N A R U C
National Association of Regulatory Utility Commissioners

June 13, 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: NARUC Comments to House Energy & Commerce Committee White Paper #3 - "Competition Policy and the Role of the Federal Communications Commission"

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

The National Association of Regulatory Utility Commissioners (NARUC) appreciates the House's thoughtful approach to reform of the federal telecommunications law. The association does not have specific positions that are relevant to all the questions posed in this white paper. Some of the questions raise overlapping issues. As a result some of our answers cover similar ground. NARUC has not taken positions on the issues raised by questions 6, 7, 8, and 10.

If you have questions about any of the responses, please do not hesitate to contact the undersigned or NARUC's Legislative Director for Telecommunications Brian O'Hara at 202.898.2205 or bohara@naruc.org or J. Bradford Ramsay, NARUC's General Counsel at 202.898.2207 or jramsay@naruc.org.

Respectfully submitted,

/s/ Chris Nelson

Chris Nelson
Chair, NARUC Committee on Communications
Vice Chairman, South Dakota Public Utilities Commission

House E&C Telecom Act Update Whitepaper #3 – Competition Policy and the Role of the Federal Communications Commission

Questions for Stakeholder Comment

1. How should Congress define competition in the modern communications marketplace? How can we ensure that this definition is flexible enough to accommodate this rapidly changing industry?

In testimony before this committee, NARUC has pointed out the importance of focusing on the right questions in any update of the federal telecommunications legislation.[1] *The reasons for regulatory oversight remain the same and do not change. One key, but certainly not the only, reason for policymakers to provide oversight is an insufficiently competitive market. The definition of competition in a given area is certainly a crucial consideration when deciding whether oversight is needed.*

NARUC does not have a specific position on the difficult question of how competition should be defined in terms of the relevant market's geographic scope or demographics. However, it is clear that the definition of the service used for defining the relevant market should be agnostic to the technology used to provide the service. No regulator or legislator should be intervening in the market to put a thumb on the scale to favor one technology over another. To the extent there are public interest requirements in terms of, e.g., reliability, resiliency, or emergency 911 communications, they should be applied without regard to the technology used to provide the service. The market should make those choices. While the 1996 Act has some deficits, the definitions sections do provide a functional approach to defined services. That is crucial. Congress should be very careful to constrain the FCC's ability to provide different treatment to functionally equivalent services.[2]

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[1] See, e.g., *Testimony by Commissioner John Burke, Chairman NARUC Committee on Telecommunications before the United States House of Representatives Energy and Commerce Committee Subcommittee on Communications and Technology hearing on "The Evolution of Wired Communications Network,"* (October 23, 2013), online at: http://www.naruc.org/Testimony/13%201022%20Burke%20Testimony2.pdf, at 3 ("[I]t is crucial for Congress, as well as state and federal regulators, to focus on the right issues.")

[2] Id., at 4, ("No regulator or legislator should be intervening in the market to put a thumb on the scale to favor one technology over another. The market should make those choices.") and at 7, ("Policy makers should, as Congress required, adopt a functional approach to defined services. The 1996 Act is far from a model of perfection. But in key areas, it does properly focus on services – not the technologies used to provide those services."). Since 1996, under successive administrations, the FCC has successfully and repeatedly usurped Congressional authority by interpreting the federal act in ways Congress could never have contemplated. The federal courts have acquiesced in these FCC determinations arguably providing license for the FCC to take actions the Commission deems prudent without seeking additional authority from Congress. See, e.g., *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011), online at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0206/FCC-11-161A1.pdf at ¶ 63 "Our authority to promote universal service in this context does not depend on whether interconnected VoIP services are

One way to assure the definition does not reflect differences that do not impact the competitiveness of the market is to examine the service provided by a particular provider (or using a particular technology) with respect to other services. If a substantial majority of business or residential users of that service in a specific area treats/views the services as directly substitutable (not as supplemental or adjunct services), then any definition of competition should also. It is also clear, that States are well positioned and possess the tools to evaluate competitive markets, however defined, located within their borders. States played a major role is opening local markets to competition before passage of the 1996 Act. Indeed, many of the competitive provisions of the 1996 legislation were derived from ongoing State initiatives to introduce competition in local service. As the very existence of the federal high cost program necessarily demonstrates, competition does not develop uniformly, but market by market. State commissions know the providers in their local markets, where they provide service and where they are investing, making them uniquely qualified to determine if sufficient competition exists. Any federal legislation should attempt to leverage that expertise.

