

**Before the
Federal Communications Commission
WASHINGTON, D.C. 20554**

In the Matter of)
Framework for Broadband Internet Service) **GN Docket No. 10-127**
)
)

**COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

On June 17, 2010, in response to an April 6, 2010 decision of the United States Court of Appeals for the District of Columbia Circuit¹ the Federal Communications Commission (“FCC” or “Commission”) released a Notice of Inquiry (NOI) seeking comment on the “legal framework for broadband Internet service.”² At a recent July 2010 meeting in Sacramento California, the National Association of Regulatory Utility Commissioners (NARUC) passed a resolution addressing discrete issues raised in this NOI.³ These comments are based on that resolution.

The FCC’s NOI outlines a series of questions on three specific approaches: (1) whether the current “information service” classification of broadband Internet service under Title I of the Telecommunications Act of 1996 (Act)⁴ remains adequate; (2) whether the FCC should classify “Internet connectivity service” as a “telecommunications service” to which the requirements of Title II would apply; and (3) a “Third Way” where the FCC affirms Internet information services

¹ See, *Comcast Corporation v. Federal Communications Commission*, 600 F. 3d 642 (D.C. Cir. 2010) (*Comcast*) available online at: <http://pacer.cadc.uscourts.gov/docs/common/opinions/201004/08-1291-1238302.pdf>.

² See, Notice of Inquiry, *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, FCC No. 10-114 (Rel. June 17, 2010) available online at: http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0617/FCC-10-114A1.pdf.

³ See, *Resolution Opposing Federal Preemption of States' Jurisdiction over Broadband Internet Connectivity Service* (July 21, 2010), which is available online at: <http://www.naruc.org/Resolutions/Resolution%20Opposing%20Federal%20Preemption%20of%20State%20Jurisdiction%20over%20Broadband%20Service.pdf>.

⁴ *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996), online at: <http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=BROWSE&title=47usc&PDFS=YES>.

remain generally unregulated, identifies the Internet connectivity service that is offered as part of wired broadband Internet service as a “Title II” telecommunications service, and forbears from applying most Title II provisions, excluding a small number needed to assure universal service, competition and small business opportunity, and consumer protection policies.

The FCC also seeks comment generally with respect to “the state’s proper role with respect to broadband internet services”⁵

In a separate docket, NARUC specifically endorsed the FCC’s net neutrality principles with some limited clarifications.⁶ Those April 25, 2010 NARUC comments, which predate the release of this NOI, suggest it is possible for the FCC on remand from the *Comcast* decision to “link its exercise of ancillary jurisdiction to an alternative statutory base.” However, the more recent July 2010 resolution *does not* specify which of the three optional approaches the FCC should adopt. Instead, it points out that, since 2005, NARUC has consistently endorsed a “functional focus” model of jurisdiction that allocates State and federal regulatory responsibilities based on their core competencies. The resolution specifies if the FCC chooses to adopt the “Third Way”, the agency should also:

- [1] Use the NARUC “functional focus-core competency” paradigm to analyze the federal State jurisdictional issues raised in the NOI; and
- [2] Assure nothing prejudices “States’ authority reserved under Section 253 . . . “to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard” consumers’ rights; and
- [3] Otherwise avoid an unlawful and inefficient application of forbearance authority under 47 U.S.C. §160 to provisions of the Act that reserve State authority.

In support of these positions, NARUC states as follows:

⁵ See, NOI *mimeo* at ¶ 2 page 2.

⁶ See, April 25, 2010 “Reply Comments of the National Association of Regulatory Utility Commissioners,” filed *In the Matter of Preserving the Open Internet Broadband Industry Practices*, GN Dkt. No. 09-191, WC Dkt. No. 07-53, at: <http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=BROWSE&title=47usc&PDFS=YES>.

I. NARUC'S INTEREST

NARUC is a quasi-governmental nonprofit organization founded in 1889 that represents the government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, *inter alia*, telecommunications carriers within their respective borders. NARUC is recognized by Congress in several statutes⁷ and consistently by the Courts⁸ as well as a host of federal agencies,⁹ as the proper entity to represent the collective interests of State commissions. All NARUC's members have a direct interest in unfettered competition in intrastate telecommunications as part of their responsibilities in implementing State law protecting consumers, public safety, and ubiquity of access to services. Federal law also urges the States to promote advanced telecommunications services like those discussed here. See 47 U.S.C. § 151 note (Section 706) (1996). Because of these clear interests, the association passed the July 2010 resolutions requiring NARUC to file comments on the issues raised in this proceeding.

