

Puerto Rico, and the Virgin Islands charged with regulating the activities of telecommunications,² energy, and water utilities.

Congress and the courts³ have consistently recognized NARUC as a proper entity to represent the collective interests of the State public utility commissions. In the Federal Telecommunications Act,⁴ Congress references NARUC as “the national organization of the State commissions” responsible for economic and safety regulation of the intrastate operation of carriers and utilities.⁵

Indeed, NARUC has testified twice before the House of Representatives on FCC process reform⁶ endorsing several specific changes to the federal telecommunications law to facilitate (and maintain) needed reforms.

² NARUC’s member commissions have oversight over intrastate telecommunications services and particularly the local service supplied by incumbent and competing local exchange carriers (LECs). These commissions are obligated to ensure that local phone service supplied by the incumbent LECs is provided universally at just and reasonable rates. They have a further interest to encourage unfettered competition in the intrastate telecommunications market as part of their responsibilities in implementing: (1) State law and (2) federal statutory provisions specifying LEC obligations to interconnect and provide nondiscriminatory access to competitors. See, e.g., 47 U.S.C. § 252 (1996).

³ See *United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), aff’d 672 F.2d 469 (5th Cir. 1982), aff’d en banc on reh’g, 702 F.2d 532 (5th Cir. 1983), rev’d on other grounds, 471 U.S. 48 (1985). See also *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

⁴ *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. §151 *et seq.*, Pub.L.No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) (“Act” or “1996 Act”).

⁵ See 47 U.S.C. § 410(c) (1971) (NARUC nominates members to FCC Joint Federal-State Boards which consider universal service, separations, and related concerns and provide formal recommendations that the FCC must act upon; Cf. 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). Cf. *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains “...Carriers, to get the cards, applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the “bingo card” system.”)

⁶ See, *Hearing on “Improving the FCC Process,” House Commerce Subcommittee on Communications and Technology* (July 11, 2013), at: <http://democrats.energycommerce.house.gov/index.php?q=hearing/hearing-on-improving-fcc-process-subcommittee-on-communications-and-technology-july-11-2013>, and the testimony of J. Bradford Ramsay, General Counsel, National Association of Regulatory Utility Commissioners, at: <http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Ramsay-CT-Improving-FCC-Process-2013-7-11.pdf>. See also, *Hearing on “Reforming the FCC Process,” House Commerce Subcommittee on Communications and Technology* (June 22, 2013), available online at: <http://democrats.energycommerce.house.gov/index.php?q=hearing/hearing-on-reforming-fcc-process-subcommittee-on-communications-and-technology-june-22-2011>, and the testimony of James Bradford Ramsay, General Counsel, National Association of Regulatory Utility Commissioners, available online at: http://democrats.energycommerce.house.gov/sites/default/files/image_uploads/Testimony_OI_06.22.11_Ramsay.pdf.

NARUC commends the Chairman and his fellow Commissioners for undertaking and supporting this process.

Many of the reforms endorsed by NARUC can be implemented by the agency through its own policies and rules.

Indeed, NARUC has specifically endorsed several of the recommendations included in the Report, although perhaps with more specific implementation goals and more rigid conditions.⁷

NARUC respectfully requests that the FCC use this proceeding as a vehicle to, *inter alia*, do the following:

- *Present its consumer service complaint information in a publicly available, searchable database on its website that is easily accessible by consumers and that enables public research comparisons;*
- *Enhance coordination/interaction with State Colleagues; and*
- *Establish time frames and procedures that assure any affected entity as an adequate opportunity to be heard.*

In support of this request, NARUC submits the following:

⁷ See, e.g., **Recommendation 1.5:** Make Status Information on Circulation Items Publicly Available. NARUC has noted elsewhere that not all FCC actions are handled at agenda meetings. The FCC Chairman circulates proposed orders on rulemakings and adjudications for action "on circulation". The Chairman also circulates items to other Commissioners at least three weeks before an agenda meeting. The practice of maintaining on the webpage an up to date list of items on circulation gives interested parties notice that some action in a particular docket is imminent. It should be continued.

DISCUSSION

The FCC should present its consumer service complaint information in a publicly available, searchable database on its website that is easily accessible by consumers and that enables public research comparisons.

In July of 2012, NARUC passed a *Resolution Regarding the Federal Communications Complaint Procedure*, available online at: <http://www.naruc.org/Resolutions/Resolution%20on%20FCC%20Consumer%20Complain%20Procedure.pdf>, urging the FCC to take the information it already collects and make it available in a more consumer/taxpayer-friendly manner.

