



N A R U C
National Association of Regulatory Utility Commissioners

EX PARTE NOTICE VIA ELECTRONIC FILING

October 20, 2011

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

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

In the Matter(s) of the Connect America Fund, WC Docket 10-90, National Broadband Plan for Our Future, GN Docket 09-51, Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket 07-135, High- Cost Universal Service Support, WC Docket 05-337, Developing an Unified Intercarrier Compensation Regime, CC Docket 01-92, Federal-State Joint Board on Universal Service, CC Docket 96-45, Lifeline and Link-Up, WC Docket 03-109

Dear Ms. Dortch:

On Thursday, October 20, 2011, the undersigned spoke with the Federal Communications Commission's **Margaret McCarthy**, Advisor to **FCC Commissioner Michael Copps**. After that conversation, the undersigned met with a group of competitive local exchange carriers with Sharon Gillett and other members of the Wireline Competition Bureau.¹ On Friday, I called **Angela Kronenberg**, Advisor to **Commissioner Mignon Clyburn**, **Zac Katz**, Advisor to Chairman **Genachowski**, **Christine Kurth**, Advisor to **Commissioner McDowell**, and FCC General Counsel **Austin Schlick** advising each via voice mail of the contents of this written ex parte, and my intent to e-mail a copy of it – with attachments to each. During the conversation with Ms. McCarthy, she asked me about **WUTC Commissioner Phil Jones** recent testimony before the Senate Commerce Committee when I referenced **Senator Mark Warner's** (D-VA) statements **about the crucial need of interconnection for next generation networks now.**

¹ NARUC's participation in that meeting was focused entirely on pressing for immediate specification that 47 U.S.C. §§251-252 interconnection and default state-mediated arbitration rights apply to IP-to-IP interconnection. We noted that States are better equipped to handle the types of factual inquiries that such arbitrations entail. The other participants in the meeting are filing a separate ex parte detailing who was present and what else was said which will also cover NARUC's participation.

Specifically, she asked me to forward a copy of a follow-up letter we forwarded to the Committee on **Commissioner Jones**' behalf *which also addressed the crucial need for clarification of carrier obligations to interconnect, subject to backstop State arbitrations.* I am attaching a copy of that letter to this letter. I also mentioned that we were hoping that **Senator Warner** would call or send a letter on the same issue. The Senator sent that letter today. I also spoke briefly – as outlined below – on the crucial need to protect revenue streams supporting State USF programs if the FCC should fail to clarify that VoIP is a “telecommunications service.”

The undersigned began by thanking each FCC representative personally for the recent informational and policy outreach to NARUC and its members (and also specifically complementing the related efforts of Wireline Competition Bureau (WCB) Chief **Sharon Gillett**, General Counsel **Austin Schlick**, Deputy General Counsel **Julie Veach**, OGC Attorney **Michael Steffen**, WCB Deputy Chief **Carol Matthey**, WCB Deputy Chief **Rebekah Goodheart**, and WCB Attorney **Patrick Halley**. Though it is very clear NARUC members have several points of strong policy and process disagreement, it is also clear that the current order includes language specifically tailored to address some pointed NARUC concerns.

During this brief conversation, the undersigned pointed out two specific concerns:

[1] To protect competition and consumers, the FCC must clarify that 47 U.S.C. §§ 251- 252 interconnection obligations as well as the back stop State arbitration option, applies to next generation networks/service.