⁷ See 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of common concern); See also 47 U.S.C. § 254 (1996); See also *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where this Court explains "Carriers, to get the cards, applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system.)

⁸ See, e.g., *United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985) (where the Supreme Court notes: "The District Court permitted (NARUC) to intervene as a defendant. Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate." 471 U.S. 52, n. 10. See also, *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976); Compare, *NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007); *NARUC v. DOE*, 851 F.2d 1424, 1425 (D.C. Cir. 1988); *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985).

⁹ NRC Atomic Safety and Licensing Board *Memorandum and Order* (Granting Intervention to Petitioners and Denying Withdrawal Motion), LBP-10-11, *In the Matter of U.S. Department of Energy (High Level Waste Repository)* Docket No. 63-001-HLW; ASLBP No. 09-892-HLW-CABO4, mimeo at 31 (June 29, 2010) ("We agree with NARUC that, because state utility commissioners are responsible for protecting ratepayers' interests and overseeing the operations of regulated . . . utilities, these economic harms constitute its members' injury-in-fact.")

II. DISCUSSION

A. *The FCC should use a “functional focus-core competency” paradigm to analyze the federal- State jurisdictional issues raised by this NOI*

In October 2005, the FCC released a proposed rulemaking¹⁰ - addressing “Consumer Protection in a Broadband Era” raising explicitly, albeit in the context of only a Title I regime, many of the same jurisdictional issues referenced in this NOI. In response, NARUC filed comments based on two 2005 resolutions¹¹ suggesting an analytical approach to federal and state oversight issues. The most recent July 2010 NARUC resolution, referenced *supra*, urges the FCC to utilize that same framework if it chooses to implement its “Third Way” proposal.

Any practical federal framework should, as that resolution suggests, leverage the relative resources of all jurisdictions without inhibiting *Congressionally-sanctioned* State efforts to either (i) promote the deployment of advanced infrastructures (47 U.S.C. § 153 (§706)) and universal service (47 U.S.C. § 254) through State-based programs or (ii) protect consumers, competition, and the public health and safety ((47 U.S.C. § 253(b)) in their respective jurisdictions.

This is the efficient way to proceed. The FCC should examine/compare its own and State “core competencies” and *maintain* the existing dual cooperative federal-State structure for any needed oversight that the Telecommunications Act clearly contemplates.

¹⁰ *In the Matter of Consumer Protection in the Broadband Era, WC Docket No. 05-271*, Notice of Proposed Rulemaking, (rel. Sept. 23, 2005) (“*Notice*”) [70 Federal Register 60259 (October 17, 2005)] available online at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.doc.

¹¹ *See, Resolution on Responding to FCC NPRM on Broadband Customer Service* (November 15, 2005) available online at: <http://www.naruc.org/Resolutions/Tcom-1FCCNPRMonBroadbandCustomerService.pdf>, and *Resolution on NARUC Telecommunications Legislative Reform* (July 27, 2005) available online at: <http://www.naruc.org/Resolutions/Summer%202005%20Telecom%20Policy%20Reform.pdf>. *See also*: NARUC Legislative Task Force Report on Federalism and Telecom (July 2005). Although the framework outlined in the Task Force Report was explicitly premised upon a comprehensive rewrite of existing FCC enabling legislation, key elements of the “functional approach” are transferable to FCC action under any of the options proposed in the NOI.

Where the FCC finds existing State core competencies and the need for any (State or federal) oversight, the only rational way to proceed is to share jurisdiction – or more precisely avoid pre-empting existing State authority. In these areas, there is a model that has a history¹² of generating successful outcomes. The FCC first sets minimum standards and the leaves States with flexibility to address novel/variations of a particular abuse. Typically, with consumer protection measures, it makes sense to allow States to impose more protective measures as well as enhanced fines or penalties.

As the July 2005 resolution specifies, State commissions have over 100 years of experience, along with the established structures and expertise necessary to “effectively and economically resolv[e] consumer and commercial complaints.”