This is a fairly obvious improvement that will provide a very useful service to consumers at little cost. It is also clear the FCC has authority to create such a database and that the Commission already collects the needed information. The Commission already posts on its Website a "Report of Consumer Inquiries and Informal Complaints" approximately four months after each quarter for wireline and wireless telecommunications services, cable and satellite television services, bundled and Voice over Internet Protocol services, and radio and television broadcast services. It also posts the outcomes of specific slamming investigations and other enforcement actions. But the data is not presented in a way that is useful or accessible to the average consumer of these services.

Such a database will not only facilitate competition on the basis of customer service, but that online publicly searchable database of consumer service complaints will also be useful to the FCC and to other State and federal agencies to

detect systemic anti-competitive and/or anti-consumer behavior by service providers.

NARUC is not alone in suggesting this very specific application that is the logical outgrowth of several of the *Report's* general recommendations.⁸

Indeed, just last week, NARUC issued a press release commending a March 25, 2014 letter from Senators Bill Nelson (FL) and Tom Udall (NM) urging the FCC to make publically available an online searchable database of consumer complaints. As the *Report* concedes, at page 24, the current consumer complaint process “does not support as much transparency as would be desirable.” For competition to flourish, consumers need access to information to help them make informed decisions. A comprehensive searchable database on consumer complaints will provide just that. This proceeding provides the perfect opportunity for the FCC to create the needed portal.

The FCC should set deadlines for action in on items presented to it for decision/action (including timely release of the texts of the associated decision).

In “Recommendation 1.1: Efficient Intake Analysis and Relevant Timelines”,⁹ *Report* at 6, the FCC contends that:

⁸ See, e.g., **Recommendation 1.4:** Make Information on All Petitions and Open Dockets Publicly Available, **Recommendation 1.6:** Enhance Transparency of All Unpublished Filings, **Recommendation 1.21:** Increase Tracking Transparency of Pending Items, **Recommendation 2.18:** Provide Better Guidance to Consumers Regarding the Milestones of the Complaint Process, **Recommendation 2.19:** Give Consumers the Means to Check the Status of Their Complaints and Rate the Response, **Recommendation 2.22:** Improve Tracking and Analysis of Complaint Data for Internal Commission Use, **Recommendation 2.23:** Make Data More Accessible and Transparent to the Public, **Recommendation 4.22:** Develop an FCC Data Mart, **Recommendation 4.23:** Develop and Implement a Data Governance Plan.

⁹ See also, **Recommendation 1.3:** Ensure Accountability for Timely Decision-making, *Report* at 8, “Timelines are only useful if properly adhered to. Making management and staff accountable for a failure to meet timelines will be necessary if we are to be successful in speeding the disposal of Commission matters.”

timelines should be created for an item (or the item could be classified within a category of items and assigned a timeline in that context). Timelines should be tracked by management to ensure compliance, and shared with all internal stakeholders to ensure expectations will be met . . . For items with statutory deadlines, imposing and meeting timelines that realistically reflect compliance with the statute is important.

This section also contains that while “items are released within a few days of adoption, [the FCC should] require release of all decisions within 30 days of adoption at the latest.”

NARUC generally agrees with both of these proposals, though our on-the-record preference is that mandatory timelines be established so that the FCC does not have the option of just sitting on a petition or pleading that raises difficult issues. Indeed, NARUC’s December 2008 letter to the Obama Transition team,¹⁰ and our testimony before Congress, specified that:

The FCC should set deadlines on each type of filing where no statutory deadline exists - including complaints - but particularly rehearing requests and remands which have a tendency to languish at the FCC). The FCC should avoid non-decisional releases on statutory (or agency set) deadlines for action – like the requirement to “act” on USF Joint Board recommended decisions within one year.

Such actions will improve the timeliness of relief, add a measure of predictability to FCC action, and prevent the agency from sitting on proceedings that may include politically unpalatable choices that are nonetheless necessary for efficient agency operation.

¹⁰ See Dec. 12, 2008 Letter from NARUC President Frederick Butler to Yale Law School Professor Susan Crawford, Obama-Biden Transition Team, at: <http://www.naruc.org/Testimony/08%201212%20RV%20FCC%20Transition%20letter.pdf>.

The FCC should seek to enhance coordination/interaction with State Colleagues.

Any examination of the Telecommunications Act of 1996, and the 1934 Act, make very clear, Congress has always expected that the FCC and its State counterparts would work together to promote competition, universal service, and the deployment of advanced services.¹¹

The 1996 legislation, far from moving away from co-regulator status, required even closer cooperation. On its face, the Act envisions collaboration between States and the FCC to determine consumer needs, promote on-going competition among providers and technologies, provide universal service, ensure public safety and privacy, and protect consumers from illegal and unfair practices.

