

GAO Questions – FCC Review  
NASUCA  
Time and Date TBD

**Problems/Challenges at the agency**

**1. What do you see as the main challenges facing FCC in accommodating a changing telecommunications industry? What factors contribute to these challenges?**

Frankly, the main challenges the FCC faces in accommodating a changing telecommunications industry is recognizing that its decisions and policies over the past decade have been fundamentally flawed and have resulted in:

- (1) Greater market concentration for telecommunications and related communications services – essentially moving the market from many providers to a largely unregulated, unconstrained duopoly in most markets, consisting of one telecommunications carrier and one cable services provider.
- (2) In consequence of (1), less competition for telecommunications, cable, broadband and other communications services.
- (3) A greater imbalance between consumers and service providers, in terms of information asymmetry, bargaining power, rates and other charges, and other terms and conditions of service.
- (4) A large-scale erosion of states’ authority to protect their citizens from unjust and unreasonable business practices utilized by carriers and cable operators, largely in disregard of the federal-state partnership established in the Federal Communications Act of 1934 (“FCA”), based on misplaced concerns about “patchwork” state regulation or “promoting” competition that is largely non-existent.
- (5) Removing, or never making available, much of the information legislators, state regulators and consumers need to assess the quality and reasonableness of service provided by carriers and cable operators.
- (6) By promoting deregulation, without adequately ensuring that competition truly exists, replacing the notion of a utility’s obligation to provide basic, universal service to all customers at prices and on terms that are just, reasonable, and non-discriminatory, resulting in reduced investment in infrastructure in areas that are marginally profitable.
- (7) Failing to develop a national broadband deployment strategy that has resulted in large segments of the population having little or no access to modern broadband service.

NASUCA will address these points more fully below.

In considering NASUCA's comments in this section, the GAO should recall that 2009 marks the 25th anniversary of the Modification of Final Judgment that broke up AT&T's monopoly over local exchange and interexchange telecommunications services, opened the interstate, interexchange market to competition, and required the company to divest its local telecommunications service operations. The seven regional Bell operating companies ("RBOCs") that were created out of AT&T's local operating companies, however, retained their regulated monopolies over local exchange service, subject to state and federal oversight, until Congress amended the Federal Communications Act ("FCA") in 1996 – just over thirteen years ago. The 1996 amendments, as we all know, opened local markets to competition by telecommunications carriers, utilities and cable operators, based on Congress' assumption that competition would promote development of new, high-speed services and would lead to lower prices for service and higher quality service. Rather than requiring local carriers to form separate affiliates to provide wholesale service to competitors, however, Congress mandated that the RBOCs provide competitors with cost-based access to their networks, network elements and facilities and wholesale services for resale. That approach was killed by a combination of court and FCC actions. In hindsight, the lack of clarity in the 1996 amendments appears to have been a fundamental flaw in achieving the competitive goals of Congress.

How far we have come since 1984 – unfortunately, the distance traveled seems to have been in a circle. In exchange for a closely-regulated monopoly providing local and long-distance telecommunications service nationwide, we find ourselves dealing with largely deregulated or unregulated duopolies that exist regionally and provide a panoply of bundled local, long distance, wireless, video and broadband services that potential competitors cannot hope to provide.

**a. The Wireline Telecommunications Market.**

First, with respect to wireline telecommunications, both the local and long distance markets have become highly concentrated. For local service, the country has gone from seven RBOCs, together with several large independent local carriers (*e.g.*, GTE, Southern New England Telecommunications or SNET), through a number of mergers and acquisitions of these local carriers,<sup>1</sup> we now have two giant national wireline carriers providing local and long distance services – Verizon and, ironically, AT&T.<sup>2</sup>

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<sup>1</sup> Verizon was formed when Bell Atlantic acquired GTE to form Verizon in 2000. Bell Atlantic had previously acquired NYNEX in 1996. AT&T – in its current manifestation – was formed when SBC (fka Southwestern Bell) acquired the long-distance and CLEC AT&T in 2006. Prior to acquiring AT&T, SBC had purchased Pacific Telesis (1997), Ameritech (1999), and SNET (1998). After the AT&T purchase, the company then acquired Bell South (2006). Perhaps at this point, Stephen Colbert may provide a humorous but salient look at at least some of the recombinations on the way to putting Humpty Dumpty together again. See <http://www.glumbert.com/media/att>.

<sup>2</sup> NASUCA is not overlooking the third major wireline carrier – Qwest (which was formed when interexchange carrier Qwest acquired U.S. West, an RBOC) – but the fact is, Qwest is significantly smaller than either Verizon or AT&T and is largely confined to serving the Mountain West. Qwest has likely escaped being swallowed up by Verizon or AT&T by virtue of the fact that its service territory is generally more costly to serve and therefore less profitable, and probably by virtue of the fact that Qwest's continued existence makes it easier to mask somewhat the

Moreover, the two largest potential competitive local carriers – AT&T and MCI – have also been swallowed up in these mergers, Verizon having acquired MCI in 2005 and, as noted, SBC acquiring (and taking the name of) AT&T in 2006. These transactions not only made Verizon and AT&T larger – they also eliminated the two CLECs that offered the most substantive and vigorous opposition to the incumbent RBOCs’ regulatory and legal efforts. AT&T and MCI do continue to offer local business service that ostensibly competes with the service offered by the other incumbent – but in many jurisdictions, these competitors have ceased actively marketing their services. In our experience, these competitive affiliates have supported regulatory initiatives by the opposite incumbent that are clearly against their legal or pecuniary interests as competitors, but which further similar efforts their own incumbent affiliate’s in other jurisdictions.<sup>3</sup> In other words, Verizon and AT&T have largely retreated to their respective territories and rather than competing against one another, have largely supported each other’s positions in states where they choose not to actively compete.

As the local and long distance markets for wireline service have become increasingly concentrated, the FCC has increasingly used its authority, under 47 U.S.C. § 160, to forbear from regulating various aspects of wireline carriers’ service. For example, pursuant to 47 U.S.C. § 160, the FCC has relieved wireline telecommunications carriers that currently report ARMIS service quality information from this and other reporting obligations (though this does not become effective for two years).<sup>4</sup> The result of this forbearance is to remove many of the basic data points that state regulators, consumer advocates and members of the public utilize to monitor wireline carriers’ revenues versus investment in order to determine, among other things, whether carriers are sacrificing their network infrastructure in order to maximize profit. While many states collect this data to some degree, many had simply adopted the ARMIS data and in any event, uniform

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duopoly that now exists in the wireline services market. At this point, Comcast, a cable provider, is the third-largest provider of telecommunications services in the U.S.

<sup>3</sup> For example, in a number of states, Verizon and AT&T have proposed reducing CLECs’ intrastate access charges to the levels charged by incumbents. Despite the fact that AT&T’s competitive affiliate’s intrastate access charges substantially exceeded the incumbent carriers’ levels, the AT&T competitive carrier supported the access charge reductions – presumably because AT&T was seeking the same reductions in those states in which it is an incumbent. *See, e.g., GI re: Reducing CLEC Intrastate Access Charges*, Case No. 08-0656-T-GI, CAD Comments and Recommendations, p. 16 (Filed Feb. 5, 2009).

<sup>4</sup> *See In re: Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering; Petition of AT&T Inc. for Forbearance*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 23 F.C.C.R. 13647 (rel. Sept. 6, 2008). Similarly, the FCC has removed from review by States and the public all network outage information reported to the agency, this time not under the forbearance provisions of 47 U.S.C. § 160 but rather under the auspices of “national security” and preventing terror attacks. *See In re: New Part 4 of the Commission’s Rules Concerning Disruptions to Communications*, Report and Order and Further Notice of Proposed Rulemaking, 19 F.C.C.R. 16830, 16834 ¶3 (rel. Aug. 19, 2004). Such reports previously were available to States and the public, though required only of wireline carriers (the August 2004 order expanded the outage reporting requirements to, among others, providers of wireless, cable and satellite communications services). Thus, while FCC deregulatory decisions have led to increasing size and market power of carriers, States and the public are increasingly excluded from having access to information that could shed light on adverse (to consumers) consequences of these developments.

national data was useful in making “apples-to-apples” comparisons of carrier financial performance and infrastructure investment.

In addition, the FCC declined to challenge the D.C. Circuit’s 2004 decision that struck down the agency’s ruling on discounts applied to CLECs’ interconnection to RBOC local networks and also struck down individual state utility commissions’ authority to set discounted rates for a number of network elements.<sup>5</sup> The effect of the *USTA II* ruling, and the FCC’s subsequent implementation of that decision,<sup>6</sup> weakened CLECs by increasing their costs to lease network facilities from incumbents. Particularly critical to this was the FCC’s elimination of CLECs’ ability to obtain the so-called UNE-Platform (a combination of incumbent’s network facilities), which up to that point had been a major mode of market entry for many competitors.

Thus, in the wireline long distance and local markets, FCC decisions and policies have allowed Verizon and AT&T to capture the vast majority of the market – generally on the theory that “bigger is better” – and have weakened regulatory oversight of these mammoth companies by both government agencies, the public and legislators, and have made it more costly and difficult for other carriers to offer meaningful, competitive alternatives.

#### **b. The Wireless Telecommunications Market.**

The same pattern of consolidation has occurred in the market for wireless service. Through an even larger number of mergers and acquisitions, both AT&T and Verizon have captured a substantial majority of this market – nearly 62% – since the 1996 amendments to the FCA were enacted. The other two national wireless carriers – Sprint and T-Mobile USA – combine for another 31% of the wireless market,<sup>7</sup> meaning that these four wireless carriers hold nearly 93% of the market overall.

In contrast to the wireline market, the wireless market was substantially deregulated by Congress in 1993 amendments to the FCA, at least with respect to “rates” and “market entry.”<sup>8</sup> Congress did, however, preserve states’ broad authority to continue regulating “other terms and conditions” of wireless service and also authorized the FCC to permit states to continue, or resume, regulating wireless carriers’ rates under certain

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<sup>5</sup> See *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”). Not only did the FCC decline to seek review of the *USTA II* decision, it declined to support industry and consumer groups’ efforts to obtain review of the decision from the U.S. Supreme Court – review that was ultimately denied.

