



N A R U C
National Association of Regulatory Utility Commissioners

January 31, 2014

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
2125 Rayburn HOB
Washington, D.C. 20515

The Honorable Henry Waxman
Ranking Member
Committee on Energy and Commerce
2322A Rayburn HOB
Washington, D.C. 20515

The Honorable Greg Walden
Chairman
Subcommittee on Communications,
Technology & the Internet
2125 Rayburn HOB
Washington, D.C. 20515

The Honorable Anna Eshoo
Ranking Member
Subcommittee on Communications,
Technology & the Internet
2322A Rayburn HOB
Washington, D.C. 20515

**Re: Comments to House Energy & Commerce White Paper #1
“Modernizing the Communications Network”**

Dear Chairmen Upton, Walden and Ranking Members Waxman, Eshoo:

Thank you for seeking public comment on white papers designed to help the Committee launch an update of the 1996 Telecommunications Act. The National Association of Regulatory Utility Commissioners (NARUC) is uniquely positioned to provide input. NARUC members are the government experts from each of your jurisdictions (including all States, U.S. Territories, and the District of Columbia) on communications and energy utilities and services. The NARUC members from your jurisdiction know and understand local demographics, market strengths and deficits, and can gauge the impact of, and implement policies complementary to, federal laws impacting facilities siting, emergency restoration of service, competition, call completion, and deployment of universally available and affordable communications services (through, *inter alia*, complementary State universal service programs and related policies). The Commissioners from each of your jurisdictions have a precise identity of interest with you, as, like each of you, they are narrowly focused on assuring each one of your constituents benefits from high-quality, reliable, and ubiquitous communications services at reasonable prices.

1. The current Communications Act is structured around particular services. Does this structure work for the modern communications sector? If not, around what structures or principles should the titles of the Communications Act revolve?

In evaluating any oversight regime, it is crucial for Congress to focus on the right issues. The reason for regulatory oversight *never changes* regardless of changes in technology used to provide a service. Regulation is needed where competition is not vigorous enough to adequately protect consumers. And policy makers intervene to impose public interest obligations. Regardless of the level of competition, some oversight is always necessary to provide things the market will not. This includes, among other things, a certain level of consumer protection, local number portability, interconnection, prioritization of restoration of services after disasters, 911 service, disabled access, and universal service.¹

¹ See, *Testimony of Commissioner John Burke on the Evolution of the Wired Communications Network before the Subcommittee on Communications and Technology Committee on Energy and Commerce, U.S. House of Representatives*, at 1 (Oct. 22, 2013) (*Burke Testimony*) at: <http://www.naruc.org/Testimony/13%201022%20Burke%20Testimony2.pdf>.

NARUC has consistently urged a technology neutral approach to regulation that recognizes the core competencies of State regulators.²

From that perspective, the basic structure Congress provided in the 1996 legislation actually is quite good.

- With a few exceptions, the basic definitions focus on function not technology.³
- Significantly, the design of the statute also compels federal and State cooperative action.⁴ The statute recognizes the crucial need for a State-mediated mechanism to assure that competitors interconnect, at 47 U.S.C. §§251-2 and, even in the most preemptive grant of authority to the agency – a section that gives the FCC explicit authority, in a specific proceeding, to preempt any State statute or rule that “*may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service*” – Congress still specifically preserved State authority:

*to impose on a competitively neutral basis...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

- Along with this broad grant of preemptive authority, the FCC was also given broad authority to forbear from applying provisions of Title II on the basis of specific findings that forbearance will “promote competitive market conditions.”⁶

² See, e.g., the November 2013 “NARUC Federalism Task Force Report: Cooperative Federalism and Telecom in the 21st Century” at 5 (NARUC 2013 Report), noting that even as far back as 2005, NARUC urged “that any rewrite of TA 96 focus on dividing the responsibility for “overseeing” communications functionally, assigning the primary responsibility to the States in areas where they have specific knowledge and expertise (for example individual consumer protection issues), and giving the FCC the lead on issues that address the needs of the nation as a whole (e.g., spectrum allocation, and the federal USF).” Text available at: <http://www.naruc.org/Publications/Federalism-task-force-report-November-20131.pdf>.

³ *Id.* at 4 and 6 (“TA96 is technology agnostic and thus can serve as the basis for communications oversight going forward, regardless of changes to the underlying configuration of the network(s) or the protocols used to transmit information...The 2013 Task force concurs.”)

