



December 12, 2008

Susan Crawford
Visiting Professor, Yale Law School
Obama-Biden Transition Team on the FCC
127 Wall Street
New Haven, CT 06520

Re: Follow-up on our Conversation about Telecommunications Policy.

Professor Crawford:

I wanted to thank you – and the other members of the FCC transition team – Dale Hatfield, Adjunct Professor at the University of Colorado and Kevin Werbach, Assistant Professor at the University of Pennsylvania's Wharton School - for taking the time to reach out to the National Association of Regulatory Utility Commissioners (NARUC) to discuss President-elect Obama's transition plans for the Federal Communications Commission. With the responsibility you have been given, each of you must be inundated with recommendations.

We can help. Telecommunications is a primary economic driver for the U.S. economy. NARUC's members oversee operations of the country's gas, electric, water and telecommunications systems and are well positioned to help you fine tune Administration policy to maximize opportunities in the *telecommunications* sector – as well as address interdependencies, synergies, and security concerns possible that involve the other critical infrastructures subject to their oversight. Mr. Obama has focused on these as priorities.

For over 120 years, NARUC's members - public utility commissions from every State, the District of Columbia and all U.S. Territories - have led the way - developing and implementing novel policies to promote the deployment of telecommunications services and protect consumers. These State programs *have – more often than not - been the prototype for most cutting edge Congressional or federal agency initiatives involving critical infrastructures.* NARUC is a gateway to this expanse of expertise and practical experience.

President Elect Obama's campaign focused on change. There are two policy challenges *where change is desperately needed.* First, in these times of budget shortfalls and deficit spending at all levels of government, *more than ever,* there is a critical need for State and federal regulators to work more closely and cooperatively to leverage experience, enforcement, and limited resources. In the past – federal agencies have not always recognized the benefits and efficiency of a *real* working partnership. Second, there is also an almost universally acknowledged need to reform the FCC's structure and procedures.

Partnership, Not Preemption

With over 200 State utility commissioners, and an enormous pool of staff experts operating in a variety of circumstances in all States and territories, NARUC can offer unparalleled access to professional analysis and practical experience to assist the Administration's examination of pro-competitive and pro-consumer policies for these industries. We also can provide an unbiased source of information, free of competing businesses' agendas, in the critical legislative debates we anticipate will arise in the new Congress.



The benefits and efficiency of close coordination and partnership with the States are myriad and obvious.

First, where FCC rules designed to protect consumers are necessary, there is no reason - theoretical or otherwise - to limit State enforcement (or use of State procedures or enhanced fines or penalties) designed to enforce those rules. *To avoid needless litigation - at taxpayer expense - such reservations of State authority should be discussed and highlighted in any potentially preemptive FCC rule or order.*

In short, taking State “cops” off the beat makes no sense. IT CAN ONLY LIMIT CONSUMER OPTIONS AND CONSUMER RELIEF. It is clear to the casual observer - that the FCC will *always* lack the human and fiscal resources to handle ALL customer complaints and concerns from all US States and territories. *Even where they do 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.¹

For the same reason, it makes little sense to severely constrain State oversight of competition in markets - markets which, because of their proximity, State authorities understand best. The political process at the State level assures State authorities help both consumers with specific problems and utility service markets to function effectively. There is no similar feedback mechanism for federal agencies. If a State commission does not do its job - the local press and television stations will make sure the public is aware of it - and ultimately the commissioners will either respond to public pressure or lose their jobs.

Second, the FCC should not limit States' ability to address new consumer abuses or marketplace issues as they arise. States are almost always the first to provide relief when new abuses of individual consumers or marketplace participants emerge. Often State efforts beat federal counterparts by one to three years; sometimes the gap is considerably longer. In the area of consumer abuses, for example, States were first with detailed Caller ID rules, slamming, cramming, and State do-not-call programs. To cite a recent example, State commissions (and Attorneys General) have been addressing abuses of cellular phone early termination fees for at least five years. The FCC has only recently even considered the issue - and then only because the issue was raised by an industry petition to preempt those same State efforts. States are also typically the first to get the complaint (and see the results) when market power is being abused by market participants.²

Whenever such consumer or marketplace abuses arise - and they always do - the law of unintended consequences should NOT be construed to work against consumers or injured competitors. To assure needed State flexibility, federal rules should be “[a] floor, not a ceiling,” as “...blanket preemption on consumer affairs will restrict consumer and market participants redress in the future.” Moreover, market participants and “...consumers should NOT have to wait for federal rulemaking every time a new issue arises.” Although it is also clear that, in some cases, federal rules may be both necessary and appropriate.³

¹ States, where they have authority, can also typically resolve a particular complaint more quickly with less cost and inconvenience to the individual consumer. Most complaints are simply not worth hiring a lawyer to resolve. Effectively requiring consumers to wait for months or longer for resolution or to hire a lawyer makes no sense. Nor is it efficient to require any State to revise its enforcement procedures or the entity currently charged with enforcing consumer protection rules.

