

**BEFORE THE
UNITED STATES SENATE
COMMITTEE ON COMMERCE, SCIENCE AND
TRANSPORTATION**

**TESTIMONY OF THE HONORABLE DIANE MUNNS
COMMISSIONER, IOWA UTILITIES BOARD
&
PRESIDENT
NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS (“NARUC”)**

ON

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Chairman Stevens, Co-Chairman Inouye and members of the committee, thank you for the opportunity to testify today. I am Diane Munns, commissioner with the Iowa Utilities Board and president of the National Association of Regulatory Utility Commissioners (NARUC). NARUC represents State utility commissioners in all 50 States and US territories, with oversight over telecommunications, energy, water and other utilities. State commissioners are generally either appointed by our governors, as I was, or stand for election, as you do. As leaders in our state, each of us is ultimately accountable to the voters, and we share your commitment to promoting the opportunity for every community to take part in the revolution of broadband convergence, new technologies and intense competition – all to the benefit of the consumer.

We commend you for convening this series of hearings on communications policy reform and we particularly appreciate your setting aside time to hear from “beyond the beltway” colleagues in State and local governments. Today’s telecom market faces enormous challenges, including rampant arbitrage and restructuring that is sapping State and federal universal service programs, the need to modernize the E-911 emergency calling system, fresh new challenges to consumer privacy and the proper mix of incentives to spur investment in the networks and innovation among the users.

Compounding your task as federal legislators is the sheer size and diversity of our nation. Every state is unique. In Alaska, replacing a single broken part to restore service in Point Hope might require an 800 mile emergency flight from Anchorage. Hawaii, on the other hand, is thousands of miles from the mainland and the main incumbent phone company was recently sold to a Washington, DC private equity firm. My own state of Iowa is served by 150 separate incumbent phone companies while other States have vast

rural areas served by a single national company. All these factors have impact on how you go about protecting consumers, encouraging competition and preserving universal service – and doing it all from the banks of the Potomac (surrounded by advocates) is, to put it mildly, a challenge.

The good news is that while major legislation can take a long time to enact at the federal level, States are also exercising leadership. In fact, for all the derision heaped on the Telecommunications Act of 1996, the current framework has allowed us to respond to a number of the challenging issues that are the subject of other hearings before this committee:

- States commissions and legislatures are examining the competitiveness of every market and paring back economic regulation where we find effective competition;
- State commissions, legislatures and localities have vigorously encouraged broadband deployment, through economic deregulation bills, municipal projects and “E-Government” initiatives where town halls, schools and libraries have acted as the “early adopters” to bring broadband to their communities.
- States are meeting nearly 20 percent of the national commitment to universal service through their own programs in 26 states;
- NARUC’s Intercarrier Compensation Task Force has become the primary forum over the last two years for all the major carriers to dialogue with each other and consumer advocates in search of a “negotiated” way to rationalize the system of payments;

- States and localities are granting video franchises to competitive providers, including Bell companies, overbuilders and the rural telcos;
- States were the first to require VOIP providers to provide 911/E-911 functionality, a move resisted by the industry but later followed by federal regulators.

The beauty of all this is that instead of relying on white papers and promises, federal policymakers need only look around the nation for real-life examples of what “works” and what doesn’t in various policy areas. On issue after issue there is a well-worn path of good ideas like the do-not-call list, slamming and cramming rules and various approaches to universal service happening first at the State level and then at the federal level.

Just as valuable, State initiatives that haven’t worked serve as priceless “red flags” to State and national leaders as they wrestle with new challenges. To borrow from another sector, what if the electric industry had nationalized the California experiment in electric deregulation in its zeal to avoid a “patchwork” and the entire nation had been subject to rolling blackouts? Instead, the California experience has been studied endlessly and regulators in Washington, DC and every State capital have been able to draw their conclusions.

With all that in mind, if I could offer one word of advice, it would be to retain the State-Federal partnership in communications policy. Look to your State commissioners as partners and honest brokers as you undertake major revisions to the Act, and do your state a good turn by keeping the partnership model in place for the next generation.

Knowing that Congress was considering sweeping changes, NARUC convened our own Legislative Task Force in November 2004 to examine our own role and our view of the future of federalism and telecommunications. After internal polling, extensive discussions and consultation with consumers and industry stakeholders, NARUC came to two important conclusions:

The first is that any overhaul of the Telecom Act should be as technology neutral as possible. When you talk to the luminaries of industry and academia, the first thing you learn is that even they don't know where today's wave of innovation and restructuring will lead or end. Will wireless broadband and broadband over power lines finally bring an explosion of competition to the "last mile," or will the ever-present incentive to merge and consolidate in networked industries steer us into a concentrated market? That question has not been answered with any finality yet.