⁴ *Id.* at 7-8. As Professor Philip Weiser (and the NARUC 2013 Report) points out, this partnership creates a cooperative federalism that represents the balance between complete federal preemption and “uncoordinated federal and state action in distinct regulatory spheres.” According to Professor Weiser:

Cooperative federalism programs set forth some uniform federal standards — as embodied in the statute, federal agency regulations, or both — but leave state agencies with discretion to implement the federal law, supplement it with more stringent standards, and, in some cases, receive an exemption from federal requirements. This power allows states to experiment with different approaches and tailor federal law to local conditions. Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. Rev. 1692, 1696 (2001).

⁵ 47 U.S.C. §§253(b).

⁶ 47 U.S.C. §160.

- The Act also includes several mechanisms, e.g., joint boards/conferences, to assure the FCC can take advantage of unquestioned State expertise on the likely impact of any regulations on, e.g., State universal service policies, State disaster recovery provisions, State consumer protection requirements, and other issues.⁷ Unfortunately, the agency has never fully utilized these opportunities to inform its decision-making.

The problem in many instances is not the Act, but the broad, and some might argue, unwarranted discretion the judiciary has given the FCC to implement it.

As former FCC Chairman Richard Wiley said in his recent testimony before your committee “functionally equivalent services should be treated in the same manner, regardless of who provides them or how they are delivered to consumers.”⁸

As noted earlier, NARUC has been on record for years urging the FCC to do just that: *apply the statute in a technology-neutral manner*.⁹

An example best illustrates the point.

⁷ See, e.g., July 2013 *Resolution Concerning Numbering and Technology Transition Trials for Voice over Internet Protocol and other IP-Enabled Services*, noting the “FCC should refer any proposed or future technology transition trials to an adequately funded Federal-State Joint Board . . . for collaborative review with the State commissions and advice.” See also, *NARUC 2013 Report* at 6 stating:

To encourage this collaboration, Sections 410 and 254 of the Act created a partnership between the States and the FCC—the Joint Boards—for collectively seeking, developing, and implementing communications policy recommendations. By referring items to the Joint Boards established by these sections of the Act, the FCC is able to gain direct insight into the potential effects of proposed communications rules and policies on individual States and their citizens. In the past, the Joint Boards have provided effective input into numerous FCC rulemakings and policies, including revisions to the Lifeline program, certification of eligible telecommunications carriers (ETCs), cost allocations, and wholesale service requirements. The Commission's recent actions in dealing with key issues like the reform of the federal USF program, however, appear to have reduced the effectiveness of the Joint Boards and caused the States to seek improvement to the FCC's rulemaking procedures.

⁸ See, *Testimony of Richard E. Wiley before the Subcommittee on Communications and Technology Committee on Energy and Commerce, U.S. House of Representatives*, at 4 (January 15, 2014) available online at: <http://docs.house.gov/meetings/IF/IF16/20140115/101648/HHRG-113-IF16-Wstate-WileyR-20140115.pdf>.

⁹ See, e.g., the Nov. 2013 *Resolution on Federalism*, “[C]hanges to the underlying structure of the network or the technology used to carry information do not change the need for reliable, robust, affordable, and ubiquitous communications services,” available online at: (<http://www.naruc.org/Resolutions/Resolution%20on%20Federalism.pdf>) and the *NARUC 2013 Report* pointing out, at 12, that “rules for interconnection do not and should not depend on the technology used by the interconnecting providers;” see also, the February 2010 *Resolution on Open Access to the Internet*, encouraging “the FCC and/or Congress, when crafting rules and regulations in this area...[to] strive to be as technologically neutral as possible,” at: <http://www.naruc.org/Resolutions/Resolution%20on%20Net%20Neutrality.pdf>; the July 2008 *Resolution Regarding the Interconnection of New Voice Telecommunications Services Networks*, “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...NARUC recognizes that in emerging and competitive markets, incumbent and competitive telecommunications carriers each benefit from appropriate technologically neutral policies...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...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,” at: <http://www.naruc.org/Resolutions/TC%20Interconnection.pdf>.

The definition of “telecommunications services” is a *functional* definition that is focused narrowly on the characteristics of the service provided-NOT the technology used to provide the service.

