



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 problem¹ 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 consistent² details available from the media/financial analysts, that this proposal will dramatically change how many carriers serving rural and insular areas can

¹ Baum, Ray, Commissioner, Oregon Public Utility Commission, State Chair, Federal State Joint Board on Universal Service, Former Chair, NARUC Intercarrier Compensation Task Force, “*USF Reform and ICC Reform: Together Again? The Basics*”, presented at NARUC’s Summer Meeting on July 22, 2008, at 21, pointing out that intercarrier compensation is “\$8 billion in fees providers pay to each other”), and, at 4, pointing out comprehensive reform is also integrally interconnected with the almost \$5 billion the FCC collects and disburses as high cost and low income universal service subsidies. (Available at: <<http://www.naruc.org/committees.cfm?c=53>>)

² In the two weeks before “Sunshine” drops on this item, interested parties have had to sort through inconsistent media/financial analyst reports, or more accurately, rumors - of what the order contains.

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.³

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.⁴ 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.

³ NARUC is not alone in recognizing the potential impact of this order. One recent letter notes: “What is under consideration is a sweeping set of reforms that could (i) virtually eliminate a critical source of carrier revenues that have existed for . . . decades, (ii) shift enormous cost recovery from carriers to end users, (iii) create huge new make -whole universal service programs, (iv) rewrite interconnection rules that have formed the basis of network architectures for more than a decade, and (v) shift universal service assessment from interstate revenues to phone numbers, and consequently from a usage to a flat-rated system. Any one of these actions would constitute an enormous change which could dramatically impact the business model of any individual or class of telecommunications carrier. This is particularly true during a time when the economy already is in unprecedented turmoil. And since these changes would affect how virtually every telecommunications product is structured, and how virtually all networks are interconnected, the resolution of scores of discrete issues will be critical to the success of each component...Indeed, the reforms contemplated even could upend the federal-state partnership on intercarrier compensation that has existed for more than 80 years.” See, *October 13, 2008 letter to Chairman Martin and Commissioners Copps, Adelstein, Tate and McDowell filed In The Matter of a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, from 360networks Inc., Birch Communications, Bluegrass Wireless, Broadview Networks, CarolinaWest Wireless, Cavalier Telephone, Cellular South, COMPTEL, DeltaCom, Hypercube, LLC, Integra Telecom, NuVox, One Communications Corp., PAETEC and All of Its Operating Subsidiaries, RCN Telecom Services, Inc., Southern Communications Services, Inc. d/b/a, SouthernLINC Wireless, TW Telecom., YourTel America, Inc., and XO Communications, LLC*, at page 2. (Available at: <http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520175399>)

⁴ This is not a new problem. Indeed, in July, Texas Congressman Joe Barton (R-TX) circulated a discussion draft titled: “FCC Procedural Reform for Openness and Clarity Encouraging Sensible Solutions Act (Available at: <<http://www.broadcastingcable.com/contents/pdf/BartonFCCReform.pdf>>), which, among other things, would require the FCC to give the public at least 60 days to weigh in on any proposed rule change, modification, or deletion.

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,⁵ or the record lacks critical recommendations from the Separations Joint Board,⁶ 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.⁷ 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."⁸ 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.⁹ 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

⁵ See, October 3, 2008 Notice of Ex Parte Contacts filed by NARUC’s General Counsel James Bradford Ramsay, filed the proceedings captioned *In the Matters 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; *IP-Enabled Services*, WC Docket No. 04-36; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Universal Service Contribution Methodology*, WC Docket No. 06-122; *Petition for Declaratory Ruling Filed by CTIA*, WT Docket No. 05-194; and *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286. (Available at: <http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520173893>)

⁶ See, October 20, 2008 Ex Parte letter to Chairman Martin and Commissioners Tate, Copps, Adelstein, and McDowell from the State Members of the Federal-State Joint Board on Separations, filed the proceedings captioned *In the Matters 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; *IP-Enabled Services*, WC Docket No. 04-36; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Universal Service Contribution Methodology*, WC Docket No. 06-122; *Petition for Declaratory Ruling Filed by CTIA*, WT Docket No. 05-194; and *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286. (Available at: <http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520176237>)

⁷ The APA allows agencies to adopt regulations *only* after reasonable public notice and opportunity for comment by interested persons. See, *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985) (citation omitted); *accord Chocolate Mfrs. Assoc. v. Block*, 775 F.2d 1098, 1104 (4th Cir. 1985) ("An interested party must have been alerted by the notice to the possibility of the changes eventually adopted from the comments.").

⁸ See, *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994); *AFL-CIO*, 757 F.2d at 338; *Chocolate Mfrs.*, 755 F.2d at 1105 (citing cases from several circuits).

⁹ See, FCC News Release “Interim Cap Clears Path for Comprehensive Reform – Commission Posted to Move Forward on Difficult Decisions Necessary to Promote and Advance Affordable Telecommunications for All Americans” (rel. May 2, 2008).

most recent specific public notice was released March 16, 2007. It extended the deadline for comments on the Missoula Plan.¹⁰

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.”¹¹ 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.”¹² 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.¹³ 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.¹⁴ 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.”¹⁵

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:

¹⁰ See, Notice, DA 07-1337 (“Pleading Cycle Extended for Comment on Amendments to the Missoula Plan Intercarrier Compensation Proposal to Incorporate a Federal Benchmark Mechanism”), CC Docket No. 01-92.

¹¹ *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

¹² *Id.* at 55.

¹³ *Id.*

¹⁴ *Public Service Commission of District of Columbia v. FCC*, 906 F.2d 713, 717 (D.C. Cir. 2001); *Reeder v. FCC*, 865 F.2d 1298, 1304-05 (D.C. Cir. 1989).

¹⁵ See, October 17, 2008 Ex Parte Letter to FCC Secretary Dortch from the New England Conference of Public Utility Commissioners, filed in the proceedings captioned “*Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122; *IP-Enabled Services*, WC Docket No. 04-36; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45,” at page 10. (Available at <http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520176113>)

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,

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