² Indeed, NARUC though its resolutions frequently plays a valuable role in alerting federal agencies and Congress to emerging abuses as well as instigating national policy changes. For example, few question that State action – and NARUC’s resolution on Wireless Consumer Conduct - led directly to CTIA’s adoption of a voluntary industry code of conduct. We also passed resolutions supporting abbreviated dialing - modeled on successful state initiatives – for a national “Call-Before-You-Dig” number and the use of 211 for consumer information access.

³ Recently, NARUC passed a resolution endorsing national wireless consumer protection standards. NARUC’s proposal included a mechanism to assure regular State input to revising these standards. *Resolution Concerning the Communications Policy Statement* at: <http://www.naruc.org/Resolutions/TC%20Communications%20Policy.pdf>. Currently, we have created a committee to create recommendations early in 2009 on an initial set of standards. *NARUC Launches Consumer Wireless Standards Ad-Hoc Committee* at: <http://www.naruc.org/News/default.cfm?pr=99>.



Finally, there is two obvious logical steps President Obama can do *immediately* to assure a minimum level of appreciation of the both the opportunities for federal and State cooperation and the often overlooked (and frequently unintended) the impact of FCC rulings on existing State broadband, universal service, and consumer protection programs. First, *appoint former or serving State Commissioners to vacancies on the FCC and to related posts in other federal agencies, and second, initiate and facilitate interest in cooperative federalism through the Administration's periodic participation at NARUC meetings.*

State commissioners live at the bleeding edge of telecommunications policy formation. They are tested. They have real world experience. They understand first-hand the real impact of federal policy changes on consumers and the market - rather than the theoretical impacts often postulated inside the Beltway – as well as how federal policy interacts (or in some cases) undermines existing State initiatives. We can help you identify suitable candidates.

NARUC as an association was originally created by an insightful federal official in 1887 to, among other things, allow for regular and face-to-face discussions about critical utility issues where State and federal officials' authority and interests overlap. Often this is a missed and unrecognized opportunity. Currently, the FCC's sister agency – the Federal Energy Regulatory Commission – has three collaboratives – co-chaired by FERC and State commissioners – on critical issues of common concern that have met at our last few meetings. The FCC also participates at NARUC meetings. Several FCC Commissioners are regular attendees as well as key FCC bureau chiefs. But both federal and state officials would benefit from greater and more focused FCC-State interaction. Our next meeting is February 15-18 in Washington, D.C. We would be very pleased to provide the Administration with a platform, in a plenary session at these meetings, to address NARUC's members on key Administration telecommunications and energy goals agendas as well as views on cooperative work with NARUC's member commissions. I also would like to invite you or other relevant members of the Administration to meet NARUC's Executive Committee to discuss mutual concerns that week at any convenient place and time.

FCC Structural and Procedural Reforms

U.S. communications policy is at an important inflection point. Cable, telephone and wireless companies aim to compete using the latest technologies. The last year or so of FCC proceedings have only highlighted long term concerns about the FCC's decision-making process and the need for regulatory reform. No one seriously contests that change is needed. The question de jure: How to reform FCC procedures and oversight functions?

There are many reform measures that have been widely touted, e.g., the need for the FCC to put out the text of actual proposed rules for comment, and the need to revise the FCC's forbearance procedures. It also seems clear the current bureau structure may no longer reflect the realities of the industry and has outlived its usefulness. Different skill sets may also require additional emphasis for agency staff.⁴ But some are less obvious.

In the seventies, the FCC used to do a better job of creating a factual record for its decisions. One thing we are considering recommending is a return to those days. A well-developed factual record necessarily and properly limits the policy options available to any agency. Facts are supposed to limit any agency's options. *At the FCC they do not.* The FCC is free to pick and choose among anecdotal data and sometimes mere assertions as a basis for Commission action. At a minimum, the FCC should list the factual submissions that underlie projected action in important rulemakings and allow for sworn in-person cross examination of the party that provided those submissions.

⁴ An increasing reliance on markets indicates that all five FCC commissioners should be provided with better information on the real world business and financial impacts on market participants and infrastructure investment/service quality of proposed FCC orders/regulations.