Indeed, there is no reference to technology in these key definitions.¹⁰

In so doing, the definitions in the statute take a technology-neutral approach to defining services.

The FCC, in implementing those definitions, has not.

It is hard to argue that any business that provides real time point-to-point voice services, for a fee, to the public is NOT a “telecommunications service” carrier.

The 1996 Act defines the term “telecommunications service” as “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,” and defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.”

Currently, real-time voice service, provided for a fee “directly to the public,” is a “telecommunications service” because it is “the transmission, between or among points specified by the user, of information” . . . in this case – the user’s voice . . . “of the user's choosing, without change in the form or content of the information as sent and received.” The 1996 Act makes no distinction based on whether the provider was previously in another related business regulated under another “silo” (e.g., cable)¹¹ or using a different packet-based technology/ communications protocol, i.e., I.P. vs. time division multiplexing (or TDM), to deliver the voice service. And yet for almost 10 years, the FCC has been unable, under different administrations, to provide needed certainty by classifying voice services, provided using Voice over Internet Protocol (VoIP), as either a “telecommunications service” or an “information service.” The result has been regulatory arbitrage that undermined the intercarrier compensation system and is the *raison d'être* for the call completion problems that continue to plague rural constituents in each of your States. NARUC, the States, and industry stakeholders continue to waste significant resources, all at the ultimate expense of the taxpayer and ratepayers, on proceedings that would be unnecessary if the FCC acted.¹²

¹⁰ The white paper contains a few misstatements. It is important to understand that the Act does not treat “information services” as a distinct category. Rather, Congress explicitly made it a residual catchall for things that are not “telecommunications services.” Specifically, the Act says that term means: “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. §153(20) (emphasis added).

¹¹ Remember, the statute specifies that a provider of a *telecommunications service* “...shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services.” 47 U.S.C. §153(51).

¹² *Burke Testimony at 8.*

There is no question that 47 U.S.C. §214 specifically requires that a carrier provide a “telecommunications service” (and thus actually qualify as a “common carrier” as defined in the Act) before it can qualify for federal universal service funding. And yet, in a recent order, the FCC, in three explicit statements, specifies it has no intention of complying with the classification scheme established by Congress.¹³

NARUC has not taken a specific position on elements of the Act that should be retained. Many argue the agency needs additional flexibility under any future reform. However, if properly utilized, arguably, the forbearance authority in Section 160, the preemption authority in Section 253 (with the crucial reservations of State authority re: non-economic oversight), and the requirement to engage in a biennial review of federal rules to eliminate those that are no longer needed in Section 161 already provide all the implementation flexibility any agency needs.¹⁴ It is hard to construct a scenario where these existing authorities cannot provide the requisite flexibility.

But there are certainly places where the Act needs adjustment. However, NARUC has not had adequate time to collect and approve official positions on potential adjustments. The provisions to designate multiple carriers to qualify for a subsidy to provide service where there are not enough customers to sustain one provider could be one target for reform.¹⁵ And there are certainly others. But much of the legal uncertainty and problems surrounding the FCC’s implementation of the 1996 legislation are directly related to the agency’s penchant for interpreting the statute in ways that even the agency itself has effectively acknowledged Congress in 1996 never anticipated,¹⁶ instead of relying on the explicit deregulatory tools Congress provided.

¹³ See, e.g., *Connect America Fund*, Report and Order, 26 FCC Rcd 17663 (2011) (“*2011 Transformation Order*”), online at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0206/FCC-11-161A1.pdf, at ¶63, noting “*Our authority to promote universal service in this context does not depend on whether interconnected VoIP services are telecommunications services or information services under the Communications Act.*” Actually, Congress required an identified “telecommunications service” for a provider to be classified as a “common carrier” and qualify for federal funds; at ¶69, noting “*Under our approach, [as opposed to Congress’ approach in the Act] federal support will not turn on whether interconnected VoIP services or the underlying broadband service falls within traditional regulatory classifications under the Communications Act.*” (Un-italicized text added); at ¶72, contending “*[L]imiting federal support based on the regulatory classification of the services offered over broadband networks as telecommunications services would exclude [some] from [participating as] the universal service program providers.*” This is an interesting statement – because it implies the FCC has in fact classified VoIP services as something else – when it continues to claim it has not. Nonetheless, it is an accurate statement of exactly what Congress, and the Act, requires. And if these explicit statements are not enough to demonstrate the agency’s determination to ignore Congressional instructions, it also clearly indicates it will ignore the definition of “telecommunications services” in the same order by creating a brand new functional “voice telephony” classification, which carriers are required to provide to get federal funds – a classification that – like services provided using VoIP, cannot possibly be distinguished from the definition of a “telecommunications service” in the Act.