<sup>6</sup> See *In re: Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 F.C.C.R. 2533 (Feb. 4, 2005) (“*TRRO*”).

<sup>7</sup> See *In re: Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Thirteenth Report, WT 08-27, Table A-4 (rel. Jan. 16, 2009), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-09-54A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-54A1.pdf).

<sup>8</sup> See 47 U.S.C. § 332(c)(3)(A); see also Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312, § 6002(b)(2)(A) (1993).

circumstances.<sup>9</sup> Yet the FCC's decisions interpreting or implementing the 1993 amendments to the FCA have weakened state and federal oversight over wireless carriers while at the same time the agency has approved the mergers and acquisitions that have allowed incumbent wireline carriers to capture the bulk of the wireless market as well.

The FCC has frequently signaled its desire to preempt states' authority to regulate even wireless carriers' "other terms and conditions" of service. Thus, the FCC's response to state consumer advocates' petition for a declaratory ruling that wireline and wireless carriers' "regulatory" line item charges were misleading and violated the agency's "truth-in-billing" and other orders was not to rein in such charges but rather to preempt state efforts to prohibit (or even require) wireless line item charges.<sup>10</sup> In the same order, the FCC sought comment whether it should adopt more stringent truth-in-billing rules but then proposed to preempt any state regulation of carrier billing practices – wireless or wireline.<sup>11</sup> Similarly, the FCC, or at least former chairman Martin, signaled a willingness to preempt states from limiting the early termination fees ("ETFs") that wireless carriers assess when customers terminate their service contracts before the service term expires, on grounds ETFs constitute "rates" under 47 U.S.C. § 332(c)(3)(A).<sup>12</sup>

In addition, through "bundling" of service packages that provide wireline local and long distance service, wireless service and broadband services (including video and data), coupled with the use of term contracts that include early termination fees ("ETFs"), the Nation's largest, vertically integrated carriers have been able to attract and retain customers by offering them a suite of services that competitors cannot match.

### **c. The Market for Advanced Services – Broadband.**

FCC decisions and policies regarding advanced services, *i.e.*, broadband and Internet Protocol-enabled ("IP-enabled") services have likewise contributed to an increasingly concentrated yet largely unregulated market characterized by a virtual duopoly in which the market is dominated by either Verizon or AT&T on the one hand, or cable giants like Comcast or Time Warner on the other. Specifically, the following FCC

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<sup>9</sup> See 47 U.S.C. § 332(c)(3)(A) & (B); see also H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. (1993) reprinted in 1993 U.S.C.C.A.N. 378, 587-88.

<sup>10</sup> *Truth-in-Billing and Billing Format*, Nat'l Ass'n of State Util. Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing, 20 F.C.C.R. 6448 (2005), vacated by Nat'l Ass'n of State Utility Consumer Advocates v. FCC, 457 F.3d 1328 (11th Cir. 2007), cert. denied sub nom. T-Mobile v. Nat'l Ass'n of State Utility Consumer Advocates, 128 S. Ct. 1119 (2008).

<sup>11</sup> See *In re: Truth-in-Billing and Billing Format*, Second Further Notice of Proposed Rulemaking, 20 F.C.C.R. at 6473-74, ¶¶49-51.

<sup>12</sup> See *In re: CTIA Petition for Declaratory Ruling That Wireless ETFs Are "Rates,"* WT Docket No. 05-194, Petition (filed March 15, 2005); see also, e.g., TechLawJournal, "Martin Discusses FCC Activities," TLJ News from Jan. 16-20, 2007 (Jan. 17, 2007), available at <http://www.techlawjournal.com/home/newsbriefs/2007/01d.asp>; Telecommunications Reports – TR State Newswire, "Martin Hopeful That Talks on ETFs Produce Agreement" (March 28, 2007), available at [www.tr.com/insight2/content/2007/in032807/In032807-02.htm](http://www.tr.com/insight2/content/2007/in032807/In032807-02.htm).

decisions that have had – predictably – a negative impact on broadband investment and deployment in the United States:

- Deciding, in 2002, to treat broadband Internet service provided by cable companies as a deregulated “information service,” not a regulated “telecommunications service”<sup>13</sup> – a decision upheld by the Supreme Court in deferring to the FCC’s interpretation under *Chevron*.<sup>14</sup>
- Making similar findings thereafter for DSL services, broadband over power lines, and wireless broadband.<sup>15</sup>
- Deciding, in decisions issued in 2003 through 2005, to eliminate many “unbundling” provisions that previously required local telephone companies to make network facilities used to provision broadband services, particularly fiber optic facilities, available to nascent competitors who typically lack the financial resources or the access to the rights-of-way to deploy their own fiber.<sup>16</sup>

In addition, NASUCA agrees with the following concise summation of the problems created by the FCC’s past policies and decisions regarding broadband offered by one authority, John Windhausen:

While the 1996 amendments to the Federal Communications Act (“Act”) authorized competitors to lease the facilities of the telephone companies at cost-based rates, the FCC’s rulings made most – if not all – of the interconnection, open access and network sharing requirements of the Act inapplicable to broadband service. Although the FCC asserted that its decisions were intended to “spur additional fiber investment by the

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<sup>13</sup> See *In re: Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798, 4802 (March 15, 2002).

<sup>14</sup> See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), applying *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

<sup>15</sup> See *In re: Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 14853 (Sept. 23, 2005) (determining wireline DSL is an information service); *In re: United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 F.C.C.R. 13281 (Nov. 7, 2006) (determining broadband over powerline service to be information service); *In re: Wireless Broadband Internet Access Services Order*, Declaratory Ruling, 22 F.C.C.R. 5901 (March 23, 2007) (determining broadband over wireless to be information service).

<sup>16</sup> See *In re: Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 F.C.C.R. 2533 (Feb. 4, 2005); *In re: Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Reconsideration*, 19 F.C.C.R.20293 (Oct. 2004) (eliminating unbundling obligations for fiber-to-the-curb (“FTTC”)); *In re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 F.C.C.R. 16978, 17145 ¶278 (Aug. 21, 2003) (eliminating unbundling obligations for fiber-to-the-home (“FTTH”)).

telephone companies,” the agency’s action effectively precluded competitors from providing service to many homes and businesses across the country because they do not have the resources to build out entirely redundant broadband-capable networks. Since cable, telephone, and wireless companies do not have to make their broadband networks services open to and accessible by independent Internet service providers (“ISPs”), such as AOL and EarthLink, where once the United States had hundreds of independent ISPs, cable and telephone giants now dominate the provision of Internet access service nationwide.<sup>17</sup>

FCC decisions have led to reduced investment in broadband networks and diminished competition in broadband services, both of which have caused the United States to fall behind many developed countries in terms of broadband deployment, subscription and capabilities. For example:

- Data compiled by the International Telecommunications Union (“ITU”) shows that the United States’ worldwide ranking, in terms of broadband subscribers per 100 persons, has dropped every year since 1999, from 3rd to 22nd in 2007.<sup>18</sup> The ITU’s most recent report likewise notes that, from 2002 through 2007, the United States dropped from 11th to 17th on the ITU’s overall Information and Communications Technology (“ICT”) Development Index.<sup>19</sup>
- Similarly, the Organisation for Economic Co-operation and Development (“OECD”) shows the United States declining, in terms of broadband subscribers per 100 persons, from 10th in December 2003 to 15th in June 2008.<sup>20</sup>
- The U.S. also lags in broadband affordability, placing 11th (behind Portugal) in terms of average broadband monthly price per advertised Mbps, according to the OECD.<sup>21</sup>

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<sup>17</sup> John Windhausen, “Building A Stronger America: A Plan to Extend Super-Fast Broadband Connections to All Americans,” A Century Foundation Report, (Jan. 27, 2009) (“Windhausen”), pp. 5-6 & Figure 1, available at <http://www.tcf.org/Publications/mediapolitics/windhausen.pdf>.

<sup>18</sup> *Id.*, p. 11. See International Telecommunications Union, ICT Statistics Database, available at <http://www.itu.int/ITU-D/ICTEYE/Indicators/Indicators.aspx>.

<sup>19</sup> See “Measuring the Information Society - The ICT Development Index, 2009 Edition,” Table 4.2, p. 22 (March 2, 2009).

<sup>20</sup> OECD Directorate for Science, Technology, and Industry, Organisation for Economic Co-Operation and Development, OECD Key ICT Indicators, “Broadband subscribers per 100 inhabitants in OECD countries,” available at [http://www.oecd.org/document/23/0,3343,en\\_2649\\_34225\\_33987543\\_1\\_1\\_1\\_1.00.html](http://www.oecd.org/document/23/0,3343,en_2649_34225_33987543_1_1_1_1.00.html). There have been questions raised about the specifics and significance of these rankings, but they certainly do not show stellar broadband performance – in deployment, subscription, speed or pricing – for the United States.

<sup>21</sup> OECD Directorate for Science, Technology, and Industry, Organisation for Economic Co-Operation and Development, OECD Broadband Portal, “Average broadband monthly price per advertised Mbit/s, by country, USD PPP” (Oct. 2007), available at <http://www.oecd.org/dataoecd/22/45/39575011.xls>.

- Over the period 2005-2008, broadband growth in rural and low-income areas of the U.S. continued to lag behind growth in urban, suburban and high-income areas, resulting in a growing “digital divide” in this country.<sup>22</sup>

Moreover, the FCC’s “advanced services” reports, required under 47 U.S.C. § 706, compounded the consequences of bad policy-making and decisions by glossing over their adverse consequences, by assuring Congress – and Americans – that “all is well,” based on a number of glaringly flawed assumptions and logic. Those flawed assumptions and logic include the following, again summed up nicely by Mr. Windhausen:

- Until very recently, the FCC defined “advanced services” as any service providing transmission speeds of 200 kbps in any direction.<sup>23</sup> With such a jarringly low standard, it is hardly surprising that year after year the FCC has concluded that Americans have reasonable access to advanced service in its reports.

- It is by now well understood that the FCC’s assumption that a single subscriber to high-speed services in a zip code means such service is available to anyone located in that zip code is highly misleading and, empirically speaking, tells regulators virtually nothing about actual service deployed to customers, service capabilities, the actual subscribership to broadband service, the price of broadband service, etc.<sup>24</sup>

- While the most recent FCC “advanced services” report notes America’s fifteenth-place ranking in broadband subscription, the agency offered several less-than-convincing arguments in support of its conclusion that this ranking is of no concern, to-wit:

- The FCC notes that the U.S. has the largest total number of broadband subscribers (about 66 million), which is more than the total number of broadband subscribers of the top twelve ranked countries combined. However, by extension, the U.S. would also be one of the world leaders in the number of people who are not subscribed to broadband service.