NARUC has already begun to collect suggestions for FCC reform from our committees that the association plans to consider in our February 2009 winter meetings as formal NARUC recommendations to the Administration and the FCC. I have attached – in Appendix A - a series of the more common recommendations that have been raised in these discussions to date.⁵ We believe they provide a useful starting point for the Administration's review of agency structure, process, and procedure. We are likely to provide additional recommendations after the February meetings.

Policy Recommendations

NARUC is a valuable source of unbiased information, experience and expertise waiting to be tapped. We urge the Administration to formalize regular interactions on specific telecommunications issues for non-biased input or briefings on specific issues as issues arise. But aside from reform, and the need to integrate cooperative Federal-State action into all federal agency policy planning apparatus, NARUC already has take specific positions on critical telecommunications sector issues pending before the FCC and anticipated in Congress. Some of these are outlined in Appendix B. As part of the Transition, NARUC would like the opportunity to address some of these with relevant members of the new Administration as soon as possible. If your schedules permit, we would like to arrange face-to-face meetings to do just that. We look forward to working closely with your Administration. The changes now occurring in national and global communications and energy markets are breathtaking. They hold the promise for improving the well being of all Americans.

As your transition team continues its important work, NARUC and its Washington staff will be pleased to assist in any way possible, up to and including providing assistance/resources to help Administration nominees concerned with the energy, telecommunications, and water sectors prepare for confirmation hearings. You should also feel free to contact me personally at anytime at to discuss any issues. Appendix C has the names and contact information for key NARUC Commissioners from every region of the country as well as NARUC's Washington-based advocacy staff. Congratulations to each of you for being chosen for the critical task of transitioning telecommunications policy into the Obama term. Let us know how we may help.

Sincerely,

Frederick Butler
NARUC President

⁵ Except where specifically noted, *the reform proposals in Appendix A did not go through NARUC's normal resolution procedure – but rather were approved by the chairs of the relevant committee Chairs (e.g., the Chairs of NARUC's Committees on Telecommunications, NARUC's Consumer Affairs Committee, and Ad Hoc Committee on Wireless Service Quality Standards), the NARUC President, and were not challenged by any member of NARUC's Executive Committee.*



APPENDIX A – FCC REFORM

[A] Due Process/Fair Notice & Opportunity to Comment: *Maintain a "circulated" order list.*

Not all FCC actions are handled at agenda meetings. The FCC Chairman circulates proposed orders on rulemakings and adjudications for action "on circulation". The Chairman also circulates items to other Commissioners at least three weeks before an agenda meeting. The recently adopted practice of maintaining on the webpage an up to date list of items on circulation gives interested parties notice that some action in a particular docket is imminent. It should be continued.

[B] Due Process/Fair Notice & Creating a good record for decision: *Put the proposed text/rationale of Rulemakings/Orders on Rehearings out for comment.*

Publish the specific language of proposed regulations with a proposed rationale and facts to support the action taken, seek public comment on the proposal and provide AT LEAST 30 days for agency consideration. This *revives* an earlier FCC practice of publishing a "Tentative Decision" prior to the adoption of final rules. The benefits are obvious. The FCC frequently releases vague Notices of Proposed Rulemaking that fail to articulate proposed rules and read more like Notices of Inquiry by posing countless open-ended questions. This process should include recommended decisions of any Joint Board or action on those recommendations. Other federal agencies' present a reasonable model for FCC action, e.g. the Federal Energy Regulatory Commission.

[C] Due Process/Fair Notice & Creating a good record for decision: *Put the proposed text/rationale of "precedential" adjudications out for comment.*

Often, the FCC effectively creates a rule in an individual adjudication (or FORBEARANCE proceeding). In those cases, the FCC should publish the specific language of proposed regulations with a proposed rationale and facts to support the action taken, seek public comment on the proposal and provide AT LEAST 30 days for agency consideration of the record of the proposals. Note this could occur either *sui sponte* or – in the case of forbearance proceedings - on motion of an outside party (if a STATE or other FEDERAL agency or entity files the motion - it should happen without further vote or consideration by the FCC chairman or commissioners).

[D] Due Process/Timely Relief: *Set deadlines for action on each type of filing.*

The FCC should set deadlines on each type of filing where no statutory deadline exists - including complaints - but particularly rehearing requests and remands which have a tendency to languish at the FCC). The FCC should avoid non-decisional releases on statutory (or agency set) deadlines for action – like the requirement to “act” on USF Joint Board recommended decisions within one year.

[E] Due Process/Timely Relief: *Publish/Release orders within 30 days of adoption.*

Publish any order, decision, or report within 30 days of FCC adoption and publish annually a report to Congress cataloging any delays between adoption and release that exceed this deadline (it should be a very short list).