2. What principles should form the basis of competition policy in the oversight of the modern communications ecosystem?

In 2012 NARUC's President convened a Task Force on Federalism and Telecommunications to update a 2005 whitepaper to respond to the changing communications landscape. NARUC's Task Force revised a set of core principles for oversight of the telecommunications sector to assist Congress, the FCC and States.

The FCC lacks the financial and personnel resources needed to singularly oversee telecommunications markets across a country the size of the United States. Moreover, the FCC is not positioned, nor does it have the same incentive, to acquire the same insight into local

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telecommunications services or information services under the Communications Act. Under **our** approach, federal support will not turn on whether interconnected VoIP services or the underlying broadband service falls within traditional regulatory classifications under the Communications Act." (emphasis added) Actually Congress was very specific in 47 USC §214 instructing that only *common carriers*, i.e., carriers that are providing "telecommunications services" (a traditional regulatory classification under the Telecommunications Act) can have access to federal USF funds so either broadband or VoIP services must fall within said "traditional" classification for funds to be provided. Even the recent 10th Circuit decision upholding the FCC's order on the merits acknowledges that fact. In one of the more poorly reasoned parts of the decision, after basically finding no problem with the notion that neither VOIP nor broadband services are necessarily "telecommunications services" aka "common carrier services", the court states: "Under the existing statutory framework, only "common carriers," defined as "any person engaged as a common carrier for hire . . . in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy," 47 U.S.C. § 153(10), are eligible to be designated as "eligible telecommunications carriers," 47 U.S.C. § 214(e). Thus, under the current statutory regime, only ETCs can receive USF funds that could be used for VoIP support." IN RE: FCC11-161 (rel May 23, 2014), mimeo at page 50, available online at: https://www.ca10.uscourts.gov/opinions/11/11-9900.pdf, The Court misses, or at least does not acknowledge, the fact that the Act also specifies that one is a "common carrier" under Title II "only to the extent one is providing "telecommunication services."

markets as NARUC's member commissions. Any federal framework should not take State "cops" off the beat or otherwise limit State's ability to protect both consumers and competition. Federal and State policymakers need to work together to ensure a competitive marketplace. What is needed is a common sense values-based approach. That's what NARUC advocates in our 2012 Cooperative Federalism and Telecom in the 21st Century report.

The NARUC Task Force recommends that all entities engaged in providing, regulating, or managing communications services, or proposing legislation for future oversight, use the following principles to guide their work. The Principles are provided in no specific order; each is equally important to ensure a robust and reliable communications ecosystem available to all consumers.

<u>Consumer protection</u> - Ensure that consumers are protected from unfair or illegal practices (including cyber threats) and that individual consumer privacy is maintained, regardless of technology.

- *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. It would make little sense for any federal legislation to limit any existing State avenues for consumer redress. This includes protecting against slamming, cramming, unfair billing practices, and cyber attack, as well as ensuring that consumers' personal information remains private and secure.*

- *By definition, even in a vibrantly competitive market, such abuses occur. Fraudulent operators are never deterred (and may actually benefit) from a robustly competitive market. But even mainstream players may find it difficult to root out bad practices if they enhance the bottom line. An obvious example arose during the heated and highly competitive long distance wars that took root in the 1990s. At that time, carriers like MCI, Sprint, and AT&T offered customers $10, $25 and $100 checks, along with competitive rates/packages to change toll service providers. At the same time, in a market teaming with both facilities-based and "reseller" competitors, slamming – or changing a customers' toll service without the customer's permission, became a big problem. There were carriers that engaged in outright fraud, and charged high rates, aided by the new market structure, but even established players offering competitive rates, received numerous fines for slamming.*

- *States and service providers should work together to track, review, and assist consumers in resolving complaints. By jointly reviewing and tracking complaints, all parties can identify and rectify problem areas.*

- *The FCC's customer data privacy standards should represent a floor–not a ceiling–for the protection of consumer privacy. Individual States, consumer protection agencies, 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, responding to disasters, and ensuring the public good. Communications policy must ensure that communications networks are reliable and available, regardless of technology.