- The FCC claimed broadband statistics depend upon the geography and population distribution of the country but ignored

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<sup>22</sup> See John B. Horrigan, “Home Broadband Adoption 2008,” Pew Internet and American Life Project, p. 3 (July 2008), available at [http://www.pewinternet.org/pdfs/PIP\\_Broadband\\_2008.pdf](http://www.pewinternet.org/pdfs/PIP_Broadband_2008.pdf).

<sup>23</sup> Compare *In re: Inquiry Concerning the Deployment of Advanced Telecommunications Capability Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Fifth Report (June 12, 2008), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-08-88A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-88A1.pdf), with *In re: Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans*, Report and Order and Further Notice of Proposed Rulemaking, 23 F.C.C.R. 9691, 9700-01, ¶20 & n. 66 (June 12, 2008).

<sup>24</sup> The FCC now collects data on a census tract level, but the basic criticisms of its reporting remain valid.

the fact that while low-speed broadband services have already been deployed to almost all American homes, most Americans are still not subscribing because of the high price and lack of competition, as well as OECD data that suggests there is very little correlation between a country's rurality (for instance, Sweden or Finland) and broadband penetration.

- The FCC claimed the U.S. market is distinctive because of its multiple broadband platforms while most other countries are dominated by DSL service but this claim was contradicted by the FCC's own data which shows the actual market presence of satellites and broadband-over-power-line platforms is negligible, and that wireless services do not generally have enough capacity to provide robust broadband services. Moreover, the FCC's assertion about the availability of multiple service providers and platforms ought to produce higher, not lower, broadband subscription rates than other countries.
- The FCC noted the prevalence of wireless services, including Wi-Fi "hot spots," that are not taken into account in the OECD rankings, but made no attempt to compare U.S. wireless broadband capabilities with those in other countries, surprising since European countries are known to have more wireless users than North America.<sup>25</sup>
- Although the FCC established a "Federal-State Joint Conference on Advanced Services in 1999," this body submitted its last report to the FCC in November 2002 – over six years ago. Even in 2002, the Joint Conference offered a more sobering assessment of broadband deployment in the U.S., concluding:

[M]any rural areas remain without broadband service and broadband providers have slowed the pace of deployment. Subscriber growth has declined relative to the growth rates of earlier years. Current monthly pricing for broadband, in connection with a lack of compelling applications and other factors have resulted in disappointing take rate levels.

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While over 13 million American households currently justify the benefits of broadband service, a large percentage of consumers will

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<sup>25</sup> Windhausen, at pp. 17-18.

only be persuaded with higher personal utility gains from broadband service or with lower prices.<sup>26</sup>

To NASUCA's knowledge, the FCC never acted upon the concerns noted in the Joint Conference's 2002 report, nor does the FCC's website note any further meetings of the Joint Conference since 2002.

**d. If Congress' Goal Truly Was More Competition, Leading to Better Service and Lower Prices, That Goal Has Largely Been Frustrated By FCC Policies and Decisions.**

The results of the FCC's decisions – with respect to wireline, wireless and broadband services – could hardly have been the result Congress was seeking when it enacted the 1996 amendments to the FCA. These results were also not those that the FCC declared would flow from its decisions while it rejected the concerns voiced by NASUCA and others about the anti-competitive, anti-consumer consequences of those decisions.

As Congress put it, the 1996 amendments to the FCA were intended to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”<sup>27</sup> The legislative history of the 1996 amendments, predictably, is replete with statements of Congress to the same effect.<sup>28</sup> To achieve its goals, the amendments enacted by Congress established a “competition first, deregulation later” approach, “preserv[ing] existing ‘rules of the road’ while market forces are permitted to develop, but which cease to have effect when those forces have developed to the point that they are sufficient to protect consumers.”<sup>29</sup>

The FCC's decisions, however – and those of several courts, particularly the D.C. Circuit – have largely frustrated attainment of these goals. To quote Mr. Windhausen one more time:

Unfortunately, the deregulatory caboose jumped ahead of the competition engine. The critical sequence enacted in the 1996 [amendments to the] Act – first ensure competition, then deregulate – was abandoned in the first half of this decade in favor of an overly simplistic deregulation-first philosophy. The [FCC] was reluctant to apply the full panoply of either telephone or cable television regulations to these new broadband services. The FCC believed that new and existing providers would invest more if they were

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<sup>26</sup> “Broadband Service in the United States: An Analysis of Availability and Demand,” Report of the Federal-State Joint Conference on Advanced Services, p. 58 (Oct. 2002), available at [http://www.fcc.gov/jointconference/services\\_study-oct2002.pdf](http://www.fcc.gov/jointconference/services_study-oct2002.pdf).

<sup>27</sup> See Pub. L. No. 104-104, 110 Stat. 56, Introductory Text.

<sup>28</sup> H. Rep. No. 104-204, pp. 1, 47, 50 & 53, *reprinted at* 1996 U.S.C.C.A.N. 10-11, 14 & 16-17; H. Conf. Rep. No. 104-458, p. 113, *reprinted at* 1996 U.S.C.C.A.N. 124.

<sup>29</sup> H. Rep. No. 104-204, p. 203, *reprinted at* 1996 U.S.C.C.A.N. 96;

unencumbered by government bureaucracy. As a result, the U.S. government abandoned the effort to promote competition, and turned a blind eye to the provisions of the 1996 Act that directed it to promote broadband investment.<sup>30</sup>

As the materials provided in the foregoing sections make clear, the competition first, deregulate second approach adopted by Congress has not been honored by the FCC, with the result that the pro-consumer benefits sought in the 1996 amendments (*i.e.*, increased deployment of advanced services, lower prices for service, better service quality) have not been realized. Moreover, without a major reversal of course by the FCC, those benefits are likely to become ever harder to realize. Recognizing that it has taken the wrong path on so many fronts, and summoning the will to admit error and reverse course is the most significant, even existential, challenge the FCC faces.

**2. Please give us your opinions on the following issues:**

- a. Transparency in decision-making at the FCC**
- b. Timeliness and clarity of FCC's decisions**
- c. The public comment and ex parte comment process at FCC**
- d. FCC's merger review process & enforcement of merger conditions**
- e. Harmonized regulatory treatment of competing services/industries**

**2a. Transparency in decision-making at the FCC.**

The FCC's decision-making process has been virtually a "black box" from the perspective of parties that are not based in Washington, DC and that lack the financial and other resources to maintain regular meetings with the Commissioners and their staff, or Staff of the various bureaus and offices within the FCC. The chief source of information regarding matters that are being circulated for decision within the agency often has been rumors or non-attributed news accounts. While the FCC Daily Digest *does* provide timely and accurate information regarding decisions and public notices issued by the FCC, it provides virtually no information to indicate that a draft order is close to being ready for circulation to the Commissioners, which is usually an event that triggers final attempts to meet with staff or the Commissioners to address potentially critical questions or issues. However, it has been our experience that industry representatives almost always are able to learn where orders are internally within the FCC – if only because industry representatives are able to "camp out" on the 8th Floor, something NASUCA and other groups rarely, and members of the public virtually never, can do.

Moreover, not all FCC decisions or actions are addressed at the agenda meetings and, until fairly recently, these non-agenda actions were often hidden from public view. Current practice is for the FCC chair to distribute proposed orders and other items for consideration to the other commissioners "on circulation" at least three weeks prior to an agenda meeting. Former Chairman Martin recently adopted the practice of maintaining, on the FCC's publicly-accessible website, a list of items on circulation, updated as

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<sup>30</sup> Windhausen, p. 4,

necessary.<sup>31</sup> This practice gives interested parties, as well as the public in general, notice that some action in a particular docket is imminent. NASUCA supports continuation of this practice in the future.

## **2b. Timeliness and clarity of FCC's decisions.**

The FCC is dogged by a lack of timeliness in responding to formal requests for action submitted to it by outside entities – whether members of the public, industry or even federal appeals courts that have remanded order to the FCC for further action or clarification. Nor is delay limited to only those matters thrust upon the FCC. The FCC is often exceedingly slow to act even upon matters that the FCC itself has initiated. This delay is all the more frustrating when coupled with the fact that the agency frequently imposes very tight time-frames for the submission of comments in response to the FCC's public notice – and NASUCA typically sees comment periods of 30 days or less for initial comments and 45-60 days for reply comments. While there are many examples of dilatory agency action, the following are particularly noteworthy.

### **(i) Responding to formal requests for action.**

In March 2005, CTIA filed a petition seeking a declaratory ruling from the FCC that early termination fees (“ETFs”) imposed by wireless carriers upon customers who terminate their service prior to the expiration of their service contract's term are “rates” and therefore, under 47 U.S.C. § 332(c)(3)(A), not subject to state regulation.<sup>32</sup> The comment period closed on August 25, 2005. Since then there have been numerous *ex parte* submissions and meetings, and an effort by former Chairman Kevin Martin to cajole some of the consumer advocate groups opposing CTIA's petition to agree to preemption in exchange for some degree of federal oversight of wireless ETFs. More than four years out, however, there is little sign this proceeding will be brought to a conclusion. Meanwhile, consumers challenging wireless carriers' ETFs continue to have to address the carriers' argument that ETFs are “rates” and that state courts (or agencies) are without jurisdiction to address the fees under state law.<sup>33</sup>

The FCC's foot-dragging becomes more nettlesome when the question of forbearance under 47 U.S.C. § 160 is involved. That provision of the FCA, enacted in 1996, provides that the FCC may forbear from applying any provision of the statute or its regulations to any telecommunications provider or service if the agency determines that: (1) enforcement of the law is not needed to ensure that charges, practices, etc. are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the law is not needed to protect consumers; and (3) forbearance from applying the law is

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<sup>31</sup> See [http://www.fcc.gov/fcc-bin/circ\\_items.cgi](http://www.fcc.gov/fcc-bin/circ_items.cgi).