¹⁴ 47 U.S.C. §161.

¹⁵ 47 U.S.C. §214(2) says “A State Commission shall...designate more than one common carrier as an eligible telecommunications carrier” to receive federal universal service subsidies. In the *2011 Transformation Order*, the FCC stretched this provision in two directions. First, it specified that Congress wanted multiple carrier designations in §214 - most that will never provide service or receive a subsidy - to facilitate an auction procedure. Many agree that auction procedure has merit but the FCC’s approach finds little support in the statute. Second it undermines the multiple designations with a series of conditions. Many of those issues are pending before the 10th Circuit.

¹⁶ See, e.g., the *2011 Transformation Order*, at ¶71:

“Information services are not excluded from section 254 because of any policy judgment made by Congress. To the contrary, Congress contemplated that the federal universal service program would promote consumer access to both advanced telecommunications and advanced information services “in all regions of the Nation.” When Congress enacted the 1996 Act...broadband capabilities were provided over tariffed common carrier facilities...It was not until 2002 that the Commission first determined that one form

In terms of principles, NARUC has recently developed a white paper with core principles that should apply to any re-write of TA 96.¹⁷ Taken almost verbatim from the white paper, the principles are listed in no specific order; each is equally important to ensure a robust and reliable communications ecosystem available to all consumers:

Consumer protection: Ensure that consumers are protected from unfair or illegal practices (including cyber threats) and that individual consumer privacy is maintained, regardless of technology used to provide the service. States, the FCC, and industry should work collaboratively to ensure that consumers are protected from unfair practices regardless of the technology used to provide those services. This includes protecting against slamming, cramming, unfair billing practices, and cyber attack, as well as ensuring that consumers' personal information remains private and secure. FCC consumer protections should be a floor—not a ceiling. Individual States and service providers should work together to determine whether additional protections are necessary based on their own needs.

Network reliability and public safety: Reliable, ubiquitously available communications are critical to protecting the public safety (911, E911, NG911), responding to disasters, and ensuring the public good, such as resolving ongoing call completion problems. Communications policy must ensure that communications networks are reliable and available, regardless of technology utilized, and the FCC should make relevant data available in real time to States.

Competition: Competition is critical to discipline the market and to ensure that consumers have multiple options for selecting the service that best meets their needs. The States are well-positioned to work with all stakeholders to ensure that there is robust competition and customer choice across their specific jurisdictions.

Interconnection: Communications networks must remain interconnected on a non-discriminatory basis regardless of technology. All consumers must be able to call each other regardless of carrier or technology, calls must complete, and no area of the country should become an isolated communications island, simply because some providers choose not to interconnect to others in those locations. The requirement to interconnect should not be limited to a subset of providers, but should apply to all suppliers, regardless of the technology they use. The States are well-positioned to continue to oversee the interconnection process as provided in Sections 251 and 252 of the Telecommunications Act of 1996, which are technology neutral.

Universal Service: Universal service remains a key policy goal of the nation as a whole. The States and the FCC should work together to ensure that service is affordable, ubiquitous, and reliable for all consumers. The States retain an important role in working with the FCC to ensure that service providers continue to meet social policy goals, including the universal availability of communications services, providing reasonably comparable and affordable service between urban and rural areas, and providing access to services such as Lifeline, Telecommunications Relay Service, and carrier of last resort (COLR) obligations as permitted by State law,

of broadband–cable modem service – was a single offering of an information service rather than separate offerings of telecommunications and information services, and only in 2005 did the Commission conclude that wireline broadband service should be governed by the same regulatory classification."

Classifications that this section quite obviously concedes–Congress *never* contemplated because it “thought” broadband, even when used to provide internet access, was a “telecommunications service.” Hence the final agency statement: “Thus...the Commission’s determinations that broadband services may be offered as information services have had the effect of removing such services from the scope of the explicit reference to “universal service” in section 254(c).” {Emphasis Added} Determinations that, according to this section, are apparently inconsistent with Congressional intent. Note, the omitted qualifiers in the last quote sentence are not consistent with the facts and are somewhat illogical.

