

**Before the
Federal Communications Commission
Washington D.C. 20554**

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| In the Matter of |) | |
| |) | |
| National Association of Regulatory |) | |
| Utility Commissioners Petition for |) | WC Docket No. 09-193 |
| Clarification or Declaratory Ruling that |) | |
| No FCC Order or Rule Limits State |) | |
| Authority to Collect Broadband Data |) | |

MEMORANDUM OPINION AND ORDER

Adopted: April 23, 2010

Released: April 26, 2010

By the Commission: Commissioners McDowell and Baker concurring and issuing separate statements.

I. INTRODUCTION

1. In this Order, we grant in part a petition for declaratory ruling filed by the National Association of Regulatory Utility Commissioners (NARUC) regarding State authority to collect data from broadband infrastructure and service providers.¹ As explained below, we conclude that the Commission has not preempted or otherwise precluded the States from mandating that broadband providers file data or other information regarding broadband infrastructure or services. In issuing this declaratory ruling, we express no opinion regarding whether the laws of any particular State authorize the State’s public utilities commission or similar agency to require the filing of such data or information. Nor do we address whether any State or group of States should, as a policy matter, engage in broadband data collection efforts that supplement ongoing federal efforts.

II. BACKGROUND

2. In its petition, NARUC requests that the Commission “clarify that no FCC-issued order or regulation limits State authority to collect any data from any broadband infrastructure or service provider.”² NARUC filed this request against the backdrop of the ongoing national effort to increase the deployment and adoption of broadband services.³ A critical element of this effort will be improving the quality and usefulness of data regarding broadband infrastructure and services. In particular, as Congress recognized in enacting the Broadband Data Improvement Act (BDIA) in October 2008,⁴ improved federal

¹ National Association of Regulatory Utility Commissioners, Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data (filed Sept. 25, 2009) (NARUC Petition).

² NARUC Petition at 1.

³ See, e.g., *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Notice of Inquiry, 24 FCC Rcd 4342 (2009) (*National Broadband Plan NOI*) (seeking comment to inform the Commission’s development of a national broadband plan). We note that the term “broadband” encompasses a wide range of telecommunications services and information services, and that broadband infrastructure typically is capable of providing, and in many cases does provide, services within both of these categories.

⁴ Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (codified in part at 47 U.S.C. §§ 1301–04).

data on broadband deployment and adoption “will assist in the development of broadband technology across all regions of the country.”⁵

3. In enacting the BDIA, Congress recognized that a number of States were attempting to collect broadband-related data.⁶ Those efforts, however, typically rely on voluntary submissions from data-holders.⁷ This reliance on voluntary submissions has made it difficult, if not impossible, for any given State to obtain comprehensive and reliable information on broadband deployment and adoption within its borders.⁸ The record indicates that States accepted a voluntary submission regime in part because of uncertainty as to whether the Commission had preempted State broadband data collection efforts.⁹

4. NARUC filed its petition in order to eliminate this uncertainty.¹⁰ The petition points out that on July 22, 2009, NARUC adopted a resolution urging the Commission to issue a declaratory ruling that it “has not asserted any general preemption of any State actions requiring broadband service providers to submit specific information, at an appropriate level of granularity as determined by the State, on broadband service locations, speeds, prices, technology and infrastructure within the State”¹¹ The petition asks that we eliminate ambiguity regarding “the scope of existing State authority” to collect data from broadband infrastructure and service providers.¹² Several parties support this request.¹³ Other parties oppose NARUC’s request, arguing that NARUC’s petition incorrectly assumes both that the States

⁵ BDIA § 102(3) *codified at* 47 U.S.C. § 1301(3).

⁶ *See* S. REP. NO. 110-204 (2007), *reprinted in* 2008 U.S.C.C.A.N. 1707, 1711, 1715; 47 U.S.C. § 1301(4) (directing that “[t]he Federal government should recognize and encourage complementary State efforts to improve the quality and usefulness of broadband data”).

⁷ *See* Michael J. Copps, Acting Chmn., FCC, *Bringing Broadband to Rural America: Report on a Rural Broadband Strategy*, at 43, para. 103 (May 22, 2009) (*Rural Broadband Report*), *attached to Acting Chairman Copps Releases Report on Rural Broadband Strategy*, GN Docket No. 09-29, Public Notice, DA 09-2258 (rel. Oct. 19, 2009); *see also* AT&T Comments at 1 (stating that AT&T has been an active, voluntary participant in various State-level broadband mapping efforts).