[F] Due process/Creating a good record for decisions: *Provide opportunity for cross examination of those that provide record submissions that support the proposed action.*

Facts should constrain the options available to any agency. At the FCC they do not. The FCC is free to pick and choose among anecdotal data and sometimes mere assertions as a basis for Commission action. The FCC should list the factual submissions that underlie projected action in important rulemakings and allow for sworn in-person cross examination of the party that provided those submissions.



[G] Efficiency – Sunshine Rules: *Drop the Artifice and require face-to-face Commissioner negotiations.*

Bring back multiday FCC Commissioner open negotiation agenda sessions - or lift the sunshine rules for face-to-face FCC commissioner negotiations. The current "Sunshine rules" do not prevent decisions from being made out of the Sunshine of public scrutiny. The Commissioners decide and usually have their dissents and concurrences prepared before the public meetings - which is more often a stylized Kabuki theatre rather than an actual decision-making session. The Sunshine rules simply put more authority in the hands of expert staff and drags out the negotiation process. This is horrifically inefficient. If the Sunshine rules cannot be eliminated and a majority of FCC commissioners cannot be involved in discussions on pending matters in private - then the FCC should consider going back to the multi-day public negotiation sessions from the 70s. Many State commissions do what the FCC used to do - have open debates in a public forum (with a transcript) on issues pending before the agency. It certainly would require FCC Commissioners to spend more time and effort preparing for discussions on draft orders – which can only improve the result.

[H] Due Process/Efficiency – Federalism: *Adjust the ex parte rules to allow efficient operations.*

Change the current ex parte rules to allow States the same ex parte treatment as Congress and other federal agencies OR at least modify the rules as they apply to State members of Federal State Joint Boards to allow free discussion with other State commissions impacted by the Boards' deliberations.

GENERALLY: Written or oral presentations from State commissioners or State staff members to FCC commissioners or FCC staff members should, like communications from other federal agencies or Congress, be exempt from certain of the FCC's ex parte restrictions - specifically, State agencies logically should be included within § 1.1204 (a) (5) which exempts presentations "to or from an agency or branch of the Federal Government or its staff and involves a matter over which that agency or branch and the Commission share jurisdiction provided that, any new factual information obtained through such a presentation that is relied on by the Commission in its decision-making process will, if not otherwise submitted for the record, be disclosed by the Commission no later than at the time of the release of the Commission's decision."

FOR STATE JOINT BOARD MEMBERS: NARUC specifically endorses changes to the ex parte rules to accommodate the special status of State members appointed to joint boards. Discussions with State members, provided that they are not of substantial significance and are not clearly intended to affect the ultimate decision, should not be subject to any disclosure requirements. Also, written or oral presentations or discussions limited to NARUC State commissioners or State staff members, should also be exempt, provided that new factual information that is relied upon in a final decision is disclosed not later than the time of issuance of the decision. This should encompass also 1) all communications (and related materials) by State commissioners or staff made during meetings, both regular and special, both formal and informal, where attendance is limited to State commissioners, staff and FCC representatives, and at which the work of a Joint Board or the FCC in relation to a Joint Board proceeding, is discussed; as well as 2) presentations by one or more State commissioners or staff members to one or more State members or staff members on a Joint Board, provided that the latter does not receive any written materials. These changes reflect the special relationship between State Joint Board representatives and other State commissions.

RATIONALE: It is clear the joint boards established under the Section 410 of the Communications Act of 1934 are designed to give all the States representatives on certain issues of mutual concern to State and Federal regulators at the adjudicatory level. In the case of State-specific disputes under (a) the representative "character of the State participants is crystal clear and direct because the statute requires the FCC to appoint a member "from each of the States in which the wire or radio communication affected by or involved in the proceeding takes place or is proposed." In the case of Joint Board's established pursuant to 410(c) it simply is not practical to have a State commissioner representative on the Joint Board from all 50 States, the U.S. Territories, and D.C. Accordingly, Congress chose to allow NARUC to appoint "representatives" to represent ALL the States. So, the FCC should modify the ex parte rules in a way that recognizes that State Commissioners that are not appointed to a particular Joint Board - are NOT the same as other parties to a Joint



Board proceedings - at least with respect to their communications to their "representatives" on the Joint Board. The Joint Board process was clearly established to give the Sovereign States, and their commissioners - all of whom are sworn to protect the public interest just as their federal counterparts - significantly greater access to and input into rules and procedures that clearly impact them and their obligations to serve the public interest directly and significantly. The FCC's ex parte regulations have significantly inhibited free State commissioner-to-State Commissioner Joint Member discussions to the detriment of the Joint Board process. NARUC's proposal is to reduce somewhat the filing requirements on communications ONLY between State Commissioners and their Congressionally specified "representative" State Commission Joint Board Members. The focus is not on the State to FCC proposal outlined in the FCC's NPRM. Such reduced requirements on State Commissioner-to-State Commissioner Joint Board Member contacts are consistent with existing ex parte regulations the FCC applies to its own communications with other agencies and the clear intent of Congress that sitting State members on Joint Boards represent the interests of all the States.