¹² State and Federal cooperation on “slamming issues”, 47 U.S.C. § 258 (1996), provides a perfect case study illustrating the practical benefits of leveraged/more effective enforcement and reduced consumer confusion inherent in this framework. The FCC by Order (FCC 00-135) recognized States should have the ability, if they choose, to mediate slamming complaints received from consumers within that State. It also acknowledged individual States have unique processes, procedures and rules regarding slamming complaints. Pursuant to the revised rules, States were (and still can) “opt-in” to become the primary forums for resolving consumer’s slamming complaints. Although Congress limited the FCC’s flexibility somewhat, the agency did not take a “cookie cutter” approach to its rules. Rather the FCC provided needed flexibility to the States to address unique fraudulent activities by establishing the regulatory floor and allowing the States to establish more stringent rules or the regulatory ceiling—particularly in the area of enhanced penalties. Initially, thirty-seven States opted-in to the FCC’s approach. There is no question oversight of slamming issues was enhanced through collaborative Federalism. See, *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, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508 (1998), stayed in part, *MCI WorldCom v. FCC*, No. 99-1125 (D.C. Cir. May 18, 1999), motion to dissolve stay granted, *MCI WorldCom v. FCC*, No. 99-1125 (D.C. Cir. June 27, 2000); *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 (2000); *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, Third Report and Order and Second Order on Reconsideration, 15 FCC Rcd 15996 (2000); Errata, DA 00-2163 (rel. Sept. 25, 2000); Erratum, DA 00-292 (rel. Oct. 4, 2000); *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, Order, 16 FCC Rcd 4999 (2001); *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, Third Order on Reconsideration and Second Further Notice of Proposed Rule Making, 18 FCC Rcd 5099 (2003).

The July 2010 resolution also specifically references the core competency of States with respect to consumer protection. States commissions excel at delivering responsive consumer protection, assessing market power, setting just and reasonable rates for carriers with market power, and providing fact-based arbitration/adjudication. States are also the long heralded “laboratories of democracy”¹³ for encouraging availability of new services and meeting policy challenges at the grassroots level. State involvement leverages enforcement efforts and provide, in many instances, faster resolution for consumers. Indeed, a recent internal NARUC survey found that just 40 State commissions, in calendar years 2007-2009 resolved 2,134,614 complaints across all regulated sectors and returned at least¹⁴ \$58,315,976 to consumers. These complaints are generally resolved on a one-for-one basis and the majority take only a few weeks through informal processes. States are almost always better positioned to respond. Practically, State authorities are often the first stop for consumers seeking assistance with a telecommunications related problem and, unlike the FCC which must respond to consumers from fifty States, each State government is only responsible for complaints arising within its borders. Moreover, any agency effort to impose blanket preemption on State telecommunications specific rules, assuming the Courts agree there is a statutory basis for such actions, *can only restrict consumer redress in the future*. While federal standards provide a useful baseline for regulations in areas involving established abuses, broad preemption would leave consumers with untenable choices when new abuses arise. Even in established areas, federal rules should recognize that novel issues and related abuses will arise and build in flexibility to allow States to act.

¹³ Justice Brandies, dissenting: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice, Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

¹⁴ This number is likely a significant understatement as only 28 of the 40 responding commissions tracked and calculated the amount of money returned to consumers as a result of their actions.

An effective, pragmatic approach to federalism, such as the framework suggested above, will recognize and take advantage of these obvious State strengths. The 2010 resolution specifies that, given these State competencies “[a]ny new regulatory framework should allow the States to perform a strong consumer-focused role, and in particular ensure that States are able to:

- Provide a local venue for investigation, alternative dispute resolution and prompt and efficient resolution of both intercarrier disputes and consumer-to-company disputes; and
- Investigate adequately and take enforcement actions against violations of State laws regarding deceptive, misleading or fraudulent business practices . . . ; and
- Maintain basic consumer protections such as the terms and conditions of service, contract disclosures, quality of service standards and reliable E911 services; and
- Initiate consumer education efforts, in cooperation with the FCC, to properly inform consumers of their rights; and
- Ensure that the special needs of customers are met through programs such as distribution of specialized equipment, Lifeline and Link-up and Relay services.”

Partnership, Not Preemption

The FCC and the State commissions have jointly taken significant steps toward deregulation of the local exchange carriers and, like the FCC, have promoted competition in telecommunications services. Through the Joint Conference on Advanced Services, we have joined to build on individual State and FCC initiatives to promote the deployment of advanced services. Through Joint Boards, Task forces and advisory bodies we have, *inter alia*, moved to streamline and assure elements of accountability for various aspects of the federal universal service programs and joined to work towards improving the deployment of emergency communications.¹⁵

¹⁵ See, e.g., *FCC Announces Joint Federal/State VoIP Enhanced 911 Enforcement Task Force*, Press Release, 2005 Westlaw 1750445 (July 25, 2005).