<sup>32</sup> See *In re: CTIA's Petition for Declaratory Ruling Regarding Early Termination Fees in Wireless Service Contracts*, Petition, WT Docket No. 05-194 (filed March 15, 2005).

<sup>33</sup> See, e.g., *Ayyad v. Sprint Spectrum*, Case No. RG03-121510, Proposed Statement of Decision (Cal. Super. Ct., Alameda County, July 28, 2008).

consistent with the public interest.<sup>34</sup> Moreover, carriers (and carriers alone) may petition the FCC to forbear from applying any provision of the FCA under these three criteria and, if the FCC fails to act on the petition within one year, the petition is deemed granted.<sup>35</sup> Not only is the carrier's petition deemed granted if the FCC fails to grant or deny the petition within a year but, at least according to the D.C. Circuit, judicial review of the FCC's "deemed granted" action is not available.<sup>36</sup> The final insult that flows from FCC inaction under 47 U.S.C. § 160 is that states are prohibited from enforcing the law once forbearance is granted, or deemed granted.<sup>37</sup>

## **(ii) Responding to federal court remands.**

FCC tardiness has also forced parties to have to seek mandamus from federal appeals courts in order to force the agency to respond to court remands where FCC orders have been challenged and found wanting in some respect. For example, the FCC failed for six years to respond to a court order that the agency provide some acceptable legal justification for its interim rules excluding dial-up Internet traffic from the reciprocal compensation requirement set forth in 47 U.S.C. § 251(b)(5), resulting in the appeals court finally issuing a writ of mandamus to the agency in response to a competitive carrier's request (it had been denied reciprocal compensation from Verizon as a result of prior FCC orders).<sup>38</sup> Similarly, Qwest Corporation and three state commissions (Maine, Vermont and Wyoming) recently sought a writ of mandamus from the 10th Circuit, requiring the FCC to respond to its 2005 remand order directing the agency to take measures to reform the non-rural, high-cost federal Universal Service Fund, as required by 47 U.S.C. § 254.<sup>39</sup>

## **(iii) Acting in matters it initiates.**

Even in proceedings initiated by the agency itself – and in which it has a particularly strong interest – the FCC is notoriously slow in ruling, if it rules at all. For example, when the FCC rejected NASUCA's petition for a declaratory ruling regarding whether carriers' "regulatory" line item charges complied with the agency's "Truth-in-Billing" and other rules on March 18, 2005, it also issued a further notice of proposed

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<sup>34</sup> 47 U.S.C. § 160(a).

<sup>35</sup> 47 U.S.C. § 160(b).

<sup>36</sup> See *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007).

<sup>37</sup> 47 U.S.C. § 160(e).

<sup>38</sup> *In re: Core Communications*, 531 F.3d 849 (D.C. Cir. 2008). The D.C. Circuit denied an earlier petition for mandamus filed by Core Communications in 2005, making it clear that the denial was, without prejudice to re-filing in the event of "significant delay" – delay for which the court rebuked the agency in its 2008 order.

<sup>39</sup> *In re: Qwest Corporation*, No. 09-9502, Petition for writ of mandamus (10th Cir., Filed Jan. 14, 2009). The petitioners and the FCC subsequently negotiated a timetable whereby the agency would respond to the 10th Circuit's remand, in light of which the court issued an order denying the petition as moot. *Id.*, Order, p. 2 (10th Cir., Issued March 20, 2009).

rulemaking proposing a series of actions that would address carriers' billing disclosures, sales and marketing practices but also preempt state regulation of such matters.<sup>40</sup> The comment period closed on the FCC's proposed rulemaking on July 25, 2005. Although a series of *ex parte* submissions were filed, no further action has been taken by the agency in the four years since the proposed rulemaking's release.

Another proceeding initiated by the FCC in which it has long delayed taking final action deals with the regulatory status of Internet Protocol ("IP") enabled services.<sup>41</sup> The FCC issued its notice of proposed rulemaking on March 10, 2004 and, among other things, sought comment regarding the following questions: (1) "the extent to which access charges should apply to Voice-over-Internet Protocol ("VoIP") and other IP-enabled services;" and (2) how to classify the providers of these services – whether as providers of telecommunications services subject to regulation under Title II of the FCA, or providers of information services subject to regulation under Title I of the FCA. The comment period has long since closed in this proceeding, yet the FCC still has not issued an order. And the absence of a comprehensive regulatory judgment about the regulatory, and thus jurisdictional, character of IP-enabled services, has resulted in the FCC's issuance of a series of conflicting and contradictory orders that have left courts, state commissions, industry, the public and other branches of the federal government completely confused – and this is not just NASUCA's assessment, it is Acting Chairman Copps' opinion as well.<sup>42</sup>

Similarly, "interim" or "transitional" decisions issued by the FCC often have a way of becoming permanent decisions through lack of follow up action by the agency. For example, there is the FCC's May 2000 order that adopted an industry-proposed settlement of outstanding issues concerning access charges and universal service that moved, on a massive scale, access costs from carriers to end-users, regardless of users' actual usage or calling patterns. That order was to have been in effect for five years but remains in effect today.<sup>43</sup> Or consider

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<sup>40</sup> See *In re: Truth-in-Billing and Billing Format*, Second Report and Order, Declaratory Ruling and Further Notice of Proposed Rulemaking, 20 F.C.C.R. 6448 (2008).

<sup>41</sup> See *In re: IP-Enabled Services*, Notice of Proposed Rulemaking, 19 F.C.C.R. 4863 (2004).

<sup>42</sup> On this very point, Chairman Copps wrote eloquently that:

*But make no mistake, the real villain here is not the decision we reach today. It is the fact that this basic statutory question [regarding IP-enabled services] has not yet been decided, even years after it first became clear that the Commission needed to do so in order to dispel the unwelcome uncertainty that presently infects this set of issues. This is most decidedly not a situation of my choosing. Indeed, as I have stated on countless occasions over the past few years, we should have dispelled this regulatory fog years ago – when broadband and VoIP were still emerging technologies and not the mainstream offerings they are today – through an open, general proceeding that solicits comment from the public as well as all affected industries and stakeholders.*

*In re: Bright House Networks v. Verizon California*, Memorandum Opinion and Order, 23 F.C.C.R. 10704, 10728 (June 23, 2008) (emphasis added).

<sup>43</sup> See *In re: Access Charge Reform*, Sixth Report and Order, etc., 15 F.C.C.R. 12962 (rel. May 31, 2000) ("CALLS Order").

the “interim freeze” the FCC established for jurisdictional separations – the process whereby incumbent local exchange carriers apportion regulated costs between the intrastate and interstate jurisdiction – nearly eight years ago and which it recently proposed extending yet again.<sup>44</sup> The FCC cannot continue to adopt “interim” solutions, often based on a less than fully developed record, that become “permanent” when they are never revisited and never expire according to their terms.

**(iv) Delay in releasing decisions.**

Occasionally, the FCC announces its decision, and the general parameters of that decision, but then delays for a significant time the release of the text of the order setting forth the specifics of the agency’s decision and its supporting rationale. The most egregious examples of this phenomenon was in the FCC’s docket to set the list of ILEC network elements that are to be made available to competitors under 47 U.S.C. § 252. First, on remand from the D.C. Circuit, the FCC announced the Triennial Review Order (“*TRO*”), on February 20, 2003. The text of the *TRO* was not released until August 21, 2003 – six months later. Then, when the D.C. Circuit also reversed *TRO*, the FCC announced the so-called Triennial Review Remand Order or “*TRRO*” on December 15, 2004 but did not release the text until nearly two months later, on February 4, 2005.”<sup>45</sup>

In response to all of these four types of delay, NASUCA would note that the simple fact is that the telecommunications world moves quickly: Carriers introduce new services, pricing schemes and practices. Sometimes these changes benefit consumers but frequently they do not, especially when the carriers can take advantage of a regulatory void created by the FCC’s muddled and delayed decision-making. For obvious reasons, the FCC needs to become far more expeditious and nimble in responding to the changing communications marketplace and regulatory environment. Accordingly, we offer the following recommendations:

- Any FCC proceeding, whether initiated by the agency or not, should be concluded by final agency action within 24 months of the date established for reply comments in the FCC’s public notice.
- The FCC should be permitted to extend this 24-month period once, by order, for up to six months. In its order extending the time frame for action, the FCC should be obligated to explain the reasons and need for the extension.
- The FCC should be required to annually report to Congress the number and nature of any proceeding that has not been concluded within the above time frame, including extensions, and include an explanation why the proceeding was not concluded within such time frames.

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<sup>44</sup> See *In re: Jurisdictional Separations and Referral to the Federal-State Joint Board*, 16 F.C.C.R. 11382 (, 11387-88, para. 9 (rel. May 22, 2001); see also *id.*, Notice of Proposed Rulemaking, CC Docket No. 80-286 (rel. March 27, 2009).

<sup>45</sup> See n. 5 above.

- Congress should make it clear that, in any situation in which the FCC is “deemed” to have acted (*e.g.*, 47 U.S.C. § 160), such “deemed” action is subject to judicial review *de novo* under both the Hobbs Act and the FCA, and further, such “deemed” action is entitled to no deference under either *Chevron* or *Christensen*,<sup>46</sup> nor to any presumption of reasonableness.
- All orders must be released within 30 days of the date of the order’s adoption by the FCC. The FCC should be permitted to extend this 30-day period once, by order, for up to 15 days. In its order extending the time frame for action, the FCC should be obligated to explain the reasons and need for the extension.
- The FCC must reject any effort by an outside party to communicate with it regarding the substance of any action during the period between an order’s adoption and release.

**2c. The public comment and ex parte comment process at FCC.**

**(i) Current FCC comment procedures.**

As noted above, the FCC frequently provides very short time frames within which interested parties must submit initial and reply comments to the public notice the agency provides regarding any particular proceeding. Most often, however, the FCC releases notices of proposed rulemakings that provide little, if any specific rules that the agency contemplates adopting. Instead, FCC proposed rulemakings are often more akin to a notice of inquiry – seeking parties’ comments and perspectives regarding a broad range of topics and issues rather than specific rules that the agency is considering adopting. A good example of such a “proposed rulemaking” was the FCC’s 2005 proposed rulemaking in its Truth-in-Billing docket.<sup>47</sup> In that notice, the FCC sought comment generally regarding how carrier charges should be organized and displayed on customers’ monthly bills – not about specific rules that the agency was considering adopting – such as:

We solicit comment on how we should define the distinction between mandated and non-mandated charges for truth-in-billing purposes. Should we define government "mandated" charges as amounts that a carrier is required to collect directly from customers, and remit to federal, state or local governments? . . .