[I] Efficiency – Federalism: *Allow the three FCC members of joint boards to attend joint board closed meetings with their five state colleagues at the same time. (Currently a “Sunshine” act violation.)*

Everyone on Joint Boards (that's seven of the eight members for the USF Joint Board and six of seven members for the Separations Joint Board) can get together and discuss possible action except for one of the three FCC Commissioners. This makes no sense. We end up playing "musical chairs" with the FCC commissioners and waste time explaining to each what has occurred while they were not in the room.

[J] Due Process/Fair Notice & Opportunity to Comment: *Correct the FCC Forbearance Procedures.*

The forbearance procedure in the Statute is flawed - steps should be taken to reduce the likelihood that any petitions can be granted "by operation of law" and thus be - effectively, immune from appellate review. On February 6, 2008, the FCC put out an NPRM on forbearance procedures under the statute. NARUC filed comments urging the FCC to quickly approve changes to its current procedures to, among other things, include [1]"a strict "complete-as-filed" requirement for forbearance Petitions similar to Section 271 requirements;" [2] policies to ensure that qualified persons, including State commissions, subject to protective orders, have timely access to confidential and highly confidential information so they can have sufficient data to file detailed and timely comments with the FCC;" and [3] formal procedures to govern the conduct of forbearance proceedings, including procedures to ensure full participation by affected States. If the other earlier suggestions to put out for comment proposed forbearance orders that have potentially broad precedential impact are followed, [1] & [3] will necessarily be a part of the change in FCC forbearance handling procedures.

[K] Efficiency – Federalism: *Improve the FCC decisional matrix to require State impact assessment.*

Include in the FCC's decisional matrix on any issue the impact of the proposed action on existing state programs and enforcement regimes, the desirability of State enforcement of consumer protection measures, State expertise on local markets and fact finding, and – to avoid useless litigation at taxpayer expense - where appropriate specify States are not preempted or that preemption will be examined on a case-by-case basis.

[L] Efficiency – Federalism: *Seek a real partnership/coordinate action with State Colleagues.*

Improve policy effectiveness between the States and the FCC by more focused and routine dialogue (as opposed to just reports) at one or more of NARUC's meetings. The FCC can increase regulatory efficiency by attempting to come to agreement with the States on the proper construction of the Statute and the allowed delegation of functions among FCC and State regulators. The FCC should, *inter alia*, conduct forums with NARUC representatives on identifying present and future challenges and opportunities in consumer education, protection, and advocacy. In the area of consumer enforcement, build on the existing efforts to cooperate on enforcement by formalizing a process to discuss jurisdictional issues in a way that best serves consumers.



[M] **Efficiency:** *Allow a majority to require an item be place on the agenda of the monthly meetings.*

The FCC internal rules should include a mechanism to allow a majority of Commissioners to require an item (NOI, NPRM, Declaratory Ruling, Forbearance Petition, etc.) - with general outcomes specified in the request - to be placed on the agenda for the required monthly public meetings within 90 days or less of the request.



APPENDIX B - NARUC's Telecommunications Policy Agenda

Central to NARUC's policy agenda is a true federal-State partnership on telecommunications sector issues going forward that allows States to continue to do what they do best, including, at a minimum protecting consumers and markets from abuse. This is outlined, *supra*, in our cover letter. However, as this sector continues to be buffeted by change driven by technological advances and both federal and state policy retrenchments – there are some other specific areas that need a finer federal focus.

Broadband Data Collection

The benefits of high speed data networks are obvious. A May 2007 Government Accountability Office report concludes it is difficult to determine where deployment gaps exist. Twenty-seven States have, or are considering, broadband data collection programs of varying degrees or related programs designed to promote deployment of advanced infrastructures. States are uniquely situated to collect data on intrastate broadband deployments and must have authority to collect needed data, on a technology neutral basis, from all providers of advanced services to both (1) target and facilitate existing State deployment initiatives and (2) provide an accurate information base for national policy-makers. The FCC could reduce wasteful litigation by simply clarifying the obvious – particularly in the wake of the passage of the Broadband Improvement Act: States do have the authority needed to collect such data. The FCC should also make clear that State's may have complete access to data the FCC collects for benchmarking and auditing State deployment programs. A December 5, 2008 Report from the Center on American Progress titled "How to Spend \$350 Billion in a First Year of Stimulus and Recovery" by Will Straw and Michael Ettlinger, implicitly recognizes the value of this State role by suggesting: "\$335 million of the funds could also be used to fully fund the Broadband Data Improvement Act, which would help states get a clearer picture of where gaps currently exist." According to this report, "[t]his \$5 billion investment would create 97,500 new jobs." NARUC supported the passage of the Broadband Improvement Act. Our support was conditioned on revisions that allowed the program to build on existing State collection efforts.

