

Testimony of

***Ray Baum, Commissioner***  
*Of the*  
**Oregon Public Utility Commission**

*On behalf of the*

**National Association of Regulatory Utility Commissioners**

*before the*

**United States House of Representatives**  
**Subcommittee on Communications, Technology and the Internet**  
**of the Committee on Energy and Commerce**

**Hearing on the Universal Service Reform Act of 2009 Discussion Draft**  
**November 17, 2009**



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## INTRODUCTION

Chairman Boucher, Ranking Member Stearns and members of the Subcommittee, I appreciate the opportunity to testify today on reform of the federal universal service fund (USF) program. I thank you for calling this hearing and commend Chairman Boucher and Representative Terry, the sponsors of the bill, and the members of this Subcommittee for your leadership on this important issue.

My name is Ray Baum. I am a Commissioner with the Oregon Public Utility Commission and the Chair of the National Association of Regulatory Utility Commissioners' (NARUC) Committee on Telecommunications. I formerly chaired a NARUC task force on intercarrier compensation. I am also currently a NARUC representative on the Federal Communications Commission's Federal-State Joint Board on Universal Service. As the State Chair of that board, I have spent hundreds of hours intensely focused upon the issues covered by your draft legislation. No one seriously disputes that reform of the existing mechanisms are long overdue.

I personally believe the issue of broadband deployment is of utmost importance to the economic productivity and quality of life of the entire country. Communities that do not have access to sufficient levels of high speed broadband within the next few years will be just as economically disadvantaged as those communities in the first half of the 20<sup>th</sup> century that did not have access to electricity and paved highways.

The reform of USF and ICC is integral to achieving that deployment. In certain key areas, this discussion draft is a major step forward. In my personal view, there is no question that, overall, it moves the policy debate much closer to a practical resolution.

I am testifying today on behalf of NARUC, which represents the State public utility commissioners in each of your States that have oversight responsibilities for all the critical utility infrastructures – telecommunications, energy, and water. Your home-State commissions have considerable expertise on the issues raised by this legislation. They are focused on what is best for your State and your constituents. A discussion with your own State’s experts can only provide a better basis for each of your decisions on this legislation. It is a contact worth making.<sup>1</sup>

While NARUC does not have a position on every aspect of the *Universal Service Reform Act of 2009 Discussion Draft*, we have endorsed specific approaches on certain key issues. Moreover, where NARUC has not taken a specific position, I have included my personal views on other issues raised by the legislation.

Four sections of the draft adopt solutions NARUC has specifically endorsed: the protection of State program contribution options; the long overdue inclusion of a *permanent* Antideficiency Act exemption; assuring the continued utility of the Joint Board process; and, the expressed recognition of an integral State role on consumer protection and service quality standards. On each of these issues, the draft says the right things. Although NARUC’s staff is

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<sup>1</sup> To get detailed contact information for experts from your State’s public service commission, go to: <http://www.naruc.org/commissions.cfm> and click on your State.

still analyzing the details of the draft, there is at least one other section addressing intercarrier compensation reform that raises serious concerns for our members. We look forward to working with the Committee on those sections.

### ***Protection of State Universal Service Programs' Contribution Base***

NARUC supports efforts to equitably distribute the funding base of the federal Universal Service Fund (USF) in a technology-neutral manner. We appreciate provisions in the *Universal Service Reform Act of 2009 Discussion Draft* that allow the Federal Communications Commission to do so. All service providers should share the responsibility for maintaining universal service.

As Congress indicated in the 1996 legislation, State programs have always been a critical and significant component of cooperative efforts to assure affordable phone service for high-cost areas and low-income individuals and promote Internet connectivity for schools, medical facilities and libraries.

