

**Before the
Federal Communications Commission
WASHINGTON, D.C. 20554**

<i>In the Matter(s) of</i>)	
<i>Technology Transitions</i>)	GN Docket No. 13-5
<i>AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition</i>)	GN Docket No. 12-353
)	

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

The National Association of Regulatory Utility Commissioners (“NARUC”) respectfully submits this reply to initial comments filed on AT&T’s February 27, 2014, submission of a “Proposal for Wire Center Trials” (“*AT&T Proposal*” or “*Proposal*”) for experiments involving the transition of two AT&T wire centers – one rural and one suburban – to all Internet Protocol services and, in part, to wireless-based service.”¹

AT&T’s proposal was filed to respond to a January 30, 2014, FCC Order.² That *Order*, at ¶ 1, purports to “kick-start the process for a diverse set of experiments and

¹ See, *Commission Seeks Comment on AT&T’s Proposal for Service-Based Technology Transitions Experiments* (“*Notice*”), DA 14-285, GN Docket Nos. 12-353 & 12-353, (rel. Feb. 28, 2014), at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0228/DA-14-285A1.pdf.

² See, *In the Matter of Technology Transitions, et al.*, GN Docket 13-5 et al., *Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative*, FCC 14-5 (rel. Jan. 31, 2014) (“*Order*”), at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0131/FCC-14-5A1.pdf.

data collection initiatives that will allow the Commission and the public to evaluate how customers are affected by the historic technology transitions that are transforming our nation's voice communications services."

NARUC, a nonprofit organization founded in 1889, has members that include the government agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the activities of telecommunications,³ energy, and water utilities. Congress and the courts⁴ have consistently recognized NARUC as a proper entity to represent the collective interests of the State public utility commissions. In the Federal Telecommunications Act,⁵ 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.⁶

³ 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).

⁴ 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).

⁵ 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").

⁶ 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.")

Numerous comments were filed in response to the February *Notice*.⁷

Shortly before the *Notice* was released, NARUC, at its Winter 2014 Meetings, passed a resolution that supports some of the initial comments filed in this proceeding. A copy of that ***Resolution Concerning Customer Notifications for Internet Protocol-Technology Service-Based Experiments***, available online at: <http://www.naruc.org/Resolutions/Resolution%20Concerning%20Customer%20Notifications%20for%20Internet%20Protocol.pdf>, is attached. The resolution, which is targeted broadly at all trial applications, *inter alia*, urges the FCC to:

Require applicants for an IP-technology service-based experiment to include in the notification(s) to customers regarding the experiment prominent information about how the customer may contact or submit complaints to the relevant State regulatory commission, other appropriate State agency or, where the State regulatory commission or other State agency does not have jurisdiction regarding IP-enabled services, directly to the FCC; and

Require as a condition for approving any application for an IP-technology service-based experiment that whenever the service provider requests the FCC to waive a mandatory condition in the experiment, as required by FCC order or rules, that the applicant be required to provide notice of such request to the relevant State regulatory commission(s) and to its affected customers and that the FCC provide an adequate opportunity for public comment on such waiver request.

⁷ See, the FCC ECFS system at: http://apps.fcc.gov/ecfs/comment_search/execute?proceeding=13-5&applicant=&lawfirm=&author=&disseminated.minDate=&disseminated.maxDate=&recieved.minDate=4%2F10%2F13&recieved.maxDate=&dateCommentPeriod.minDate=&dateCommentPeriod.maxDate=&dateReplyComment.minDate=&dateReplyComment.maxDate=&address.city=&address.state.stateCd=&address.zip=&daNumber=&fileNumber=&bureauIdentificationNumber=&reportNumber=&submissionTypeId=&checkbox_exParte=true

NARUC also supports the comments filed by the *Vermont Department of Public Service*⁸ (“*Vermont Comments*”) - which imply the FCC should eliminate controversy in this, and several other open proceedings, by confirming the classification of VoIP services as a “telecommunications service.”

In support of the positions, NARUC states as follows:

DISCUSSION

The FCC should ensure that “providers address those consumer protections that were highlighted before the agency grants any...changes to the FCC’s rules.”