¹⁷ NARUC 2013 Report, at Section IV, pages 10-15.

regardless of technology. The need for Universal Service Fund (USF) support will continue regardless of changes in technology. The States should retain a prominent role in all decisions related to USF.

Regulatory diversity: Regulation should be functional rather than based on the specific technology used to initiate a communication and carry information. Regulation should be technology neutral and developed after reviewing and evaluating constitutional and statutory State and federal roles and exploring multiple points of view. The States remain important laboratories for exploring solutions to complex problems. Federal and State regulators should seek multiple points of view on issues, including utilizing the Joint Boards to ensure that State and end user needs are heard and understood.

Evidence-based decision making: Open and transparent evidence-based decision making should be the primary tool in reforming regulatory policies. The best policies are developed by gathering information, evaluating all points of view, and exploring multiple options. The States are ideally suited to conduct evidence-based proceedings.

Broadband access, affordability, and adoption: The universal availability of broadband service is important to ensure job growth and the availability of quality medical care and education across the nation. The States have a key role in ensuring broadband deployment and adoption for their constituents, as well as in protecting the consumers of those services. The States are well-positioned to work with the FCC, industry, and others to determine where broadband is needed and to assess the availability of competitive choices as well as aid the FCC and industry in defining consumer protections for broadband service, including exploring privacy issues, ensuring accurate billing, and working with industry to review and resolve customer complaints.

2. *What should a modern Communications Act look like? Which provisions should be retained from the existing Act, which provisions need to be adapted for today's communications environment, and which should be eliminated?*

As noted in the response to question one, NARUC has not taken specific positions that allow it to respond fully to the question presented. NARUC hopes to be able to amplify this response before the Committee completes its white paper series. That said, the preceding discussion makes clear that, *at a minimum*, the following provisions/reservations of State authority, should be retained, including:

- **47 U.S.C. §§251-2 Interconnection Arbitration¹⁸**

In all critical infrastructure industries, interconnection among competing utilities has usually been a source of concern. The 1996 Act, in Sections 251 and 252, provides a back-up alternative – regulatory arbitration - for competing providers with widely divergent market power, but only when voluntary negotiations fail. Interconnection between competing carriers, while crucial for competition, is not always in the interests of both carriers. Some claim the market already has resolved all problems. But it is clear that many competing carriers that want to interconnect via IP, because it is unquestionably more efficient and necessarily a lot less expensive, cannot. Large carriers have no difficulty shifting between TDM and IP technologies on their own networks, yet it appears competing carriers heretofore have been unable to even get large carriers to the negotiation table. This provision is another victim of the FCC's intransigence in classifying services. If VoIP were classified as a "telecommunications service" it would be clear that Sections 251-2 apply to IP interconnections and the arbitration option would be available to smaller carriers that cannot get large carriers to the table to discuss interconnection. Because the January 15, 2014 D.C. Circuit decision in *Verizon et al v.*

¹⁸ See, e.g., the July 2008 NARUC Resolution Regarding the Interconnection of New Voice Telecommunications Services Networks, online at: <http://www.naruc.org/Resolutions/TC%20Interconnection.pdf>.

*FCC*¹⁹, suggests at least that Court would find any FCC effort to use “ancillary authority” to force interconnection illegal,²⁰ it seems unlikely the agency, if it acts at all, would classify VoIP as an information service. But it is crucial for Congress to maintain some avenue to assure competitors do interconnect if voluntary negotiations fail. Providers with market power should not have the capability to disadvantage competitors by limiting interconnection to older and more expensive technologies.

- **47 U.S.C. §253(b) and other Reservations of State authority²¹ to continue to address universal service, public health and welfare, and service quality.**

This section gives the FCC a powerful tool to assure no State is inhibiting competitive entry or competition. Significantly, it also, in tandem with other crucial reservations of State authority in the Act, reserves State authority to maintain existing State universal service programs, protect the public welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

These are all critical values that should be preserved in any re-write of TA 96.

Congress should not limit State authority to manage service restoration and prioritization in the wake of any disasters.

Nor should Congress limit or inhibit the ability of existing State-level universal service and broadband deployment programs to achieve their designated goals.²²

And certainly, there is no conceivable rationale for Congress to limit its constituents’ access to State remedies or penalties for federally defined inappropriate or abusive conduct (or specify what entity a State must use to provide relief).

