

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

<i>In the Matters of</i>	)	
	)	
<i>Connect America Fund</i>	)	<b>WC Docket No. 10-90</b>
	)	
<i>A National Broadband Plan for Our Future</i>	)	<b>GN Docket No. 09-51</b>
	)	
<i>Establishing Just and Reasonable Rates for Local Exchange Carriers</i>	)	<b>WC Docket No. 07-135</b>
	)	
<i>High-Cost Universal Service Support</i>	)	<b>WC Docket No. 05-337</b>
	)	
<i>Developing an Unified Intercarrier Compensation Regime</i>	)	<b>CC Docket No. 01-92</b>
	)	
<i>Federal-State Joint Board on Universal Service</i>	)	<b>CC Docket No. 96-45</b>
	)	
<i>Lifeline and Link-Up</i>	)	<b>WC Docket No. 03-109</b>

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

The National Association of Regulatory Utility Commissioners (NARUC) respectfully submits these brief initial comments on Section XV, ¶¶ 603-667 of the Federal Communications Commission’s (“FCC”) or (“Commission”) February 9, 2011 released “Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking” (*USF/ICC Transformation NPRM*).<sup>1</sup>

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<sup>1</sup> See, *Connect America Fund*, WC Dkt 10-90, *A National Broadband Plan for Our Future*, GN Dkt 09-51, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Dkt 07-135, *High-Cost Universal Service Support*, WC Dkt 05-337, *Developing an Unified Intercarrier Compensation Regime*, CC Dkt 01-92), *Federal-State Joint Board on Universal Service*, CC Dkt 96-45), *Lifeline and Link-Up*, WC Dkt 03-109, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (rel. Feb. 9, 2011) at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-11-13A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-13A1.doc), published at 76 Fed. Reg. 11632 (Mar. 2, 2011) at: <http://www.gpo.gov/fdsys/pkg/FR-2011-03-02/pdf/2011-4399.pdf>, see also FCC Mar. 2, 2011 notice at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-11-411A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-411A1.doc).

According to the FCC, the *USF/ICC Transformation NPRM* is intended to facilitate the modernization and streamlining of the FCC’s universal service fund and intercarrier compensation policies with the underlying goal of bringing “affordable wired and wireless broadband – and the jobs and investment they spur – to all Americans while combating waste and inefficiency.”<sup>2</sup> Based on four core principles,<sup>3</sup> the *USF/ICC Transformation NPRM* offers several reforms to achieve this goal. The FCC established an earlier separate comment cycle for Section XV of the rulemaking. In Section XV, the FCC seeks comment on ways to reduce arbitrage opportunities and the attendant inefficiencies enabled by the current intercarrier compensation system with a special focus on Voice over Internet Protocol traffic, “phantom traffic”, and “access stimulation.” The notice concedes the FCC’s failure to specify whether interconnected voice over internet protocol (VoIP) traffic is subject to intercarrier compensation rules has led to numerous billing disputes and litigation and specifically seeks comment on the appropriate intercarrier compensation framework for such traffic. It also asks for comment on several proposals dealing with "phantom traffic" and "access stimulation."

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<sup>2</sup> See, FCC Proposes Modernizing and Streamlining Universal Service (News Release) (rel. February 8, 2011) at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-304522A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304522A1.doc).

<sup>3</sup> *USF/ICC Transformation NPRM* at 7-8, ¶ 10. The four principles include modernizing the FCC’s universal service fund and intercarrier compensation system for broadband; exercising fiscal responsibility to control the size of the USF; requiring accountability of companies receiving support, and transitioning to market-driven policies.

## DISCUSSION

NARUC is a nonprofit organization founded in 1889. Its members include the government agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the activities of telecommunications,<sup>4</sup> energy, and water utilities. Congress and the courts<sup>5</sup> have consistently recognized NARUC as a proper entity to represent the collective interests of the State public utility commissions. In the Federal Telecommunications Act,<sup>6</sup> Congress references NARUC as “the national organization of the State commissions” responsible for economic and safety regulation of the intrastate operation of carriers and utilities.<sup>7</sup>

The proper classification of both nomadic and facilities-based VoIP traffic, which would solve many issues in the least disruptive and most legally sustainable manner, along with paired federal action on interstate phantom traffic and access stimulation schemes are both long overdue. Both issues raise concerns of obvious interest to NARUC’s State commission membership.