- *States, the FCC, and service providers should work together to ensure that all consumers can access emergency services (i.e., 911, E911, and NG911) regardless of the technology used to carry calls.*

- *The FCC's outage reporting data provides a baseline for determining network reliability. This data should be shared with the States where allowed under applicable State laws so that the FCC and the States may work together to ensure that networks remain reliable.*

- *States and the FCC should work together to resolve call completion problems so that all consumers may make and receive calls to all locations across the country.*

- *States, the FCC, and industry should collaborate with broadband providers, electric utilities, and equipment manufacturers to address the issue of continuing voice service during major power outages.*

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. States are well positioned to work with all stakeholders to ensure that there is robust competition and customer choice across their specific jurisdictions.

- *Customers should have the choice of multiple providers, products, and services.*

- *States should work with industry and the FCC to determine where competition is adequate to ensure customer choice.*

- *The FCC, other federal agencies, and the States should work together, where statutorily permitted, to collect the granular data necessary to determine the areas where effective competition exists and to monitor changes to the competitive landscape.*

- *Where competition is not sufficient to ensure adequate and affordable service, when appropriate, the States and the FCC should consider further steps.*

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.

- *Interconnection is necessary to ensure ubiquitous service and enhance competition among providers.*

- *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.*

- *Sections 251 and 252 of the Act are technology neutral. The rules for interconnection do not and should not depend on the technology used by the interconnecting providers.*

- *The States, the FCC, and industry should work together to examine the way the interconnection of next generation communications networks should be accomplished in order to ensure that all providers can complete calls to all other providers, regardless of the technology they use.*

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, regardless of technology.*

- *The States and the FCC should continue to focus on the role set forth in Section 254 of the Telecommunications Act of working together to define and implement the requirements for universal service, regardless of technology.*

- *The FCC can best fulfill its responsibilities under Section 254 by working with the Federal-State Joint Board on Universal Service to determine the requirements for universal service, including funding and contribution mechanisms.*

- *The States are well positioned to work with the FCC to determine the effects of changes to the universal service funding methodology. Potential reforms of the federal USF contribution and support mechanisms should not negatively affect State USF funds or create the potential for causing gaps in the ubiquitous availability of service.*

- *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.*

- *The FCC and the States should work together to collect the data necessary to make informed decisions.*

- *In order to ensure that all interested parties are given an adequate and meaningful opportunity to be heard, the FCC's informal rulemaking processes should be conducted openly and fairly and should rely primarily on timely written comments and not on ex parte communications.*

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.*

- *The States should work with the FCC and industry to define consumer protections for broadband service, including exploring privacy issues, ensuring accurate billing, and working with industry to review and resolve customer complaints.*

- *The States are well-suited to work with the FCC and industry to track and evaluate the reliability of broadband service, including, where allowed under applicable State laws, reviewing outage reporting data and ensuring that service is restored on a timely basis..*

- *The States are well-positioned to work with the FCC, industry, and others to develop equitable and sustainable funding mechanisms for broadband service.*

3. How should intermodal competition factor into an analysis of competition in the communications market?

This question is a subset of Question 1. Our response to it tracks the discussion provided to respond to question 1. The technology used to provide a service cannot change the values we place upon our communications network. As noted, supra, that is why NARUC has for years consistently urged Congress and federal regulators to take a technology-neutral approach to regulation.[3] *The consumer does not distinguish whether the network provides the service using IP or TDM protocol to packetize the voice or data stream, fiber or copper, or, in some instances, wireline or wireless technology.*

The policy question should focus on if, in the defined market, the services compete directly and are considered as completely substitutable to a majority of business and residential consumers.

If the answer is yes, then "intermodal" competition is integral to an analysis of competition occurring within a particular (and properly defined re: size and demographics) market.