NARUC has endorsed a technology-neutral application of the federal Telecommunications Act of 1996 almost since its inception. Moreover, as far back as July of 2008 (see attached resolution), NARUC specifically recognized that “it is in the public interest for telecommunications carriers to interconnect their networks to exchange traffic in a technologically neutral manner, as provided for under Sections 251 and 252.” Indeed, the 2008 resolution specifically notes that:

- “Interconnection of telecommunications carriers’ networks for the exchange of voice traffic *is essential to ensure that consumers continue to enjoy the benefits of robust competition* and to receive voice services that are universally connected, reliable, secure, and of high quality; *and*”
- “The Act, in its imposition of interconnection requirements is technologically neutral and does not distinguish between circuit switched facilities and other network facilities that may be used to exchange voice telecommunications traffic; *and*”

- “Telecommunications carriers are substituting Next Generation Network technology in their networks in place of circuit switched technology in order to reduce the costs of providing voice telecommunications services and for other network management purposes; *and*”
- “The Federal Communications Commission (FCC) has determined that the exchange of voice telecommunications traffic between telecommunications carriers is subject to the interconnection obligations under Section 251 irrespective of the regulatory classification of the retail service provided to the ultimate end user; *and*”²

Now is the time for the agency to confirm that determination.

It is not surprising that U.S. Senator Mark Warner (D-VA) was vocal in a recent Senate hearing about the need for the FCC to act upon and the desirability of procedures assure interconnection of competing next generation networks³ – used to provide voice and other services. Interconnection disputes between networks operators are common and recurring. Indeed, any examination of the literature demonstrates that such issues are characteristic of all networked industries. Regulatory discussions of bottleneck facilities and market power in the electricity, gas and telecommunications industry date are replete in the majority of the written proceedings recording NARUC 100 year plus annual meetings. In July of 2008, NARUC passed the attached resolution to assure that networks that are used to deliver voice communications – whatever the technology used – should remain subject to the duties and arbitration provisions found in 47 U.S.C. § 251-2.

² The FCC has essentially *already* made the necessary findings that indicate direct IP-to-IP interconnection is subject to § 251. Unfortunately, it is apparent, based on the behaviors of certain carriers, that additional clarification is needed. See ¶¶48-49 of the Memorandum Opinion and Order, and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, CCB/CPD No. 98- RM 9244, FCC 99-188 (1998), where the FCC declared, that, to ensure the agency “. . . rules make it possible for competing telecommunications providers to offer seamless service to end-users by interconnecting with incumbents’ networks,” that:

[I]nterconnection obligations of sections 251(a) and 251(c)(2) apply to incumbents’ packet-switched telecommunications *networks* and the telecommunications services offered over them...[rejecting the argument] that Congress intended that section 251(c) not apply to new technology not yet deployed in 1996. Nothing in the statute or legislative history indicates that it was intended to apply only to existing technology. Moreover, Congress was well aware of the Internet and packet-switched services in 1996, and the statutory terms *do not include any exemption* for those services. {emphasis added}

Subsequently, in the *Advanced Services Remand Order*, the Commission again states that “the interconnection obligations set forth in section 251(c)(2) apply to packet-switched services as well as circuit-switch services.” See, Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78 98-91, FCC 99-413, at ¶22 (1999).

³ See the video of the October 12, 2011 United States Senate Committee on Commerce, Science and Transportation hearing, called by Senator Rockefeller, on “*Universal Service Reform – Bringing Broadband to all Americans*,” online at: http://commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=106c5f06-326f-4808-a316-14ed516b6e43. As noted earlier, Senator Warner also sent a letter today to the Chairman (see attachment) – NARUC takes no position on other aspects of the letter, but we are on “all fours” with the Senator’s strong endorsement of action on IP-to-IP interconnection now.

In a world where IP to IP connections are increasingly the norm, direct interconnection requirements on a technology-neutral basis are a necessary prerequisite for competition. It appears the FCC is considering whether to address such interconnection duties in a future proceeding. That would be a mistake. The omission of clear requirements for direct interconnection with *facilities-based* VoIP over managed networks—at a time when many existing agreements are due for renegotiation—will mean that the competitive promise of the 1996 Act will remain unfulfilled. Further delay in clarifying the specific requirement to maintain technology-neutral interconnection and a role for the States, which have historically arbitrated intercarrier interconnection disputes, would be a mistake. If a competitive carrier cannot get interconnection, whether to the Public Switched Telephone Network or an IP network, competition will be stunted and consumers will suffer.

