

Resolution Opposing Federal Preemption of States' Jurisdiction over Broadband Internet Connectivity Service

WHEREAS, The Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened at its July 2005 Summer Committee Meetings in Austin, Texas, adopted a Resolution that endorsed a report on *Federalism and Telecom*, by the NARUC Legislative Task Force, which expressed support for “a ‘functional-focus’ model of jurisdiction” that allocates “State and federal responsibility over telecommunications based on analysis of the characteristics of each governmental function exercised, and of the comparative abilities of different levels of government to exercise the function successfully;” *and*

WHEREAS, The aforementioned Resolution further stated that: “Any new regulatory framework should allow the States to perform a strong consumer-focused role, and in particular ensure that States are able to:

- Provide a local venue for investigation, alternative dispute resolution and prompt and efficient resolution of both intercarrier disputes and consumer-to-company disputes;
- Investigate adequately and take enforcement actions against violations of State laws regarding deceptive, misleading or fraudulent business practices, including slamming and cramming;
- Maintain basic consumer protections such as the terms and conditions of service, contract disclosures, quality of service standards and reliable E911 services;
- Initiate consumer education efforts, in cooperation with the Federal Communications Commission (FCC), to properly inform consumers of their rights; and
- Ensure that the special needs of customers are met through programs such as distribution of specialized equipment, Lifeline and Link-up and Relay services;” *and*

WHEREAS, In the Telecommunications Act of 1996, Congress recognized the critical role State commissions must play to facilitate the availability and adoption of affordable advanced telecommunications services by: (1) in Section 706 specifying that States (and the FCC) “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,” a term defined “without regard to any transmission media or technology, as high speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology;” and (2) in Section 254, and others, specifying that States have the authority to take reasonable steps to preserve and advance universal service, a term defined as “taking into account advances in telecommunications and information technologies and services;” *and*

WHEREAS, On April 6, 2010, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in *Comcast v. FCC* (600 F.3d 642) (*Comcast* decision) that cast doubt on the ability of the FCC, and possibly the States, to ensure fair competition among broadband Internet

connectivity service providers and to protect the public's safety and welfare when they use broadband Internet services; *and*

WHEREAS, On June 17, 2010, the FCC released a *Notice of Inquiry* (FCC 10-114) seeking comments on the legal and practical consequences of all options for a legal framework for broadband Internet service in light of the *Comcast* decision, including among other options classifying wireline, terrestrial wireless and satellite broadband Internet connectivity services as a "telecommunications service" pursuant to a "third way" of regulatory oversight "under which the Commission would: (i) reaffirm that Internet information services should remain generally unregulated; (ii) identify the Internet connectivity service that is offered as part of wired broadband Internet service (and only this connectivity service) as a telecommunications service; and (iii) forbear under section 10 of the Communications Act from applying all provisions of Title II other than the small number that are needed to implement the fundamental universal service, competition and small business opportunity, and consumer protection policies that have received broad support;" *and*

WHEREAS, In Paragraph 109 of the *Notice of Inquiry*, the FCC explicitly requests commenters to address the implications for State and local regulation that would arise from the three proposals for a legal framework for broadband Internet connectivity service and broadband Internet service; *and*

WHEREAS, In Paragraph 110 of the *Notice of Inquiry*, the FCC indicates that "if a State were to impose requirements on broadband Internet connectivity service or broadband Internet service that are contrary to a Commission decision not to apply similar requirements, we would have authority under the Communications Act and the Supremacy Clause of the United States Constitution (Article III, section 2) to preempt those State requirements;" *and*

WHEREAS, The *Notice of Inquiry* seeks comment on all options, including one that would apply Sections 201, 202, 208, 222, 254, and 255 and forbearing from applying all other Title II sections to broadband Internet connectivity service or broadband Internet service and notes that "section 10(e) (of the Communications Act) provides that '[a] State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying;" *and*

WHEREAS, When not acting pursuant to a specific preemption provisions of the Communications Act, such as those in Sections 253 or 276, the proper test for FCC preemption established by longstanding jurisprudence requires both inseparability and inconsistency with the statutory goals; *and*

WHEREAS, On March 16, 2010, the FCC released *Connecting America: The National Broadband Plan* (National Broadband Plan) that sets forth four ways in which the federal, State and local governments can influence the advancement of the broadband ecosystem:

1. Design policies to ensure robust competition and, as a result maximize consumer welfare, innovation and investment;

2. Ensure efficient allocation and management of assets government controls or influences, such as spectrum, poles, and rights-of-way, to encourage network upgrades and competitive entry;
3. Reform current universal service mechanisms to support deployment of broadband and voice in high-cost areas; and ensure that low-income Americans can afford broadband; and in addition, support efforts to boost adoption and utilization;
4. Reform laws, policies, standards and incentives to maximize the benefits of broadband in sectors government influences significantly, such as public education, health care and government operations; *and*

WHEREAS, The U. S. Department of Commerce, National Telecommunications and Information Administration announced on May 28, 2010 that State governments and other existing awardees in its State Broadband Data and Development Grant Program may seek funding for various initiatives to help their communities compete in the digital economy and for up to three additional years of broadband data collection and mapping work; *and*

WHEREAS, The FCC has expeditiously responded to the U.S. Court of Appeals' *Comcast* decision by releasing a *Notice of Inquiry* (FCC 10-114) to identify the legal approach that will best support its efforts to ensure universal access to affordable, high-quality broadband services; promote broadband innovation, investment and competition; and protect and empower consumers; *now, therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its 2010 Summer Committee Meetings in Sacramento, California, supports a "functional-focus" model of jurisdiction that allocates State and federal regulatory responsibility over communications services, similar to that adopted by the *Resolution* which adopted the *Federalism and Telecom* white paper, as attached, at its 2005 Summer Committee Meetings in Austin, Texas, and if the FCC chooses to implement a "third way" of regulatory oversight for broadband Internet connectivity service and broadband Internet service it should apply this model to broadband Internet connectivity service, based on analysis of the characteristics of each governmental function exercised, and of the comparative abilities of different levels of government to exercise the function successfully; *and be it further*

RESOLVED, That if the FCC chooses to implement a "third way" of regulatory oversight for broadband Internet connectivity service it should be very clear that the rationale does not prejudice in any way States' authority reserved under Section 253 of the Communications Act of 1934, as amended, "to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers;" *and be it further*

RESOLVED, That the FCC not forbear from applying Title II provisions of the Communications Act of 1934, as amended, which reserve authority to the States as such forbearance would be contrary to the bi-jurisdictional oversight of broadband Internet connectivity service.

Sponsored by the Committee on Telecommunications

Adopted by the NARUC Board of Directors July 21, 2010