Before the

UNITED STATES SENATE
COMMITTEE on COMMERCE, SCIENCE and TRANSPORTATION

TESTIMONY of the HONORABLE TONY CLARK PRESIDENT, NORTH DAKOTA PUBLIC SERVICE COMMISSION & CHAIRMAN, TELECOMMUNICATIONS COMMITTEE of the NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS ("NARUC")

on

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National Association of
Regulatory Utility Commissioners
1101 Vermont Ave, N.W., Suite 200
Washington, D.C. 20005
Telephone (202) 898-2200, Facsimile (202) 898-2213
Internet Home Page http://www.naruc.org

Mr. Chairman, Co-Chairman Inouye and members of the Committee, thank you for the opportunity to testify today. I am Tony Clark, President of the North Dakota Public Service Commission and Chairman of the Telecommunications Committee of the National Association of Regulatory Utility Commissioners (NARUC). NARUC represents State commissions in all 50 States, the District of Columbia and US territories, with jurisdiction over telecommunications, electricity, gas, water and other utilities.

This series of hearings is especially important to me because of the impact that universal service programs have on rural States like mine. North Dakotans are eager to embrace the power and promise of VOIP, IPTV, wireless broadband and other innovative services, but *all* of those technologies require underlying infrastructure: wires, switches, towers and routers – and those require real investment to build and maintain, especially in rural markets. We read daily about how intertwined the global information economies of Silicon Valley, New York, Los Angeles and Seattle are to those of Singapore, Tokyo, London and Bonn. In North Dakota, we like the idea of Fargo, Valley City and even tiny Mandaree (pop. 558, on the Fort Berthold Indian Reservation) being part of that global information economy too – a concept that would be unthinkable without a first class communications infrastructure. So the Telecommunications Act's promise of reasonably comparable rates and services for high cost areas means a lot to States like mine.

Beyond their economic value, telecommunications networks are also critical infrastructure. One of the most valuable lessons we learned when Hurricane Katrina struck the Gulf Coast last year was how the importance of reliable communications networks is magnified tenfold when disaster strikes – natural or manmade – and first responders and relief organizations must coordinate thousands of workers and volunteers in real time efforts where each minute can be measured in lives lost or saved.

USF at an Existential Crossroads:

We're here today because Universal Service is at a crossroads. On the contribution side, there is a growing chasm between the services and carriers that sustain the fund, and those that interconnect to the network supported by it. The end result is that the contribution requirement is falling ever more heavily, and unfairly, on a shrinking number of carriers. This means that the charge the end user has to pay on interstate and international toll calls has risen to close to 11 percent recently, which is a result of the growing demands on a shrinking revenue base of toll calls. On the distribution side, the Universal Service Fund has grown tremendously in the past few years. These two trends are on a crash course, making the status quo unsustainable.

On both sides, the Universal Service Fund faces a number of existential questions:

- Should it explicitly fund broadband infrastructure and services?
- What is the optimal size of the fund and does it need to be capped?
- Should it fund competition in high cost markets?
- How many networks should it be used to fund in high cost markets?
- On what cost basis should carriers be reimbursed?
- How many access lines per customer should be funded?
- Is it intended for networks or for individuals?

- Should contributions be pegged to network usage, use of numbers, connections or some other methodology?
- Should universal service continue to be a shared Federal-State responsibility, or should the federal government take on the entire burden?

Each choice carries both costs and opportunities, and a decision on any one of them will have a ripple effect on all the others. In addition, universal service programs are inextricably intertwined with intercarrier compensation and larger impacts on the entire communications market. To be perfectly frank, the costs and benefits of different options will vary from State to State, as will the advice of your individual State commissions, but at the end of the day, we must all find common ground.

On a practical level, NARUC believes that whatever the federal Universal Service Fund is intended to accomplish, it should be done as efficiently as possible. That is why we support a permanent exemption of federal Universal Service programs from the Antideficiency Act. We commend you for securing this year's exemption and we look forward to working with you to make that exemption permanent beyond 2006.

Eligible Telecommunications Carrier Designations:

Under Section 214(e) of the Act, State commissions are delegated to help administer the federal Universal Service Fund by designating eligible telecommunications carriers (ETCs) in each State that receives support. The Act requires a finding that the carrier will offer the services supported by Universal Service throughout the service area, either using its own facilities or a combination of its own facilities and resale of another carrier's facilities, and that it will advertise the availability of those services using media of general distribution. The Act also requires an ETC designation to be consistent with the public interest, convenience and necessity, but did not set forth specific criteria to be applied under the public interest tests in Sections 214 and 254 of the Act. For service areas already served by a rural telephone company, the Act specifically requires a public interest determination to be made before a State commission designates a competitive ETC for that service area.