Historically we have worked cooperatively for years on accounting issues and more recently, as discussed earlier, on slamming enforcement. This NOI provides an opportunity for the FCC to expand and build upon such efforts.

B. *The FCC should avoid an unlawful and inefficient application of forbearance authority under 47 U.S.C. §160 to provisions of the Act that reserve State authority.*

In paragraph 86 of the NOI the FCC asks “[a]re there provisions of Title II from which we lack the authority to forbear?”

The answer is quite obviously yes.

Indeed, the FCC implies as much when it asks later in the same paragraph if Section 10 provides authority to forbear from provisions of the statute *that do not directly impose obligations on carriers.*”

The answer to that question is just as obviously - no.

[1] *The plain text of the Statute Does not Permit Forbearance of provisions that do not impose obligations on carriers.*

At the heart of this and the related NOI inquires about forbearance and §§ 253, 224 and other sections that reserve State authority¹⁶ is the question:

Did Congress actually intend for the FCC to be able to selectively reallocate *continuing* federal-State jurisdictional responsibilities based on the authority granted in Section 10 (47 U.S.C. § 160(a))?

Congress clearly did not.

¹⁶ In the 1996 Act, Congress’s intent to preserve State authority is repeatedly emphasized. See 47 U.S.C. § 261 (Preserving existing State regulations and allowing States to prescribe new rules.); 253(b) (preserving “the ability of a State to impose . . . requirements necessary to preserve and advance universal service . . . and safeguard the rights of consumers”); 254(i) (directing States to ensure that “universal service is available at rates that are just, reasonable, and affordable”); 153(41) (recognizing State “regulatory jurisdiction with respect to intrastate operations”); 601(c), codified in notes to § 152; and 706(c), codified in notes to § 157, (establishing cooperative paradigm where both State and federal authorities are to encourage the deployment of advanced telecommunications capability).

The plain language of the act – as well as the legislative history – is not susceptible of such an interpretation. Section 10 specifies that FCC can only forbear from statutory provisions (or FCC regulations) that the FCC “appl[ies] to a telecommunications carrier or a class of telecommunications carriers”.

The FCC does not in any sense “apply” Section 214(e)(2)’s reservation of State authority to designate ETCs to carriers. Congress did. The FCC does not “apply” the Section 706 and 254 duties for both the FCC and States to assure universal service and promote advanced services to carriers. Congress did.

Similarly, the FCC does not “apply” Section 253 in any sense – including its specific reservations of State authority – to carriers. It applies Section 253 to State and local laws. If the FCC could forbear from such provisions, it could also presumably forbear from the requirements in Section 10 that require it to make certain public interest findings before it chooses to forbear or to reject a forbearance petitions – a ludicrous suggestion.

This interpretation is buttressed by the Act’s citations to two “requirements” the statute specifies the FCC cannot forbear from applying “to telecommunications carriers” until they are “fully implemented” (47 U.S.C. § 160(d)). Both are both quite clearly requirements that are imposed upon carriers. One - § 251(c) is a “subpart” of a provision – that only lists requirements on carriers.

This interpretation is also backed up by the limitation language in § 160(e). Under subpart (e), if the FCC forbears from “a provision of this chapter,” then a State cannot apply to a carrier or enforce the same Telecommunications Act provision against a carrier either. The references are logically linked to the new duties imposed on carriers by the Act. States do not “continue to apply or enforce” substantive delegations or reservations of either FCC or State

authority in the statute. If this language referencing enforcement of specific provisions of the Act were not clear enough, the legislative history of subsection (e) removes all doubt. See, Telecommunications Act of 1996, *House Conference Report No. 104-458*, 1996 U.S. Code Cong. and Adm. News 10 (January 31, 1996), at page 185, which notes, *inter alia*, “This new subsection is not intended to limit or preempt State enforcement of State statutes or regulations.”

[2] *Assuming arguendo, a Court might find forbearance of § 253 and related substantive reservations of State authority are permissible, the FCC has no record that justifies “forbearance” sui sponte of “applying those sections.”*

Section 253 allows the FCC to preempt certain State laws, but specifies in part (b) that:

“Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”

The only logical reason the FCC could be considering forbearance of a statutory provision that gives that agency explicit and apparently fairly broad authority to preempt State laws on a case-by-case basis, has to be to eliminate these Congressionally-mandated reservations of State authority.