The 1996 legislation recognized the lessons of history. States are almost always the first to provide relief and the bulk of enforcement when new abuses emerge, e.g., slamming, cramming or mislabeling of simple business expenses as “regulatory charges.” Often State efforts beat federal counterparts by one to three years. Sometimes the gap is longer.²³ States authorities are closer to your constituents and our commissions (and

¹⁹ This decision vacates key aspects of the FCC’s so-called “net neutrality” order and is available online 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)

²⁰ The only evidence available strongly suggests that the biggest obstacle to establishing VoIP interconnection agreements is incumbent LECs’ unwillingness to do so—not any technical issues related to VoIP interconnection. See July 8, 2013 *Comments of Comptel*, filed in the FCC’s GN Docket No. 13-5, at 9, available online at: <http://apps.fcc.gov/ecfs/document/view?id=7520928883> (“The RBOCs, such as AT&T and Verizon, nevertheless, continue to refuse to enter into VoIP interconnection agreements that would comply with the simple competitive protections of those statutory provisions, such as public disclosure, opt-in rights and arbitration (should negotiations fail).”).

²¹ See, e.g., 47 U.S.C. §§152(b), 261(a) & (b), 706, and 601.

²² Lichtenberg, Sherry, Akyea, Kafui, Bernt, Phyllis, “Survey of State Universal Service Funds 2012” (Report 12-10, NRRI, Silver Springs, MD, July 2012), online at: <https://prodnet.www.neca.org/publicationsdocs/wwpdf/72012nrriusf.pdf>.

²³ For example, by the time the Federal government got around to establishing a national “do-not-call” register, on June 27, 2003, at least nine States had already established State do-not-call registries. On the public policy front similar gaps between State and federal action to address issues exist. For example, in 1976, South Dakota became the first State to offer a Statewide Deaf Relay program with State appropriated funds. Other States started programs. In 1987, California began the first round-the-clock relay program. That same year NARUC petitioned the FCC to conduct a further notice of inquiry on federal relay services. It was 1990 before a national relay service was sanctioned by Congressional action. Compare, July 2007 *Testimony of North Dakota Commissioner Clark before the House Subcommittee on*

Attorneys General) feel a stronger urgency to act quickly (and are more likely to suffer consequences if they do not act). Moreover, our proceedings and rulemakings generally are finished more quickly than those at the FCC.

Whenever abuses arise, the law of unintended consequences should NOT be construed to work against consumers. To assure needed State flexibility, as the *NARUC 2013 Report* suggests, in a discussion of privacy protections, that generally speaking any federal consumer protection rules (and fines and penalties in particular) should be a floor, not a ceiling. Moreover, consumers should NOT have to wait for federal rulemaking every time a new issue arises. In any case, the federal government will always lack the manpower to help all consumers in every State. In many cases, whatever assistance it may provide will be complicated by distance and time zones. As the FCC has acknowledged in some contexts, this means that even where federal minimum standards may be appropriate, State/local governments must be allowed to enforce the federal standards and adopt more specific standards where needed.²⁴

Telecommunications and the Internet, arguing NARUC believes, in some cases, federal standards for consumer protection “may be one way to address carrier concerns over potentially conflicting State regulations. After all, States also want to ensure that compliance costs are minimized so that investment dollars can be focused on providing new service to consumers. However, we also want to be sure that federal standards are accompanied by State enforcement. Experience has taught us that relying solely on the federal government in these mass markets is folly. Take for example, the (earlier referenced) Do-Not-Call List experience. While both States and the federal government have enacted these laws, in practice, enforcement has fallen overwhelmingly to States, in fact, almost exclusively. For illustrative purposes, consider this somewhat dated – but still relevant history lesson: North Dakota is a State of only about 640,000 people. In the first 2 ½ years of its strict State Do-Not-Call law, the State Attorney General has enforced 53 settlements, totaling over \$64,000, and issued 7 cease and desist orders just in his State alone. In approximately the same time frame, the entire federal government, despite receiving over one million complaints, [had] only issued 6 fines and filed 14 lawsuits. Even more importantly from the consumer’s viewpoint, telemarketers were quick to exploit a patchwork of loopholes and “workarounds” to the federal rules and the calls kept coming. It fell to a handful of States to say that “no means no.” It is not that federal officials don’t care, it is just that there is simply no way they can effectively respond to individual complaints across a nation this large unless States are full partners in enforcement.”

