N A R U C

National Association of Regulatory Utility Commissioners

EX PARTE NOTICE VIA ELECTRONIC FILING

September 21, 2011

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW Room TW-A325
Washington, D.C. 20554

RE: Notice of Oral Ex Parte Contacts filed in the proceedings captioned:

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

Dear Ms. Dortch:

On Monday, September 19, 2011, several members of the National Association of Regulatory Utility Commissioners ("NARUC") had three separate meetings with FCC representatives: one with FCC Commissioner Michael Copps Policy Advisor for Wireline Issues, **Margaret McCarthy**, one with FCC Commissioner **Mignon Clyburn** and her Wireline Legal Advisor **Angela Kronenberg**, and one with the Chief Counsel and Senior Legal Advisor to the Chairman, **Zachary Katz**, joined by **Mark Stephens**, FCC Chief Financial Officer, Wireline Competition Bureau Chief **Sharon Gillett**, Wireline Competition Deputy Bureau Chief **Carol Mattey**, and Wireline Competition Bureau Associate Chief **Rebekah Goodheart**.

Representing NARUC in those meetings were: (i) NARUC Second Vice President, Washington Utilities and Transportation Commission Commissioner **Philip B. Jones**, (ii) Chairman of NARUC's Committee on Telecommunications and member of the Federal State Joint Boards on Universal Service and Separations, Vermont Public Service Board Commissioner **John D. Burke**, (iii) Pennsylvania Public Utility Commission Commissioner **James H. Cawley**, a member of the NARUC Telecommunications Committee and the State Chair of the Federal State Joint Board on Universal Service (and his telecom. advisor **Labros E. Pilalis**), (iv) Indiana Utility Regulatory Commission Commissioner **Larry S. Landis**, a member of the NARUC Telecommunications Committee and the State Chair of the Federal State Joint Conference on Advanced Services as well as a member of the Federal State Joint Board on Universal Service, and (v) NARUC's General Counsel, **James Bradford Ramsay**.

In each of the offices, the Commissioners made the following points:

[1] Partnership, not preemption. The FCC should rely on incentives rather than concocting an untested legal theory that lacks support in the history or text of the statute.

Industry argues that inaction on access charge reform/rebalancing by eighteen (18) specified States provide a clear policy basis for preemption. However, based on a September 2011 informal survey of NARUC members, it appears in the short time that has elapsed since industry suggested those States as a problem, as described in more detail in the attached narrative provided to attendees, at *least half seem to be on track to initiate or complete significant reforms within the next six months. States have developed different approaches, depending on unique circumstances and carrier relationships, toward lowering intrastate access charges. But such initiatives are entirely consistent with both the federal and state statutes under a dual jurisdictional model, and the principles of cooperative federalism.*

Industry has also suggested that States are either unable or unwilling to initiate or complete reform measures in a reasonable time frame, whether the FCC provides incentives for State action or not. This is a ludicrous and unsupported allegation that ignores history. Indeed, the cited (and inaccurate) 18 State "barrier" to access reform, necessarily suggests also that the majority of States have already acted.

Industry also argues States are not interested in promoting deployment or utilization of a "federal policy" of broadband build-out, and that State oversight of intrastate access charges somehow is a direct impediment to such a policy. Commissioner Landis provided a copy of a September 2011 Ball State University, Digital Policy Institute Report titled, Telecommunications Deregulation, A Policy Progress Report, which is scanned in and separately filed with this ex parte. That report points out, mimeo at 1, that, in just the last 10 years "more than half of all states have made significant adjustments to their telecommunications policy landscape." The paper cites reforms in five categories. Just one category of reforms, institution of State-wide video franchising, "had a significant effect on the adoption of broadband telecommunications, accounting for almost 6 percent of new subscriptions in those states which had the longest history of statewide market access by providers." Id. at 5. In other words, the net incremental impact of State video franchising reform in the 25 states which benefitted from the States' initiatives in less than 10 years has been the net addition of more than five million broadband terrestrial subscribers. In addition, there are States with statutorily mandated broadband deployment provisions (e.g., Pennsylvania) or other programs that also address adoption issues. It is obvious that States authorities, including Governors, legislatures, as well as NARUC's member commissions, are interested in promoting further build-out of broadband infrastructure, and in informing their citizens of the benefits of utilizing broadband applications in the 21st Century.

[2] Preemption of State "Carrier of Last Resort" (COLR) Obligations will have unintended and anti-consumer consequences.

