

**BEFORE THE
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON TELECOMMUNICATIONS
AND THE INTERNET
UNITED STATES HOUSE OF REPRESENTATIVES**

**TESTIMONY OF THE HONORABLE TONY CLARK
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&
CHAIRMAN, TELECOMMUNICATIONS COMMITTEE,
NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS (“NARUC”)**

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Chairman Upton, Ranking Member Markey and members of the Subcommittee, thank you for the opportunity to testify today. I am Tony Clark, chairman of the NARUC Telecommunications Committee and president of the North Dakota Public Service Commission. NARUC represents State utility commissions in all 50 States and US territories, with oversight over telecommunications, energy, water and other utilities.

We appreciate the opportunity to share our perspective and insights about the staff discussion draft on Internet protocol and broadband services, which we view as the beginning of an important dialogue at this Subcommittee about the appropriate legal and regulatory framework to encourage innovation and protect consumers in today's evolving communications market.

The telecommunications industry as we know it is undergoing tremendous transformation and restructuring. The long-distance industry has mostly disappeared and once mighty competitors are being absorbed by their former adversaries in the local phone business. New players have emerged in the nascent "nomadic" VOIP industry and a growing number of younger consumers are "cutting the cord" to use their wireless phone as their only phone.

Today's marquee battle is the grand duel between cable and baby Bell companies over who will dominate the "triple play" or "quadruple play" market of voice, video, data and wireless bundles, but this battle could easily give way to one between the network owners and the "edge" providers like Yahoo!, Google and Microsoft whose next wave of disruptive technologies could turn today's giants into commodity providers. Or new wireless broadband offerings could flood the market with "last mile" transmission options, driving prices down and leading to another round of consolidation. Just last

week, Sprint-Nextel announced a joint venture with four cable companies to deliver TV shows on cell phones, and BellSouth's chief technology officer referred to a search engine company as a serious potential competitor.

NARUC's members have embraced this new paradigm of innovation and change because we see it as a powerful engine of economic development and consumer empowerment in each of our States. Recognizing these seismic changes and a corresponding interest from Congressional leaders to reexamine the foundations of the Communications Act, NARUC commissioned a Legislative Task Force last year to take stock of the current legal and regulatory baseline and make recommendations on whether and how it should be revised. After listening to numerous stakeholders and intensive internal discussions, the Legislative Task Force reached two important conclusions:

The first was that any broad reform must be technology neutral. Even the leading luminaries and entrepreneurs in the telecommunications industry don't know where today's transformation will lead or end. In the chaos that is the genius of modern capitalism, they are constantly placing bets, forming new ventures, making mid-course corrections and sometimes losing big money when things don't turn out as expected. With that in mind, it struck us as untenable for policymakers to build a framework around any kind of technology, even a widely deployed one like Internet protocol. Such an approach would invariably choose winners and losers and ultimately distort investment decisions as capital and energy flowed to products in the best regulatory "silo."

The second conclusion was the development of our "functional federalism" concept, which is the idea that if Congress is going to rewrite the Telecommunications Act, it doesn't have to be bound by traditional distinctions of "interstate" and "intrastate,"

or figure out a way to isolate the intrastate components of the service. Instead, a federal framework should look to the core competencies of agencies at each level of government – State, federal and local – and assign regulatory functions on the basis of who is properly situated to perform each function most effectively. In that model, States excel at responsive consumer protection, efficiently resolving intercarrier disputes, ensuring public safety, assessing the level of competition in local markets and tailoring national universal service and other goals to the fact-specific circumstances of each State. Economic regulation is necessary only where there is market power and if robust competition one day removes the need for economic regulation of all types, we believe that will be a good thing.

This is not actually a new model. For the past several years, wireless carriers have been governed under Section 332 of the Act, which does ***not*** declare wireless to be interstate, but rather assigns appropriate functions to State and federal authorities. It assigns spectrum management functions to federal authorities, includes a rebuttable presumption of competitiveness for wireless carriers, and allows states to handle consumer protection and other terms and conditions of service. Wireless carriers are also allowed to avail themselves of State arbitration procedures for interconnection to the wireline phone network. Under this model, the wireless industry has already eclipsed the traditional phone business in total number of subscribers and is *only* growing stronger.

While NARUC's members are still analyzing the discussion draft, we want to raise a number of high level issues and serious concerns. First, we are concerned that this discussion draft is very technology specific by according special status to any service or infrastructure that utilizes "packet switching." While packet switching is supplanting

circuit-switching and time-division multiplexing today, something else that may or may not be a successor protocol is invariably in the queue behind it. While it might take longer and require more dialogue among disparate stakeholders, we encourage you instead to pursue a technology-neutral approach that looks to the salient features of each service, such as whether it has market power, whether it is interconnected to the Public-Switched Telephone Network (PSTN) or its successor, and whether it is selling access to networks supported by universal service.

