

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

For Immediate Release: **October 21, 2008**

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States Urge FCC to Call for Public Comments on Intercarrier Compensation, Universal Service Proposal

WASHINGTON—The Federal Communications Commission must allow more time for due process and public comments before it acts on a sweeping proposal that will revamp intercarrier compensation and the Universal Service Fund.

In a letter sent today to the FCC, the National Association of Regulatory Utility Commissioners said a proposal from agency Chairman Kevin Martin to reform both programs needs to be fully vetted by all stakeholders because it will have a profound impact on the telecommunications industry and consumers in an era of financial uncertainty. The letter is pasted below.

"Respectfully, in the wake of the credit crisis still reverberating throughout the U.S. economy, the FCC is rushing to resolve a \$13 billion problem based on insufficient information, an inadequate record, and an incredibly compressed deliberative period," the letter said. "There is no need to do so."

While there is a need to fix these crucial programs as soon as possible, the FCC must give parties an opportunity to comment before acting on the proposal on Nov. 4—a few short weeks away, NARUC said. The proposal leaves too many unanswered questions and will have significant unintended consequences for the industry, consumers, and the State regulators charged to protect them.

"The Commission cannot rely on informal news briefings, a release announcing a draft is circulating, and private-party submissions to support a change in the rules governing intercarrier compensation where it does not give commenters adequate notice or a fair opportunity to challenge either the veracity of the evidence submitted or the structure of the rules proposed," the letter said.

This is especially important because any new proposal raises a host of unanswered questions, NARUC said, such as: Will it increase wireless/cellular or broadband deployment in unserved or underserved high cost areas, or actually undermine deployment? Is the legal rationale proffered consistent with Congressional intent? How does this approach benefit consumers, if at all? Will it put upward pressure on local rates; if so, what are the expected rate increases?

Instead of moving forward early next month, NARUC urged the FCC to give parties at least 90 days to comment on the proposal and issue a Further Notice of Proposed Rulemaking summarizing the several discrete issues raised in the record and enunciating its tentative conclusions and proposed legal theories. NARUC also pressed the FCC to decide the future treatment of compensation for termination of Internet Service Protocol-bound traffic before a Nov. 5 court deadline.

The letter was signed by the following State regulators: NARUC Telecommunications Committee Chairman Ray Baum of Oregon; Commissioner Mark K. Johnson of Alaska; Commissioner Larry S. Landis of Indiana; Commissioner John D. Burke of Vermont; Commissioner Philip B. Jones of Washington; Commissioner Tony Clark of North Dakota; Commissioner Steve Kolbeck of South Dakota; and Commissioner Betty Ann Kane of the District of Columbia.

TEXT OF LETTER

NOTICE OF EX PARTE PRESENTATION (47 C.F.R. § 1.1204(10))

October 21, 2008

The Honorable Kevin Martin, Chairman
The Honorable Deborah Taylor Tate, Commissioner
The Honorable Michael Copps, Commissioner
The Honorable Jonathan Adelstein, Commissioner
The Honorable Robert McDowell, Commissioner

Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: NARUC MOTION/REQUEST FOR PUBLIC COMMENT ON RECENTLY CIRCULATED "REPORT AND ORDER, ORDER ON REMAND, AND FURTHER NOTICE OF PROPOSED RULEMAKING" ON UNIVERSAL SERVICE AND INTERCARRIER COMPENSATION REFORM.

In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, In the Matter of Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers Regarding Access Charges and the ESP Exemption, CC Docket No. 08-152, In the Matter of IP-Enabled Services, WC Docket No. 04-36, In the Matter of Universal Service Contribution Methodology, WC Docket No. 06-122, In the Matter of Petition for Declaratory Ruling Filed by CTIA, WT Docket No. 05-194, In the Matter of Jurisdictional Separations & Referral to the Federal-State Joint Board, CC Docket No. 80-286

Commissioners:

Respectfully, in the wake of the credit crisis still reverberating throughout the U.S. economy, the FCC is rushing to resolve a thirteen billion dollar problem based on insufficient information, an inadequate record, and an incredibly compressed deliberative period. There is no need to do so. The FCC can easily respond to the Core remand on November 4th separately and then later address broader issues after all Commissioners have an opportunity to understand the draft proposal, and the FCC has an opportunity to solicit public input and to create a proper record for action.