The technology used to provide the service is not generally a relevant consideration. Consumers care if the service works and that they are getting what they pay for. Though sometimes a specific technology can engender a new problem,[4] *the reasons State commissions and agencies like the FCC were created remain the same.*

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[3] *NARUC Legislative Task Force Report on Federalism and Telecom* (July 2005). See also, NARUC's February 2003, NARUC passed *Resolution Relating To Voice Over The Internet Telecommunications*, available online at: http://www.naruc.org/Resolutions/voice_over.pdf, that notes "a significant portion of the nation's total voice traffic could be transported on IP networks within a few years" and urged the FCC to "confirm its tentative decision that certain phone-to-phone calls over IP networks are *telecommunications services*." In November 2003, NARUC passed a *Resolution on "Information Services"*, at http://www.naruc.org/Resolutions/info_services.pdf, cautioning the FCC to consider the negative implications associated with a finding that IP-based services are subject to Title I jurisdiction, including the (i) uncertainty and reduced capital investment while the FCC's authority under Title I is tested; (ii) loss of consumer protections applicable to telecommunications services under Title II; (iii) disruption of traditional balance between federal and State jurisdictional cost separations; (iv) increased risk to public safety… content; (vi) loss of State and local authority over emergency dialing services…" Those warnings remain valid today. See also, NARUC's 2008 *Resolution Regarding the Interconnection of New Voice Telecommunications Services Networks*, online at: http://www.naruc.org/Resolutions/TC%20Interconnection.pdf. ("NARUC applauds the numerous advances in technology . . . to enable the efficient transmission of voice telecommunications traffic and the continued successes in developing innovative means to deliver voice telecommunications services . . . 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.") See also, NARUC's February 2012 *Resolution on Mandatory Reporting of Service Outages by Interconnected Voice over Internet Protocol Service Providers*, asking the FCC to, *inter alia*, extend the mandatory service outage reporting requirements in 47 C.F.R. Part 4 to interconnected VoIP service providers.

[4] Some argue some technology specific rules may be needed to address the reduced resiliency of wireless and fiber networks. But there is no question that competing services should face similar rules. Both rely more on commercial power both at the network level and at the customer premise. The battery backup system installed with FiOS service is the responsibility of the consumer, after one year. There is a similar question, given the increasing number of wireless-only households, of backup power to cell towers. NARUC has raised concerns about the problem and had a panel on the interdependencies between the telecom and energy sectors at our conference last November.

Oversight is required where competition is not vigorous enough to adequately protect consumers. Where competition is sufficient to ensure market choice and innovation, then there is a reduced (or possibly no) need for economic oversight. But the obligations to maintain other types of oversight remain. Mechanisms must be in place to protect consumers and maintain established public interest obligations. Regardless of the level of competition, some oversight is always necessary to provide things the market will not. This includes protecting consumers from fraudulent actors and poor service quality, imposing requirements to facilitate or enhance competitive forces, e.g., (i) requiring local number portability[5] and (ii) facilitating interconnection in markets with competing carriers with widely divergent market power, assuring disabled access, emergency calling services and universal service, and assuring a proper level of network reliability, as well as adequate plans that provide robust service restoration after disasters. By selectively applying these values only to specific technologies, policymakers distort the market and put their thumb on the scale in favor of one particular service. Policymakers should not choose winners and losers – the market should decide.

Moreover, whenever problems and abuse of customers arise—and they always do--the law of unintended consequences should NOT be construed to work against consumers. To assure needed State flexibility, federal rules should be "[a] floor, not a ceiling," as "…blanket preemption on consumer affairs will restrict consumer redress in the future." Moreover, "…consumers should NOT have to wait for federal rulemaking every time a new issue arises." In some cases, federal rules are necessary and appropriate. However, the federal government will always lack the manpower to help all consumers in every State. In many cases, whatever assistance they may provide will be complicated by distance and time zones. 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. Certainly, there is no rationale for Congress to limit its constituents' access to State remedies or penalties for federally defined inappropriate or abusive conduct.

4. **Some have suggested that the FCC be transitioned to an enforcement agency, along the lines of the operation of the Federal Trade Commission, rather than use broad rulemaking authority to set rules *a priori*. What role should the FCC play in competition policy?**

NARUC has not taken positions on the issues raised by this question. However, any such change, would if anything, increase the need for preservation of existing State mechanisms that protect business and residential consumers, ensure reliability, emergency communications, and service restoration, prevent disconnection in appropriate and defined circumstances, and maintain universal service.

[5] Number portability, which unquestionably facilitates competition, had to be forced on the wireless industry at a time when many considered that sector to be the poster child for a competitive market.