The Act shares regulatory jurisdiction. It divides responsibilities along the traditional lines but looks to the States to provide insight into the needs of their residents, to ensure that comparable service is available to all consumers regardless of location, and to encourage competition and the universal availability of service by ensuring that providers interconnect their networks, regardless of the technology those networks use. The Act also recognizes that the States have specific expertise in many areas, particularly those requiring investigation and adjudication.

¹¹ See, e.g., 47 U.S.C. §§ 152, 214, 251, 252, 254, and §1302 (Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996), as amended by the Broadband Data Improvement Act (BDIA), Pub. L. No. 110-385, 122 Stat. 4096 (2008), is now codified in Title 47, Chapter 12 of the United States Code. See 47 U.S.C. § 1301 et seq.

Indeed, the Act creates specific mandates for the States and the FCC to work together through the establishment of two Federal and State Joint Boards to evaluate issues and recommend solutions to problems. In Section 254 of the Act, Congress established the Federal-State Joint Board on Universal Service to implement the universal service mandates of the Act as well as policies related to the designation of Eligible Telecommunications Carriers under Section 214(e).

Section 214 designates roles for State commissions to implement the Act. States are tasked with identifying carriers eligible to receive support from the federal Universal Service Fund, determining which carriers would provide service to unserved areas, and adjudicating petitions from carriers wishing to withdraw from providing services supported by the federal USF. And there are other cooperative roles.

Congress recognized that State Commissions, far from being just another stakeholder, had crucial and continuing roles under the Act. The States typically have vital information and practical real-world experience with the impacts of both State and federal policies. Improved coordination can only result in better outcomes.

Curiously, the *Report* specifically suggests in *Recommendation 1.14*, working with NTIA to ensure smooth FCC-NTIA coordination process on spectrum issues. The Staff specifically suggests: “NTIA and FCC staff should work together to determine if there are additional measures that could be taken that

would facilitate coordination between NTIA and the FCC on spectrum issues of mutual concern.” *Report* at 13.

Although the State Commissions and the FCC hold a much broader portfolio of common interests, there is no analogue to this NTIA Recommendation that addresses coordination with States in the Report.

NARUC respectfully suggests that there should be.

An obvious start would be a similar FCC-State staff process to consider how Joint Board referrals could be integrated into the decision-making process on universal service issues *ab initio*, perhaps under specific time frames. There are several obvious candidates for referral in the current environment. In the last three years, NARUC has passed resolutions urging referrals of reform of contribution for the federal universal Service program,¹² of development/modification of the cost model to be used to determine connect America Fund Phase II Support,¹³ of the QRA model and any successor methodology,¹⁴ and other issues.

It is true, of course, that the FCC, through the *Wireline Competition Bureau* and the *Consumer and Intergovernmental Affairs Bureau* does seek coordination with various State Commissions though NARUC. The States and the FCC decision-making process benefits from that coordination. But closer coordination is possible.

¹² *Resolution Supporting Reform of the Federal Universal Service Contribution System* (Feb. 12, 2014), at <http://www.naruc.org/Resolutions/Resolution%20Supporting%20Reform%20of%20the%20Federal%20Universal%20Service%20Fund%20Contribution%20System.pdf>

¹³ *Resolution on Joint Board Referrals* (November 14, 2012), available online at: <http://www.naruc.org/Resolutions/Resolution%20Seeking%20Joint%20Board%20Referrals.pdf>

¹⁴ *Resolution Urging the Federal Communications Commission to Refrain from Implementing Quantile Regression Analysis on Rural Rate-of-Return Carriers Until Concerns Are Resolved, and To Engage State Regulators in Consideration of Next Steps* (July 25, 2012), available online at: <http://www.naruc.org/Resolutions/12%200801%20Passed%20Resolution%20to%20Protect%20State%20Authority%20to%20Assess%20Taxes%20and%20Fees%20for%20State%20Universal%20Service%20Funds%20and%20E911%20Services.pdf>

Indeed, FCC Staff and Commissioners are a frequent and visible presence at NARUC's meetings and, from time to time, on NARUC conference calls.

But this proceeding should provide another vehicle to improve the process.

Possible ideas NARUC put forward to enhance the working relationship in the earlier cited 2008 letter to the Administration, at page 7, include:

Federalism: *Improve the FCC decisional matrix to require State impact assessment.* Include in the FCC's decisional matrix on any issue the impact of the proposed action on existing State programs and enforcement regimes, the desirability of State enforcement of consumer protection measures, State expertise on local markets and fact finding, and – to avoid useless litigation at taxpayer expense - where appropriate specify States are not preempted or that preemption will be examined on a case-by-case basis.

