

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

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| <i>In the Matter of</i> |) | |
| |) | GN Docket No. 13-5 |
| <i>VCXC Petition For Notice of Inquiry</i> |) | |
| <i>On the Migration to HD Voice</i> |) | |
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**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

The National Association of Regulatory Utility Commissioners (“NARUC”) respectfully submits this brief reply to initial comments filed on comments responding to the February 25, 2014-filed *Voice Communication Exchange Committee (“VCXC”) Petition for Notice of Inquiry on the Migration to High Definition (HD) Voice*,¹ noticed by the Federal Communications Commission (“Commission” or “FCC”) for comment on May 23, 2014.²

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

¹ See, *VCXC Petition for Notice of Inquiry on the Migration to HD Voice*, filed February 25, 2014, online at: <http://apps.fcc.gov/ecfs/document/view?id=7521089152>.

² See, *Wireline Competition Bureau Seeks Comment on VCXC Petition for Notice of Inquiry on the Migration to HD Voice (“Notice”)*, DA 14-713, GN Docket No. 13-5, (rel. May 23, 2014), available online at: <http://apps.fcc.gov/ecfs/comment/view?id=6017662744>.

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

The FCC has for some years now put the cart before the horse. Before the agency continues with additional exploration of either the IP transition or the roll-out of HD voice services, it must first classify the subject services as either “telecommunications services” or “information services.”

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.”)

The classification necessarily limits the FCC's options in terms of oversight and intervention to that permitted by Congress in the Telecommunications Act. Extended discussions without even a preliminary indication of what provisions of the statute apply, or do not apply, is inefficient.

Both the VCXC petition and, e.g., the *Comments of Vonage Holding Corp.*, at 3, online at: <http://apps.fcc.gov/ecfs/comment/view?id=6017848899>, implicitly suggest the FCC can modify the Congressional scheme as long as it is in service of FCC's perceived "policy goals," by, for example, possibly ignoring the required application of 47 U.S.C. §251(c) where incumbent local exchange carriers are involved in an interconnection arrangement. If point-to-point real time voice communications offered to the public for a fee are, in fact, "telecommunications services", as NARUC has suggested in prior comments, then the FCC cannot through inaction "forbear from applying the requirements of section 251(c)...until it determines that those requirements have been fully implemented." 47 U.S.C. §160(d).

As the Supreme Court states in *Utility Air Regulatory Group v. EPA*, June 23, 2014, slip op. at 16 (http://www.supremecourt.gov/opinions/13pdf/12-1146_4g18.pdf):

An agency has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always "give effect to the unambiguously

expressed intent of Congress.” *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U. S. 644, 665 (2007) (quoting *Chevron*, 467 U. S., at 843).

The so-called “IP Transition”, including any experiments involving HD voice that the FCC may authorize, cannot rewrite existing statutory law.”⁷ Whether or not any service is subject to Title II provisions is a factual inquiry based on parameters specified in the statute. There is no “choice” by the FCC or any service provider if the specified service meets the statutory definitions. Significantly, as the recent D.C. Circuit decision in *Verizon v. Federal Communications Commission* (“Verizon”)⁸ makes very clear, the classification, whether as a “telecommunications service” or an “information service”, sets very real limits on the FCC authority.

According to the statute, and the D.C. Circuit, service providers can only be treated as a common carriers under Title II to the extent they provide a telecommunications service.⁹ So there are only two preliminary questions for the FCC to answer.

⁷ See, e.g., March 31, 2014 *Comments of the Pennsylvania Public Utility Commission*, at 2, filed in GN Dockets Nos. 13-5 & 12-353, at: <http://apps.fcc.gov/ecfs/document/view?id=7521096406>.

⁸ *Verizon v. Federal Communications Commission*, D.C. Circuit Case 11-1355 (Jan. 14, 2014), at: [http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/\\$file/11-1355-1474943.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/$file/11-1355-1474943.pdf).

⁹ 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.”

Neither question requires any examination of the technology used to provide the service.

First, are IP-based voice services, including HD voice, “telecommunications”?

The answer could not be clearer.

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. Voice over Internet Protocol (“VoIP”) ‘voice’ services, whether HD or not, like voice services using older packet technologies, transmit voice in real time to points specified by the user without change in form or content. HD just provides more of the original frequencies than existing IP services. Voice traffic has been multiplexed/packetized for years before the invention of the “IP” protocol. Indeed, VoIP services provided by Vonage, AT&T, Verizon, and others 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.

Second, are IP-based voice services of all kinds “telecommunications services”?

Again the answer is evident on the face of the statute.

VOIP service, including HD voice, 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.”¹⁰

VoIP point-to-point voice services, which competes directly against existing TDM technology-based voice services, are being offered as a direct (and indistinguishable to end-users) substitutes for older technology services.

In fact, 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.¹¹

¹⁰ 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.” Note –that “information services” by contrast are a catch-all carrier that only include “information services” that are not used to provide a “telecommunications service.” See, 47 U.S.C. § 153(24), excluding from the definition of information services “any use of any such capability for the management, control, or operation of a telecommunication system or the management of a telecommunications service.”

¹¹ 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*, 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.

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.¹² Necessarily, as the FCC has conceded on brief in recent litigation, those carriers are providing “telecommunications services.”

As the Joint Petitioners, including NARUC, pointed out on reply in that 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’ 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. 26.¹³

¹² 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.”

¹³ Joint Universal Service Fund Reply Brief, at page 11, filed July 30, 2013, In Re: FCC11-161, 10th Circuit Case No. 11-9900.

The very same voice service, offered in exactly the same way by other carriers, cannot – in any circumstances – be considered as providing an “information” service. *Confirming the classification will also simplify many outstanding proceedings as well as any NOI on the VCXC petition.*

As NARUC pointed out at page 4, in our January 2013 comments filed to respond to an AT&T pleading filed earlier in this Docket 1305 proceedings, a pleading that asked the FCC to consider “IP Transition” trials:

The approach suggested . . . 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).¹⁴

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

¹⁴ 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>.

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 (whether “HD” or not) offered to the public, whether they use TDM or VoIP, are “telecommunications services.

CONCLUSION

NARUC respectfully requests that the FCC confirm the classification of VoIP services, including HD voice, as “telecommunications services.”

Respectfully Submitted,

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