⁸ *See* D.C. Comm’n Reply at 4–5.

⁹ *See* NARUC Petition at 2; *see also id.* at Appendix A, p.1 (reproducing NARUC, Resolution Supporting Access to Broadband Mapping Data (adopted July 22, 2009)).

¹⁰ *See* NARUC Petition at 6; *see also id.* at Appendix A, p. 1. On October 22, 2009, the Wireline Competition Bureau issued a public notice inviting comment on NARUC’s petition. *See Comment Sought on NARUC Petition for Clarification or Declaratory Ruling Regarding State Authority to Obtain Broadband-Related Data*, WC Docket No. 09-193, Public Notice, DA 09-2286 (WCB 2009). AT&T Inc. (AT&T), the California Public Utilities Commission and the People of the State of California (Cal. Comm’n), the Michigan Public Service Commission (Mich. Comm’n), and the United States Telecom Association (USTelecom), and Verizon and Verizon Wireless (Verizon) filed comments, and CTIA – The Wireless Association (CTIA), the National Cable & Telecommunications Association (NCTA), the Public Service Commission of the District of Columbia (D.C. Comm’n), Qwest Communications International Inc. (Qwest), Southeast Telephone, Inc. (Southeast Telephone), and USTelecom filed replies.

¹¹ NARUC Petition at Appendix A, p.3.

¹² NARUC Petition at 6.

¹³ *See, e.g.,* Cal. Comm’n Comments at 2–3; Southeast Telephone Reply at 2; D.C. Comm’n Reply at 2–3.

have the authority to mandate the filing of broadband-related data and that it would be good public policy for the States to impose such a mandate.¹⁴

III. DISCUSSION

5. Under Section 1.2 of the Commission's Rules, the Commission may issue a declaratory ruling either to terminate a controversy or to remove uncertainty.¹⁵ The Commission has broad discretion whether to issue such a ruling.¹⁶ The record reflects widespread uncertainty regarding whether the Commission has preempted the States from mandating the filing of broadband information.¹⁷ The record also makes clear that this uncertainty may impede State efforts to promote broadband deployment and adoption.¹⁸ We therefore exercise our discretion to resolve this uncertainty. To the extent NARUC's petition or the parties ask that we resolve any other matter, we decline to do so in this proceeding.

6. Unquestionably, the Commission possesses the authority to preempt State regulations in certain circumstances. Some provisions of the Communications Act grant the Commission explicit preemption authority.¹⁹ In addition, the Supreme Court has repeatedly recognized that federal agencies have very broad conflict preemption authority, regardless of whether there is an express preemption provision in the statute.²⁰ Where State regulation conflicts with a federal regulatory objective, and that conflict impinges upon the Commission's exercise of its own lawful authority, the Commission may preempt.²¹

7. The question now before us is whether the Commission has exercised its delegated authority to preclude the States from undertaking mandatory broadband information collection efforts.²²

¹⁴ See, e.g., NCTA Reply at 2–4; Qwest Reply at 2, 4; US Telecom Reply 1–2, 4.

¹⁵ See 47 C.F.R. § 1.2.

¹⁶ See *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973).

¹⁷ Compare AT&T Comments at 3 (stating that the Commission has not specifically restricted State authority to collect data from broadband providers); California Comm'n Reply at 2 (“As far as [the California Commission] has been able to determine, the FCC to date has not issued any order limiting the authority of states to collect data directly from broadband facility and service providers”) with Qwest Reply at 2-3 (arguing that the classification of broadband Internet access service as an information service preempts the States from collecting data on those services “[b]ecause it is difficult, if not impossible, to discern an independent value to broadband data collection, or to distinguish broadband data collection from broadband”).

¹⁸ See D.C. Comm'n Reply at 2 (stating that some State efforts to collect broadband-related data were rebuffed on the ground that the Commission had preempted such State action).

¹⁹ See, e.g., 47 U.S.C. § 251(d)(3) (establishing an independent section 251 preemption standard regarding State regulation of access and interconnection rights); 47 U.S.C. § 253 (requiring the Commission to preempt State or local requirements that prohibit entities from offering telecommunications services).