Efficiency – Federalism: *Seek a real partnership/coordinate action with State Colleagues.* Improve policy effectiveness between the States and the FCC by more focused and routine dialogue (as opposed to just reports) at one or more of NARUC's meetings. The FCC can increase regulatory efficiency by attempting to come to agreement with the States on the proper construction of the Statute and the allowed delegation of functions among FCC and State regulators. The FCC should, *inter alia*, conduct forums with NARUC representatives on identifying present and future challenges and opportunities in consumer education, protection, and advocacy. In the area of consumer enforcement, build on the existing efforts to cooperate on enforcement by formalizing a process to discuss jurisdictional issues in a way that best serves consumers.

The FCC should establish time frames and procedures that assure any affected entity as an adequate opportunity to be heard.¹⁵

Many agency observers, including NARUC,¹⁶ have long recognized the problems with the FCC's rulemakings process. Professor Weiser,¹⁷ explained the problem this way:

In terms of the use of rulemaking proceedings, the FCC has gotten into the habit of commencing wide-open rulemakings that do not propose specific rules and leave parties with the challenge of guessing what issues are really important—or reserving their energies and resources until the *ex parte* process when that might become clear. Technically speaking, this practice does not violate the Administrative Procedure Act, as that law only specifies that NPRMs must include “a description of the subjects or issues involved.”[] Practically speaking, however, this practice undermines the opportunity for meaningful participation and effective deliberation. {footnote omitted}

Report Recommendation 3.8, captioned: “Include Proposed Rules in NPRMs Whenever Possible, and Draft Proposed and Final Rules Early in the Process of Developing Decisional Documents,” suggests the correct solution – one specifically endorsed by NARUC as early as 2008. The FCC must include the

¹⁵ The FCC often issues orders in non-rulemaking proceedings that have broad applicability. The agency's rules recognize the fairness issues – and the opportunities for creating a better record for decisions in a note to 47 C.F.R. § 1.1208 stating: in such cases “the Commission or its staff may determine that a restricted proceeding not designated for hearing involves primarily issues of broadly applicable policy rather than the rights and responsibilities of specific parties and specify that the proceeding will be conducted in accordance with the provisions of § 1.1206 governing permit-but-disclose proceedings.”

¹⁶ See Dec. 12, 2008 Letter from NARUC President Butler to Professor Crawford, Obama-Biden Transition Team, Appendix A, at page 5-6, at: <http://www.naruc.org/Testimony/08%200916%20NARUC%20House%20ltr%20Prepaid%20Calling%20Card%20fin.pdf>. (“Publish the specific language of proposed regulations with a proposed rationale and facts to support the action taken, seek public comment on the proposal and provide AT LEAST 30 days for agency consideration. This *revives* an earlier FCC practice of publishing a “Tentative Decision” prior to the adoption of final rules. The benefits are obvious. *The FCC frequently releases vague Notices of Proposed Rulemaking that fail to articulate proposed rules and read more like Notices of Inquiry by posing countless open-ended questions.*”)

¹⁷ See, Weiser, Philip J., *FCC Reform and the Future of Telecommunications Policy*, at 16-17, (January 5, 2009), (“*FCC Reform*”) available at: <http://fcc-reform.org/fccref/weiser-20090105.pdf>.

specific language of the proposed rule or modification in its requests for comment. This, in turn, logically requires there also be “certain prior” proceedings.

Some praise former Chairman Genachowski for increasing the instances in which the text of a proposed rule was put out for comment before adoption to 85%, as compared to 38% in prior administrations. That praise is deserved.

The question that naturally arises is – why would it not be better to make that number 100%, as this Recommendation clearly suggests should be the FCC’s goal.

The *Report’s* **Recommendation 3.10** suggests another key piece of the puzzle. The FCC should adopt minimum comment periods for significant FCC regulatory actions, including rulemakings. NARUC believes at the very minimum, there should be *at least* 30 days to comment on a proposal and 30 days to reply.

Though it will require the FCC to manage its proceedings more carefully, this is a crucial improvement over the current process. Under the current rules, NARUC’s State member commissions – *who often are among the best positioned to provide useful and relevant input* - cannot get comments drafted and approved in time to make shorter deadlines. By establishing a minimum 30 day comment time frame, the agency will tilt its’ process in favor of better and more complete records. Shortchanging the development of the record can only lead to less informed decisions.