[3] The failure to classify VoIP services as "telecommunications services" and to re-acknowledge the continued severability of VoIP traffic will undermine existing State COLR obligations, make it difficult if not impossible for both States currently contemplating State universal service programs(USF) to implement them, as well as for the 22+ States with existing universal service programs to maintain them. In the long term, whatever the FCC's current legal stance, based on existing Court precedent, this failure <u>will necessarily eliminate the funding base for these State programs.</u> That result is inconsistent with explicit Congressional mandates in Section 254 of the Act.[1] Such result will also generate additional funding pressures arising from access restructuring mechanisms on the redirected federal USF, lessening the support amounts available for broadband deployment in high-cost areas. If the FCC wants and needs State cooperation on an ongoing basis to promote universal service and broadband access, this is a strong prescription to destroy the financial means for such cooperation.

[1] It is also inconsistent with the explicit reservations of authority in 47 U.S.C. Section 253. That section, which is questionably the broadest grant of preemptive authority provided to the FCC in the entire statute – allowing the FCC to preempt ANY state or local law that has the effect of prohibiting ANY telecommunications service provider from entering a market - still explicitly reserves State authority over inter alia, service quality and universal service.

The ABC Plan proponents, ignoring the FCC's E911 initiatives, the requirements of CALEA, and, most recently, the FCC';s 2010 decision to allow State USF programs to assess the intrastate revenues of nomadic VoIP based on the complement to the interstate safe harbor (as opposed to wireless and "fixed" VoIP services which already pay into such state programs based on severed traffic) – as well as the economic imperative imposed by proliferation of so-called "location-based" services, argue that both nomadic and fixed VoIP services are just not severable. This is – on its face – inconsistent with current practice, FCC rulings, and clear and easily discerned industry trends. But more importantly, such a ruling undermines existing State COLR obligations (as industry will continue to argue such obligations should no longer apply to any network that label's its traffic protocol with the adjective "Internet" – whether (i) it "rides" unmanaged the public internet or is managed end-to-end, (ii) the endpoints are in fact known, or (iii) it fits squarely with the functional definition of "telecommunications services" as all fee based traffic currently so labeled clearly does. It also arguably eliminates the funding base for State USF programs (which according to existing precedent – cannot burden the federal programs and must be drawn from intrastate operations). In 47 U.S.C. § 254, Congress tried to mandate such programs. Moreover, the NPRM suggests this is something the FCC wishes to encourage to reduce the financial burden on the federal fund. As Congress clearly expected the States to play a prominent role in the building out of advanced services to high-cost areas to rural and unserved America, it makes little sense for the FCC to narrow States' options to recover the costs of its participation.

[4] ***The likely impact of the ABC plan proposal cannot be determined based upon the current record. The CQBAT cost model that was "released" – subject to a protective order – to the public remains a black box. There is no way to determine the impact and likely outcome of either the ABC plan proposal or any proposal that closely tracks or is otherwise found on the results of this cost model. The FCC should immediately order the ABC plan proponents to provide full access to the model. Absent full access and a reasonable time to utilize that access, the FCC cannot rely on the model as a basis for action. See, e.g., <u>American Radio Relay League v. FCC</u>, 524 F.3rd 227 (D.C. Cir. 2008).***

Everyone has heard that early runs of the ABC model required a federal universal service fund to double in size. This need to scrutinize the model and its inputs (and likely impact) is obvious. However, as the attached Affidavit of Dr. Robert Loube indicates, the documentation that has been released about the model will not enable anyone to validate the ABC plan or analyse its financial effects on various States and carriers. The model remains a black box, operating behind a screen. The analyst is only allowed to change a limited number of support variables such as the cost benchmark and a cost cap called the alternative technology cutoff and to aggregate the support results according to geographic (county or census block group) or regulatory (price cap carriers or individual carriers) attributes. The access provided to this "model" will not enable anyone to "price out" significant modifications to the ABC plan such as those which would remedy the deficiencies in the ABC plan discussed in the comments of the National Association of Regulatory Utility Commissioners, the National Association of State Utility Consumer Advocates, the Rural Broadband Coalition, the Nebraska Rural Independent Companies, the Maine Public Utilities Commission, the Vermont Public Service Board, the Kansas Corporation Commission, the Nebraska Public Service Commission, and the Pennsylvania Public Utilities Commission. To fully vet the model requires full disclosure of the model, its inputs, outputs, and source code. Users must be allowed to download all of the information and run the model themselves.

[5] The ABC plan proposed uniform and nationwide $0.0007/MOU intercarrier compensation rate is not cost based and is non-compensatory. The potential adoption of this intercarrier compensation rate will create severe problems both for carriers and the States. The $0.0007/MOU rate will create unwarranted funding pressures for the redirected federal USF mechanism, and will subtract from the available support amounts that could otherwise be available for broadband deployment in high-cost areas.[2]

Please do not hesitate to contact the undersigned at 202.898.2207 or jramsay@naruc.org if you have any questions about this filing.