5. What, if any, are the implications of ongoing intermodal competition at the service level on the Commission's authority? Should the scope of the Commission's jurisdiction be changed as a result?

Congress should include provisions in any re-write to assure functionally equivalent services are treated/classified the same. Any rewrite should not permit the FCC to favor some entrants over others by refusing to classify a service for over a decade – as it has with VoIP services. The FCC's recalcitrance is not just inefficient. It has actively encouraged regulatory arbitrage and has required significant (and unnecessary) litigation before the FCC and the courts over, e.g., access to numbering resources, support for federal and State universal service programs, and interconnection policy, all at taxpayer/ratepayer expense. It also is, if not the cause, certainly a significant root cause for the call completion problems that continue to plague your constituents in rural areas

6. What, if any, are the implications of ongoing intermodal competition on the role of the FCC in spectrum policy?

NARUC has not taken positions on the issues raised by this question.

7. What, if any, are the implications of ongoing intermodal competition at the service level on the FCC's role in mergers analysis and approval?

NARUC has not taken positions on the issues raised by this question.

8. Competition at the network level has been a focus of FCC regulation in the past. As networks are increasingly substitutes for one another, competition between services has become even more important. Following the *Verizon* decision, the reach of the Commission to regulate "edge providers" on the Internet is the subject of some disagreement. How should we define competition among edge providers? What role, if any, should the Commission have to regulate edge providers – providers of services that are network agnostic?

NARUC has not taken positions on the issues raised by this question.

9. What regulatory construct would best address the changing face of competition in the modern communications ecosystem and remain flexible to address future change?

The existing structure of the federal Telecommunications Act has several features that warrant consideration in any re-write.

TECHNOLOGICAL NEUTRALITY/ FUNCTIONAL APPROACH/MECHANISMS TO LIMIT FCC'S ABILITY TO APPLY CLASSIFICATIONS INCONSISTENTLY: Congress should retain the functional approach inherent in the existing definitions of "telecommunications services" and "information services" in the current Act. Functional definitions, if applied consistently, should assure that the FCC does not intervene in the market to slant its regulations to favor a particular technology or industry segment. Although the FCC has not adhered to the technology neutrality inherent in the current definitions in Title II, objectively, they do provide an excellent model for moving forward, provided that Congress can find a way to limit the FCC's ability to apply these basic classifications inconsistently. To date, the Courts have generally limited application of the specific provisions in the 1996 legislation designed to do just that.

MARKET TOOLS & PRESERVATION OF STATE AVENUES FOR CONSUMER REDRESS: Recall, also, the current federal legislation provides numerous tools for the FCC to forebear from imposing regulations where conditions warrant and even a very specific and broad provision to preempt any State or local law that prohibits or has the effect of prohibiting any telecommunications service provider from providing any telecommunications service. Significantly, even in that provision, 47 U.S.C. S 253, which gives the FCC, upon complaint, a broad charge to eliminate State laws that may prohibit the provision of competitive services, Congress included an equally crucial preservation of State avenues for consumer redress of service quality complaints as well as preservation of State universal service programs/measures. Again, in any rewrite, it makes little sense for Congress to take State "cops" off the beat or otherwise limit State avenues for consumer redress (or even specify the State mechanism that must be used for consumer redress).

USE OF FEDERAL STATE JOINT BOARDS/SUNSHINE REFORM: Third, Federal – State joint boards do provide a useful function. The efforts to rein in the abuse of the FCC lifeline program is perhaps the latest example where the Joint Board's recommendations, based in part on long-standing State programs, assisted the agency in crafting possible solutions to the problems presented. The Boards certainly provide an additional forum where the costs and benefits of any proposed changes to the federal universal service program can be weighed. Unfortunately, the FCC almost never makes use of them. Congress should consider ways to assure that the federal universal service program is reviewed periodically by the Federal State Joint Board on Universal Service, including supported services. As part of its review, Congress should also adjust the sunshine rules to allow FCC Commissioners to participate in deliberations involving the rest of the board.

10. Given the rapid change in the competitive market for communications networks and services, should the Communications Act require periodic reauthorization by Congress to provide opportunity to reevaluate the effectiveness of and necessity for its provisions?

NARUC has not taken positions on the issues raised by this question.