According to the initial comments filed by the Michigan Public Service Commission (“*Michigan’s Comments*”), at pages 6-7:

The FCC highlighted several items of concern that need to be addressed during the trials. Those items include the issues the states have been confronted with over the years in protecting consumers and ensuring reliable and affordable telecommunications service. Those items are articulated throughout the order and in particular in Appendix B to the order noted as guidelines. Those items are also of the utmost importance to state regulators to ensure the delivery of reliable telecommunications service to consumers as we move forward in the transition to an all IP environment. The MPSC urges the FCC to ensure that providers address those consumer protections that were highlighted and ensure the trials resolve any issues related to those protections before the FCC grants any permanent changes to the FCC’s rules.

NARUC’s resolution provides direct support for *Michigan’s Comments*.

⁸ See, March 31, 2014, *Comments of the Vermont Department of Public Service*, filed in GN Docket Nos. 13-5 & 12-353, online at: <http://apps.fcc.gov/ecfs/document/view?id=7521097105>.

The FCC should assure Consumer Notifications prominently provide proper information about complaint procedures.

One of the sections of the *Order*, referenced by the Michigan Comments, "emphasizes the importance of [customer] notice requirements in the context of service-based experiments" (at Appendix B, ¶ 45-46) and indicates the FCC will "require applicants to demonstrate that they will provide notice of:

[T]he nature of any existing network changes;

[W]hether customers may opt in or opt out of the experiment after it has begun;

[T]he timing of any changes;

[W]hat features of the providers' existing technology will no longer be available on the new technology and how that may impact third-party devices and services the customer uses (e.g. medical monitoring services);

[H]ow the provider's services will change including any differences in prices, terms and conditions;

[W]here a customer may go for more information; and

[A]ny other details regarding the experiment that likely will be of relevance to customers.

NARUC's resolution, like *Michigan's Comments*, endorses these crucial FCC requirements. However, the resolution takes the FCC's proposed conditions a step further in the direction of assuring both transparency and full consumer protections during the trials. The customer notifications required by the FCC should, but do not, specify inclusion of information about how customers may submit complaints

regarding the service-based experiment to the State commission, other appropriate State agency or, where the State commission lacks sufficient oversight regarding IP-enabled services, directly to the FCC. NARUC respectfully requests the inclusion of such specific contact information in any final order approving this or subsequent trials.

The FCC should not waive any mandatory condition in an experiment without providing notification and an opportunity to comment specifically on the waiver by affected consumers/State oversight agencies.

Other parts of the sections cited by *Michigan's Comments*, as well as other parts of the FCC *Order*, set forth: “mandatory conditions to ensure that all experiments preserve consumer protection values”, which include, among other things:

□ compliance with existing FCC rules: to protect customer privacy; to ensure truth-in-billing, which addresses both anti-slamming and cramming; to facilitate local number portability; to “ensure that routing and call delivery processes are in place so calls are successfully completed” (at ¶¶ 65-69);

□ voluntary participation by existing customers (at Appendix B, ¶6);

□ continued Lifeline service available to all qualifying customers (at ¶ 32);

□ regular certification by a carrier-petitioner that they have sufficient, reliable backup power in any central office that directly serves a PSAP to maintain full service functionality, including network monitoring capabilities, for at least 24 hours at full office load (at¶ 44 and fn. 62); and

□ continued access for persons with disabilities (at ¶ 29).

The *Order* also allows "applicants [to] request that the Commission waive a mandatory condition in an experiment" (at ¶ 37 and fn. 50).

NARUC's resolution requests that the FCC assure that a trial applicant provides specific notification to the applicable State commission, as well as to the applicant's existing and prospective customers, that (i) it has filed a waiver request and (ii) there is an opportunity to comment on that request before the agency acts.

The FCC has already acknowledged the obvious importance of these conditions to customers and the public interest by requiring separate consideration and a request for waiver before they can be changed. Customers in trial areas are unlikely to be aware of many of the AT&T requests or the opportunity (or how) to comment specifically and oppose (or support) such waivers. The FCC should make sure both those customers and any affected State oversight body have been notified by the trial applicant of the specific waivers requested as well as the opportunity to oppose or support the request.