[2] *The FCC should immediately clarify that VoIP is a “telecommunications service”, but failing that, must be sure to reserve State authority with respect State universal service programs, State COLR obligations, and State quality oversight.*

The failure to classify VoIP services as “telecommunications services” and, in particular, *to re-acknowledge the continued severability of such 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.⁴ The failure to properly classify VoIP service and possibly the legal rationale used to set up a “separate” access charge regime for VoIP traffic could long term eliminate both those State functions.

Whatever the FCC’s current legal stance, based on existing Court precedent,⁵ if severability is not addressed, this failure could eliminate the funding base for these State programs. The FCC should also take this opportunity to explicitly reject the novel “economic” severability argument advanced by the ABC plan proponents.

⁴ 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.”)

⁵ 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>.

Undermining State authority vis-à-vis VoIP services is inconsistent with explicit Congressional mandates in Sections 254 (and Section 706) 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.

Assuming *arguendo*, the FCC determines NOT to classify VoIP services in this order, to protect State authority to, *inter alia*, promote universal service, it must be very careful to, at a minimum,

- explicitly buttress and reaffirm the findings and reasoning in its prior orders with respect to State authority to, *inter alia*, assess both fixed and nomadic VoIP providers to support State programs.⁶
- reaffirm the severability of existing VoIP traffic;
- expressly reject the novel “economic inseparability” argument advanced by the ABC plan proponents.

NARUC’s counsel also reminded all the FCC Commissioner offices and the General Counsel that, because, [1] for purposes of their service on the Joint Board, State members are basically considered federal employees and also because [2] the Statute specifies that the FCC must provide State members with the ability to “participate in deliberations but not vote,” in this proceeding,⁷ Sunshine restrictions do not apply to Universal Service Joint Board members.

⁶ The FCC should at a minimum – cite to the relevant orders {{See *In the Matter of Universal Service Contribution Methodology*, WC Docket 06-122; CC Dockets 96-45, 98-171, 90-571, 92-237; CC Dockets 99-200, 95-116, 98-170; WC Docket 04-36, *Report and Order and Notice of Proposed Rulemaking*, 21 FCC Rcd 7518 (June 2006) (Contribution Order), aff’d in part, vacated in part, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007), at ¶156 and at note 189 (“Because we permit interconnected VoIP providers to report on actual interstate revenues, this Order does not require interconnected VoIP providers that are currently contributing based on actual revenues to revise their current practices.”)}. See also, *In the Matter of Universal Service Contribution Methodology*; *Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, WC Docket No. 06-122, FCC 10-185, Declaratory Ruling, 25 FCC Rcd 15651 (rel. November 5, 2010) (Declaratory Ruling).}} and strongly affirm their reasoning and impact: {{Though the FCC is not addressing classification of interconnected VoIP services in this order, we strongly reaffirm the legal rationale and resulting State authority specified in the November 2010 Declaratory Ruling and also the June 2006 Contribution order, including in particular the ¶156 specification of the impact on “an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls.”}}

⁷ See, 47 U.S.C. § 410 (a) & (c), noting that members of the Federal State Joint Board on Universal Service are considered by Statute to be subject to the duties and obligations of an examiner “designated by the Commission,” and that the FCC is *required* to “afford the state members of the Joint Board and opportunity to participate in its deliberations, but not vote, when it has under consideration the recommended decision of the Joint Board or any further decisional action that may be required in the proceeding.” 47 U.S.C. § 410 (a) & (c). This is a

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: *Zac Katz, Advisor to Chairman Genachowski*
Margaret McCarthy, Advisor to FCC Commissioner Michael Copps
Christine Kurth, Advisor to Commissioner McDowell,
Angela Kronenberg, Advisor to Commissioner Mignon Clyburn,
Austin Schlick, FCC General Counsel
Sharon Gillett, Wireline Competition Bureau Chief

further decisional action in the same docketed proceeding as the last formal recommended decision from the Joint Board. Even if it were not in the same docketed proceeding, it would still qualify as “any further decisional action.” Moreover, a majority of the Joint Board concurred in the recommendation filed in May 2011 in this docket and the FCC is acting on those recommendations in this proceeding.

