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At Phoenix Conference

STATE REGULATORS STEP UP EFFORT TO RETAIN UNE AUTHORITY

Eighty state regulatory commissioners, representing 34 states, sent letter to FCC Wed. asking agency not to restrict their ability to retain unbundled network element platform (UNE-P) as entry strategy in their states. Letter, announced by NARUC Pres. David Svanda at conference sponsored by Phoenix Center, also urged FCC not to preempt state commissions' ability to add UNEs in their states beyond those that might be on national list. Letter comes as FCC weighs changes in its UNE rules and state regulators have become increasingly concerned that they might not have flexibility to make changes in whatever FCC does.

Letter also urged FCC to reflect several other principles when it makes its UNE decision: (1) "Any FCC list should, at a minimum, include all existing [UNEs]." (2) UNEs shouldn't be "delisted" without state "check-off." (3) FCC should "caucus" with states before "promulgating the 'necessary and impair' standard used to evaluate if a UNE should be available." (4) FCC should confirm state authority to add UNEs.

At all-day Phoenix conference, panelists debated how "intermodal" competition could be expanded and whether it was as important as some said it was. Regulators, including FCC Chmn. Powell, have cited intermodal competition — competition among different technical platforms — as factor when weighing whether various markets are competitive. However, in broadband, there are only 2 strong intermodal competitors — ILECs' DSL and cable modem — and most regulators would like to see 3rd one, said Scott Marcus, Internet adviser at FCC. It's not clear what technology could become that "3rd wire," he said, because "the jury's still out" on other broadband modes such as satellite, WiFi, terrestrial wireless. "We'd like a 3rd wire rather than new regulations," Marcus said. Indication of true intermodal competition is seen in way consumers now use e-mail instead of cellphones and cellphones instead of long distance services, ex-NTIA Dir. Gregory Rohde said. However, "broadband is still a duopoly" and emerging broadband technologies are promising but not yet proved for widespread use, he said.

Rohde and Z-Tel Vp Thomas Koutsky said regulators shouldn't give up on intramodal competition — competition among similar platforms, for example CLECs vs. ILECs. There never will be large number of facilities-based entrants in telecom because of cost and other barriers, Koutsky said. Strongest telecom competition developed where wholesale markets were strong, such as in long distance, Koutsky said. Rohde also urged FCC to make more spectrum available in unlicensed bands and "quickly restart the 3G debate" so U.S. can compete effectively against Europeans and Asians. NARUC Legislative Dir. Jessica Zufolo cautioned against "undermining" wholesale telecom market "in the name of intermodal competition" and particularly against denying states role in local competition processes. "Intermodal competition is a worthy policy goal but it's not going to work without a state role," she said. Zufolo said it was "huge stretch to argue that wireless is a substitute for wireline" because of differences in numerous issues such as E-911 abilities and service quality.

Sen. Dorgan (D-N.D.) said FCC should have more power to impose "significant and heavy" fines on carriers who "thwart competition." Dorgan, outgoing Commerce Consumer Affairs Subcommittee Chmn., said Powell has tendency to "watch" when FCC should be more aggressive in some areas. "Barriers exist for competitive carriers," Dorgan said. "We need an FCC that will be diligent and aggressive on these issues." FCC will soon make decisions that will determine how much competition exists in local markets, Dorgan said, referring to several open proceedings. But FCC leadership doesn't have "a lot" of institutional knowledge and often has to rely on staff, he said. Dorgan was hesitant to forecast what telecom issues Senate might address, but said budget and security issues will likely dominate agenda early. He also said Republican takeover of Senate doesn't mean that party can act without consensus since Democrats still have enough votes to block cloture.

FCC is making "exhaustive attempt" to collect market information to help guide triennial review, said Simon Wilkie, FCC chief economist. Wilkie described abstract mathematics called "game theory" and how it relates to FCC's role of regulation. Theory says regulator acts as "mechanism" to create rules (as in regulations) that participants follow. However, participants will try to "game" system for their benefit and all act strategically in their own interests, he said. To create rules that can't be "gamed," regulators must make some compromises and trade offs, he said, and only way to make best regulations is extensive and thorough examination of data. John Mayo, Georgetown U. Business School dean, said regulators should operate under premise it's better to enable competition rather than disable monopoly power. "If they're to err, it should be on the side of enabling competition at every junction," Mayo said. But Robert Blau, BellSouth vp-executive & federal regulatory affairs, said telecom industry needs growth to attract capital investments and it's apparent that UNE-P isn't growing industry, adding that regulators should "try something else." — *Edie Herman, Terry Lane*