Another possible distinction between government mandated and non-mandated charges could be based on whether the amount listed is remitted directly to a governmental entity or its agent. . . . *We seek comment on these potential distinctions between government mandated*

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<sup>46</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Christensen v. Harris County*, 529 U.S. 576 (2000).

<sup>47</sup> See *In re: Truth in Billing and Billing Format*, Second Report, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 20 F.C.C.R. 6448.

*and non-mandated charges that we have set forth, as well as any others that commenters may wish to propose. It would be helpful if commenters indicate how whatever proposal they support is in accord with our truth-in-billing policy goals and other policy considerations, and if they address how whatever distinction and definitions they advocate comport with Commission precedents and/or industry efforts to address billing and other consumer issues. We also encourage commenters to assess the ease or difficulty of administering any proposed distinction between government mandated and non-mandated charges. . . .*

*We seek further comment on the mechanics of placing government mandated fees and taxes in a section of a bill separate from all other charges, and we recognize that some of these specifics may depend largely on how we distinguish ultimately between government mandated and non-mandated charges. Should a bill only separate government mandated from non-mandated charges, or should it require separation of categories of charges beyond merely government mandated and non-mandated? In addition, should the labeling of such categories of charges be subject to imperative national uniformity, and if so, what should these categories be called?<sup>48</sup>*

Such lack of specificity in proposed rulemakings is problematic since the FCC apparently feels that, because it has issued a “notice” of proposed rulemaking, it has *carte blanche* to adopt any rules that may find support in something a party said in general comments or *ex parte* communications. Such an approach is more akin to rulemaking “by ambush” and violates the spirit, if not the letter, of the notice-and-comment requirements of the Administrative Procedures Act (“APA”).<sup>49</sup>

A corollary problem to vague rulemakings undertaken by the FCC is the lack of opportunity for parties to comment upon any specific rules that the agency ultimately decides to adopt, or to address the merits or demerits of the agency’s rationale in proposing such rules. In this regard, NASUCA notes the agency’s departure in recent years from its former practice of publishing a “tentative decision” prior to adoption of final rules.<sup>50</sup> Such tentative decisions gave interested parties a final opportunity to speak directly, in specific terms, to the merits or demerits of particular rules or the FCC’s rationale for their adoption.

Similarly, the FCC has in recent years adopted broad, generally applicable legal requirements or prohibitions that apply prospectively, in the context of what the agency

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<sup>48</sup> *Id.* at 6469-71, ¶¶40-44 (emphasis added).

<sup>49</sup> *See* 5 U.S.C. § 553(b).

<sup>50</sup> *Compare, e.g., In re: Computer II*, Tentative Decision, 72 F.C.C.2d 358 (1979), *with id.*, Final Decision, 77 F.C.C.2d 384 (1980).

characterizes as “adjudications.”<sup>51</sup> In some instances, such as the FCC’s declaratory ruling that all state laws requiring or prohibiting wireless carriers’ line item charges were preempted, the FCC provided little or no advance notice to interested parties that such sweeping pronouncements are planned. Not only are the federal APA’s provisions likely violated by such action but parties’ due process rights are similarly harmed by FCC action that fundamentally alters or even abrogates their legal rights and obligations without providing advance notice of such action and an opportunity to fully respond to such action.

In light of the foregoing concerns, NASUCA recommends the following actions should be implemented to improve the FCC’s processes for eliciting and considering public comment regarding proposed agency action:

- Establish longer time frames for public comment in proposed rulemakings or in other proceedings in which the FCC proposes to adopt broadly applicable national policies that may have the force and effect of law. Unless required by a short action deadline imposed by statute, initial comments should be due no less than 60 days following publication in the Federal Register of the notice of proposed FCC action, with reply comments due no less than 30 days after initial comments.
- Make greater use of Notices of Inquiry and Advanced Notices of Proposed Rulemaking in order to solicit comments on broad issues and topics upon which the FCC seeks input and that may be ultimately incorporated in proposed rules. Concomitantly, cease the agency’s current practice of issuing notices of proposed rulemaking that contain no specific proposed rules but instead seek generalized, broad comment on courses of action the agency should take.
- Provide Notices of Proposed Rulemaking only when the agency has specific rules that it intends to adopt and evidence or rationale supporting the adoption of such rules.
- Provide public notice of Tentative Decisions and or “adjudications” that will have broad, prospective applicability to stakeholders as a class, rather than to an individual party to an agency proceeding, and allow public comment before adopting a final decision.

**(ii) The FCC’s current *ex parte* process.**

The FCC’s current *ex parte* process is established in the agency’s procedural rules.<sup>52</sup> Almost all FCC proceedings are designated as “permit-but-disclose,” meaning that

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<sup>51</sup> NASUCA wishes to make it clear that it does not concede that such FCC actions constitute adjudications rather than rulemakings subject to the notice and comment requirements of the APA.

<sup>52</sup> See 47 C.F.R. §§ 1.1200 – 1.1216. Section 1.1206 of the FCC’s rules is the critical provision setting forth requirements for the vast majority of *ex parte* presentations submitted to the agency.

*ex parte* communications with the agency are allowed. Except for prohibiting *ex partes* submitted after the Sunshine period expires (subject to several exemptions), the FCC's rules contain virtually no limits on the number of *ex partes* that may be presented nor do the rules obligate parties to provide notice to other parties in a proceeding of the submission (subject to an exception where the *ex parte* is linked to a petition for declaratory ruling that would preempt state law).

As noted above, the FCC often provides very short time frames within which interested parties must submit initial and reply comments to the public notice the agency provides regarding any particular proceeding, yet proceedings remain "open" for months or years after the close of the public comment period. Parties – particularly representatives of regulated entities – have taken advantage of this long period of administrative limbo to make some of their most critical arguments through written or oral *ex parte* presentations to the agency. In major proceedings, the volume of *ex parte* submissions by a party may substantially exceed the volume of material submitted in the party's comments. Moreover, many of the issues that could have been addressed in a party's comments will often be addressed, sometimes for the first time, in *ex parte* submissions to the FCC. This has allowed parties to take advantage of the *ex parte* process to inject or expand upon issues and arguments that received little, if any, attention during the public comment period, essentially allowing parties to "sandbag" other parties during the comment period in order to make the critical arguments in *ex parte* submissions – submissions that other parties may never see or to which they may not have an adequate opportunity to respond. This has been an especial problem in forbearance proceedings before the FCC, and has been exacerbated by the lack of procedural rules tailored to forbearance.

NASUCA returns to two examples to support these criticisms: (1) the FCC proceeding in response to NASUCA's petition for a declaratory ruling that carriers' "regulatory" line item surcharges violated, among other things, the agency's Truth-in-Billing rules;<sup>53</sup> and (2) the proceeding initiated in response to CTIA's petition for a declaratory ruling that wireless ETFs are "rates" and thus not subject to state regulation.<sup>54</sup>

In the Truth-in-Billing proceeding, NASUCA petitioned the FCC to issue a declaratory ruling prohibiting telecommunications carriers from imposing monthly line-item charges, surcharges or other fees purporting to recover costs of complying with government regulations unless such charges have been expressly mandated or authorized by the government. NASUCA asserted that such line item charges generally recovered the carriers' ordinary operating costs and served only to confuse consumers and inhibit their ability to make informed choices about the price of carriers' service, in violation of either or both the FCC's "Truth-in-Billing" order or 47 U.S.C. §§ 201-202. Although the FCC ultimately denied NASUCA's petition, it went far beyond the scope of issues raised in that petition, dedicating most of its efforts to preempting states from

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<sup>53</sup> *In re: NASUCA Petition for Declaratory Ruling Regarding Carrier Line Item Charges*, Petition, CG Docket No. 04-208 (filed March 31, 2004).

<sup>54</sup> *See In re: CTIA's Petition for Declaratory Ruling Regarding Early Termination Fees in Wireless Service Contracts*, Petition, WT Docket No. 05-194 (Filed March 15, 2005).

regulating wireless carriers' use of line item charges (and indeed, proposing to preempt any state regulation of any carrier's billing practices – wireless or otherwise).

The FCC never provided any notice to NASUCA or the public that it was contemplating preemption in response to NASUCA's petition.<sup>55</sup> Nor could NASUCA or a member of the public have foreseen that state preemption was a possible result of the proceeding based on the petition itself, since nowhere in the petition did NASUCA suggest that state laws ought to be preempted. Instead, as the FCC candidly acknowledged in its order, preemption was urged by wireless carriers, “[p]rimarily in *ex parte* submissions” made after the comment period closed.<sup>56</sup> In other words, with no public notice and chiefly as the result of *ex parte* communications received from industry after the comment period closed, the FCC went off on its course to cavalierly preempt state laws – many of which were related to long-standing regulatory assessments or state taxes – to the extent those laws impacted wireless carriers' line item charges.

In the second proceeding, involving CTIA's petition for a declaratory ruling that wireless ETFs are “rates,” much of the wireless industry's argument has been set forth primarily in *ex parte* submissions presented to the FCC long after the comment period closed on August 25, 2005. In large measure, the submissions argued the meaning and significance of FCC rulings released years before the CTIA proceeding was even initiated – surely these arguments could have, and should have, been made at the comment stage rather than in *ex partes* to the FCC. For example, on July 2, 2008 – nearly 3 years after the comment period on CTIA's petition closed - Sprint Nextel submitted a lengthy legal argument for preemption of state laws based largely on its construction of FCC rulings

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<sup>55</sup> See 69 Fed. Reg. 33021 (June 14, 2004). The Federal Register notice stated only:

This document seeks comment on a Petition filed on March 30, 2004, by the National Association of State Utility Consumer Advocates (NASUCA). NASUCA filed a Petition for Declaratory Ruling prohibiting telecommunications carriers from “imposing monthly line-item charges, surcharges or other fees on customers” [sic] bills unless such charges have been expressly mandated by a regulated agency.” NASUCA contends that all monthly line items are subject to the “full and non-misleading billed charges” principle adopted by the Commission in its Truth-In-Billing Order.

