



N A R U C
National Association of Regulatory Utility Commissioners

EX PARTE NOTICE VIA ELECTRONIC FILING

October 1, 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 Thursday, September 19, 2011, the undersigned met with the Federal Communications Commission's General Counsel Austin Schlick and Deputy General Counsel Julie Veach. Prior to the meeting, the undersigned forwarded four hyperlinks to four comments/*ex partes* filed by the National Association of Regulatory Utility Commissioners (NARUC) in the above captioned proceedings.¹

The undersigned reiterated NARUC's arguments with respect to preemption and focused in particular on the ABC Plan proponents dueling legal rationales to justify classifying VoIP as interstate and establishing a separate intercarrier compensation regime for all such traffic.

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.

¹ The links were to comments filed on September 21 <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021711197> and <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021711199>, on August 3, 2011, available online at: <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021705367>, on April 18, 2011, available online at: <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021239296>, and on April 1, 2011, available online at: <http://www.naruc.org/Testimony/11%200401%20NARUC%20ICC%20USF%20INITIAL%20CMTS%20.pdf>.

However you view the Statute, it is clear Congress expected State Commissions to play a strong and independent role with respect to both universal service - particularly with respect to advanced services – and service quality.² The failure to properly classify VoIP service and potentially the legal rationale used to set up a “separate” access charge regime for VoIP traffic will long term eliminate both those state functions.

In the long term, *whatever the FCC’s current legal stance*, based on existing Court precedent,³ this failure will necessarily eliminate the funding base for these State programs. That result is inconsistent with explicit Congressional mandates in Section 254 of the Act. 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.

NARUC complained on Sept. 21 that (1) the access the ABC plan proponents offered to the model was defective as no analyst, whether employed by outside interests or the FCC own staff, could make any realistic judgments about the validity of the models outputs based on the limited access provided, and (2) that even if full access had been provided, the proponents studied decision to delay releasing the model until so late in the process had already denied parties with standing adequate time to vet the model as a matter of due process – assuming the FCC were still to act at its October agenda meeting.

On September 19th, less than seven days before the FCC Chairman is expected to circulate a draft order in this docket to his fellow Commissioners, and less than two weeks before sunshine drops and all advocacy on that order must cease, the ABC proponents filed with the FCC a plan that purports to provide full access to the model’s inner workings – and in so doing necessarily concede that the access they provided previously was insufficient for any useful analysis.

To anyone that has any familiarity with the use of such models, this is the same as providing no access at all. But even assuming *arguendo*, two weeks was a legally adequate time to review the model, the proponents have further limited access to six workstations a day and to parties that have the financial resources to, on incredibly short notice, send expert staff to Cincinnati, Ohio and pay \$500 for access and \$100/day to examine the model. In response to a question, the undersigned suggested that far from buttressing the case for the FCC to use or rely on the model, this latest and carefully timed filing all but prohibits its use.

² 47 U.S.C. Section 253, 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. (“Nothing in this section shall affect the ability of a State to impose on a competitively neutral basis and consistent with Section 254...requirements necessary to preserve and advanced universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers.”)

³ See, e.g., AT&T Corp. v Public Utility Commission of Texas, et al., Case No. 03-50454 (5th Cir. June 4, 2004) (“the PUC’s assessment on both interstate and intrastate calls creates an inequitable, discriminatory, and anti-competitive regulatory scheme.”) Available online at: <http://www.ca5.uscourts.gov/opinions/pub/03/03-50454-CV0.wpd.pdf>.

Indeed, it even calls into question any other proposal that tracks the numbers laid out in the ABC plan – that lacks some other fully vetted (and as yet unreferenced in the record) model based support.

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