



N A R U C  
National Association of Regulatory Utility Commissioners

***EX PARTE NOTICE VIA ELECTRONIC FILING***

*October 14, 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 Contact 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 Wednesday, October 14, 2011, the undersigned met with the Federal Communications Commission's Christine D. Kurth, the Policy Director & Wireline Counsel for FCC Commissioner Robert McDowell. During the conversation, I covered either obliquely or directly most of the key points outlined in prior comments already filed in the record of these proceedings on September 21, 2011 at: <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>.

The undersigned reiterated NARUC's arguments with respect to the "novel" preemption arguments<sup>1</sup> 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.

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<sup>1</sup> The undersigned pointed out that successfully advancing "novel" legal interpretations of statutory text – like the State preemption theories expounded at length in this proceeding – can only – if sanctioned by the courts - in the long term - increase the discretion of the FCC to expand its authority at will regardless of clear Congressional restrictions. Adhering to the statutory text and promoting narrow interpretations – consistent with the FCC's own prior decisions, long held views of the statutory text and common usage of terms, and legislative history, can only have the opposite impact. The FCC has been given a broad tool in 47U.S.C. § 253, to stop State laws that truly impede competition. The FCC has also tools to deregulate (in the forbearance provisions) where deregulation is justified by market conditions and consumer impact. Neither of those provisions are appropriate for application in this context. States – far from being regulatory Luddites – have been the instigators of most deregulatory trends. Competition in local exchange service began with State experiments that were copied in key provisions of the 1996 legislation.

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.

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.<sup>2</sup> 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,<sup>3</sup> 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 19<sup>th</sup>, 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.

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The trend at the State level has been for quite a while now to move away from economic regulation – while retaining authority to advance universal service, assure emergency services and service restoration, and monitor service quality. These crucial State roles – which cannot be duplicated by a single agency in a country this size - are likely to be undermined by the preemption advanced in this proceeding.

<sup>2</sup> 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.”)

<sup>3</sup> See, e.g., *AT&T Corp. v Public Utility Commission of Texas, et al.*, Case No. 03-50454 (5<sup>th</sup> 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. The plan is to restrain growth of the fund, but without fully vetting the model it is impossible to determine the impact on the fund size, given the clear Congressional mandate for reasonably comparable service at comparable rates.

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

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