Likewise, the May 25, 2004 notice published by the FCC likewise gave no hint the agency might preempt state regulation in response to NASUCA's petition, instead advising the public merely that:

NASUCA argues that carriers' current uses of line-item charges are misleading and deceptive in their application, bear no demonstrable relationship to the regulatory costs they purport to recover, and therefore constitute unreasonable and unjust carrier practices and charges.

*In re: NASUCA Petition for Declaratory Ruling Regarding Carrier Line Item Charges*, Public Notice, F.C.C.R. 9541 (2004).

<sup>56</sup> 20 F.C.C.R. at 6473-74, ¶49 nn. 147-48. Although this portion of the FCC order addressed broader preemption of wireless carriers' and interstate wireline carriers' billing practices, the comments and *ex parte* submissions the FCC cited were the same as those it cited as examples of state laws preempted by Section 332(c)(3)(A). Compare 20 F.C.C.R. 6473-74, ¶49 nn.147-48 with *id.* at 6463-64, ¶31 nn. 87-88.

entered in 1999 and 2000 and district court decisions entered in 2002 and 2004.<sup>57</sup> These arguments could easily have been made in Sprint Nextel's comments rather than in an *ex parte* presentation.

What is particularly troubling about parties' use of the *ex parte* process to make their key arguments is the fact that many parties in FCC proceedings lack the manpower and resources to stay abreast of all the presentations that may be made in a proceeding. Unlike comments, which have a specific filing deadline – in other words, a finite period of time to pay close attention to – *ex parte* presentations can be made to the FCC anytime prior to the close of the Sunshine period (*i.e.*, 1 week before the FCC meeting to consider the matter).<sup>58</sup> When FCC proceedings remain open for two, three, four or even more years, the prospect of a party sneaking a critical *ex parte* “under the radar” increases significantly.

Another problem with *ex partes* is the often glaring lack of information provided in many of the notices of *ex parte* presentations submitted to the agency. Parties often meet with the Commissioners, their staff, and/or staff of the various FCC bureaus and other offices, to discuss issues related to one or more pending proceedings, present their arguments and supporting information, or to answer questions the FCC's personnel have about a proceeding. Yet the notices of these *ex parte* contacts provide little but the most general information about the meeting, other than to note who was present and to include the formulaic “brown paper bag” recitation that “the parties discussed issues relating to *x*” or “the discussions were consistent with *y*'s prior submissions.”<sup>59</sup> This practice leaves any other interested party in the dark as to, among other things, what particular issues the party initiating the meeting with the FCC sought to discuss; what particular issues FCC staff expressed interest in discussing; what questions were asked by FCC staff and what were answers given by the other party(ies).<sup>60</sup>

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<sup>57</sup> See Sprint Nextel *ex parte*, WT Docket No. 05-194 (July 2, 2008), available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6520032687](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520032687).

<sup>58</sup> 47 C.F.R. § 1.1203.

<sup>59</sup> See, e.g., CTIA *ex parte*, WT Docket No. 05-194 (May 21, 2008) (CTIA met with FCC staff “to discuss CTIA’s continued support for a determination that wireless carrier early termination fees are rates . . . and therefore are subject to the Commission’s exclusive jurisdiction.”), available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6520010665](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520010665); T-Mobile/Sprint *ex parte*, CGB Docket No. 04-208 (March 3, 2005) (“The discussion was consistent with the comments filed by T-Mobile and Sprint in the above-referenced docket.”), available at [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6517417977](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517417977).

<sup>60</sup> The FCC’s *ex parte* rules do, at least on their face, contemplate more detail being provided in memorializing oral presentations to the agency. For example, the rules provide:

A person who makes an oral *ex parte* presentation subject to this section that presents data or arguments not already reflected in that person's written comments, memoranda or other filings in that proceeding shall, no later than the next business day after the presentation, submit to the Commission's Secretary, an original and one copy of a memorandum which summarizes the new data or arguments. . . . *Memoranda must contain a summary of the substance of the ex parte presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.*

More generally, the *ex parte* process currently disproportionately favors those stakeholders that have a permanent presence in Washington, D.C. and are therefore able to – and often do – meet with the FCC and its staff on a weekly or even daily basis to discuss pending matters. State and local governments and other parties with limited resources, on the other hand, whose interests are often directly affected by ongoing proceedings, are significantly handicapped by budgetary or staffing limitations. Moreover, in at least one instance, the FCC applied its *ex parte* rules rigorously to exclude from its record a state’s written submission by a state whose laws the agency intended to preempt where the submission was sent electronically to the commissioners before the close of the Sunshine period, but which inadvertently was not filed with the FCC’s secretary until the day the period closed.<sup>61</sup>

Based on the foregoing concerns with the FCC’s comment and *ex parte* process and procedures, NASUCA recommends the following measures should be considered for adoption:

- Impose limits on the number of *ex parte* presentations that may be submitted to the FCC after the close of the comment period in pending matters, such as limiting the number of *ex parte* presentations any party (including affiliates, subsidiaries, etc.) may make or limiting the time period during which such presentations may be made. Such limits could be exceeded only upon a showing of good cause to the FCC, such as factual information discovered or developed, or legal developments – such as legislation enacted or agency or judicial decisions rendered - after the close of comment that has significant relevance to the issues presented in the proceeding.
- Enforce the current rules’ requirement that the substance of any *ex parte* presentation must be provided in some detail and that more than a one or two sentence description of the views and arguments presented is required. In addition, or in the alternative, where the notice of *ex parte* presentation fails to provide sufficient detail of the substance of the presentation, FCC staff should be required to provide the missing detail in a supplemental notice submitted no more than seven calendar days following the original *ex parte* notice.

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47 C.F.R. § 1.1206(b)(2) (emphasis added). This requirement, however, appears to be observed more in the breach than in the observance, and NASUCA is unaware of any adverse consequences that have flowed from non-compliance with the rule.

<sup>61</sup> See Vermont *ex parte*, CG Docket No. 04-208 (March 4, 2005); available at [http://fjallfoss.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch\\_v2.hts](http://fjallfoss.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch_v2.hts). Since the FCC’s secretary deemed Vermont’s notice to have been received after the Sunshine period closed, Vermont’s presentation was “associated with, but not made part of the record” and its failure to comment within the Sunshine time frame was ultimately the basis for the FCC’s motion to dismiss Vermont from the 11th Circuit appeal of the agency’s declaratory ruling preempting the state’s laws – which the court ultimately granted. See *Nat’l Ass’n of State Utility Consumer Advocates v. FCC*, 457 F.3d 1238, 1245-46 & 1248-49 (11th Cir. 2007).

- Any materials provided to the FCC during an *ex parte* presentation, or referred to by the parties during such a presentation, should either be attached to the subsequent notice of presentation or specifically identified, with appropriate citations or Internet links, to allow other parties to obtain and review the materials.
- Exempt relevant state agencies and officers – such as state utility commissions, state consumer advocates, attorneys general offices, legislators and governors’ representatives – from many of the restrictions imposed under the FCC’s *ex parte* rules by treating such agencies and officers in the same way that federal agencies and officials are treated under those rules.<sup>62</sup>
- Require parties submitting a notice of *ex parte* presentation to provide, simultaneously, a copy of the notice to the representative of any state or state agency, or association of states or state agencies, that are currently parties to the relevant FCC proceeding.

## **2d. FCC’s merger review process and enforcement of merger conditions.**

### **(i) Merger review is both perfunctory and preordained.**

The FCC’s merger review process has become both perfunctory and preordained, in favor of approval, driven primarily by the notion that “bigger is better.” As we noted above, during the last decade, the FCC has approved every merger presented to it for approval by major telecommunications carriers. As a result, the wireline telecommunications market is dominated by two national carriers – Verizon and AT&T. Likewise Verizon and AT&T dominate the wireless market – combining to control nearly 62% of the wireless market between them. Sprint Nextel and T-Mobile together account for another roughly 31% of the wireless market. These same two carriers – Verizon and AT&T – have a dominating share of the market for broadband services as well, via both Digital Subscriber Line (“DSL”) services and various fiber-to-the-x (“FTTx”) services such as FiOS (Verizon) or UVerse (AT&T).

NASUCA filed comments with the FCC opposing many of the mergers that have produced these two communications giants out of the once diverse and multi-faceted markets for local and long-distance wireline, wireless and broadband services. In fact, NASUCA commissioned a report by Economics and Technology, Inc. (“ETI”) to provide a realistic assessment of the actual extent of competition in local and long distance telecommunications and the potential impact of the SBC/AT&T and Verizon/MCI mergers thereon, to review the various regulatory events leading up to those mergers, and to develop and propose a specific policy agenda for reinvigorating the nation’s regulatory machinery to reflect the growing re-concentration and potential for re-monopolization of the United States’ telecommunications industry brought about by those mergers.<sup>63</sup>

<sup>62</sup> See, e.g., 47 C.F.R. § 1.1204(a)(5).

<sup>63</sup> Lee L. Selwyn, Helen E. Golding and Hillary A. Thompson, “Confronting Telecom Industry Consolidation: A Regulatory Agenda for Dealing with the Implosion of Competition,” Economics and Technology, Inc. (prepared for NASUCA) (April 2005); available at <http://www.nasuca.org/NASUCA%20White%20Paper%204-05.pdf>.

**(ii) Enforcement of merger conditions has been non-existent and now is largely irrelevant.**

Most, if not all, of the conditions – such as they were – imposed by the FCC as part of its approval of the mergers mentioned have long since sunset. To the best of our knowledge, the FCC has never taken any enforcement action for non-compliance with conditions imposed by the agency as a basis for approval of the mergers. Indeed, lack of FCC enforcement was virtually guaranteed since the agency adopted no measures to monitor carrier compliance with its merger conditions.