²⁴ The FCC has frequently recognized States’ core competency with respect to consumer protection. A May 3, 2000 FCC order recognized, at ¶¶ 24-6, the clear benefits of leveraged enforcement:

Joint State-federal activities have been very effective in protecting consumers against *various types* of telecommunications fraud. It is imperative that the States and the FCC continue to cooperate, and expand their interaction, in order to eradicate slamming . . . We agree with NARUC that the States are particularly well-equipped to handle complaints because they are close to the consumers and familiar with carrier trends in their region. . . establishing the State commissions as the primary administrators of slamming liability issues will ensure that “consumers have realistic access to the full panoply of relief options available under both State and federal law.” . . . Moreover, State commissions have extensive experience in handling and resolving consumer complaints against carriers, particularly those involving slamming . . . We conclude that State commissions have the ability and desire to provide prompt and appropriate resolution of slamming disputes between consumers and carriers in a manner consistent with the rules adopted by this Commission. In most situations, State commissions will be able to provide consumers with a single point of contact for each State, thereby enabling slammed consumers to rectify their situations, receive refunds, and get appropriate relief with one phone call. State commissions also will be able to provide consumers and carriers with timely processing of slamming disputes. Finally, but of critical importance, States will provide a neutral forum for the resolution of slamming disputes.

In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, CC Docket No. 94-129, First Order on Reconsideration, 15 FCC Rcd 8158 (rel. April 13, 2000). In this *First Order on Reconsideration*, the FCC recognized States should have the ability, if they choose, to mediate slamming complaints received from consumers within that State. It also acknowledged individual States have unique processes, procedures and rules regarding slamming complaints. Initially 37 States “opted-in” to the FCC’s approach. This coordinated approach to slamming enforcement continues today.

- **47 U.S.C. §§410, 254 and other provisions that leverage State expertise and facilitate cooperation in consumer protection and universal service policies.**²⁵

The NARUC 2013 Report specifies that Congress should increase the collaboration between the FCC and the States to examine and provide solutions to communications issues. In the past, the Joint Boards have provided effective input into numerous FCC rulemakings and policies, including revisions to the Lifeline program, certification of eligible telecommunications carriers (ETCs), cost allocations, and wholesale service requirements. There is no question that this type of collaboration is a pre-requisite to good decision making. States are much better positioned to gauge the practical impact of federal policies on some programs, like State disaster recovery measures, State universal service programs, State broadband deployment initiatives, electric and telecommunications industry interdependency issues, and others. Sections 410 and 254 of the Act create a partnership between the States and the FCC—the Joint Boards—for collectively seeking, developing, and implementing communications policy recommendations. By referring items to the Joint Boards established by these sections of the Act, the FCC is able to gain direct and crucial insights into the potential effects of proposed communications rules and policies on your individual States and your constituents.

3. *Are the structure and jurisdiction of the FCC in need of change? How should they be tailored to address systemic change in communications?*

NARUC has in the past provided significant critiques of FCC process and procedures rather than the agency’s actual structure. We also have sent lengthy letters to the Administration²⁶ and testified before this Committee twice on a host of needed procedural reforms that will improve the operation, efficiency and fairness of agency operations.²⁷ For example, we support legislation to provide FCC Commissioners with more technical expertise²⁸ based on a 2009 NARUC resolution. That resolution notes that recent FCC orders demonstrate that the Commission needs access to more technical expertise and “encourages the Commission to consider enhancing its capabilities and analysis in finance and engineering.”²⁹ Indeed, the recently passed *NARUC 2013 Report*, at 7-8, raises particular concerns of the impact on decision-making of the FCC’s *ex parte* procedures. In practice, that process frequently results in numerous complex pleading filed near the end of comment periods. This can prevent other parties from providing a proper critique and often clear rebuttal of facts and allegations

²⁵ See, e.g., Bernt, Phyllis, *Universal Service in the National Broadband Plan: A Case for Federal-State Cooperation*, *Journal of Information Policy* 1(2011): 125-144.

²⁶ See *Dec. 12, 2008 Letter from NARUC President Butler to the Obama-Biden Transition Team*, App. A, online at: <http://www.naruc.org/Testimony/08%200916%20NARUC%20House%20ltr%20Prepaid%20Calling%20Card%20fin.pdf>. This letter contains a list of proposed procedural reforms.