Classification of Information Services and Intercarrier Compensation Reform

At the heart of the recent controversy about the FCC's compliance with the notice requirements of the Federal Administrative Procedure Act are crucial federal determinations directly affecting both retail rate design and State consumer protection capability. Recently, the FCC put out for comment a series of draft orders that virtually rewrite key sections of the Statute – overriding literally decades of case law, ignoring express reservations of State authority, and redefining statutory terms in a manner that Congress could never have intended -- to, among other things, (i) unlawfully constrain State retail rate design by preempting intrastate access charges, (ii) with no factual basis, based on a specious legal rationale, determine that services which clearly fit Congresses' functional definition of "telecommunications services" in the Telecommunications Act of 1996, are instead "information services" that should be regulated under Title I because they use a particular protocol;⁶ and (iii) undermine State universal service and infrastructure deployment programs by revising without caveat the federal contribution mechanism or addressing required adjustments to the Part 36 separations rules. This proceeding makes the case for a closer examination focused on the real world impact of an FCC ruling on existing State operations and initiatives. Appointees to the FCC should be sure to put any revised tentative proposal out for additional comment before action.

⁶ In a November 19, 2003 resolution, available at http://www.naruc.org/Resolutions/info_services.pdf, NARUC cautioned 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 in the courts; (ii) loss of consumer protections applicable to telecommunications services under Title II; (iii) disruption of traditional balance between federal and State jurisdictional cost separations and the possibility of unintended consequences; (iv) increased risk to public safety; (v) customer loss of control over content; (vi) loss of State and local authority over emergency dialing services; and (vii) reduced support base for federal and State universal service as well as State and local fees and taxes. Those warnings remain valid today.



Cellphone/Wireless Consumer Protections

In the last few years, the incredible business and marketing successes of the cellphone industry has lead to greater federal interest in consumer protections. For a few years, the wireless industry was at or near the top of the Better Business Bureau's complaint list which led legislators in both the House and the Senate to propose bills during the last Congress. Consistent with the discussions in our cover letter, NARUC was successful in persuading the bills sponsors that a federal-State partnership, not preemption was the best way to go.

The sponsors – Senators Kobluchar and Rockefeller in the Senate – Representative Markey in the House - recognized that State regulators continue to play a critical role protecting consumers and specifically reserved State authority to use existing fines and administrative procedures/enforcement mechanisms to enforce federal consumer protection standards.

States are almost always the first to provide relief when new abuses emerge, e.g., slamming, cramming or mislabeling simple of business expenses as "regulatory charges." Often State efforts beat federal counterparts by 1 - 3 years. Sometimes the gap is longer. The bills took slightly different tacks on how to assure States could continue to handle such emerging problems.

The Markey House discussion draft sought to allow States in the first instance to handle any new abuse not covered by federal standard, but subject to any industry applying to the FCC to have the State action invalidated. The Senate bill put no limits on State enforcement - simply reserving existing State authority – which permits enforcement of more protective State measures even where the bill established a federal rule.

Obviously, in some cases, federal rules are necessary and appropriate. Indeed, a July 2006 NARUC resolution endorsed federal legislation to ban the transmission of misleading caller identification information.

Most recently, in the aftermath of the introduction of the legislation described, supra, in July 2008, NARUC passed a resolution specifically calling for national standards to protect cellphone consumers. However, because (i) the federal government will always lack the manpower to help all consumers and (ii) in many cases, whatever assistance they may provide will be complicated by distance and time zones, the resolution says that even where federal standards may be appropriate, State/local governments must be allowed to enforce the federal standards.

The resolution also suggests a formal procedure – which would require new federal legislation - to assure the federal rules address emerging abuses – as well as “technical” variations on old abuses designed to bypass existing regulations. Under this proposal, Congress would specify the FCC create a Joint Task Force composed of three FCC Commissioners, five State commissioners, an industry representative, a representative of the State Attorneys General, and a consumer advocate to engage in a collaborative process (including public comments and reply comments) to mutually agree upon set of uniform national wireless consumer protection standards. According to NARUC's Resolution: “the joint task force would hold public meetings, except for deliberative sessions, and would continue to meet at least every six months after the initial standards are adopted to review any proposals for changes as deemed necessary; such meetings could be held sooner at the option of the chair of the joint task force or by request of the majority of the joint task force.