In some States, standards were interpreted to allow a degree of latitude in ETC designations. Our experience in North Dakota allowed for very little. Prior to my tenure, the Public Service Commission (PSC) denied ETC status to a competitive ETC applicant, citing the public interest standard and a number of policy concerns, including impact on the federal fund. The carrier sued the PSC, and the court ruled that questions of federal fund sufficiency were outside the scope of any State PSC inquiry. Lacking the ability to take into consideration this factor, the public interest standard became a relatively easy burden for a competitive ETC to meet.

In March 2005, acting on a recommendation of the Federal-State Joint Board on Universal Service, the FCC issued permissive guidelines for the States to use in their ETC designations, partially in response to the growing role and prominence of competitive ETCs. A major policy goal of those guidelines was to ensure that *all* ETCs used any universal service disbursements to invest in infrastructure and defray consumer costs in the appropriate service area. Specifically, the guidelines call for a requirement for each carrier seeking ETC status to:

a. Provide a five-year plan demonstrating how high-cost universal service support will be used to improve its coverage, service quality or capacity in every wire center for which it seeks designation and expects to receive universal service support;
b. Demonstrate its ability to remain functional in emergency situations;
c. Demonstrate that it will satisfy consumer protection and service quality standards;
d. Offer local usage plans comparable to those offered by the incumbent local exchange carrier (ILEC) in areas for which it seeks designation; and
e. Acknowledge that it may be required to provide equal access if all other ETCs in the designated area relinquish their designations pursuant to Section 214(e)(4) of the Act.

The Order also encouraged States to apply a public interest standard, including consideration of a cost-benefit analysis and potential "creamskimming" effects in instances where an ETC applicant seeks designation below the study area level of a rural incumbent LEC. And to make sure the guidelines were applied uniformly, the FCC encouraged States to require annual certifications from all ETCs, even those previously designated, including progress reports on coverage and service quality improvements.

At this writing, at least 24 State commissions have either implemented the guidelines or initiated rulemakings to incorporate some or part of these suggested guidelines. NARUC's members are available to talk about our individual experiences if Congress intends to reexamine this process.

USF Contributions and State programs:

NARUC supports efforts to more equitably distribute the funding base of the federal Universal Service Fund (USF) in a technology-neutral manner, although we believe such efforts must be accommodated by similar efforts to ensure the long-term sustainability of State programs. Today, universal service is a jointly shared responsibility between the States and the federal government, with 26 State programs distributing about $1.3 billion, or nearly 20 percent of the overall national commitment to universal service. This joint approach benefits both "net donor" and "net recipient" States because it lessens the burden on an already sizable federal program and permits another option when federal disbursement formulas that "work" in the aggregate do not adequately serve a particular State or community.

We are concerned, however, that efforts to expand the federal contribution base without a complementary clarification of co-extensive State authority could create tremendous funding gaps. Specifically, there is a danger that if the federal fund were expanded to draw against *intrastate* revenues, as several bills have proposed, Section 254(f) of the Act could be interpreted to prevent State programs from collecting any assessments, an issue already addressed by the addressed by the US Circuit Court for the Fifth Circuit in *AT&T v. Public Utility Commission of Texas*, 373 F.3d 641 (5th Cir., 2004).

Endangering State universal service funds would also raise issues of fairness in the federal distribution formula. The 1996 Act explicitly contemplated the creation of State universal service funds and State funds have been generally created to meet needs not met by the federal distribution formula. For example, many States used their funds to address the impact on carriers of lowering *intrastate* access charges, while others used State funds to address implicit subsidies that still exist between urban and rural areas within their States, or to increase broadband deployment.

We believe the ultimate solution is to stabilize the contribution base of State universal service programs at the same time the base is stabilized for the federal program, by making State USF assessment authority co-extensive with that of the federal program, using numbers, connections, total revenues or whichever approach is ultimately chosen.

Conclusion:

Beyond universal service programs, States have also taken numerous measures to encourage expeditious availability of broadband and telephonic infrastructure, including numerous bills that deregulated incumbent phone companies in return for promises to offer broadband, cooperative agreements to purchase broadband services in return for commitments to build out to surrounding business and residential areas, and in some cases, public builds of broadband infrastructure.

Ultimately, NARUC's members share each of your concerns about delivering the best, most efficient, advanced and affordable communications services to each of your communities. As you consider changes to universal service, both State and federal, we offer ourselves as partners, especially when it comes to impact of national policies on each individual State. I appreciate the Chairman's recent appearance before NARUC and this Committee's desire to tap the expertise of our State commissions as Congress moves to resolve Universal Service and other important communications issues.