Currently, thirty-one petitioners, numerous intervenors, and the FCC, have wasted scarce taxpayer and staff resources in the 10th Circuit Court of Appeals arguing over process issues associated with the FCC’s November 2011 Universal Service

Reform decision – some that could not have occurred if these proposals and minimum 30 day comment cycles had been in effect.¹⁸ There are, of course, also many substantive policy issues involved in the appeal, but there is at least a chance that a remand could occur on process issues. Whatever happens in that appeal, arguing over process issues is not an effective use of anyone’s resources. Disagreements should be focused on substance – not on whether the process provided a fair opportunity to assure the record reflects all information needed for FCC Commissioners to make an informed decision.

Deadlines make it easier – not more difficult - to plan comment cycles. The only time problems might arise is when the FCC wishes to base its decision on some late filed submission or report – which because of a looming statutory deadline has not been subject to in-depth critiques by other interested stakeholders.

This is not a hypothetical concern. In several forbearance proceedings, petitioners filed data that purportedly supports their petitions very close to the statutory deadline. Such action effectively eliminated the opportunity for any opposition or real analysis. Indeed, NARUC passed a resolution in 2008 seeking revisions to the FCC’s existing forbearance procedures to assure that States have a realistic opportunity to

¹⁸ In the same proceeding, the FCC set truncated comment cycles (of 21 and 14 days) on a broad notice shortly before the final order was adopted. Routinely, on complex items, the agency sets 30 and 45-day comment cycles at least to provide commenters adequate time to digest and respond on the complex issues involved. Despite the volume and complexity of issues involved in the Universal Service/Intercarrier Compensation Reform docket, the FCC set a shorter comment cycle. Such shorter time periods are more prejudicial to those with fewer resources than industry, such as States, consumer groups and others.

participate and comment on data provided in such circumstances.¹⁹ The FCC has taken steps to “fix” the forbearance comment cycle, but that has not fixed the problem in other contexts.

For example, in the proceedings that lead to the FCC’s November 2011 Universal Service and Intercarrier compensation reform order, the record was inundated the record with *ex parte* submissions up to, and on, the Sunshine blackout date of October 21.²⁰ Indeed, the FCC itself inserted over 100 items into the record shortly before that date.²¹

The agency adopted the order just seven days later on October 27th. It was impossible for stakeholders to provide any meaningful response to these last minute submissions. The FCC needs to establish some sort of procedure, as it did in the forbearance context, to assure this sort of thing does not happen again.

¹⁹ To address this problem, NARUC asked the FCC to require forbearance petitioners to file “complete” petitions before the statutory shot clock starts. This will help ensure that all parties have a fair opportunity to thoroughly review and present their views to the Commission.

²⁰ The FCC’s Electronic Comment Filing System (ECFS) includes no less than 775 substantive *ex parte* contact disclosures from July 29 to October 21, 2011 alone. A number of these “permit but disclose” *ex parte* contacts and submissions involved the discussion of quantitative data and analyses. Some of these were submitted on a confidential basis with only redacted versions of the filings available in the public domain.

²¹ On October 7, 2011, two weeks before the start of the Sunshine period, and again on October 17 and 19 (two days before the deadline), the agency began inundating the record with lists of academic reports and published articles, studies, position papers, analyses, statistics, newspaper articles, white papers, publications, handbooks, state laws, state regulatory pleadings and decisions, reference works, industry surveys, treatises, congressional reports, and correspondence to the FCC. Staff described them as “publically available information it may consider as part of this proceeding.” See <http://apps.fcc.gov/ecfs/document/view?id=7021713537> (Oct. 7, 2011) (35 items and “a description of the basic statistical methods used for developing the updated corporate operations expense limitation formula that was presented in our prior Public Notice”); <http://apps.fcc.gov/ecfs/document/view?id=7021714787> (Oct. 17, 2011) (63 items); and <http://apps.fcc.gov/ecfs/document/view?id=7021715588> (Oct. 19, 2011) (16 items and “a summary of staff analysis of areas where mobile service is available only from a small or regional provider receiving high-cost support”). The FCC relied on these “publically available sources” to determine that the “bill and keep” (\$0 rate) intercarrier compensation regime (a lynchpin of the FCC’s “reform” effort) was allegedly “less burdensome” and “consistent with cost causation principles.” *FCC November 18, 2011 Transformational Order* at ¶¶ 742-743 and n. 1295-1296; ¶ 744 and n. 1304, 26 FCC Rcd. 17905-06. This crucial decision is based in part on this collection of materials submitted days before the record closes – forestalling any real opportunity of a reasoned critique/response.

CONCLUSION

For the foregoing reasons, NARUC respectfully urges the FCC to proceed to implement the improvements to FCC process outlined, *supra*.

Respectfully Submitted,

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