However, there is currently no record of State infringements that could justify the public interest and other required findings under Section 160(a) that are prerequisites for forbearance. Indeed, the FCC, in the NOI, at page 29, (¶ 66), quite clearly indicates the existing record suggests the opposite:

If we were to classify Internet connectivity service as a telecommunications service and take no further action, that service would be subject to all requirement of Title II that apply to telecommunications service or common carrier service.

If the Commission chose, it could provide support for Internet connectivity services through the Universal Service Fund under section 254.

Under section 222, the Commission could ensure that consumers of Internet connectivity enjoy protections for their private information.

Consumers with disabilities would see greater accessibility of broadband services and equipment under section 255.

And the Commission could protect consumers and fair competition through application of sections 201, 202 and 208.

If the FCC needs to retain authority under Sections 201, 202, 255, 222, 208 to protect consumers, as the NOI specifically proposes, it necessarily means the FCC believes that market forces will not protect consumers across the board.

This in turn means that State rules that advance the very same goals, and do not directly conflict with the FCC's rules¹⁷ are permissible.

Particularly in the arena of consumer protection and enforcement, it is hard to understand how the FCC could

[1] concede consumer protections under those statutory provisions are critical and do not meet the "forbearance criteria" and

[2] simultaneously successfully assert (much less create a record to support) the notion that any analogous State rules/procedures that (i) also "protect consumers", (ii) are necessarily consistent with analogous FCC's efforts to protect consumers, and (iii) arguably generally consistent with Congress specific charges to the State to promote advanced services and preserve universal service, and reservations in Section 253(b) actually do meet the very same criteria.

NARUC respectfully suggests such an effort, even if successful, would, on its face, be an inefficient way to proceed.

¹⁷ See, *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 375 n.4 (1986).

CONCLUSION

NARUC requests that any final rules in this proceeding reflect the foregoing comments.

Respectfully submitted,

James Bradford Ramsay
GENERAL COUNSEL
NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS
1101 VERMONT AVENUE, N.W., SUITE 200
WASHINGTON, DC 20005
(202) 898-2207

DATED: August 12, 2010

Resolution Opposing Federal Preemption of States' Jurisdiction over Broadband Internet Connectivity Service

WHEREAS, The Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened at its July 2005 Summer Committee Meetings in Austin, Texas, adopted a Resolution that endorsed a report on *Federalism and Telecom*, by the NARUC Legislative Task Force, which expressed support for “a ‘functional-focus’ model of jurisdiction” that allocates “State and federal responsibility over telecommunications based on analysis of the characteristics of each governmental function exercised, and of the comparative abilities of different levels of government to exercise the function successfully;” *and*

WHEREAS, The aforementioned Resolution further stated that: “Any new regulatory framework should allow the States to perform a strong consumer-focused role, and in particular ensure that States are able to:

- Provide a local venue for investigation, alternative dispute resolution and prompt and efficient resolution of both intercarrier disputes and consumer-to-company disputes;
- Investigate adequately and take enforcement actions against violations of State laws regarding deceptive, misleading or fraudulent business practices, including slamming and cramming;
- Maintain basic consumer protections such as the terms and conditions of service, contract disclosures, quality of service standards and reliable E911 services;
- Initiate consumer education efforts, in cooperation with the Federal Communications Commission (FCC), to properly inform consumers of their rights; and
- Ensure that the special needs of customers are met through programs such as distribution of specialized equipment, Lifeline and Link-up and Relay services;” *and*

WHEREAS, In the Telecommunications Act of 1996, Congress recognized the critical role State commissions must play to facilitate the availability and adoption of affordable advanced telecommunications services by: (1) in Section 706 specifying that States (and the FCC) “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,” a term defined “without regard to any transmission media or technology, as high speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology;” and (2) in Section 254, and others, specifying that States have the authority to take reasonable steps to preserve and advance universal service, a term defined as “taking into account advances in telecommunications and information technologies and services;” *and*

WHEREAS, On April 6, 2010, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in *Comcast v. FCC* (600 F.3d 642) (*Comcast* decision) that cast doubt on the ability of the FCC, and possibly the States, to ensure fair competition among broadband Internet connectivity service providers and to protect the public’s safety and welfare when they use broadband Internet services; *and*