The FCC should confirm the classification of VoIP services as “telecommunications services.”

The *Vermont Comments* and comments filed by the Pennsylvania Public Utility Commission both effectively point out that AT&T is still attempting to get the FCC to do what the agency has specifically stated it would not do in this proceeding: implicitly confirm AT&T's novel argument that VoIP is not a “telecommunications service.” The *Vermont Comments* point out, at page 1, that, in footnote 111 of the Plan, AT&T asserts: “Thus insofar as AT&T, as a VoIP provider is not providing that

service as a common carrier and no longer will provide telephone exchange service or exchange access, it would no longer be subject to that obligation.”

But the “IP Transition process, inclusive of experiments that are being sought and the FCC may authorize, cannot rewrite existing statutory law.”⁹

AT&T cannot “choose” to provide that service as a common carrier.

Whether or not any service is treated as a common carrier under Title II is a factual inquiry based on parameters specified in the statute.

There is no “choice” involved if the specified service meets those specifications.

According to the statute, AT&T’s service can only be treated as a common carrier under Title II to the extent it is providing a telecommunications service.¹⁰

So the only questions that must be asked are:

[1] Is AT&T offering “telecommunications”?

Answer – YES.

The statute defines “telecommunications” as the transmission, between or among points specified by the user, of information of the users choosing, without change in form or content of the information as sent and received.

⁹ See, March 31, 2014 *Comments of the Pennsylvania Public Utility Commission*, at 2, filed in GN Dockets Nos. 13-5 & 12-353, available online at: <http://apps.fcc.gov/ecfs/document/view?id=7521096406>.

¹⁰ 47 U.S.C. § 153(51) “A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent it is providing telecommunications services.”

Voice over Internet Protocol (“VoIP”) ‘voice’ services, like voice services using older technologies, transmit voice in real time to points specified by the user without change in form or content. Voice traffic has been multiplexed/packetized for years before the invention of the “IP” protocol. Indeed, AT&T is using its VoIP product to compete directly with and substitute for functionally equivalent “telecommunications services.” A new arrangement of “zeroes and ones” in a packetized programming language does not change the nature of the service being offered to the public.

[2] Is AT&T therefore offering a “telecommunications service”?

Answer: YES.

AT&T’s VOIP service, exactly like the current voice services it is replacing, is both “offered for a fee” and offered “directly to the public or to such classes of users as to be effectively available to the public” significantly “regardless of the facilities used.”¹¹

VoIP point-to-point voice services (both in competition with existing older TDM technology-based voice services in this trial and elsewhere) are being offered as a direct (and indistinguishable to end-users) substitutes for older technology services.

¹¹ 47 U.S.C. § 153(53) “The term ‘telecommunications service’ means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”

In fact, as the *Vermont Comments* obviously suggest, the FCC has already, albeit implicitly, decided that VoIP service must be “telecommunications services.” NARUC recently filed comments pointing out that recent court decisions prohibit the FCC from providing numbering resources to entities that do not qualify as “telecommunications service” providers under the statute.¹²

By the same token, many carriers have already qualified for federal universal service subsidies based solely on their provision of voice services using IP technology as common carriers.¹³ Necessarily, as the FCC has conceded on brief in the related pending 10th Circuit litigation, those carriers are providing “telecommunications services.”

As the Joint Petitioners, including NARUC, pointed out on reply in that pending litigation:

Petitioners argued that by adding “voice telephony service” to the list of supported services under section 254(c)(1), without limiting the definition of that service to “telecommunications services,” the *Order* violates §254(c)(1). USF Br. 17-18. Respondents denounce this argument as “wrong,” FCC Br. 24, but then concede virtually all its premises. They agree that “only ‘eligible telecommunications carriers’

¹² See, March 4, 2014 *Comments of the National Association of Regulatory Utility Commissioners on the Report on the Six-Month Trial of Direct Assignment of Number Resources to Interconnected Voice Over Internet Protocol Providers*, available online at: <http://apps.fcc.gov/ecfs/document/view?id=7521088290> and filed in the proceedings captioned: *In the Matter(s) of Numbering Policies for Modern Communications*, WC Docket No. 13-97, *IP-Enabled Services*, WC Docket No. 04-36); *Telephone Number Requirements for IP-Enabled Services Providers*, WC Docket No. 07-243; *Telephone Number Portability*, CC Docket No. 95-116; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Connect America Fund*, WC Docket No. 10-90; *Numbering Resource Optimization*, CC Docket No. 99-200.