There is no question, even from the few consistent details available from the media/financial analysts, that this proposal will dramatically change how many carriers serving rural and insular areas can access capital to maintain existing infrastructure as well as rollout broadband to those areas where buildout is most costly. Indeed, some argue it calls into question the ability of some publicly-held companies to operate in what could become the most challenging environment in over half a century. There is also no question it fundamentally, and irrevocably, alters the structure for federal and state oversight of the industry - perhaps increasing the need for complementary State universal service programs.

Beyond that, little else can be predicted with any certainty.

The 167-page detailed draft raises a host of issues that no-one - including the majority of the FCC Commissioners that are expected to vote on the document in two weeks - has had (or will have) time to fully assimilate. As with any new proposal, it raises a host of unanswered - and unanswerable on the current record - questions: Will it increase broadband deployment in unserved or underserved high cost areas, or actually undermine deployment? Will it increase wireless deployment in those same high cost areas, or actually undermine deployment? How does this approach benefit consumers, if at all? Is the legal rationale proffered consistent with Congressional intent? Will it put upward pressure on local rates? What is the impact on existing State universal service and broadband deployment initiatives? Does it effectively establish retail telephone rates by constraining

State rate design options? How does it impact the business models of midsize and small companies that serve rural communities? Published accounts suggest the FCC will face possibly hundreds of proceedings filed by rural carriers facing revenue shortfalls or CMRS providers which file to show actual costs in order to receive high cost support. Does the FCC have the resources to handle this volume of proceedings? Does the current investment climate suggest adjustments in the timing or scope of various aspects of the order?

Compounding the problem - in the two weeks that remain - those who have critical information needed to answer these questions, including the FCC's State commission colleagues, cannot obtain any authoritative information about the details of the proposals. If the FCC insists on addressing this comprehensive proposal so quickly, it will necessarily do so on the basis of an incomplete record. Moreover, as NARUC suggested earlier this month, it will dramatically increase the odds of a successful appeal – which will perversely delay reform which is clearly within reach.

A few things are clear.

Parties have not had a fair or realistic opportunity to comment on the proposal.

As outlined in the media and by financial analysts – the proposals – particularly those that address intercarrier compensation directly, bear little resemblance to proposals the FCC has actually sought comment upon.

Whether or not the proposed sweeping preemption is legally sustainable, or the record lacks critical recommendations from the Separations Joint Board, or the current process will provide the Commission with the record information it needs to make informed decisions - if the FCC chooses to move forward on this proposal without providing an additional opportunity for comment, it will do so in clear violation of the Federal Administrative Procedures Act.

The Federal Administrative Procedures Act (“APA”), 5 U.S.C.A. §500 et seq., requires – as a matter of fundamental fairness - that agencies give adequate notice and an opportunity to comment to interested persons before taking action on proposed rules. Although a final rule need not be identical to an original proposed rule, "(i)f the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and opportunity to respond to the proposal." In deciding whether additional comment is required before the agency issues a final rule differing from a proposed action based on comments received, the courts look to see if the final rule promulgated by the agency is "a logical outgrowth" of the original proposed rule. There is no "logical outgrowth" if the final rule materially alters the issues involved in the rulemaking or substantially departs from the terms or substance of the proposed rule.

The last time comment was solicited in this proceeding it was through a simple notice - on May 2, 2008 - inviting commenters to refresh the record on prior intercarrier compensation proposals. The Commission has not, however, issued a new public notice and sought comment on any specific proposal(s) for revising the intercarrier compensation regime since 2007. A review of CC Docket No. 01-92 indicates the most recent specific public notice was released March 16, 2007. It extended the deadline for comments on the Missoula Plan.

Suggesting the current proposal is a logical outgrowth of the Missoula plan is not tenable.