***Resolution Regarding the Interconnection of New Voice Telecommunications Services
Networks***

WHEREAS, The benefits of competition can be measured by the continuous delivery of voice and advanced services to market from numerous types of telecommunications carriers as defined by the Telecommunications Act of 1996 (the Act) 47 U.S.C. 153 (44). These benefits are largely being realized across the United States due to innovations in technology guided by the principles set forth in the Act; *and*

WHEREAS, NARUC applauds the numerous advances in technology achieved by the telecommunications industry to enable the efficient transmission of voice telecommunications traffic and the continued successes in developing innovative means to deliver voice telecommunications services to consumers across the nation; *and*

WHEREAS, Interconnection of telecommunications carriers' networks for the exchange of voice traffic is essential to ensure that consumers continue to enjoy the benefits of robust competition and to receive voice services that are universally connected, reliable, secure, and of high quality; *and*

WHEREAS, Section 251 of the Act requires all telecommunications carriers to interconnect with the facilities and equipment of other telecommunications carriers; *and*

WHEREAS, The Act, in its imposition of interconnection requirements is technologically neutral and does not distinguish between circuit switched facilities and other network facilities that may be used to exchange voice telecommunications traffic; *and*

WHEREAS, Telecommunications carriers are substituting Next Generation Network technology in their networks in place of circuit switched technology in order to reduce the costs of providing voice telecommunications services and for other network management purposes; *and*

WHEREAS, The Federal Communications Commission (FCC) has determined that the exchange of voice telecommunications traffic between telecommunications carriers is subject to the interconnection obligations under Section 251 irrespective of the regulatory classification of the retail service provided to the ultimate end user; *and*

WHEREAS, NARUC recognizes that this resolution does not address the regulatory classification of telecommunications carriers, nor is it intended to influence any proposals to change said classification; *and*

WHEREAS, Section 252 of the Act provides State commissions with the primary responsibility to mediate, arbitrate and approve interconnection agreements between incumbent local exchange carriers and other telecommunications carriers; *and*

WHEREAS, NARUC recognizes that State commissions and the FCC will continue to work together to evaluate what rules, guidelines or performance standards are needed to ensure that

telecommunications carriers are able to compete fairly with incumbent local exchange carriers;
and

WHEREAS, NARUC recognizes that in emerging and competitive markets, incumbent and competitive telecommunications carriers each benefit from appropriate technologically neutral policies; *and*

WHEREAS, NARUC supports technical standards that allow all telecommunications carriers to interconnect with each other as the “network of networks” develops and that do not mandate the use of a particular technology or a specific network configuration; *and*

WHEREAS, Congress has clearly intended and NARUC has consistently advocated that the State commissions have a clear role to exercise their explicit authority under Sections 251 and 252; *and*

WHEREAS, NARUC recognizes that it is in the public interest for telecommunications carriers to interconnect their networks to exchange traffic in a technologically neutral manner, as provided for under Sections 251 and 252; *and*

WHEREAS, Insofar as State commissions have been at the forefront of implementing and enforcing the open market requirements of the Act and in working with the incumbent local exchange carriers and competitive telecommunications carriers alike to advance local exchange competition; *now, therefore, be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened at its 2008 Summer Meetings in Portland, Oregon, recognizes that State commissions should continue their active role in ensuring that consumers enjoy the full and unconstrained benefits of local competition for voice telecommunications services; *and be it further*

RESOLVED, That the NARUC General Counsel be directed to take any appropriate actions which protects the authority, under Sections 251 and 252, of State commissions and the preservation of telecommunications carriers’ interconnection rights and traffic exchange obligations, under Sections 251 and 252, in a technologically neutral manner.

Sponsored by the Committee on Telecommunications
Adopted by the Board of Directors July 23, 2008