state officials have been encountering some resistance to their initial efforts to begin collecting data for the NTIA grants. In the past, as described by the NARUC Petition, some state efforts had been rebuffed on the grounds that state action was preempted by actions of the FCC.⁶ Whether the FCC had in fact preempted states' data collection was discussed by the NARUC Committee on Telecommunications and a Resolution was adopted by the NARUC Board of Directors on July 22, 2009. That Resolution, attached to the *NARUC Petition*, asked the FCC to grant a petition for declaratory ruling declaring, not only the importance of expanding the scope of available broadband services data, but also that

the FCC has not asserted any general preemption of any State actions requiring broadband service providers to submit specific information, at an appropriate level of granularity as determined by the State, on broadband service locations, speeds, prices, technology and infrastructure within the State, provided such State agrees to provide a minimum level of data confidentiality and protection as required by the [Broadband Data Improvement Act] at 47 U.S.C. § 1304.⁷

The present *NARUC Petition* is the direct result of that Resolution.

³ NTIA Notice of Funds Availability, State Broadband Data and Development Grant Program, 74 Fed. Reg. 32545 (July 8, 2009) (“NoFA”). On October 26, 2009, NTIA announced the award of a grant to the District of Columbia Office of the Chief Technology Officer (“DC OCTO”) for almost \$1.5 million. On the same day, NTIA announced the award of grants to ConnectArkansas and the New York State Office of Cyber Security & Critical Infrastructure. See Press Release: *NTIA Awards Grants for Broadband Mapping and Planning in Arkansas, the District of Columbia and New York*, October 26, 2009.

⁴ Public Law 111-5 (February 17, 2009) (“Recovery Act”).

⁵ Title I of Public Law 110-385, 122 Stat. 4096 (October 10, 2008) (“BDIA”).

⁶ See *NARUC Petition* at n. 3.

⁷ *Id.* at Appendix B.

COMMENTS FILED

The *NARUC Petition* is supported by the California Public Utilities Commission (“CPUC”) and the Michigan Public Service Commission (“MPSC”). Both Commissions note that Congress intended the states to play a key role in efforts to promote the nationwide deployment and adoption of advanced services.⁸ Both Commissions also note the data collection mission created by Congress for the states in the Recovery Act and in BDIA.⁹ MPSC and CPUC both support a ruling that would put an end to the frustrations and obstacles states face in assuming their responsibilities.

Opposing grant of the Petition, to the extent it would presume to give states the authority to impose data collection requirements on broadband service providers, are the United States Telecom Association (“USTelecom”), Verizon and Verizon Wireless (“Verizon”), and AT&T Inc. (“AT&T”). USTelecom notes that 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 prerequisite to mandatory data collection.¹⁰ Thus, the FCC is being asked to jump over the “gating” issue of the extent to which state commissions have the necessary jurisdiction.¹¹ Similarly, Verizon asks that the FCC reject any efforts to expand the role of states over broadband data collection in ways that would ignore the interstate nature of broadband services.¹² AT&T recognizes the important role that state agencies can play in helping to achieve national goals of 100% broadband deployment.¹³ AT&T also notes that it has been a voluntary participant in various state-level broadband mapping efforts across the country and that it looks forward to continuing these and similar programs in the future.¹⁴ To the extent that the NARUC Petition is intended to confirm that such voluntary

⁸ CPUC Comments, November 2, 2009, at 2; MPSC Comments, November 2, 2009, at 2.

⁹ CPUC at 2-3; MPSC at 2.

¹⁰ USTelecom Comments, November 2, 2009, at 2.

¹¹ *Id.* at 5.

¹² Verizon Comments, November 2, 2009, at 1-2.

¹³ AT&T Comments, November 2, 2009, at 1.

¹⁴ *Id.*

programs are consistent with federal policy, AT&T is in support.¹⁵ However, to the extent that the NARUC Petition asks for a sweeping declaration that there are no limits on state authority to collect any data from any broadband infrastructure or service provider, AT&T is opposed and asks that the Petition be denied.¹⁶

DISCUSSION

The DC PSC supports the *NARUC Petition*. We share the frustrations and obstacles facing other states as they prepare to engage in the broadband mapping and deployment responsibilities that Congress has given them, and which they accept willingly. States and their designated entities are eager to participate in the opportunities afforded by the Recovery Act and the BDIA. Our goals are the same as those of the service providers and of the FCC: 100% national broadband availability and affordability.

The service provider commenters wish to rely on voluntary compliance with state data collection efforts. We don't believe that voluntary efforts on the part of broadband service providers will be sufficient to achieve that 100% goal. First, some providers will simply not respond. In fact, this has been our recent experience. On June 2, 2009, the Chairman of the DC PSC, Betty Ann Kane, sent a letter to each broadband service provider doing business in the District requesting a copy of their most recent Form 477 in order to help the District seek funding under the BDIA and the Recovery Act. Most service providers responded helpfully, but Verizon Wireless and AT&T Wireless refused to provide the data, citing the DC PSC's lack of jurisdiction over their services. Second, when some service providers do not provide data, the results are incomplete, if not inaccurate. Certainly this is what NTIA was trying to avoid when it set out the requirements in its July 8, 2009 NoFA. There, NTIA set out the requirement that grant awardees (that is, the States or their designated entities) shall provide, *for each facilities-based provider of broadband service*, a list of all addresses at which broadband service is available to end users.¹⁷ NTIA is not interested in the particulars of just *some* of the

¹⁵ Id.