In the wake of that resolution, anticipating renewed Congressional interest, NARUC appointed its own Ad Hoc Committee to propose a set of basic federal consumer protection standards to Congress. The Committee anticipates completing its work and providing a proposal to NARUC for adoption – and subsequent release to Congress and the Administration in the 1st quarter of 2008.

Privacy

Your Administration should support legislative and administrative efforts that, to the extent practical, give customers the ability to choose the degree of privacy protection, both with respect to information outflows



and inflows. Unless a customer grants explicit, affirmative informed consent, customer-specific information about utility service should only be used in connection with rendering or billing for that service or other services requested by the customer. That data should not be otherwise available to affiliates or third-parties, unless by federal or State commission order. If this Administration establishes a privacy forum or initiative, NARUC respectfully requests that State commissions, because of their experiences with a range of privacy issues in the utility context, should play a key role.

Truth in Billing

Your Administration should support FCC and State efforts to ensure information on bills delivered to telecommunications consumers is accurate, understandable and useful, and contains consistent definitions of common charges. NARUC supports FCC efforts to establish consistency in terminology contained in telecommunications bills and appreciate that agency's recognition of the importance of maintaining existing State Truth-in Billing programs intact.

Separations

Attention needed now: The FCC should expedite action on Comprehensive reform of the Part 36 Separations Process. The Separations Freeze ends July 2009. The FCC has committed to working with the State joint board members on reform of the process. The State members have provided a suggested solution. The FCC should expedite this proceeding. .

Universal Service

Application of ADA and Assuring Viability of State Programs Keeps the Federal Universal Service (USF) Program Efficient.

Contribution base: State and federal universal service programs were designed to ensure affordable phone service for both high-cost areas and low-income individuals, as well as to promote Internet connectivity for schools and libraries, and rural health care. Both now face tremendous structural funding challenges as the telecom industry evolves and contribution requirements fall disproportionately on a shrinking base of services.

Antideficiency Act: Federal universal service programs are further challenged by an August 2004 OMB decision to apply the Antideficiency Act (ADA) to the federal programs. The ADA requires the Universal Service Administrative Corporation (USAC) to keep cash or government securities on hand for every outstanding work order, as opposed to collecting investment earnings while such orders are pending for a year or more. This makes the whole program much more expensive and less efficient. Congress temporarily exempted USF from the ADA, but that exemption will expire in December 2008. The Administration should support a permanent exemption of the federal USF from the ADA.

State programs: Nearly 20 percent (over \$1.3 billion) of the joint State/federal commitment to universal service is borne by State programs in 26 states. But State programs face the same structural challenges as the federal program, as new services that rely on ubiquitous phone service fail to make an equitable contribution. Federal and State policymakers agree that spreading the contribution base as broadly as possible would mean a lower contribution for each user, less market distortion and a fairer system. Congress and the FCC are now exploring various methods of doing so, including a flat assessment on each North American Numbering Plan telephone number, or on each network connection. Anything that undermines funding for State specific programs can only increase the burden on the Federal programs. Services that rely on the ability to contact every home and business in America should make an equitable contribution to State universal service programs. Administration, agency or Congressional efforts to broaden the base of the federal universal service programs should clarify that States have equal authority to broaden their assessment base.



Federalism Generally and Telecommunications Reform

The telecommunications industry as we know it continues to undergo transformation and restructuring. NARUC's members have embraced this new paradigm of innovation and change because it is a powerful engine of economic development and consumer empowerment in each of our States. Recognizing these changes and a corresponding interest from Congressional leaders in reexamining the Telecommunications Act, NARUC commissioned a Legislative Task Force in 2005 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:

Technology neutrality: Any broad reform must be technology neutral. As history, and anticipatory legislation make all too clear, no-one can predict where today's transformation will lead or end. It makes no sense for policymakers to build a framework around any specific technology, e.g. Internet protocol. Such industrial policy making invariably chooses winners and losers - distorting investment decisions as capital and energy flow to products in the best regulatory "silo."