Consumer protection:

We commend the staff for recognizing State expertise and experience and the vital role we play in handling consumer complaints. A recent survey found that in just 20 State commissions, over 230,000 consumer complaints had been handled in 2004. These complaints are generally resolved on a one-for-one basis and the majority take only a few weeks through informal processes.

We are concerned, however, that the discussion draft takes a “one-size-fits-all” approach when it comes to consumer protection standards, without providing flexibility to the State agencies that enforce them. This is unfortunate because the same dynamism that brings exciting new products and services to consumers also produces a host of new complaints and novel misunderstandings, especially for products supplanting traditional phone service.

A particular case in point has been the national do-not-call list, enacted two years ago with great fanfare. Federal agencies, although they receive thousands of complaints a week, have issued only six (6) fines since its enactment, and States have provided the bulk of its enforcement. 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” could not be circumvented just because the consumer had made a purchase from the company 18 months ago or because the call was pre-recorded (which might actually be *more* annoying). Without that State flexibility, consumers would be in a much worse position.

NARUC doesn’t object to federal consumer protection standards, but we do object to an approach that makes those standards a “ceiling” on State action and fails to give those who help consumers the tools, authority and flexibility they need to get the job done.

Interconnection:

We commend the staff for including interconnection rights between and among BITS, VOIP and telecom providers. In a networked industry, fierce competitors will always have to cooperate to operate a seamless network of networks, but there are frequent perverse incentives for one carrier or another to frustrate interconnection for anti-competitive reasons.

We are very concerned, however, that the draft federalizes the traditional State role of mediating, arbitrating and enforcing those interconnection agreements. Current law already includes a provision for the FCC to arbitrate interconnection agreements when the State commission does not act, but the isolated instances where this has been necessary have not generally gone well. In one case, a cable company in the competitive phone business had to spend 3 years and over \$2 million to arbitrate an interconnection dispute at the FCC, even though it was eventually vindicated on every issue. Sending

such disputes to federal courts or another forum would be even more onerous, with discovery rules and a multi-year process for resolving disputes that could be adjudicated in a matter of weeks at a State commission. We are concerned about the ripple effect that a backlog of such cases would have on the entire industry, especially when some traditional phone providers are already seeking to deny interconnection altogether to new competitors. The ability to interconnect seamlessly into the traditional phone system is the linchpin of success for many VOIP services.

Connectivity principles:

We applaud the staff for including proscriptions against blatant digital protectionism by network owners. Many broadband providers are under tremendous investor pressure to drive as many customers as possible to their proprietary voice, video and data products. While consumers can benefit from “intelligent networks” and compelling proprietary products, we hope the network owners’ competitive strategies will turn on price, quality and features – not impairing competitors’ products or imposing artificial bandwidth limits on consumers.

Public Safety:

We support the inclusion of an obligation for VOIP providers to provide 911 / E-911 capabilities to their consumers, and we commend the staff for preserving State and local assessment authority to continue supporting and upgrading the PSAP systems, but we are very concerned that the bill includes no State role to enforce those obligations and leaves the mediation and arbitration of interconnection to such facilities at the federal level. As discussed above, federalizing all the arbitration cases could lead to a dangerous backlog of arbitration requests. The need for a fast and effective dispute resolution

procedure is even more acute with the 911/E-911 system because the provider that controls the trunk lines and selective router has a 100% monopoly over these elements, and competitors need that access to do business – and it is always a local call.

Universal service:

NARUC supports efforts to more equitably distribute the funding base of the federal Universal Service Fund (USF) in a technology-neutral manner, although we believe such efforts must be accommodated by similar efforts to ensure the long-term sustainability of State programs. Today, universal service is a jointly shared responsibility between the States and the federal government, with 26 State programs distributing about \$2 billion – or 28% of the overall national commitment to universal service. This joint approach benefits both “net donor” and “net recipient” states because it lessens the burden on an already sizable federal program and permits another option when federal disbursement formulas that “work” in the aggregate do not adequately serve a particular state or community.

Our concern is that any expansion of the federal base without a complementary clarification of State authority could create tremendous funding gaps. The impact of those gaps would fall disproportionately on consumers who rely on State programs, and would raise thorny questions about the equity of federal disbursement formulas.

Conclusion:

In conclusion, we appreciate your thoughtful consideration of our input and look forward to continuing a fruitful dialogue over the discussion draft and all the issues that it raises with the members of the Energy and Commerce Committee. As a next step, we would be pleased to work with you and your staff on an approach that preserves the

strong points of the discussion draft before us, but is technology neutral and includes more vigorous and flexible procedures for consumer protection, interconnection, public safety and universal service.