²⁷ *Testimony of James Bradford Ramsay before the House of Representatives Energy and Commerce Committee’s Subcommittee on Communications and Technology on Reforming the FCC Process*, (July 11, 2013), available online at: <http://www.naruc.org/Testimony/13%200711%20Ramsay%20FINAL%20NARUC%20testimony%20FCC%20reform%20.pdf>, and also Mr. Ramsay June 22, 2011 testimony on the same topic before the same committee, available online at: <http://www.naruc.org/Testimony/11%200622%20Ramsay%20NARUC%20testimony%20FCC%20reform.FINAL.PDF>

²⁸ *NARUC Letter to the House Energy Commerce Committee Chairman Rockefeller and Ranking Member Hutchison, supporting The FCC Technical Expertise Capacity Heightening (TECH) Act*, (March 29, 2011) online at: <http://www.naruc.org/policy/Testimony/11%200329%20NARUC%20FCC%20tech%20enhancement%20act%20support.pdf>.

²⁹ See, e.g., *NARUC’s February 2009 Resolution on Reform of FCC Management and Process*, available online at: <http://www.naruc.org/Resolutions/TC%20Resolution%20on%20Reform%20of%20FCC%20Management%20and%20Process.pdf>.

contained in such late-filed pleadings. This, in turn, can lead to FCC decisions based on inaccurate or flawed data or reasoning. As the Republican leaders of this Committee recognized only yesterday, the FCC's use of Joint Board mechanism, is crucial "to ensure any changes . . . achieve the statutory goals in an effective and appropriately tailored way." Any revisions to the Act should include mechanisms to ensure the FCC returns to its earlier policy of actively seeking Joint Board recommendations. To do this, the *NARUC 2013 Report* recommends that the FCC refer matters to the Joint Boards more regularly; follow the APA rules in its formal and informal rulemakings; and seek diverse regulatory input from a variety of sources.

Some of our proposed process reforms were adopted in the bipartisan Federal Communications Process Reform Act.³⁰ Whatever happens to that legislation in the Senate in this Congress, this Committee should use this initiative as an opportunity to reconsider some of the proposals that were not.

4. *As noted, the rapidly evolving nature of technology can make it difficult to legislate and regulate communications services. How do we create a set of laws flexible enough to have staying power? How can the laws be more technology-neutral?*

As noted earlier, the Act already provides the FCC with a range of options that provide it with significant flexibility. Congress can enhance the likelihood for effective oversight by building on the basic functional definitions in the Act. The basic definitions in the Act are technology agnostic and thus can serve as the basis for communications oversight going forward, regardless of changes to the underlying configuration of the network(s) or the protocols used to transmit information. Perhaps Congress could consider ways to constrain the FCC's "creative" approach to effectively re-writing substantive provisions of the statute, which would, in turn, require them to instead rely on the tools Congress has already provided.

5. *Does the distinction between information and telecommunications services continue to serve a purpose? If not, how should the two be rationalized?*

The distinction was created to distinguish services that all policy makers are likely to agree must be subject to at least some overriding public interest standards, from services that should not have to comply with such requirements. This would include things like one or more of the following: emergency communications requirements including the provision of 911 service, restoration priorities during natural disasters, technical access for law enforcement acting pursuant to court order, disabled access provisions, assuring dialed calls are completed, universal service, required interconnection, etc. But the distinction is only useful if the FCC applies the classification logically and consistently based on the core functionality provided. See the discussion under question 1 at pp 1-7.

If you have questions about any of NARUC's positions or would like to discuss it further, please contact the undersigned, or NARUC Legislative Director Brian O'Hara at (202)898-2205, bohara@naruc.org, or NARUC General Counsel Brad Ramsay at (202)898-2207, jramsay@naruc.org. We look forward to providing additional input as your process continues.

Sincerely,

Colette D. Honorable
NARUC President

Chris Nelson
Chair, NARUC Committee on Telecommunications

cc: Members of the Committee on Energy and Commerce

³⁰ *Walden Announces Bipartisan Agreements on FCC Process Reform and Legislation to Improve Federal Spectrum Use* (December 9, 2013) online at: <http://energycommerce.house.gov/press-release/walden-announces-bipartisan-agreements-fcc-process-reform-and-legislation-improve>.