Universal Service is a responsibility States and the federal government share. According to one 2006 report, about 22 State programs distribute at least \$1.3 billion, or approximately 17 percent of the overall national commitment to Universal Service.<sup>2</sup> Currently, at least 22 States

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<sup>2</sup> Jing Liu & Edwin Rosenberg, *State Universal Service Funding Mechanisms: Results of the NRRI's 2005–2006 Survey*, National Regulatory Research Institute (July 2006). (“[T]wenty two jurisdictions, or 43 percent, currently have either a functioning high-cost USF, a functioning high-cost USF under revision, or an approved but not functioning fund . . . All but five . . . require Commercial Mobile Radio Service providers to contribute . . . two . . . require Voice over Internet Protocol service providers to contribute . . . Thirty-three commissions . . . have a state low-income program, which provides a subsidy to basic local residential telephone services . . . Nine . . . have a subsidy program for schools and libraries. Seven . . . have a subsidy program for rural health care facilities . . . five . . . have a subsidy program for advanced telecommunication services [separate from] other subsidy programs for schools, libraries . . .” available online at: <<http://nrri.org/pubs/telecommunications/06-09.pdf>>.

have high-cost universal service programs, and at least 33 have low-income programs. Others have programs to promote the deployment of advanced services generally and/or rural health care/schools and library programs. Many of these State programs are supported in part or whole by assessments on carriers providing voice telephony services. All advance Congress' goals to promote universal service and deployment of advanced infrastructure.

There is no question these programs reduce the overall burdens on existing federal programs. There is also no question that elimination of these programs will significantly undermine the goals of this draft legislation.

Funding is critical. Like the federal programs, state programs face funding challenges as the telecom industry evolves and contribution requirements fall disproportionately on a shrinking base of services.

This draft, in Section 108, provides a critical step forward by assuring States can require "communications service providers" to contribute to State programs. *The FCC has the authority now to eliminate the need for the new definition of "communications service provider" by making a long overdue final classification of the status of facilities-based and so-called nomadic VoIP providers.* But it is unclear when or if they will do so.

Even so, this section explicitly expands the methods the FCC can consider as funding bases – and critically – also expands the new methods available to the States. This is a

significant improvement. This provision is good for States, good for the federal program and good for consumers.

NARUC looks forward to working with the legislation sponsors on the scope of State assessment authority. We respectfully suggest the best way to guarantee the long-term stability of State programs is to slightly adjust the draft to assure State assessment authority is co-extensive with that of the federal program.

### *Antideficiency Act Exemption*

NARUC strongly supports the permanent exemption of the federal programs from the provisions of the Antideficiency Act (ADA).

The Universal Service Fund must be run efficiently to maximize the public benefit. That is why we support a permanent exemption of the USF from the ADA. An August 2004 decision by the Office of Management and Budget to apply the Act to the federal USF programs was a mistake. That decision 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 far less efficient.* Fortunately, Congress has, every year since, temporarily exempted USF from the ADA. However, the current exemption expires next month and a permanent fix is long overdue.

The draft's exemption allows the FCC to continue to invest contributions in liquid, interest-bearing, government-backed securities until they are disbursed. Making the exemption

permanent assures no lapse in this efficient use of taxpayer dollars and removes the annual uncertainty of whether the extension will be renewed.

***Federal-State Joint Board on Universal Service Reviews of Supported Services***

NARUC welcomes the language in the discussion draft maintaining the Joint Board and requiring a referral of the definition of supported services every five years. The previous legislation only required “periodic” reviews of supported services. The FCC has elicited a number of recommendations from the Board since the 1996 legislation – but a definitive timetable for reviews is definite improvement in the governing legislation that will ensure that definitions keep pace with adoption trends and technology.

The legislation also provides the FCC and the Joint Board with a clear outline of issues for deliberation and a deadline for its initial recommendation on both the definition of supported services and the Section 214 inquiries. Aside from NARUC, I would like to add my personal commitment – and that of my State colleagues on the Joint Board – to work with you on this legislation, and with our FCC colleagues on the inquiries Congress designates when the President signs it into law.

States, because of their long history with rates, facility-siting, safety regulation, and consumer protection, and also because of their proximity and knowledge of local markets, demographics and market participants, have crucial insights into the real costs and real benefits of these federal programs. The sponsors were wise to require a Joint Board recommended decision as a prerequisite for FCC action on issues like the definition of supported services.

Here too, there is one area – probably an oversight - where NARUC would like to suggest a minor improvement. The draft eliminates the current provision in 47 U.S.C. § 254(a)(2) that requires the FCC to “complete any proceeding to implement ...recommendations from any joint board on universal service within one year after receiving such recommendations.” That section provides some impetus for the FCC to do something (other than ignore) a recommendation from a Joint Board. Without a provision like it, the FCC is free to sit on a recommendation – perhaps for the entire five years until the time for the next recommendation comes due. Inclusion of some analogous provision in the final bill will assure not only that the definition of supported services is actually reviewed at least once every five years, but also that the FCC will have some time pressure to act on the recommendations.