¹⁶ Id. at 1-2.

¹⁷ NoFA, 74 Fed. Reg. at 32557.

broadband service providers, but asks for data about *each*. Absent universal voluntary compliance, which experience tells us is unlikely, awardees run the risk of being unable to satisfy the NTIA directive. Third, our suspicions about voluntary compliance were heightened this summer when a coalition of major industry trade associations, as well as Comcast, AT&T and Verizon, sent a letter to Assistant Secretary Lawrence Strickling, NTIA Administrator. That letter offered some suggestions regarding changes that should be made to data collection under the NoFA, including enhanced confidentiality guarantees, changes in the granularity required, and the elimination of Average Revenue Per User data. However, all the signers would commit to doing, if the suggested changes were made, would be to encourage cooperation with state mapping awardees.¹⁸ In other words, if NTIA met the demands of the broadband providers, they would commit to encouraging volunteerism. This is not sufficient if we are to meet the goal of 100% availability and affordability.

The first step toward achieving that goal is to remove uncertainty about whether the FCC has issued any “order or regulation that limits State authority to collect any data from any broadband infrastructure or service provider.” That is all the *NARUC Petition* asks. The *Public Notice* inviting comment on the *NARUC Petition* noted that it is unclear what basis, if any, there might be for a claim that the Commission has preempted state-mandated collection of data regarding broadband infrastructure and services.¹⁹ The Commission asked that any party claiming that state data collection is preempted explain in detail the basis for such claim.²⁰ Not one of the parties opposing the Petition has done so. In simple fact, there is no FCC order or regulation that preempts state authority and the FCC should speedily say so.

¹⁸ See August 6, 2009 Letter to Lawrence E. Strickling from Mathew M. Polka, American Cable Association, Curt Stamp, Independent Telephone and Telecommunications Alliance, John Rose, Organization for the Promotion and Advancement of Small Telecommunications Companies, Todd B. Lantor, Rural Cellular Association, Larry James, COMPTTEL, Kathy Grillo, Verizon, Fred Campbell, Wireless Communications Association International, Kelly Worthington, Western Telecommunications Alliance, Kathryn A. Zachem, Comcast Corporation, Robert W. Quinn, AT&T, Walter McCormick, US Telecom, Kyle McSarrow, National Cable & Telecommunications Association and Caressa Bennet, Rural Telecommunications Group.

¹⁹ *Public Notice* at 1.

²⁰ *Id.*

As to the “gating” question of the authority for the States to collect such data, this issue was not part of the NARUC Petition and the Commission was not asked to rule on this issue. Further, the DC PSC takes no position as to whether such authority exists in any particular State. We also take no position on whether, if such authority existed, it would conflict with federal law to the extent that such State authority would be preempted. However, we note that States have participated in the FCC dockets and NTIA proceedings aimed at establishing data collection parameters.²¹ We recognize that, to be valuable, broadband data collection efforts must have some degree of uniformity. The DC PSC is not concerned, as USTelecom is, about “layering 50+ state utility commission mandates - potentially each requiring different data sets in different formats.”²² We think it highly unlikely that data collection efforts designed to create a national broadband map will vary, to any meaningful degree, by state. Awardees will surely follow the NTIA template for collecting information. We note that in the Comments filed jointly in FCC GN Docket 09-51 by the DC PSC and the New Jersey Board of Public Utilities, we recommended that the FCC conform the granularity of its data gathering efforts to those of NTIA insofar as possible. We recommended that Form 477 be changed to gather data at the “address level”, or at the very least, at the census block level, rather than at the census tract level currently used in Form 477 by the FCC. We also emphasized the need for data collection coordination among participants.²³ We think this practical and pragmatic approach is likely to be followed by every State. Thus, we do not believe it likely that any state data collection effort would conflict with the federal system of data collection, or with any other aspect of the FCC’s regulation of interstate broadband services. In any case, this issue is not before the FCC at this time. All the Commission is being asked to do is remove any uncertainty about whether it has issued any orders that would limit state authority to collect data from broadband service

²¹ See, e.g., the Comments filed on July 30, 2009 in GN Docket No. 09-51, *A National Broadband Plan for Our Future*, by State Commissions from Colorado, Massachusetts, Nebraska, California, Missouri and jointly by the District of Columbia and New Jersey.

²² USTelecom Comments at 6.

²³ Comments of the Public Service Commission of the District of Columbia and the New Jersey Board of Public Utilities, GN Docket 09-51, July 30, 2009, at 4.

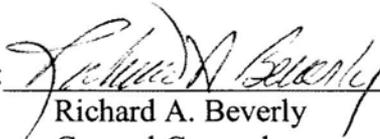
providers. We ask the Commission to grant the *NARUC Petition* and declare that it has not issued any such orders.

CONCLUSION

For the foregoing reasons, the Public Service Commission of the District of Columbia urges the FCC to speedily grant the *NARUC Petition*.

Respectfully submitted,

THE PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

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November 9, 2009