



N A R U C
National Association of Regulatory Utility Commissioners

January 6, 2010

The Honorable John D. Rockefeller
Chairman
Committee on Commerce, Science
and Transportation
254 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Kay Bailey Hutchison
Ranking Member
Committee on Commerce, Science
and Transportation
560 Dirksen Senate Office Building
Washington, D.C. 20510

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

The Honorable Joe Barton
Ranking Member
Committee on Energy and Commerce
2322 Rayburn HOB
Washington, D.C. 20515

Dear Chairmen and Ranking Members:

On behalf of the National Association of Regulatory Utility Commissioners (NARUC), I am writing to explain our strong opposition to a recent letter from discrete industry interests seeking “legislation affirming that all Internet Protocol (“IP”)-based services are subject to exclusive federal jurisdiction.”¹ The requested law eliminates State consumer, market, and infrastructure protections. On its face, it is anti-consumer, overbroad, biased to benefit one technology, and, if enacted, will undermine competition and likely result in other unanticipated and unfortunate consequences.

NARUC represents the interests of commissions in each of your States charged with oversight of telecommunications. Our members share your commitment to assure each constituent receives the benefits of competitive markets and new services. Your State regulators *know* problem areas and have keen insights about communications markets and the impact of federal legislation in your State. We have State-focused concerns about service reliability, infrastructure protection, and universal service.

On its face, the requested legislation necessarily eliminates all State-level consumer protections.

There is never a good reason to constrain your constituents’ options for assistance by taking State consumer “cops” off the beat. This leaves them with basically one remedy – the Federal Communications Commission - a forum many apparently don’t even know exists.² But even when they are aware of federal remedies, the federal government will *always* lack the human and fiscal resources to handle ALL customer complaints and concerns from across the U.S. State commissions handle thousands of consumer complaints every year, and generally provide individual relief in a

¹ This would cover voice services. See, Undated letter to Congress signed by AT&T, Google, Microsoft, NAM, TechAmerica, TIA, T-Mobile, Verizon and The VON Coalition (circulated November 2009).

² “[S]urvey results suggest that most wireless consumers with problems would not complain to FCC and many do not know where they could complain.” See *Telecommunications: FCC Needs to Improve Oversight of Wireless Phone Service*, Government Accounting Office, GAO-10-34, at p. 15 (11/10/2009), available at <http://www.gao.gov/new.items/d1034.pdf>.

matter of weeks.³ Even where federal agencies have the necessary resources to help individual consumers, the difficulty of dealing with the FCC for a consumer that lives outside the Beltway - often in different time zones - limits its efficacy and speed.

The industry proposal also necessarily eliminates every State's ability to protect *competition* when markets fail. States will no longer fill the gap when voluntary negotiations fail - mediating, arbitrating and approving interconnection agreements between incumbent and smaller new competitors.⁴ Of greater concern, the requested law will undermine State initiatives to assure the security and reliability of critical infrastructures before, after, and during natural and manmade catastrophes. It could negatively impact the funding of key public policies, including State universal service support and broadband deployment initiatives to expand networks and services in your State.⁵ That, in turn, will increase the stress on the already strained *federal* universal service programs and could damage States' ability to operate, maintain and upgrade vital public safety systems.

The only rationale industry offers to justify such far-reaching, draconian changes in the current allocation of authority between States and the Federal Government is the supposed "inherent interstate nature" of IP networks. Industry's "inherently interstate" rationale is a chimera. In fact, the reach of these networks is no broader or narrower than the existing telephone network. *But in any case - whether a service is "inherently interstate" or "inherently intrastate" is completely irrelevant to the enforcement and consumer protection issues raised by this proposal.* Your constituents still reside in your State. Universal service and broadband deployment issues still arise in your State. These providers still sell services to your constituents in your State. They still site infrastructure in your State. Some will even go out of business in your State. Disasters still impact the reliability of services in your State. Communications providers still have to interconnect physically with competitors in your State. Bad actors still defraud customers in your State. Even large, established companies have a track record of facilitating unlawful marketing practices or marginally ethical billing practices that harm consumers in your State. And *that* is where your State Commission operates best - protecting consumers and competition in your State.

Moreover, as a matter of simple public policy, it makes no sense to create another technology-based regulatory classification, and one more disparate regulatory regime under which services are regulated. Policy makers should not distort the market by putting a thumb on the balance - favoring one technology (in this case IP-based services) over others. Economists agree the better approach is to treat functionally equivalent communications services in the same manner.