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<sup>4</sup> NARUC’s member commissions have oversight over intrastate telecommunications services and particularly the local service supplied by incumbent and competing local exchange carriers (LECs). These commissions are obligated to ensure that local phone service supplied by the incumbent LECs is provided universally at just and reasonable rates. They have a further interest to encourage LECs to take the steps necessary to allow unfettered competition in the intrastate telecommunications market as part of their responsibilities in implementing: (1) State law and (2) federal statutory provisions specifying LEC obligations to interconnect and provide nondiscriminatory access to competitors. See, e.g., 47 U.S.C. § 252 (1996).

<sup>5</sup> See *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). 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).

<sup>6</sup> *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. §151 *et seq.*, Pub.L.No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) (“Act” or “1996 Act”).

<sup>7</sup> See 47 U.S.C. § 410(c) (1971) (NARUC nominates members to FCC Joint Federal-State Boards which consider universal service, separations, and related concerns and provide formal recommendations that the FCC must act upon; Cf. 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). Cf. *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the 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.)

Indeed, less than five months ago, at our November 2010 meetings, NARUC passed a resolution, appended to these comments, urging quick FCC action on traffic pumping issues. It is clear from both the notice's descriptions, and the long history of problems associated with the described practices, that these – as our resolution terms them - “transparently abusive” - arbitrage schemes have hurt consumers and skewed existing compensation data. The FCC has the record it needs to act in its pending docket on *interstate* traffic. Many of the participants in these schemes are recipients of federal (and sometimes state) universal service subsidies. While we have not taken any position on any of the notice's proposals, we have argued that a fast answer on this narrow set of issues can only provide a better basis for comprehensive reform of both universal service and intercarrier compensation. The resolution specifically asks the FCC to “immediately issue a declaratory ruling on traffic pumping and consider further efforts to limit or prohibit similar schemes of intercarrier compensation arbitrage as recommended in the National Broadband Plan.”

NARUC commends the FCC for recognizing the negative impact these practices impose on all ratepayers, the taxpayers that join ratepayers in subsidizing the litigation over these issues, the carriers that do not attempt to abuse the regulatory regime in such a “transparently abusive” fashion, and on competitive entry.

The only obvious flaws in the presented proposals is that some proffer unitary solutions that also cover *intrastate* compensation regimes. These approaches ignore the statutory text and press well beyond the authority Congress granted to the agency.

Several of the related proposals for VoIP intercarrier compensation reform suffer from the same skewed reading of both the statutory text and current case law.

Fortunately, ¶618 suggests one approach that is on its face consistent with both the statutory text and good economic policy. Currently, carriers are free to use any technology they wish to provide phone services. Most intuitively understand why policy makers should not tilt the competitive playing field by choosing to favor (or

disadvantage) any particular carrier based solely upon the technology used to deliver a functionally equivalent service. NARUC, and many others, have long been proponents of adherence to this so-called “technologically neutral” approach to policymaking.<sup>8</sup> Much of the taxpayer/ratepayer funded seemingly endless litigation over various classification schemes have been driven by efforts by some to cram a service that obviously fits precisely the functional definition of a “telecommunications service” into some other category.

In ¶ 619, the FCC proposes that it could “...determine that interconnected VoIP traffic is subject to the same intercarrier compensation charges—intrastate access, interstate access, and reciprocal compensation—as other voice telephone service traffic both today, and during any intercarrier compensation reform transition.”

This has at least the benefit of adhering to the principle of technological neutrality. After all, there is no question, as the FCC tacitly acknowledges elsewhere in the notice,<sup>9</sup> that interconnected VoIP services are indistinguishable from “other voice telephone service” to the end user. Indeed, Vonage, as well as facilities-based VoIP operators constantly advertise their services as “telephone services” competing with existing telecommunication services.<sup>10</sup>

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<sup>8</sup> Compare the FCC’s reasoning in the *USF/ICC Transformation NPRM* at ¶95 where it uses the term “competitive neutrality” to describe the same concept: “The Commission chose to define the supported services in functional terms, rather than as tariffed services, in order to promote competitive neutrality and provide greater flexibility.”