²⁰ See, e.g., *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2003) (where State law frustrates the purposes and objectives of Congress, conflicting State law is “nullified” by the Supremacy Clause); *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (“The statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof.”); see also U.S. CONST. Art. 6, § 2.

²¹ See *Public Service Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990); see also *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Public Utility Comm'n of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989); *Illinois Bell Telephone Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989); *National Ass'n of Regulatory Utility Comm'rs v. FCC*, 880 F.2d 422 (D.C. Cir. 1989).

²² See *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (citations omitted) (recognizing that “a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation”).

We conclude that the Commission has not preempted or otherwise precluded the States from mandating that broadband providers file data or other information regarding broadband infrastructure or services with the States.

8. As an initial matter, we note the Commission has not expressly preempted the States from mandating the filing of broadband-related information.²³ Indeed, the parties opposing NARUC's request for declaratory ruling make no claim of express preemption, but instead rely on implied preemption arising from the Commission's classification of various types of broadband Internet access service as information services.²⁴ Certain parties also maintain that the Commission's treatment of various broadband services, including broadband Internet access service, as interstate services precludes the States from imposing data filing requirements regarding those services.²⁵

9. Classifying broadband Internet access service as an information service or finding that this service is jurisdictionally interstate, however, does not by itself preclude mandatory State data-gathering efforts.²⁶ More fundamentally, mandatory State broadband information collection efforts would not necessarily conflict with those actions or with any other Commission action or policy. In fact, Congress recognized in the BDIA that State broadband data gathering can be "complementary" to federal efforts.²⁷ Given the specific federal recognition of a State role in broadband data collection, we anticipate

²³ See AT&T Comments at 3 ("NARUC is correct to the extent it argues that the Commission has not specifically acted to place 'limits [on] State authority' to collect data from broadband providers . . .").

²⁴ See, e.g., NCTA Reply at 2; Qwest Reply at 1–2. Although the Commission has acknowledged that broadband Internet access service traffic may include an intrastate component, it has concluded that broadband Internet access service is properly considered jurisdictionally interstate for regulatory purposes. See, e.g., *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, 22475, para. 16 (1998), *recon. denied*, 17 FCC Rcd 27409 (1999); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4832, para. 59 (2002) (*Cable Modem Order and NPRM*), *aff'd*, *NCTA v. Brand X*, 545 U.S. 967 (2005); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5911, para. 28 (2007) (*Wireless Broadband Classification Order*); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281, 13288, para. 11 (2006).

²⁵ See, e.g., NCTA Reply at 2; Qwest Reply at 1–2.

²⁶ See *Global NAPS, Inc. v. Verizon New England, Inc.*, 444 F.3d 59 (1st Cir. 2006) (holding that "[a] matter may be subject to FCC jurisdiction, without the FCC having exercised that jurisdiction and preempted state regulation") (emphasis in original); *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, 22412-14, paras. 16-18 (2004) (*Vonage Preemption Order*) (classifying Vonage's VoIP offering as a "jurisdictionally mixed service" and expressly preempting the Minnesota Commission's regulation of that service), *aff'd sub nom. Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007); see also *Cable Modem Order and NPRM*, 17 FCC Rcd at 4848–49, para. 98 (2002) (seeking comment on whether the Commission's assertion of jurisdiction over the cable modem service "preclude[d] State and local authorities from regulating cable modem service and facilities in particular ways" and on whether the Commission should use its "preemption authority to preempt specific state laws or local regulations"). We note that the category of "information services" includes all "enhanced services." See *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, FCC 09-93, at 10-11, para. 27 (Oct. 22, 2009).

²⁷ BDIA § 102(4) codified at 47 U.S.C. § 1301(4); see *id.* § 106 codified at 47 U.S.C. § 1304.

that such State efforts will not necessarily be incompatible with the federal efforts or inevitably stand as an obstacle to the implementation of valid federal policies.²⁸

10. We recognize, of course, that an absence of federal preemption does not mean that the States as a group or any particular State or State agency has the authority to mandate broadband data collection.²⁹ Although we do not question that States may have a legitimate interest in broadband data-gathering,³⁰ we decline to address the extent of such State authority.³¹ To the extent a specific controversy arises regarding whether a particular State or State agency possesses such authority, the State may resolve that controversy under applicable law. Moreover, because this proceeding is focused on the narrow question of whether the Commission has preempted mandatory State broadband information collection efforts, we decline to address here the suggestion that we should confer upon State commissions authority that they lack under State law.³²