With that in mind, we thought it was best to take policymakers and regulators out of the business of betting on one technology or another – even if all the talking heads are praising it as the "wave of the future." The last thing we want to do is create another wave of arbitrage and market distortion, and if even Bill Gates doesn't know what will happen next, how are we supposed to?

The second important conclusion was that in considering State vs. federal rules, Congress need not yoke itself to old rules about whether a particular service is "interstate" or "intrastate" in nature. Rather, federal policymakers need only look to the core competencies of agencies at the State, federal and local level and ask "who does what best"? And that's the process we began on a number of issues. Our goal in each

case was to go back to first principles, look at why regulations are there in the first place, and then decide which level of government is best suited to handling the task.

Consumer protection.

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 legislation already introduced before this committee would take 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 three years ago with great fanfare. Federal enforcement of the do not call law has been less than aggressive, however, especially when compared to the stellar track record of states. For illustrative purposes, consider this: North Dakota is a state of only about 640,000 people. In the first 2 ½ years of its strict state do not law, the state Attorney General has enforced 53 settlements, totaling over \$64,000, and issued 7 cease and desist orders just in his state alone. Meanwhile, the entire federal government, despite receiving over one million complaints, has only issued 6 fines and filed 14 lawsuits. 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”. Without that State enforcement and

flexibility, consumers would be in a much worse position. The vast majority of state commissioners believe two lessons can be taken from experiences like these.

1.) state enforcement of consumer protection standards has proven to be far more effective than federal enforcement. This nation is too large to expect one or two federal agencies to respond to all consumer complaints.

2.) states must retain a level of flexibility to tailor consumer protection standards that consumers expect. Weak, one-size-fits-all, loophole ridden federal standards will invite a consumer backlash unlike anything seen before in this industry. State commissions still report almost universally that telecommunications complaints are the number one reason for constituent complaint calls.

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. Gutting our nation's consumer protection standards and creating an enforcement blackhole must not be the outcome of a process that should, rather, be bringing more regulatory parity and investment certainty to the important telecommunications sector.

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 \$1.3 billion, or nearly 20 percent 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 co-extensive 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.

NARUC also supports a permanent exemption of federal universal service programs from the Antideficiency Act. We commend you for securing this year’s exemption and we look forward to working with you to make it permanent beyond 2006.

Interconnection:

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 concerned that at least one bill before this committee would federalize 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 have already sought 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 committee for convening last week's hearing on network neutrality. 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 competing networks and compelling proprietary products, we hope the network owners' competitive strategies will turn on price, quality and features – not impairing or degrading competitors' products or imposing artificial bandwidth limits on consumers.

E-911 / Public Safety:

NARUC supports a requirement for VOIP providers to provide E-911 functionality, and believes States ought to be able to enforce it. However, this is an area where access to facilities and state mediation, arbitration and enforcement of interconnection agreements are particularly important. We should all take the E-911 obligation seriously enough to provide a fast, effective interconnection process like the one found at the State level. In most cases, the incumbent provider has a complete

monopoly over the trunk lines to 911 call centers. Without a referee to ensure interconnection, the incumbent becomes the *de facto* referee and can use that role to thwart competitive entry by denying access to a functionality most consumers find to be a basic necessity.

Video franchising:

NARUC is not prepared to make a policy recommendation on this issue, but we are in the midst of an intensive consultation process with consumers, local governments, industry and other stakeholders to gather information. To that end, we recently completed a survey of what some of our States are doing on franchising. Some of them offer statewide franchising, such as Texas, Alaska, Hawaii and Vermont. Others oversee a local process. All share substantial responsibility with localities, especially on issues like right-of-way.

Conclusion:

Seven years ago, I argued the landmark case of *AT&T v. Iowa Utilities Board* before the U.S. Supreme Court, a case that some scholars have called the beginning of the end for the old models of federalism. Since then I've watched with some amusement as the State commissions and the concept of federalism have gone in and out of style with nearly every industry segment – ILEC, CLEC, cable, wireless, VOIP – you name it. Even the dot.com companies readily avail themselves of State remedies when they want a change to the Uniform Commercial Code, articles of incorporation in Delaware or an anti-spam statute like the one they sought in Virginia and other States.

To those with a bottom line, federalism is a doctrine of convenience in many ways, and I don't even fault them for it because they have a fiduciary duty to their

investors. My hope with Congress and my plea to you today, however, is to maintain the Federal-State partnership that has worked so well over the years in so many facets of society and the economy, and to take your time to build a set of policies you can be proud of. In that endeavor, we offer ourselves as your partners.