Enforcement of merger conditions simply is no longer an appropriate consideration. Instead, the FCC or Congress needs to consider restoring some of the competitive safeguards that the agency has systematically removed, or rendered inapplicable, over the past 8 years or more. These include revisiting, and reversing, the following FCC actions:

- Deciding, in 2002, to treat broadband Internet service provided by cable companies as a deregulated “information service,” not a regulated “telecommunications service”<sup>64</sup> – a decision upheld by the Supreme Court in deferring to the FCC’s interpretation under *Chevron*.<sup>65</sup>
- Making similar findings thereafter for DSL services, broadband over power lines, and wireless broadband.<sup>66</sup>
- Deciding, in decisions issued in 2003 through 2005, to eliminate many “unbundling” provisions that previously required local telephone companies to make network facilities used to provision broadband services, particularly fiber optic facilities, available to nascent competitors who typically lack the financial resources or the access to the rights-of-way to deploy their own fiber.<sup>67</sup>

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<sup>64</sup> See *In re: Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798, 4802 (March 15, 2002).

<sup>65</sup> See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), applying *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)..

<sup>66</sup> See *In re: Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 14853 (Sept. 23, 2005) (determining wireline DSL is an information service); *In re: United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 F.C.C.R. 13281 (Nov. 7, 2006) (determining broadband over powerline service to be information service); *In re: Wireless Broadband Internet Access Services Order*, Declaratory Ruling, 22 F.C.C.R. 5901 (March 23, 2007) (determining broadband over wireless to be information service).

<sup>67</sup> See *In re: Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 F.C.C.R. 2533 (Feb. 4, 2005); *In re: Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Reconsideration*, 19 F.C.C.R.20293 (Oct. 2004) (eliminating unbundling obligations for fiber-to-the-curb (“FTTC”)); *In re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand

As ETI concluded in its 2005 report for NASUCA, the federal government and state governments need to consider that the consequences of the various mergers have largely reassembled AT&T in traditional wireline telecommunications, and introduced the monopoly or duopoly to wireless and broadband services to boot. This reassessment is particularly important in light of the various deregulatory measures that have been put in place on the supposition that competition in all sectors of the US telecommunications industry had arrived, was economically sustainable, and indeed was irreversible. Virtually all states and the FCC have abandoned cost-based rate-of-return regulation in favor of various “incentive” or “market-based” systems, and have over the past decade eliminated safeguards and backstops that had been hard-wired into the early incentive regulation plans – things like inflation-related annual price cap adjustments, productivity offsets to those annual price cap changes, sharing and capping of excess earnings, and periodic reviews intended to achieve a balance between providing the Bells with incentives for efficiency while maintaining protections against monopoly abuses. Yet in many important respects, there is an even greater need for regulation of the Bell monopolies today than there was when the Bell System was whole.

Today, the Bell companies are allowed to, and do, operate in both monopoly and competitive markets using the same network assets and pool of human and other resources. Cost allocation requirements, where they even exist, are at best subject to lengthy after-the-fact reviews and virtually no effective enforcement. The Bell monopolies have enormous incentives and opportunities to shift costs to their monopoly operations while shifting revenues to other “below-the-line” business units and affiliates. And their chances of being caught are less than an ordinary taxpayer’s chances of an IRS audit – and in proportion the penalties for such cost shifting – if actually detected – are almost always far less severe.

Among other things, the federal government should consider:

- Revising price cap and other alternative regulation regimes to conform to competitive realities, so as to ensure just and reasonable rates for all consumers.
- Requiring a reinitialization of jurisdictional separations rules, so that the cost responsibility for today’s network is not assigned based on a decade-old formula.
- Reinstating and vigorously enforcing the protections, intended under 47 U.S.C. §§ 271 & 272, that consumers – and surviving competitors – deserve if any of the putative benefits of competition are to be realized.

**2e. Harmonized regulatory treatment of competing services/industries.**

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and Further Notice of Proposed Rulemaking, 18 F.C.C.R. 16978, 17145 ¶278 (Aug. 21, 2003) (eliminating unbundling obligations for fiber-to-the-home (“FTTH”)).

In the communications arena, harmonized treatment of supposedly competing services or industries, *i.e.*, leveling the playing field, has too often meant treating these services or industries in a roughly equal *but deregulatory* fashion – based on the notion that the market for these services is competitive. This approach has generally resulted in a “race to the bottom” among states and the federal government, each rushing to deregulate these services and industries with little or no evidence that the market is actually, meaningfully competitive. Indeed, the rush to deregulate is often undertaken despite evidence that suggests an absence of meaningful competition and highly concentrated markets. As NASUCA noted above, there is abundant evidence suggesting that meaningful competition is lacking in both the wireline and wireless telecommunications market, that these markets have become increasingly concentrated and are dominated by two carriers – Verizon and AT&T, and that the market for broadband services in most parts of the country is essentially a duopoly consisting of the major telecommunications carrier (Verizon or AT&T) and one of the major cable operators (Time Warner, Comcast, Suddenlink or Charter).

Unfortunately, this deregulation has also included doing away with many consumer protections for wireline services, due to the ostensible “protections” the FCC assumes – usually on faith – have been wrought by a competitive market. The truth is that such protections need to be extended to other services – wireless and VoIP among them – not removed from wireline service.

More significantly, evidence suggests that deregulation has not in fact produced the results that state and federal legislators and regulators expected, *i.e.*, lower prices and better service. The evidence is mounting that quite the opposite has actually occurred: State and federal deregulation of telecommunications and broadband services have resulted in higher prices for many services and worse service quality as well.

In light of the foregoing, NASUCA does not oppose harmonizing the treatment of competing, or at least in theory competing or substitutable services – so long as such services are regulated equally rather than equally deregulated. Accordingly, NASUCA recommends that:

- Further efforts to deregulate the markets for telecommunications and broadband services should be put on hold until a thorough and comprehensive evaluation of the state of competition nationally, regionally and on a state-by-state basis can be undertaken and completed by states and the FCC.
- At a minimum, wireline, wireless and broadband service providers should be required to make their networks available for interconnection and facilities sharing, on a lowest cost basis, to any and all providers.
- The FCC should revisit and, in large measure, reverse those decisions regarding unbundling, network sharing and interconnection criticized above.

- FCC efforts to limit or preempt state consumer protection efforts should be ceased.

### **Factors that contribute to the challenges facing the agency**

#### **3. Do you think FCC's current bureau structure is conducive to achieving the agency's goals in a changing telecommunications industry?**

NASUCA has no opinion regarding the FCC's current bureau structure per se. The problems and criticisms addressed herein are not structural, by and large, but rather are deficiencies in leadership and philosophical or managerial in nature. If the leadership of the FCC continues to follow the deregulatory, preemptive approach that has characterized the agency's decisions over the past decade or so, and continues to maintain an overly cozy relationship with industry, then changing or modifying the current bureau structure amounts to little more than "rearranging the deck chairs on the Titanic."

#### **4. What particular aspects of FCC do you think need adjusting? Do you think FCC will need any structural changes to address future challenges?**

*See response to No. 3 above.*

#### **5. What changes would you recommend to help improve the functioning of FCC? Could these changes be made now or would they require a change in regulation or legislation?**

As NASUCA noted above, structural change within the FCC is less critical than changing the agency's overall leadership, philosophy and managerial style. In that regard, NASUCA believes that Acting Chairman Michael J. Copps has already taken appropriate steps in that direction. For example, Chairman Copps has implemented the following changes – all of which NASUCA applauds:

- Holding a weekly "Chairman's Office Briefing" with the chiefs of each Bureau and Office within the agency, together with a representative from each Commissioner's office, to discuss matters and issues pending before the agency.
- Requiring requests for information directed to the agency's bureaus and offices from the Commissioners' offices to be answered directly and as quickly as possible, without requiring such requests to be routed through the Chairman's office first.
- Increasing the extent to which the FCC seeks, and obtains, advice and input from non-traditional stakeholders in agency matters.
- Making greater use of FCC advisory committees and paying greater attention to the advice and recommendations of such committees.

- Developing high-quality, timely and non-partisan reports for Congress to inform the public policy dialogue with federal legislators.
- Likewise developing White Papers on a variety of public policy issues that would be put out for public consumption to help people understand important communications issues and educate the media on important communications issues facing the country, as well as provide a source of information for both Congressional and Administration policy planning.

None of these measures require any change in regulation or legislation.

While Chairman Copps' actions represent a very timely, very necessary step in the right direction, NASUCA believes there are at least three other important matters that the FCC can, and must, address that should not require any legislative changes or traditional rulemaking procedures. *First*, the FCC should improve the intake process for informal complaints and inquiries from consumers, the content of the quarterly reports the FCC develops through the intake process, and the enforcement actions taken in response to such complaints or inquiries. *Second*, the FCC should revise its regulations governing employees' conduct in avoiding conflicts of interest and investigations by its Inspector General into well-founded complaints or comments suggesting that agency employees have violated the agency's conflict of interest rules. *Third*, the FCC should consider establishing a Consumer Advocate within the agency to ensure that communications' consumers' concerns are adequately considered by the FCC and to act as a liaison with state consumer advocates.

**(i) Revising the FCC's informal complaints intake process and reporting.**

On April 6, 2006, NASUCA met with the two bureaus responsible for handling consumer complaints to the agency and enforcement actions taken in response to those complaints (*i.e.*, the Consumer and Government Affairs Bureau and the Enforcement Bureau, or EB) to address the issues related to handling informal complaints and inquiries from consumers. NASUCA expressed concerns regarding the agency's intake procedures for informal complaints and inquiries, the subsequent processing of such complaints or inquiries, and the public reporting of informal complaints and inquiries by the FCC. Specifically, NASUCA was concerned about such things as: (1) how the FCC determined what contacts it received from consumers were "complaints" and which merely constituted "inquiries," and what, if any, what guidelines or policies governed such determinations; (2) what action FCC employees took with respect to informal complaints and whether or how the resolution of such complaints was recorded; (3) how the FCC determined whether to take further enforcement action against a telecommunications carrier that was the subject of informal complaints; (4) measures the FCC took to coordinate its complaint processing with appropriate state agencies; and (5) the lack of granularity in the FCC's quarterly reporting of informal complaints and inquiries received by the agency.

Although FCC employees were cordial and forthcoming in responding to NASUCA's concerns, a number of those concerns were never resolved. For example, NASUCA was advised that there were no clear guidelines for FCC employees to utilize in determining whether a consumer contact should be considered a "complaint" or an "inquiry." More significantly, NASUCA was advised that any contact that included a question about a carrier's service would be

characterized as an “inquiry,” even though the consumer was clearly complaining about some aspect(s) of the carrier’s service.