11. We also reject the suggestion that a declaration of non-preemption will subject broadband providers to multiple onerous and disparate reporting requirements that add little value to the broadband data collection that is already underway at the federal level.³³ States seeking to collect broadband-related data are fully competent to address these policy arguments and craft balanced broadband information collections that supplement, rather than interfere with, federal information collection efforts. Even so, to the extent that State data collection regimes thwart any federal policies or requirements, providers may petition the Commission to preempt any conflicting State regulation.³⁴

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to sections 1, 4, and 201(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 151, 154, 201(b), and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that the petition for clarification or declaratory ruling that NARUC

²⁸ See *Wyeth v. Levine*, 129 S. Ct. at 1204; cf. *Louisiana Public Service Comm'n*, 476 U.S. at 374 n.4 (citations omitted) (recognizing that the Commission may preempt State regulation where it is “not possible to separate the interstate and the intrastate components of the asserted FCC regulation”).

²⁹ See, e.g., USTelecom Comments at 6.

³⁰ See, e.g., BDIA § 102(4) codified at 47 U.S.C. § 1301(4) (directing the Federal Government to “encourage complementary State efforts to improve the quality and usefulness of broadband data”); NARUC Petition at 5 (pointing out that obtaining “information about what ‘broadband telecommunications capability’ is available in each part of the State” is the “obvious prerequisite for effective State planning to promote deployment”).

³¹ See, e.g., D.C. Comm'n Reply at 6 (arguing that NARUC's petition did not ask us to rule on the question whether the States have the authority to collect broadband-related data); NCTA Reply at 2 (urging that we deny NARUC's petition to the extent it requests that we declare that the States have authority to collect broadband-related data).

³² See Michigan Comm'n Comments at 3 (urging that we issue “a ruling to ensure that state agencies have authority to request information related to broadband service from any broadband provider”). But see USTelecom Comments at 5 (“The Commission is not empowered to expand the state statutory limits on state commission jurisdiction.”).

³³ See, e.g., CTIA Reply at 3–4; US Telecom Comments at 6; Verizon Comments at 5; AT&T Comments at 4–5. But see D.C. Comm'n Reply at 6 (stating that it is “unlikely” that state requirements will be highly variant).

³⁴ See *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information et al.*, CC Docket Nos., 96-115, 96-149, 00-257, 17 FCC Rcd 14860, 14894 (2002) (adopting federal customer privacy requirements for telecommunications carriers pursuant to statute and declining to preempt state-imposed customer privacy requirements as a general matter, noting that carriers always have the opportunity to establish that the burdens from complying with both state and federal requirements are unworkable, or that different schemes make it impracticable to achieve a key objective of the regulation).

filed in WC Docket No. 09-193 IS GRANTED to the extent set forth in this Memorandum Opinion and Order and otherwise IS DENIED.

13. IT IS FURTHER ORDERED, pursuant to section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**CONCURRING STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

Re: *National Association of Regulatory Utility Commissioners Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data*, WC Docket No. 09-193

I understand the states' reasons for seeking clarity on their broadband data collection authority, especially with regard to their broadband mapping efforts. I am concerned, however, that this order may create an environment of conflicting broadband data collection rules. Such complexities could force providers to expend resources on data collection rather than on deployment efforts. Additionally, I urge the Commission to seriously consider preempting the states in any areas where there exists a conflict with federal policy. Our nation's broadband regulatory regime has been successful thus far, and I worry that this order could be used as a foundation for increased regulations in the broadband space rather than as a supplement to the current light regulatory approach. For all of these reasons, I respectfully concur.

**CONCURRING STATEMENT OF
COMMISSIONER MEREDITH A. BAKER**

Re: *National Association of Regulatory Utility Commissioners Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data*, WC Docket No. 09-193

I concur with today's decision. I agree with the narrow legal conclusion of this order but I have grave concerns about the negative impact of possible inconsistent and burdensome state data reporting requirements on providers' incentives for investment and innovation in broadband Internet access services. As the order notes, the Commission may—and in my judgment, should aggressively—preempt state regulations that conflict with federal policy, specifically our successful long-standing light-touch regulatory approach to the Internet. That said, I am happy that the Commission will be moving forward with broadband mapping efforts because that is a critical step toward ensuring that all Americans have access to broadband capability.