***Partnership – not Preemption: Keeping State Consumer Cops on the Beat***

The work of a 2004 NARUC legislative taskforce resulted in the release and adoption of a white paper that focused on the evolving nature of federalism. That paper ultimately concludes that good public policy should be based on the core competencies of agencies at each level of government – state, local and federal.

For example, effective consumer protection depends largely on where the consumer is domiciled, regardless of whether calls are placed to in-State or out-of-State destinations. Requests to interconnect, and presumably any needed service quality standards for government subsidized services obviously depend on where the relevant facilities are located. States

commissions excel at, among other things, delivering responsive consumer protection and resolving interconnection disputes.

We are particularly pleased that the draft bill's sponsors, in specifically requiring *subsidized* carriers to “comply with applicable State and federal consumer protection and service quality standards,” *explicitly recognize the immutable logic of keeping State consumer cops on the beat*. As President Obama recognized in a recent Executive Order: “Throughout our history, State and local governments have frequently protected health, safety, and the environment more aggressively than has the national Government.”<sup>3</sup>

This amendment to Section 214 recognizes the key role States play to ensure consumers receive high service quality and are treated fairly. The federal government will *always* lack the manpower to help *all* consumers in *every* State. In many cases, whatever assistance they may provide will be complicated by distance and time zones. Moreover, this section also assures that companies that seek federal (and State) subsidies actually deliver the promised quality services.

### ***Intercarrier Compensation***

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<sup>3</sup> May 20, 2009 *Memorandum for the Heads of Executive Departments and Agencies*. “[From our Nation's founding, the American constitutional order has been a Federal system, ensuring a strong role for both the national Government and the States. The Federal Government's role in promoting the general welfare and guarding individual liberties is critical, but State law and national law often operate concurrently to provide independent safeguards for the public. Throughout our history, State and local governments have frequently protected health, safety, and the environment more aggressively than has the national Government . . . [t]he general policy of my Administration that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States... Executive departments and agencies should be mindful that in our Federal system, the citizens of the several States have distinctive circumstances and values, and that in many instances it is appropriate for them to apply to themselves rules and principles that reflect these circumstances and values. As Justice Brandeis explained more than 70 years ago, “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”. President Barack Obama, available at: [http://www.whitehouse.gov/the\\_press\\_office/Presidential-Memorandum-Regarding-Preemption/](http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Regarding-Preemption/)

The section of the bill that raises the most concern is the provision giving the FCC *carte blanche* to reform intercarrier compensation for both interstate and intrastate traffic. The costs and benefits of intercarrier compensation reform will vary from State to State, as will the advice of your individual State commissions, but at the end of the day, we must all find some common ground. NARUC, over the past 10 years, has created a series of recommendations for reform of these charges. Indeed, I was part of a multi-year task force that brokered a dialogue among every segment of industry seeking a consensus solution to problems raised by the current regime.

For States that already mirror the interstate regime, the preemption is not necessary. For others the preemption is problematic. The differential impact on each State makes a one-size-fits-all approach potentially punitive. NARUC has specifically endorsed several key prerequisites to intercarrier compensation reform, including:

- [1] The compensation system should ensure that revenues, cost assignment, and the risk of confiscation are jurisdictionally consistent for all classes of traffic.
- [2] State commissions should continue to have a significant role in establishing rates and protecting and communicating with consumers. The role should reflect their unique insights, as well as assure substantial discretion in developing retail rates for services provided by providers of last resort, even if a unified compensation solution is adopted. A proposal preserving a significant State role that fits within the confines of existing law is preferable.
- [3] The estimated cost impact on a carrier-by-carrier basis, by State, must be computed before a decision is made whether to adopt a new intercarrier compensation plan.

- [4] The FCC should be required to regularly revisit its cost allocation rules for regulated/nonregulated services. Costs that should not be recovered through regulated rates ought to be excluded from the computation of intercarrier compensation rates.
- [5] Before any new intercarrier compensation plan is implemented, the effect of the plan on local exchange rates, including both interstate and intrastate subscriber line charges (SLCs), should be computed.
- [6] Even when a referral to a Joint Board is not mandated by law, in order to ensure State input the FCC should make a referral, and the Joint Board should act on that referral, in an expedited manner.