Functional federalism: The paper also elaborates on NARUC's "functional federalism" concept. If Congress is going to rewrite the Telecommunications Act, it does not have to be bound by traditional distinctions of "interstate" and "intrastate." 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 the functional federalism model, States excel at:

- * *Responsive consumer protection and handling new abuses;*
- * *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.*



Appendix C
List of NARUC's Executive Committee and Board of Directors
Washington Staff Contact Information

NARUC EXECUTIVE COMMITTEE

President

The Honorable Frederick F. Butler
New Jersey Board of Public Utilities
(973) 648-2027

First Vice President

The Honorable David C. Coen
Vermont Public Service Board
(802) 828-2358

Second Vice President

The Honorable Tony Clark
North Dakota Public Service Commission
(701) 328-2400

Treasurer

The Honorable Charles E. Box
Illinois Commerce Commission
(312) 814-2859

The Honorable Susan D. Parker
Alabama Public Service Commission
(334) 242-5191

The Honorable Marsha H. Smith
Idaho Public Utilities Commission
(208) 334-3912

NARUC'S BOARD OF DIRECTORS (which includes the Executive Committee)

The Honorable Ray Baum, Chair, NARUC Committee on Telecommunications
Oregon Public Utility Commission
(503) 378-6611

The Honorable John W. Betkoski, III
Connecticut Department of Public Utility Control
(860) 827-2803

The Honorable Anne C. Boyle, Chair, NARUC Committee on Consumer Affairs
Nebraska Public Service Commission
(402) 471-0215

The Honorable Garry A. Brown, Chair, NARUC Committee on Electricity
New York State Public Service Commission
(518) 474-2523



The Honorable Ric Campbell
Public Service Commission of Utah
(801) 530-6716

The Honorable Elizabeth B. Fleming, Chair, NARUC Committee on Critical Infrastructure
South Carolina Public Service Commission
(803) 896-5270

The Honorable Carlito P. Caliboso
Hawaii Public Utilities Commission
(808) 586-2020

The Honorable Lisa Polak Edgar
Florida Public Service Commission
(850) 413-6044

The Honorable Jeanne M. Fox
New Jersey Board of Public Utilities
(973) 648-2013

The Honorable Elia Germani
Rhode Island Public Utilities Commission
(401) 941-4500

The Honorable G. O'Neal Hamilton, Chair, NARUC Committee on Gas
South Carolina Public Service Commission
(803) 896-5200

The Honorable Dustin "Dusty" Johnson
South Dakota Public Utilities Commission
(605) 773-3201

The Honorable W. Robert Keating
Massachusetts Department of Public Utilities
(617) 305-3522

The Honorable David W. King, Chair, NARUC Committee on Water
New Mexico Public Regulation Commission
(505) 827-4531

The Honorable Sara Kyle
Tennessee Regulatory Authority
(615) 741-3125

The Honorable Larry S. Landis
Indiana Utility Regulatory Commission
(317) 232-2706

The Honorable Patrick J. Oshie, Chair, NARUC Committee on Energy Resources and the Environment
Washington Utilities and Transportation Commission
(360) 664-1171



The Honorable Arnetta McRae, Chair, Committee on International Relations
Delaware Public Service Commission
(302) 736-7535

The Honorable Jon W. McKinney
Public Service Commission of West Virginia
(304) 340-0307

The Honorable Richard E. Morgan
District of Columbia Public Service Commission
(202) 626-0518

The Honorable Michael R. Peevey
California Public Utilities Commission
(415) 703-3703

The Honorable Mark Sidran
Washington Utilities and Transportation Commission
(360) 664-1173

The Honorable Stan Wise
Georgia Public Service Commission
(404) 657-4574

NARUC's Washington Staff

(Anyone listed below can provide additional contact information for any of the Commissioners listed above.)

NARUC OFFICE OF THE EXECUTIVE DIRECTOR

Charles D. Gray - NARUC's Executive Director (202) 898-2208 cgray@naruc.org
Deborah L. Scott - Executive Assistant to the Executive Director (202) 898-2211 dscott@naruc.org

Mr. Gray is responsible for the overall management of the Association. He directs the programs and implements the policies of the Association. He has over 30 years experience at NARUC.

NARUC POLICY DEPARTMENT

James Bradford Ramsay - NARUC's General Counsel (202) 898-2207 jramsay@naruc.org
Deana M. Dennis - Legal and Legislative Assistant (202) 898-1892 ddennis@naruc.org

Mr. Ramsay is responsible for all Association related legal issues and is in charge of Policy department advocacy initiatives. He has been with NARUC since 1990. Among other things - he is also NARUC's line counsel on telecom issues and, inter alia, serves as staff to the FCC-State Joint Boards on Universal Service and Separations as well as the Joint Conference on Advanced Services. He has testified on NARUC's behalf in the US Senate.

Brian M. O'Hara - Legislative Director, Telecommunications (202) 898-2205 bohara@naruc.org

Mr. O'Hara directs the Association's policy advocacy on Capitol Hill on Telecommunications issues. He is a Hill alumni and came to NARUC with several years experience as lobbyist for a telephone trade association.