¹³ Alternatively, the FCC could be knowingly allowing carriers to commit fraud by illegally accessing funds that Congress reserved to Title II *common carriers*, *i.e.*, carriers to the extent that they are providing “telecommunications services.”

are eligible for subsidies under section 254,” and that an ETC must be—a “common carrier” that offers supported services. FCC Br. 26, *citing* 47 U.S.C. §214(e)(1)(A). They also agree that an entity can be designated as an ETC under the statute only if it “complies with appropriate federal and state requirements” applicable to telecommunications carriers under Title II of the Act. *Id.*, *quoting IP-Enabled Services*, 20 F.C.C.R. 10245, 10268 (2005) (subsequent history omitted). This concession was not apparent on the face of the *Order*, as the FCC specifically included VoIP in the definition of “voice telephony service” without classifying VoIP as a telecommunications service. *Order*, ¶63 (JA at 412); FCC Br. 26.¹⁴

The very same voice service, offered in exactly the same way by other carriers, cannot – without exceedingly arbitrary and/or capricious agency action – be considered as providing an “information” service. *Confirming the classification will also simplify many other outstanding proceedings.*

As NARUC pointed out at page 4, in our January 2013 comments filed to respond to AT&T’s first request for the FCC to consider trials:

The approach suggested in the AT&T Petition, particularly the novel idea of imposing exclusive federal jurisdiction over phone service provided using VoIP technology by classifying it as an “information service,” is not only flawed from a policy perspective, but it is also a prescription for wasteful litigation as the petition nowhere outlines in any detail an adequate legal basis for, or provides empirical evidence to support, preemptive FCC action. Moreover, the approach AT&T asks the Commission to “trial” will unquestionably require a dramatic change to the FCC’s Part 36 rules. Such changes cannot be considered without a recommended decision from the Federal-State Joint Board on Separations. 47 U.S.C. § 410(c).¹⁵

¹⁴ Joint Universal Service Fund Reply Brief, at page 11, filed July 30, 2013, In Re: FCC11-161, 10th Circuit Case No. 11-9900.

¹⁵ *See, Comments of the National Association of Regulatory Utility Commissioners*, filed January 13, 2013, in the proceeding captioned: *In the Matter(s) of AT&T’s Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, WC Docket No. 12-353, online at: <http://apps.fcc.gov/ecfs/document/view?id=7022113735>.

And later in the same pleading, at pages 11-12:

Other than the FCC's inexplicable reticence to classify any VoIP services, without exception, since Computer II, the FCC has always treated all voice service that utilizes the public switched network as common carrier services – whatever protocols were utilized – because, as the definitions in the Act specify, the voice communication from the end-user's standpoint undergoes no change in the form or content of the information as sent and received. See, e.g., *Computer and Communications Industry Ass'n. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983). See also, *NARUC v. FCC*, 525 F.2d 630, 643 (D.C. Circuit 1976) “[W]e reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve . . . A particular system is a common carrier *by virtue of its functions.*” {emphasis added}

The FCC should state explicitly what it has necessarily has already found as a matter of law - by allowing VoIP provider access to federal universal service funds: Fee –based voice services offered to the public, whether they use TDM or VoIP, are “telecommunications services.

CONCLUSION

NARUC respectfully requests that the FCC: (i) assure required consumer notifications prominently provide proper information about complaint procedures, (ii) avoid waiving any mandatory condition in an experiment without providing notification and an opportunity to comment specifically on the waiver by affected consumers/State oversight agencies, and (iii) confirm the classification of VoIP services as “telecommunications services.”

Respectfully Submitted,

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