NARUC stands willing to work with you to modify this provision to meet our mutual goals of reducing access charges in a competitively neutral manner while not over burdening consumers or the universal service fund.

#### *Other Issues and Some Personal Observations*

NARUC has long been a proponent of efficiency in operation of the universal service programs. While NARUC has not taken a specific position on the capping mechanism, the audits provisions, the performance setting and review measures, the wireless auction mechanism, and the traffic pumping and phantom traffic provisions in the draft, combined they show an interest in and movement towards a more efficient federal mechanism that does place – at least some - limits on fund growth.

*Since NARUC has NOT taken a specific position on these mechanisms* – I wanted to take a moment and express my *personal* recommendations on how Congress or the FCC under its direction should proceed.

First, *in my opinion*, as provided in the discussion draft and also as endorsed by the Joint Board in its 2007 Recommendation Decision, high-speed broadband should be declared a supported service. This should be done as soon as possible. As we speak the digital divide between rural and urban America is growing exponentially and it is now two years since the Joint Board made its initial recommendation to the FCC to declare it so.

Second, *in my view*, deployment of high-speed broadband should be a condition for receiving federal funding. Receipt of high-cost support should be contingent on having a 3-5 year plan to deploy high-speed broadband to high-cost rural areas. Over that time the current high-cost fund based on the costs of a public switch telephone network could be converted to a high speed broadband deployment fund. Carriers would recover their broadband network costs from affordable end user rates and support, where appropriate, from the new fund. The target speeds should be 20-50 mbs for anchor institutions and 3-5 mbs for residential customers.

Third, *I personally believe* intercarrier compensation rates for all forms of INTERstate traffic should be transitioned to zero over five years. NARUC has not specifically addressed the length of any transition and the Association strongly believes preemption of INTRAsate authority is unnecessary and inappropriate. I believe one way to avoid preemption is to condition receipt of federal high-cost support on the State reducing in stages intrastate access

charges to mirror Federal rates. States that adopt Federal target rates could transfer foregone intrastate revenue to the Federal USF. These funds would form the basis of broadband build out fund that would be focused on high-speed broadband build out in unserved areas.

Fourth, Rural LECs support from the new broadband fund would be based on actual costs incurred in provisioning high-speed broadband subject to rate-of-return regulation with all revenues and expenses accounted for. Mid-size and RBOC funding would be frozen at current levels with additional support limited to infrastructure build out targeted to unserved areas based on a cost modeling and/or in combination with RFPs or competitive bidding. This support for infrastructure deployment to unserved areas could be subject to a 20% company match. After infrastructure build out RBOC funding for high cost rural areas would be phased out. Funding for the Mid-size companies for broadband deployment in unserved areas would be also be phased out. Continued support for mid-size carriers as frozen under the high-cost fund would be reviewed at the end of the five year period to determine the level of support required to maintain the appropriate broad services for their high-cost rural areas on a going forward basis.

Fifth, it is my opinion that the current funding of wireless service in high-cost rural areas is largely dysfunctional with a few exceptions. The draft bill's discussion of a wireless auction is a very positive step in the right direction. At some point in the very near future Congress and the FCC may find that the consuming public has chosen mobile high-speed broadband as its communication technology of choice with the expectation that it be available almost everywhere.

Finally, the draft bill's provisions on traffic pumping, phantom traffic, auditing, capping the fund(subject to ICC adjustments and repeal of the parent trap) and repeal of the identical support rule are all excellent and should be timely implemented.

I personally believe expedited implementation of the above concepts will help insure a smooth transition to a broadband world where voice is just an application, where minutes and access charges don't matter. Such an effort will greatly mitigate the digital divide that is otherwise inevitable. This will help ensure that all Americans, regardless of where they live, will enjoy the economic productivity and enhanced quality of life available through the broadband world.

### ***Conclusion***

Universal service has long been in need of reform. We appreciate Chairman Boucher and Representative Terry's leadership on this issue. This bill is a major step forward in the long journey to meaningful reform. NARUC looks forward to working with this Subcommittee and the full committee on this draft as it advances through the committee process. Thank you again for your invitation to testify before you today and I look forward to any questions you may have.