The GAO itself subsequently noted similar concerns in its February 2008 report regarding the informal complaint process and enforcement from 2003 through 2006.<sup>68</sup> Based on its investigation, the GAO’s report concluded that:

- While FCC assesses the impact of its enforcement program by periodically reviewing certain program outputs, it lacked the management tools needed to fully measure its outputs and manage its program.
- The EB had not set specific enforcement goals, developed a well-defined enforcement strategy, or established performance measures linked to its enforcement goals. While the FCC measured some outputs, such as the extent to which it takes enforcement action within its limitations period for assessing fines, or the time it takes to close investigations, it did not measure outcomes such as the effects of its enforcement actions on levels of compliance in certain areas.
- Limitations in the FCC’s approach for collecting and analyzing enforcement data constituted the agency’s principal challenge in providing complete and accurate information on its enforcement program and made it difficult to conduct trend analysis, determine program effectiveness, allocate FCC resources, or accurately track and monitor key aspects of all complaints received, investigations conducted, and enforcement actions taken. For example, the EB used 5 separate databases and manually searches tens of thousands of paper case files to track and monitor the extent to which each of its divisions takes enforcement action within its limitations period for assessing fines or the time it takes to close an enforcement case.

There has been no indication from the agency that the concerns NASUCA raised with the FCC in April 2006, and those noted by the GAO in February 2008, have ever been addressed internally by the FCC. Accordingly, NASUCA recommends the following actions to improve the complaint intake, enforcement and reporting procedures utilized by the FCC:

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<sup>68</sup> CITE With respect to informal complaints handled by the FCC during this period, the GAO noted that Of the approximately 454,000 informal complaints received by the FCC from 2003-2006, the CGB processed about 95% by sending a letter of acknowledgment to the complainant and, where appropriate, referred them for resolution to the company that was the subject of the complaint. Of these informal complaints, roughly 23,000 remained open at the time of GAO’s inquiry, with approximately 16% of these open from 1 to 4 years.

As for investigations by the FCC’s Enforcement Bureau (“EB”), the GAO observed that the EB conducted about 46,000 investigations from 2003-2006, in response to complaints it received directly, complaints referred to it by the CGB, violations detected through audits and inspections, and self-initiated inquiries. Of the 39,000 investigations closed by the EB, roughly 9% (3,400) were closed with an enforcement action, and approximately 83% (32,200) were closed with no enforcement. Roughly 7,200 investigations remained open at the end of 2006 and of these, roughly 19% (1,400) had been open from 1-4 years.

- Establishing clear guidelines requiring CGB staff to characterize a consumer contact as an informal complaint, rather than an inquiry, if the consumer has any complaint about a regulated entity’s service regardless of the number of questions (*i.e.*, inquiries) the consumer may also have about the regulated entity’s service or the FCC’s oversight of that service. Thus even if the bulk of a consumer’s contact with the FCC consists of questions about the regulated entity, if the consumer makes only one statement complaining about that entity’s services or practices or prices, the contact will be deemed an “informal complaint.”
- Providing greater detail and granularity to the public regarding informal complaints received by the CGB. At a minimum, the FCC’s quarterly reports should identify the following information:
  - Each regulated entity for which the number of informal complaints received equals 5% or more of the total informal complaints received by the CGB, by category and class of complaint, and the total number of informal complaints received for each such entity. For example, if the CGB receives 400 “Wireless – Early Termination Fee” informal complaints in a quarter, the FCC would report each regulated entity that was the subject of 20 or more informal complaints and also the number of informal complaints actually received regarding such entity.
  - Each state for which the number of informal complaints received equals 5% or more of the total informal complaints received by the CGB, by category and class of complaint, and the total number of informal complaints received for each state.
  - The number informal complaints, by category, opened and closed during the quarterly reporting period and the manner of resolution by category (such as “closed – provider credit issued,” “closed – provider denied fault,” “closed – customer service restored,” etc.).
- Providing quarterly reports regarding the number and character of enforcement actions commenced by the EB during the quarter, utilizing the classes and categories utilized by the CGB to report informal complaints,
- Implementing the recommendations set forth in the GAO’s February 2008 report.

**(ii) Revising the FCC’s employee conflict of interest regulations.**

The FCC’s internal regulations governing decision-makers’ recusal from further activity in proceedings once they have begun negotiating for employment outside the agency need to be tightened to eliminate gaps that contributed to actual, or apparent, conflicts of interest. Moreover, the manner in which the FCC’s Office of Inspector General (“OIG”) investigates and responds to well-founded complaints regarding such conflicts also needs to be reviewed and evaluated.

NASUCA’s suggestion stems from an its experience in one proceeding of note in which it was a primary party. In that proceeding, an FCC decision-maker may not have sufficiently self-recused from continuing to participate in matters that involved issues directly and materially

benefiting a sector of the communications industry with whom the decision-maker was negotiating employment during the period immediately preceding issuance of an FCC order ruling in the industry's favor. NASUCA subsequently raised its concerns with the FCC in correspondence addressed to the OIG, which undertook what appeared to be an especially truncated, cursory review of the facts and ultimately concluded that the employee had not acted improperly under the FCC's rules and guidelines. Not only is NASUCA concerned about the manner in which the OIG conducted its investigation, it is also concerned that the OIG apparently operates on the assumption that it is the burden of parties outside the agency to supply information and evidence that likely exists only inside the FCC, in order for the OIG to act upon a complaint that necessarily must rely on circumstantial evidence for the most part.<sup>69</sup> Likewise troubling to NASUCA were the ambiguities and gaps in the federal rules regarding disqualification of employees and recusal in these situations.

Generally speaking, the rules provide that “[a]n employee who becomes aware of the need to disqualify himself from participation in a particular matter to which he has been assigned should notify the person responsible for his assignment.” 5 C.F.R. § 2635.604(b); *see also* 18 U.S.C. § 208. In the case of decision-makers within the FCC staff, such as bureau chiefs or heads of offices, NASUCA believes the “person responsible for his assignment” is the Chairman of the FCC. Since office heads or bureau chiefs have no supervisors *per se*, it is reasonable to assume that the Chairman must be notified when such high-level employees recuse themselves from proceedings to which they have been assigned by the Chairman. That the Chairman should receive such notification makes additional sense because it is the Chairman to whom the Commission has delegated responsibility for the detection and prevention of acts, short of criminal violations, which could bring discredit upon the Commission and the Federal service.<sup>70</sup> Moreover, the Chairman, as *supervisor* of heads of offices or bureaus, is charged with determining whether, for appearances' sake, an employee who has disqualified himself should not immediately resume duties involving a company with which the employee was recently having employment discussions. *See* 5 C.F.R. § 2635.606(b).

In the matter to which NASUCA refers, it was never made clear by OIG or anyone else within the FCC precisely to whom the decision-maker communicated the recusal decision. Nor did OIG provide NASUCA with information suggesting that the scope of matters from which the decision-maker did self-recuse was ever reviewed or approved by a supervisor (*i.e.*, the Chairman). NASUCA found this of particular concern, because the scope of recusal adopted by the agency official was very narrow and did not appear to include at least two other proceedings in which the prospective employer had a material interest. Nor did OIG provide information to NASUCA regarding precisely who among the numerous staff participating in relevant proceedings was informed of the decision-maker's disqualification. And finally, OIG failed to assure NASUCA that it had interviewed relevant staff or reviewed internal documents to ensure that the subject of NASUCA's complaint had indeed been fully removed from internal discussions and decisions regarding the matters as to which the disqualification applied.

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<sup>69</sup> NASUCA representatives subsequently met with OIG staff to discuss its concerns. To the best of our knowledge, no definitive actions were taken by OIG in response to NASUCA's concerns.

<sup>70</sup> *See* 47 C.F.R. § 19.735-104(a).

The sensitive nature of NASUCA's complaint and concerns necessarily limits its ability to fully discuss them here, but based on our experience we recommend that:

- The FCC, in conjunction with other relevant federal agencies, should thoroughly review the commission's internal practices and procedures regarding employee disqualification and recusal from further participation in matters pending before the FCC, in order to ensure that both the spirit and letter of federal rules are satisfied.
- The FCC, in conjunction with other relevant federal agencies, should thoroughly review the standards and practices of the OIG in investigating reasonable complaints regarding ethics concerns involving agency staff. At the very least, the FCC should make it clear that once a reasonable complaint has been lodged, setting forth in sufficient detail the grounds upon which relies, the burden shifts to agency staff in question to demonstrate that the rules were fully complied with. Moreover, OIG should be directed to provide complainants with specific evidence upon which it relies when it concludes an investigation with a determination that no violation of the agency's ethics rules has occurred.

**(iii) Establishing an FCC Consumer Advocate.**

Consistent with Acting Chairman Copps' statements regarding seeking out the advice and input of non-traditional stakeholders in agency matters, and to ensure that FCC decisions adequately take account of consumers of communications services, the agency should establish a National Consumer Advocate who would exist and function independently of the existing bureaus and offices within the agency. Among other things, NASUCA recommends that:

- The FCC's Consumer Advocate should serve primarily as a liaison between state consumer advocates' offices and the FCC, providing for a greater flow of information between the states and the FCC regarding communications issues that affect consumers nationally, regionally or in individual states. In no way, however, should the FCC's Consumer Advocate be seen as a substitute for state consumer advocates; rather this officer should serve to further the state-federal partnership that must exist if consumers of communications services are to be protected from unreasonable, unjust, deceptive or unfair business practices of communications service providers.
- The FCC Consumer Advocate should serve as the Chairman's designee on advisory committees that have a significant consumer orientation, such as the Consumer Advisory Committee.
- The FCC Consumer Advocate should serve to promote the interests of consumers in communications matters and to assist in communicating state advocates' positions within and without the agency as a whole.
- The FCC Consumer Advocate should also be tasked with monitoring and providing constructive input regarding improving the agency's informal complaint and inquiry intake and

reporting processes, as well as enforcement activities undertaken by the EB regarding consumer-related matters.

- 6. From your perspective as stakeholders that interact with both the FCC and state commissions: Are there lessons learned or practices employed at the state public utility commissions that would be valuable when evaluating how FCC carries out its mission and considering options for reform?**