Almost 500 ex partes have been submitted in this docket since March 16, 2007. Given the lack of notice about the direction the agency has proceeded, commenters have not had any real opportunity to view or critique any of the myriad of proposals submitted in this huge docket, nor – except for leaked information about a large draft order circulated internally last week, has the Commission expressed which alternatives it is considering.

The Commission cannot rely on informal news briefings, a release announcing a draft is circulating,

and private party submissions to support a change in the rules governing intercarrier compensation, where it does not give commenters adequate notice or a fair opportunity to challenge the either veracity of the evidence submitted or the structure of the rules proposed. Section 553(b) of the APA requires the Commission to publish a general notice for proposed rulemaking in the Federal Register which includes “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” Section 553(c) requires the Commission to “give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments . . .” The notice required by the APA “must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based.” Notice allows adversarial critique of an agency's proposal and is “one of the few ways that the public may be apprised of what the agency thinks it knows in its capacity as a repository of expert opinion.” It is fairly clear that in this instance such notice is lacking.

Moreover, the opportunity to comment is meaningless if an agency fails to give notice of the data upon which proposed action would be based. Further, the Commission cannot craft a resulting intercarrier compensation rate that bears little resemblance to that public notice. In *National Bank Media Coalition v. FCC*, the Second Circuit found that the FCC failed to provide adequate public notice when it adopted an order that differed substantially from its original notice. The Court also found that the Commission inappropriately relied on non-disclosed maps and internal studies – pointing out there- as here - absent clear and adequate notice of specific proposals, interested parties cannot fairly anticipate rule variations proposed in the comments, and notice of these variations cannot thereby be imputed to such parties.

NARUC agrees with the procedural suggestions proffered in a recent filing by its affiliate – the New England Conference of Public Utility Commissioners: “Comprehensive reform should be established in a careful, meaningful way through the established NPRM process and not . . . rushed due to a . . . unrelated court deadline.”

Prior to adopting any intercarrier compensation proposal, the Commission should issue a new notice and allow additional comment on the proposed action. We respectfully request the Commission take the following steps to assure a proper record for action:

1. Decide the future treatment of compensation for termination of ISP-bound traffic before the November 5 court deadline.
2. Issue a Further Notice of Proposed Rulemaking (FNPRM) summarizing the many discrete issues raised in the record, and enunciating the Commission's tentative conclusions, and proposed legal theories and factual determinations on each such issue.
3. Given the breadth of the proposed action, provide interested parties at least 90 days to consider and comment.

If you have any questions about this letter, please do not hesitate to contact any of the undersigned or J. Bradford Ramsay at 202.898.2207 or jramsay@naruc.org.

Respectfully Submitted,

Ray Baum
Chairman, NARUC Communications Committee
State Chairman, Federal State Joint Board on Universal Service
Former Chairman, NARUC Intercarrier Compensation Task Force

Mark K. Johnson
State Chairman, Federal State Joint Board on Separations

Larry S. Landis
State Chairman, Federal State Joint Conference on Advanced Services
Member, Federal State Joint Board on Universal Service
Former Vice Chair, NARUC's Intercarrier Compensation Task Force

John D. Burke
Member, Federal State Joint Board on Universal Service
Member, Former State Chair, Federal State Joint Board on Separations
Former Member, NARUC's Intercarrier Compensation Task Force

Philip B. Jones
Chair, NARUC Telecommunications Legislative Subgroup
Former Member, NARUC's Intercarrier Compensation Task Force

Tony Clark
Immediate Past Chairman, NARUC Telecommunications Committee
Former Member, NARUC's Intercarrier Compensation Task Force

Steve Kolbeck
Member, Federal State Joint Board on Separations

Betty Ann Kane
Member, Federal State Joint Conference on Advanced Services

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NARUC is a non-profit organization founded in 1889 whose members include the governmental agencies that are engaged in the regulation of utilities and carriers in the fifty States, the District of Columbia, Puerto Rico and the Virgin Islands. NARUC's member agencies regulate telecommunications, energy, and water utilities. NARUC represents the interests of State public utility commissions before the three branches of the Federal government.

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