N A R U C

National Association of Regulatory Utility Commissioners

October 17, 2013

The Honorable Greg Walden
Chairman
Subcommittee on Communications and Technology
U.S. House of Representatives
Washington, DC 20515

The Honorable Henry Waxman
Ranking Member
Subcommittee on Communications and Technology
U.S. House of Representatives
Washington, DC 20515

Re: Response to additional questions for the record from July 11 hearing on "Improving FCC Process"

Dear Chairman Walden and Ranking Member Waxman:

Thank you for allowing NARUC to provide the Subcommittee with additional information regarding FCC reform. I have answered your questions below.

1. *Can you think of situations in which an NOI confers no benefit and unnecessarily leads to delay? For example, if the FCC is looking to update technical rules that would redesignate certain spectrum for voice to broadband services, would the requirement for the FCC to issue a NOI really contribute to the process?*

Answer:

Yes, there are situations where requiring a Notice of Inquiry (NOI) would not provide necessary benefits but could delay a needed FCC decision. Almost all, if not all, are covered by the emergency and interpretive exceptions built into the federal Administrative Procedure Act and incorporated by reference in the original draft legislation. Other clarifications of existing technical rules can also be addressed under that exemption without the need of a separate NOI. Other than that, it is difficult to come up with a scenario that would not benefit from a prior NOI.

Presumably, the quarterly updating of the Universal Service Fund surcharge – since it is calculated pursuant to final FCC rules – would not be subject to the requirement for a NOI under the draft legislation. Similar types of changes should not be subject to the NOI requirement, e.g., the implementation of costs or charges that are calculated based on existing FCC final rules. If my assessment of the legislation is incorrect and such items are <u>not</u> deemed exempt, it might make sense to add a very narrowly tailored list of exemptions to the requirement for a NOI. The exemption would need to be very narrowly drafted and avoid generic language or open-ended references to prevent the exemption from becoming an ambiguous statutory provision the agency could misuse to bypass the NOI requirement.

As noted in NARUC's testimony, the FCC has a habit of using Notices of Proposed Rulemakings (NPRMs) more as NOIs. Instead of actually proposing actual rules many NPRMs actually ask broad policy questions ideally asked via an NOI. NARUC supported Section 13(a) (1) (B) of the bill as

early as 2008. That section requires the FCC include the specific language of the proposed rule or modification in the NPRM – a difficult task for the agency if it is really a mislabeled NOI asking broad questions that was released as an NPRM. Few complain that the FCC ever issues decisions too quickly. Some do complain that it lets issues languish for extended periods of time. So long that, in some cases, the agency has to seek to refresh the record before acting or dismiss the underlying petition as stale. Sections – (f), (g) (h) and (i) of the draft are laudable procedural vehicles to (1) assure that orders do not languish at the agency and (2) allow all Stakeholders to know when matters in which they have an interest are likely to come up for decision. NARUC has said, "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." These other provisions of the draft legislation effectively suggesting deadlines for FCC action on both NOIs and NPRMs are likely to shorten the rulemaking process at the FCC, not lengthen it.

2. *What happens when the FCC has to address routine matters, such as fee proceedings, or refresh the record in an already open proceeding" Would an NOI still be necessary in such instances?*

Answer: As noted in the answer to the first question, I do not believe that fees calculated pursuant to established FCC rules would be subject to the NOI requirement. Fee proceedings are very specific questions and do not address broad policy issues. In the case where the FCC has already completed an NOI at the time the law becomes effective, and needs to refresh the record before proceeding, I do not read the draft legislation to require another NOI. As long as the FCC is required to issue the actual text of any proposed rules in the subsequent NPRM, no small business, entrepreneur or smaller State or local government would be disadvantaged.

If you have questions about NARUC's positions or would like to discuss it further, please contact NARUC General Counsel Brad Ramsay at (202)898-2207, jramsay@naruc.org, or Legislative Director Brian O'Hara at (202)898-2205, bohara@naruc.org.

Sincerely,
/s/ James Bradford Ramsay

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