WHEREAS, On June 17, 2010, the FCC released a *Notice of Inquiry* (FCC 10-114) seeking comments on the legal and practical consequences of all options for a legal framework for broadband Internet service in light of the *Comcast* decision, including among other options classifying wireline, terrestrial wireless and satellite broadband Internet connectivity services as

a “telecommunications service” pursuant to a “third way” of regulatory oversight “under which the Commission would: (i) reaffirm that Internet information services should remain generally unregulated; (ii) identify the Internet connectivity service that is offered as part of wired broadband Internet service (and only this connectivity service) as a telecommunications service; and (iii) forbear under section 10 of the Communications Act from applying all provisions of Title II other than the small number that are needed to implement the fundamental universal service, competition and small business opportunity, and consumer protection policies that have received broad support;” *and*

WHEREAS, In Paragraph 109 of the *Notice of Inquiry*, the FCC explicitly requests commenters to address the implications for State and local regulation that would arise from the three proposals for a legal framework for broadband Internet connectivity service and broadband Internet service; *and*

WHEREAS, In Paragraph 110 of the *Notice of Inquiry*, the FCC indicates that “if a State were to impose requirements on broadband Internet connectivity service or broadband Internet service that are contrary to a Commission decision not to apply similar requirements, we would have authority under the Communications Act and the Supremacy Clause of the United States Constitution (Article III, section 2) to preempt those State requirements;” *and*

WHEREAS, The *Notice of Inquiry* seeks comment on all options, including one that would apply Sections 201, 202, 208, 222, 254, and 255 and forbearing from applying all other Title II sections to broadband Internet connectivity service or broadband Internet service and notes that “section 10(e) (of the Communications Act) provides that ‘[a] State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying;’” *and*

WHEREAS, When not acting pursuant to a specific preemption provisions of the Communications Act, such as those in Sections 253 or 276, the proper test for FCC preemption established by longstanding jurisprudence requires both inseverability and inconsistency with the statutory goals; *and*

WHEREAS, On March 16, 2010, the FCC released *Connecting America: The National Broadband Plan* (National Broadband Plan) that sets forth four ways in which the federal, State and local governments can influence the advancement of the broadband ecosystem:

1. Design policies to ensure robust competition and, as a result maximize consumer welfare, innovation and investment;

2. Ensure efficient allocation and management of assets government controls or influences, such as spectrum, poles, and rights-of-way, to encourage network upgrades and competitive entry;

3. Reform current universal service mechanisms to support deployment of broadband and voice in high-cost areas; and ensure that low-income Americans can afford broadband; and in addition, support efforts to boost adoption and utilization;

4. Reform laws, policies, standards and incentives to maximize the benefits of broadband in sectors government influences significantly, such as public education, health care and government operations; *and*

WHEREAS, The U. S. Department of Commerce, National Telecommunications and Information Administration announced on May 28, 2010 that State governments and other existing awardees in its State Broadband Data and Development Grant Program may seek funding for various initiatives to help their communities compete in the digital economy and for up to three additional years of broadband data collection and mapping work; *and*

WHEREAS, The FCC has expeditiously responded to the U.S. Court of Appeals' *Comcast* decision by releasing a *Notice of Inquiry* (FCC 10-114) to identify the legal approach that will best support its efforts to ensure universal access to affordable, high-quality broadband services; promote broadband innovation, investment and competition; and protect and empower consumers; *now, therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its 2010 Summer Committee Meetings in Sacramento, California, supports a "functional-focus" model of jurisdiction that allocates State and federal regulatory responsibility over communications services, similar to that adopted by the *Resolution* which adopted the *Federalism and Telecom* white paper, as attached, at its 2005 Summer Committee Meetings in Austin, Texas, and if the FCC chooses to implement a "third way" of regulatory oversight for broadband Internet connectivity service and broadband Internet service it should apply this model to broadband Internet connectivity service, based on analysis of the characteristics of each governmental function exercised, and of the comparative abilities of different levels of government to exercise the function successfully; *and be it further*

RESOLVED, That if the FCC chooses to implement a "third way" of regulatory oversight for broadband Internet connectivity service it should be very clear that the rationale does not prejudice in any way States' authority reserved under Section 253 of the Communications Act of 1934, as amended, "to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers;" *and be it further*

RESOLVED, That the FCC not forbear from applying Title II provisions of the Communications Act of 1934, as amended, which reserve authority to the States as such forbearance would be contrary to the bi-jurisdictional oversight of broadband Internet connectivity service.