Respectfully submitted,
/s/
James Bradford Ramsay
NARUC General Counsel

cc: The Honorable Mignon Clyburn, FCC Commissioner
Zachary Katz, Chief Counsel and Senior Legal Advisor to the Chairman
Angela Kronenberg. Wireline Legal Advisor to Commissioner Clyburn
Margaret McCarthy, Policy Advisor for Wireline Issues to Commissioner Copps
Mark Stephens, FCC Chief Financial Officer
Sharon Gillett, Wireline Competition Bureau Chief
Carol Mattey, Wireline Competition Deputy Bureau Chief
Rebekah Goodheart, Wireline Competition Bureau Associate Chief

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2 While NARUC did generally endorse the State member plan in a recent resolution, that resolution did not specifically address this aspect of the ABC proposal. *See*, ***Resolution Strongly Supporting the Proposals Submitted on Universal Service Reform by the State Members of the Federal State Joint Board on Universal Service***, *available at:* http://www.naruc.org/Resolutions/Resolution%20Supporting%20USF%20State%20Members%20Proposals%20on%20USF%20Reform.pdf. All of the State members have expressed concerns about this aspect of the ABC plan. Indeed, the State members filed a July 13, 2011 ex parte in these proceedings specifying that: "Unrealistic proposals on intercarrier compensation (e.g., "bill and keep" or $0 and $0.0007/MOU rates) will simply put additional and undesirable "revenue replacement" pressures on the federal USF mechanism and will retard other FCC goals, i.e., broadband loop facilities and Internet Protocol (IP) based switching deployment (soft switches)."

Appendix A - Partnership, Not Preemption

The FCC should not disturb the concurrent regulatory scheme, but maintain the working partnership with the States. The dual-jurisdictional roles have worked for decades and will continue to do so well into the future. To do otherwise will result in the FCC becoming responsible for many duties that States now perform (e.g. resolution of carrier to carrier disputes, consumer disputes, service regulation, audits, certification of the federal universal service fund support consistent with Section 254, etc.). The industry proposals to preempt intrastate access charges based on a brand new reading of Section 251 that is wildly inconsistent with legislative history, the plain text of the statute, and common usage should be rejected.

The FCC has recognized that many States already mirror interstate carrier access tariffs or have already acted to rebalance access charge rates. Some industry players assert that "market forces" and technology changes will make access charges an un-used anachronism in less than a decade. Yet those same industry players feel compelled to urge the FCC to hasten the process citing allegedly several States where supposedly uneconomic or inappropriately high intrastate carrier access charges remain.

This is a place for the FCC to tread carefully. In States where intrastate and interstate switched access rates are at or near parity, there is no discernable reason for the FCC to assert authority or order cuts to access rates. With interstate and intrastate rates at, or near parity, there is no inconsistency between State and federal policy goals that could possibly justify such action. Furthermore, the FCC must be careful not to overthrow State legislative mandates regarding access charges and must carefully consider the impact of its actions on existing federally "mandated" State Universal Service Programs. And it is clear that the States - writ large - are already addressing access reform issues.

In response to these perceived allegations, NARUC's Committee on Telecommunications created a special task force to examine the current state of State access charge reform activity. We informally surveyed NARUC member States with a special emphasis on the minority of States, just 18, that some have suggested require the FCC to act.

Approximately 35 States have responded informally to NARUC's queries so far and of those 35, 10 currently have open proceedings to reform access charges. Five of those ten States are on the industry suggested recalcitrant "18" list.

Arizona, Nebraska, and North Carolina (which apparently has evidentiary hearings scheduled for next month) have open and active dockets. New York was just in final settlement discussions when the release of the NPRM resulted in the proceedings being held in abeyance pending FCC action. However, the docket remains open. In Georgia, the commission has an open docket – 32235 on access reform though according to staff most of the policy decisions related to access have been largely decided and the focus of the proceeding has changed.

Two other States on the "18" list have also taken recent actions towards reform. Specifically, South Dakota just completed a docket this spring requiring competitive local exchange carriers to mirror RBOC intrastate rates (though they can seek higher rates via a contested proceeding). And in Washington State there is a proceeding underway to examine small incumbent local exchange carrier earnings reviews which many see as paving the way for reductions to their access charges. Moreover, the largest Washington incumbent local exchange carrier is CenturyLink which is required to file an alternative form of regulation (AFOR) plan for the combined CenturyLink/Qwest company within the next three years and it is specifically *acknowledged in a merger settlement condition that access reform will be addressed in that proceeding. Frontier, which is the remaining large ILEC in Washington already has intrastate access rate that are virtually at parity with interstate levels.*

Moreover, it appears that another six States believe it likely that additional State proceedings/actions on reform are likely in their State in the next six months. Of those six – two were on the "18" list.

If the actions of these 18 States are supposed to provide a clear policy basis for preemption, NARUC respectfully suggests that in the short time that has elapsed since industry suggested them as a problem, nine seem to be on track to initiate or complete significant reforms within the next six months. Rather than preemption, providing financial incentives for change might provide a better policy option – one that is much more likely to survive judicial review.