<sup>9</sup> See, *USF/ICC Transformation NPRM* at ¶612 where the FCC notes that “Interconnected VoIP services, among other things, allow customers to make real-time voice calls to, and receive calls from, the public switched telephone network (PSTN), and increasingly appear to be viewed by consumers as substitutes for traditional voice telephone services.”

<sup>10</sup> In a November 19, 2003 resolution, available at [http://www.naruc.org/Resolutions/info\\_services.pdf](http://www.naruc.org/Resolutions/info_services.pdf), NARUC cautioned the FCC to consider the negative implications (differential treatment) associated with a finding that IP-based services are subject to Title I jurisdiction, including the (i) uncertainty and reduced capital investment while the FCC’s authority under Title I is tested in the courts; (ii) loss of consumer protections applicable to telecommunications services under Title II; (iii) disruption of traditional balance between federal and State jurisdictional cost separations and the possibility of unintended consequences; (iv) increased risk to public safety; (v) customer loss of control over content; (vi) loss of State and local authority over emergency dialing services; and (vii) reduced support base for federal and State universal service as

Furthermore, this is the *sole* FCC alternative that adequately preserves state commission jurisdiction to deal with intrastate intercarrier compensation disputes where interconnected VoIP traffic is or may be implicated. NARUC notes that a number of states have already and successfully dealt with specific case adjudications involving intrastate intercarrier compensation disputes where VoIP traffic was at issue through the proper use of applicable state *and* federal law (the FCC's non-classification of VoIP notwithstanding).<sup>11</sup> The ability of the states to continue dealing with such matters in their proper exercise of their respective intrastate jurisdictions depends on the FCC's specific adherence to this sound alternative.

But more importantly, as suggested by our November 25, 2008 comments in most of these proceedings, CC Docket No. 01-92, CC Docket 96-95, and WC Docket No. 03-109 proceedings, it avoids the problems associated with the other proposals.

The proposals suggested in ¶ 615 to immediately adopt a Bill-and-Keep regime for VoIP, and in ¶ 616 to create VoIP-specific intercarrier compensation rates, whatever their merits from a policy perspective, are prescriptions for protracted litigation – litigation the FCC is likely to lose. Both require the FCC to virtually rewrite key sections of the Statute – overriding literally decades of case law, ignoring express reservations of State authority, and redefining statutory terms in a manner that Congress could never have intended -- to, among other things unlawfully constrain State retail rate design by preempting intrastate access charge regimes

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well as State and local fees and taxes. Those warnings remain valid today.

<sup>11</sup> *In re Sprint Communications Company L.P. v. Iowa Telecommunications Services Inc. d/b/a Iowa Telecom.* (Iowa Util. Bd. February 4, 2011), Iowa Util. Bd. Docket No. FCU-2010-0001; *Palmerton Telephone Company v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other Affiliates*, (Pa. PUC March 16, 2010), Pa. PUC Docket No. C-2009-2093336; *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Tel. Co., and Wilton Telephone Co.*, DT 08-28, Order No. 25,043 (NH PUC November 10, 2009); *Request for Expedited Declaratory Ruling as to the Applicability of the Intrastate Access Tariffs of Blue Ridge Telephone Company, Citizens Telephone Company, Plant Telephone Company, and Waverly Hall Telephone LLC to the Traffic Delivered to Them by Global NAPs, Inc.*, Docket No. 21905 (GA PSC July 29, 2009), Order Adopting in Part and Modifying in Part the Hearing Officer's Initial Decision, Document No. 121910 (GA PSC Order). Global NAPs has sought FCC preemption of certain Pa. PUC, NH PUC, and Md. PSC decisions. NPRM n. 913, at 192 referencing *In re Global NAPs Petition for Declaratory Ruling and for Preemption of the Pennsylvania, New Hampshire and Maryland State Commissions*, WC Docket No. 10-60.

## **Conclusion**

NARUC's resolutions confirm the widely held principle that functionally equivalent services should be treated the same, that regulators should not intervene in markets by favoring one technology over another, that the 1996 Act requires a functional approach, that an approach that treats services that are substitutable for/functionally equivalent to existing telephony services differently is inconsistent with Congressional intent, and that the express terms of the Act does not permit, and an appropriate policy approach would not countenance the intrusion into retail intrastate rate design proposed by the proposed preemption of State access charges.