Sponsored by the Committee on Telecommunications

Adopted by the NARUC Board of Directors July 21, 2010

Resolution on NARUC Telecommunications Legislative Reform

WHEREAS, Modern, efficient telecommunications capabilities are essential to the preservation of the public health, safety, and welfare, and the vitality of the nation's economy; *and*

WHEREAS, States and the federal government have significant responsibilities to ensure that all citizens continue to have access to modern, affordable, high quality, and reliable telecommunications capabilities; *and*

WHEREAS, While market forces may change the need for certain economic regulatory oversight, the need for State consumer protections is likely to continue; *and*

WHEREAS, States by nature of their local accountability have particular interests and responsibilities in preserving public health and safety, including assuring the provisioning of E911 and maintenance of outside plant, maintaining consumer protections, maintaining affordable services, including very strong interests in maintaining universal service, ensuring accessibility for individuals with disabilities, promoting the deployment of advanced technologies and services, ensuring service quality and reliability, and maintaining conditions for fair competition; *and*

WHEREAS, Consumers are more accustomed to addressing problems with telecommunications services at the State level, and States have established structures and expertise necessary to respond to those concerns and have over a century of experience effectively and economically resolving consumer and commercial complaints; *and*

WHEREAS, In anticipation of efforts to amend existing national telecommunications law in response to the evolving telecommunications marketplace, the National Association of Regulatory Utility Commissioners (NARUC) has established a Legislative Task Force to develop a legislative proposal for NARUC's consideration; *and*

WHEREAS, On February 16, 2005, the NARUC Board of Directors adopted a resolution directing the Legislative Task Force to expeditiously consider a specific list of issues to develop further policy specificity and a consensus document for consideration by the Consumer Affairs and Telecommunications Committees; *and*

WHEREAS, Members of the Legislative Task Force, the Telecommunications Committee, the Consumer Affairs Committee, and the Washington Action Committee have exchanged ideas and considered those issues through questionnaires and conference calls; *and*

WHEREAS, Those deliberations reveal a growing consensus that NARUC should support establishment of a new regulatory framework that recognizes the particular strengths and interests of the federal, State, and local levels of government; *and*

WHEREAS, The traditional call endpoint method of determining regulatory jurisdiction is deemed by most task force members to be obsolete; *and*

WHEREAS, The members' deliberations also reflect recognition of the need for government at all levels to be able to adapt their exercise of regulation to reflect evolving market conditions; *and*

WHEREAS, The Legislative Task Force has developed the attached White Paper, entitled *Federalism and Telecom*, outlining the States' interests, expertise, and proposals for federal legislative reform; *now, therefore, be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its July 2005 Summer Meetings in Austin, Texas, adopts the attached *Federalism and Telecom* white paper; *and be it further*

RESOLVED, That any fundamental reform of national telecommunications law should assign regulatory authority on the basis of regulatory function, rather than on the traditional basis of call endpoints; *and be it further*

RESOLVED, That any effort to reform national telecommunications law should provide to all relevant levels of government the flexibility to respond as needed to evolving market circumstances; *and be it further*

RESOLVED, That any new regulatory framework should recognize the particular expertise and interests of the federal, State, and local levels of government and should recognize that States have particular expertise and interest in retail rate, service quality, network reliability, and consumer-related issues, in preserving universal service, in ensuring public safety, and in promoting competition through implementation of federal policies and, where appropriate, development of tailored State policies; *and be it further*

RESOLVED, Any new regulatory framework should allow the States to perform a strong consumer-focused role, and in particular ensure that States are able to:

- Provide a local venue for investigation, alternative dispute resolution and prompt and efficient resolution of both intercarrier disputes and consumer-to-company disputes;
- Investigate adequately and take enforcement actions against violations of State laws regarding deceptive, misleading or fraudulent business practices, including slamming and cramming;
- Maintain basic consumer protections such as the terms and conditions of service, contract disclosures, quality of service standards and reliable E911 services;
- Initiate consumer education efforts, in cooperation with the FCC, to properly inform consumers of their rights; and
- Ensure that the special needs of customers are met through programs such as distribution of specialized equipment, Lifeline and Link-up and Relay services; *and be it further*

RESOLVED, That the NARUC General Counsel shall represent these views before Congress by all appropriate means.

*Sponsored by the Telecommunications Committee and Consumer Affairs Committee
Adopted by the NARUC Board of Directors July 27, 2005*