



N A R U C
National Association of Regulatory Utility Commissioners

October 16, 2009

NOTICE OF ORAL EX PARTE CONTACT

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: NARUC notice of oral ex parte contacts involving meetings concerning the proceedings captioned:

In the Matter(s) of

A National Broadband Plan for Our Future, GN Docket 09-51; Special Access Rates for Price Cap Local Exchange Carriers, WC Docket 05-25; and Developing a Unified Intercarrier Compensation Regime, CC Docket 01-92

Dear Secretary Dortch:

On September 21, 2009, **Washington State Commissioner Philip Jones** and NARUC's General Counsel, Brad Ramsay met at 5:00 pm, with **Ms. Sharon Gillett, Wireline Competition Bureau Chief**.

SPECIAL ACCESS: During the meeting, Commissioner Jones referenced NARUC's July 2009 resolution that specifically requests that the FCC take steps to improve special access data collection by regularly collecting market concentration and pricing data, and also evaluate the benefits and costs of collecting data on the location of competitive providers' facilities and self-supplied facilities, whether wireless or wireline. A copy of the resolution is attached. The resolution also suggests that, following the collection of such data, the Commission should also consider improving its current methods for determining where competition is effective by:

- Measuring the presence and substitutability of non-PSTN technologies that do not rely on collocation in ILEC central offices,
- Recognizing that competition can decrease as well as increase over time due to industry structure and competitive factors, by recognizing that current and planned circuit capacity and service offerings are important variables in competition,
- Differentiating between markets for channel terminations and for interoffice transport,
- Adopting a more granular geographic scale than the MSA for measuring the competitiveness of these markets, and
- By investigating the extent to which the terms contained in ILEC special access discount plans affect competition.

A copy of the special access resolution is attached to this ex parte notice as Appendix A.

NARUC's PETITION FOR DECLARATORY RULING: A July 2009 NARUC resolution asks the FCC to "immediately grant a petition for declaratory ruling affirming that: (1) it is an important aim of federal policy to expand the scope of available broadband services data; and (2) the FCC has not asserted any general preemption of any State actions requiring broadband service providers to submit specific information, at an appropriate level of granularity as determined by the State, on broadband service locations, speeds, prices, technology and infrastructure within the State, provided such State agrees to provide a minimum level of data confidentiality and protection." NARUC filed that petition about two weeks ago. During the meeting, Mr. Ramsay also urged quick action NARUC's yet-to-be-docketed, petition for declaratory ruling that the FCC has not to date – released any order that limits State authority to collect broadband data.

NBP: During a discussion of the broadband plan, NARUC mentioned that a number of States that mirror the federal interstate access charge regime. Mr. Ramsay posited that a significant number of States either mirrored the interstate access charge regime or no longer set those rates because of deregulation. Mr. Ramsay will be filing to supplement the record of this proceeding with more specific information as soon as an informal survey can be completed.

If you have any questions about this letter, please do not hesitate to contact the undersigned at 202.898.2207 or jramsay@naruc.org.

Respectfully Submitted,

/s/

**James Bradford Ramsay
NARUC General Counsel**

Appendix A - Resolution on Special Access

WHEREAS, In a resolution passed in February of 2007, NARUC found that special access, including channel terminations and dedicated transport, is a key input to all telecommunications providers including wireless carriers; *and*

WHEREAS, The majority of special access services are provided by the former regional Bell Operating Companies, or incumbent carriers, which have been substantially reduced in number due to recent industry consolidation; *and*

WHEREAS, Special access services are increasingly viewed as critical inputs to the provision of broadband services, whether by ILECs including rural ILECs, CLECs, or wireless carriers; *and*

WHEREAS, Although substitutes exist for some special access services, especially those of higher capacity, the extent of competition for a particular service usually varies with its capacity, price, and location; *and*

WHEREAS, The Federal Communications Commission (FCC) in 1999 issued a Pricing Flexibility Order that defined triggers for granting pricing flexibility from the price cap rules that otherwise apply to special access, and those triggers were based on the number of collocations by competitive carriers in the incumbents' wire centers, and using those triggers, the FCC later irreversibly granted upward pricing flexibility for channel terminations in about one-third of the top 50 Metropolitan Statistical Areas (MSAs) and upward pricing flexibility for transport in about 90 percent of the top 50 MSAs; *and*

WHEREAS, The FCC issued a Notice of Proposed Rulemaking on January 31, 2005, to reexamine the appropriate regulatory framework for the interstate special access services of price-capped local exchange carriers, after which the Commission took no further substantive action; *and*

WHEREAS, In response to a Congressional inquiry, the Government Accountability Office (GAO) in 2006 issued a report concluding that facilities-based special access competition existed in a relatively small subset of buildings and that the FCC needed to improve its data collection and analysis in order to determine the true extent of competition in special access markets; *and*

WHEREAS, The 2007 resolution recited NARUC's long-standing interest in ensuring that sufficient competition exists in local exchange markets so that market-based rates can apply to wholesale services such as special access, and where competition is judged not to be sufficient, regulatory policies should be adopted that prevent dominant carriers with excessive market power from operating in a manner that harms competition; *and*

WHEREAS, Pursuant to the 2007 resolution, the Committee on Telecommunications, under the aegis of the Federal Regulatory Subcommittee, conducted a study to examine these issues and collected data from numerous industry sources, after which NARUC contracted with the National Regulatory Research Institute (NRRI) to produce a report; *and*

WHEREAS, NRRI issued a report first issued on January 21, 2009, that concluded that the evidence did not support a simple "thumbs-up" or "thumbs-down" judgment on market power for special access

markets, finding that certain markets are more competitive than others and that the level of competition varied by location, circuit capacity, and service components, as well as over time, and also concluding that ILECs still have substantial market power in most geographic areas, especially for channel termination and DS-1 services, with the main exception being relatively compact downtown areas; *and*

WHEREAS, The NRRI report also found almost no evidence of the validity of the FCC's current policy equating special access competition with the presence of collocation in ILEC central offices, finding that market concentration for channel terminations remained high in all areas, regardless of pricing flexibility, and finding that the FCC collocation proxy consistently overestimated the competitiveness of the DS-1 and DS-3 channel termination markets, and concluded that "the time for additional FCC action is certainly ripe;" *now, therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its Summer 2009 Meetings in Seattle, Washington, requests that the FCC take steps to improve special access data collection by regularly collecting market concentration and pricing data, and also evaluate the benefits and costs of collecting data on the location of competitive providers' facilities and self-supplied facilities, whether wireless or wireline; *and be it further*

RESOLVED, That, following the collection of such data, the Commission should also consider improving its current methods for determining where competition is effective by:

- Measuring the presence and substitutability of non-PSTN technologies that do not rely on collocation in ILEC central offices,
- Recognizing that competition can decrease as well as increase over time due to industry structure and competitive factors, by recognizing that current and planned circuit capacity and service offerings are important variables in competition,
- Differentiating between markets for channel terminations and for interoffice transport,
- Adopting a more granular geographic scale than the MSA for measuring the competitiveness of these markets, and
- By investigating the extent to which the terms contained in ILEC special access discount plans affect competition; *and be it further*

RESOLVED, That following the collection of such data, the Commission should consider whether growth in wireless services has been harmed by use qualifications that prevent wireless carriers from making purchases of unbundled network elements; *and be it further*

RESOLVED, That NARUC directs its General Counsel to communicate this resolution to Congress, and to all relevant Federal and State agencies and policymakers.

*Sponsored by the Committee on Telecommunications
Adopted by the NARUC Board of Directors, July 22, 2009*