**Respectfully Submitted,**

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**April 1, 2011**

***Attachment - Resolution Supporting Expedient FCC Action on Traffic Pumping Schemes***

**WHEREAS**, Various State commissions have opened investigations into allegations that some local exchange carriers (LECs) have entered into contracts with third parties to create services (e.g., free adult chat-lines, free conference calling, etc.) that result in large increases in one-way terminating traffic which significantly enhance the LEC's revenues via the inter-carrier compensation regime – arrangements often referenced as “traffic pumping schemes;” *and*

**WHEREAS**, Most State commissions have authority to address key aspects of traffic pumping schemes, but recognize that the Federal Communications Commission (FCC) is well positioned to resolve the increasing number of interstate traffic pumping complaints uniformly; *and*

**WHEREAS**, The FCC has tentatively concluded in the Traffic Pumping NPRM1 that a rate-of-return carrier which “shares revenue, or provides other compensation to an end user's customer, or directly provides the stimulating activity, and bundles those costs with access is engaging in an unreasonable practice that violates Section 201(b) of the federal Telecommunications Act and the prudent expenditure standard;” *and*

**WHEREAS**, A minority of LECs continue to create new traffic pumping schemes resulting in continuous disputes among carriers on whether compensation is owed for termination of traffic associated with free conference calling, international bypass calling, chat-lines, re-homing numbers to create calls subject to the access regime, or other novel arrangements to generate higher volumes of terminating traffic; *and*

**WHEREAS**, Traffic Pumping does not include traffic imbalances arising from legitimate transport and termination service for discrete, wholesale, or retail service arising from State or federal law; *and*

**WHEREAS**, Those LECs, whose business plans center on traffic pumping, have received millions of dollars in federal Universal Service support from the High Cost Fund; *and*

**WHEREAS**, These schemes have negatively impacted consumers and all segments of the telecommunications industry, including but not limited to: other incumbent LECs, interexchange carriers, and wireless providers by diverting finite resources to proceedings related to limiting or eliminating such transparently abusive arbitrage activities; *and*

**WHEREAS**, This activity has created a significant increase in the number of disputed access billings, even for LECs with legitimate billings; *and*

**WHEREAS**, There have been cost estimates provided to the FCC by various segments of the telecommunications industry that calculate the cost of this activity to be hundreds of millions of dollars annually and growing; *and*

**WHEREAS**, The National Broadband Plan (NBP) has established a schedule to begin efforts to address comprehensive inter-carrier compensation reform in late 2010, but has not provided definitive dates for resolution of this issue; *and*

**WHEREAS,** The NBP recognizes the estimated costs to achieve broadband deployment goals and thereby adopted recommendations including Recommendation 8.7, which commits the FCC to adopt interim rules to eliminate or reduce the growing costs borne of the telecommunications industry with inter-carrier compensation arbitrage; *and*

**WHEREAS,** Segments of the telecommunications industry have called for the FCC to address this issue expeditiously rather than waiting until a comprehensive inter-carrier compensation program is finalized; *and*

**WHEREAS,** Industry segments have also recommended, among other proposals, that the FCC declare that traffic pumping, coupled with revenue sharing or other compensation to increase traffic volumes, is an unjust and unreasonable practice and either prohibit it outright or impose rigid, clear, and broad constraints on such practices; *and*

**WHEREAS,** A number of State commissions have generally acknowledged the significant costs borne by the various industry segments and consumers impacted by this inter-carrier compensation arbitrage, as well as the demand on the limited human resources of State Public Utility Commissions in such investigations and arbitrations, especially at this time of severe fiscal constraint by State governments; *now, therefore be it*

**RESOLVED,** That the National Association of Regulatory Utility Commissioners, convened at its 2010 Annual Meeting in Atlanta, Georgia, acknowledges the need for the FCC to act immediately to address the issue of traffic pumping and not wait for the finalization of comprehensive inter-carrier compensation reform; *and be it further*

**RESOLVED,** That the NARUC General Counsel should convey that NARUC supports the FCC moving immediately in WC Docket 07-135 to issue a declaratory ruling on traffic pumping; and to consider further efforts to limit or prohibit similar schemes of inter-carrier compensation arbitrage as recommended in the National Broadband Plan.

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*Sponsored by the Committee on Telecommunications*

*Recommended by the NARUC Board of Directors November 16, 2010*

*Adopted by the NARUC Committee of the Whole November 17, 2010*