Industry's letter to Congress also significantly distorts FCC decisions suggesting that agency (in its *Vonage* decision dealing with Voice-over-Internet Protocol, or "VoIP" services) has largely preempted State oversight of IP-enabled services. This is untrue. Actually, the FCC has *never* found that State oversight of *fixed* (versus nomadic) VoIP is preempted. In fact, the Eighth Circuit, after listening to FCC counsel strongly press this precise point, agreed and made it clear in its order upholding the FCC's *Vonage* decision that the issue of whether "State regulation of fixed VoIP should not be preempted remains an open issue." Significantly, the Eighth Circuit also noted that "the FCC

³ A March 2005 informal NARUC survey revealed that in 2004, just 20 of NARUC's 51-plus commissions handled over 230,000 complaints. The November 10, 2009 GAO paper cited in footnote 2, at page 27 notes - on just wireless complaints, just 21 commissions received 8,314 complaints in 2008.

⁴ NARUC Resolution Regarding the Interconnection of New Voice Telecommunications Services Networks, July 23, 2008, <http://www.naruc.org/Resolutions/TC%20Interconnection.pdf>.

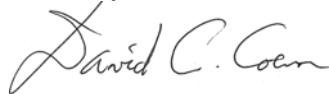
⁵ See, e.g., *Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rules Allowing State Universal Service Funds to Assess Charges on Nomadic VoIP Intrastate Revenues*, Federal Communications Commission WC Docket No. 06-122.

has indicated (that) VoIP providers who can track the geographic endpoints of their calls do not qualify for the preemptive effects of the Vonage order."⁶

Unfortunately, instances of poor service quality and subpar customer service by telecommunications carriers and other communications service providers are well documented.⁷ Moreover, by definition, competition cannot deter fraudulent carrier activity. And even with established carriers, systemic problems arise that the market cannot remedy. States are almost always the first to learn of and provide relief when new abuses emerge, e.g., slamming, cramming or mislabeling as “regulatory charges” carriers’ simple operating expenses. Often States’ efforts to address such practices beat their federal counterparts by 1 - 3 years. Sometimes the gap is longer. It makes little sense to limit your constituent’s avenues for redress of concerns to far-removed Federal regulators or courts, force your constituents to wait years for Federal action (if it ever comes),⁸ and remove significant State disincentives for bad behavior.

NARUC is committed to working with Congress, the FCC and industry to ensure all Americans have access to quality communications services at competitive prices. A competitive market place and adequate consumer and infrastructure protections cannot continue if State oversight is eliminated. A continuing Federal-State partnership is necessary to assure your constituents benefit from robust competition. Technology may change, but protecting consumers, competitions, and critical infrastructure remain policy constants. The industry request is irresponsible and ill advised. It is not in your constituents’ or the country’s interest, and should be rejected. Please contact 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 if you would like to discuss this issue further.

Sincerely,



David D. Coen
President, NARUC

cc: Senate Committee on Commerce, Science and Transportation
Members of the House Committee on Energy and Commerce

⁶ *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570 (8th Cir. 2007) slip op. at 22 (Available at: <http://www.ca8.uscourts.gov/opns/opFrame.html>) The court cites to a 2006 FCC decision which specifies a VoIP provider “with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation.” See, *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, FCC 06-94, 21 FCC Rcd 7518, 7546, ¶ 56 (rel. 06/27/2006), aff’d in part, vacated in part, Vonage Holdings v. FCC, 489 F.3d 1232, 1244 (D.C. Cir. 2007). {emphasis added} (http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-94A1.pdf). Fixed VoIP providers can and do track endpoints.

⁷ See, *Verizon Service Quality Performance Lags, Public Utility Law Project*, August 27, 2009, <http://pulpnetwork.blogspot.com/2009/08/verizon-service-quality.html>. *FCC Quarterly Report on Informal Consumer Inquiries and Complaints for the 1st Quarter of 2009* found wireline complaints increased 34% from the 4th Quarter of 2008, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293273A1.pdf. Some States have opened dockets to address declining service quality from large incumbents. See, e.g., *General Investigation re: Verizon Service Quality*, Case No. 08-0761-T-GI (WV Pub. Serv. Comm’n).

⁸ Consider, for example, wireless carriers’ early termination fees (“ETFs”). The FCC has thus far rejected calls to reexamine its 1992 decision that wireless ETFs are a reasonable business practice, despite obvious and significant changes in the wireless market. Likewise, a ruling on the question of whether States are preempted from regulating wireless ETFs has languished for five years at the FCC (WT Docket No. 05-194) – while State action on wireless ETFs has been a key impetus for industry’s grudging concession to at least begin prorating such fees.