

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL FILE RECEIVED
JUN - 9 1992
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of
Amendment of Part 90 of the
Commission's Rules to Eliminate
Separate Licensing of End Users
of Specialized Mobile Radio Systems

PR Docket No. 92-79

INITIAL COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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Pursuant to Sections 1.49, 1.415, and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. Sections 1.49, 1.415, and 1.419 (1991), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits the following comments addressing the Commission's Notice of Proposed Rule Making ("NPRM"), [FCC 92-172], as released May 5, 1992, in the above-captioned proceeding:

I. NARUC'S INTEREST

NARUC is a quasi-governmental nonprofit organization founded in 1889. Its member's include those governmental bodies of the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in the regulation of carriers and utilities.

NARUC's mission is to improve the quality and effectiveness of public utility regulation in America. Specifically, NARUC is composed of the State officials charged with the duty of

regulating telecommunications common carriers within their respective borders. As such, they have the obligation to assure those telecommunications services and facilities required by the public convenience and necessity are established, and that service is furnished at rates that are just and reasonable.

NARUC supports the FCC's desire to encourage larger and more efficient use of radio in the public interest. Indeed, in a recent resolution, NARUC specifically encouraged the FCC to, THROUGH APPROPRIATE PROCEDURES, provide additional competition to cellular systems via SMR systems.¹

However, as that resolution indicates, NARUC is concerned that certain Specialized Mobile Radio ("SMR") services currently authorized by the Commission in other related dockets, e.g., Fleet Call Inc.'s ("FCI") Enhanced SMR service, Mobile Radio New England's ("MRNE") recently authorized digital offerings, etc., involve common carriage and therefore are subject to State regulatory authority.²

¹ See, NARUC's March 4, 1992 "Resolution Regarding Preemption of State Regulation of Wireless Common Carrier Services", Reported NARUC Bulletin, No. 10-1992, pp. 8-9.

² See, 47 U.S.C. Section 331(c)(3); Memorandum Opinion and Order ("FCI Order"), In re Request of Fleet Call, Inc. for Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, released March 14, 1991, 6 FCC Rcd 1533 (adopted February 13, 1991)(FCC 91-56), reconsideration denied, 6 FCC Rcd 6989 (1991); Letter No. 7320-12 (April 13, 1992), In the Matter of Mobile Radio New England Request for Waiver, File No. LMK-91260.

These recent orders maintain these SMR services' status as a private land mobile radio. Thus, although States may regulate cellular common carriers, the States are preempted from regulating provision of what appears to be a "functionally equivalent" service.

The FCC's proposal in this proceeding eliminates end user licensing requirements on SMR carriers. As its previous filings in the two listed proceedings indicate, NARUC argued that this requirement is not relevant to any statutory analysis distinguishing between private and common carrier radio services. However, the FCC's private carrier findings in the proceedings cited above rely almost exclusively on the few small remaining distinctions in the regulations, including the end user licensing requirement.

Accordingly, in light of the FCC's findings and proposals in (i) the FCI and MRNE proceedings, and (ii) other recent and related dockets, NARUC believes the Commission should carefully examine whether the elimination of this requirement, under its own analysis, effectively eliminates "the private carrier status of Specialized Mobile Radio Licensees." NPRM at 2, n. 11. At a minimum, if the Commission eliminates end-user licensing, it must consider whether that removal requires the reopening of the Fleet Call, Mobile Radio New England, and related proceedings based upon these changed circumstances.

II. BACKGROUND

Specialized Mobile Radio ("SMR") was initially classified by the Commission as a private radio service. NARUC unsuccessfully appealed this classification asserting, inter alia, that such service constituted common carriage subject to state regulation. Subsequently, in 1982, Congress enacted Section 332(c)(1) to provide a "...clear demarcation between private and common carrier land mobile services."³ According to the conference report "...[t]he basic distinction...is a functional one, i.e., whether or not a particular entity is engaged functionally in the provision of telephone service or facilities of a common carrier as part of the entity's service offering. If so, the entity is ...a common carrier."⁴

Significantly, in that report, the conferees also note that, although the FCC maintains its exclusive radio licensing authority, "...states retain full jurisdiction to engage in the economic regulation of common carrier stations (i.e., regulation of entry, rates and practices)...to the extent they deem it necessary...to do so." Moreover, the report goes on to note that "...the Commission may not use its licensing powers to circumvent

³ House Conference Report No. 97-765, Joint Explanatory Statement of the Committee of Conference on P.L. 97-259, The Communications Amendments Act ("House Report"), 97th Cong., 2nd Sess. 54, reprinted in, 3 U.S. Code Cong. & Ad.News '82 Bd.Vol., at pages 2237, 2298 (1983).

⁴ House Report, at 2237, 2298.

limitations in its economic regulatory jurisdiction over common carrier station. {Emphasis Added}"⁵

It is significant that at the time of both the Court of Appeals decision and the 1982 amendment, the SMR regulatory scheme promulgated by the Commission was significantly more restrictive. Since 1982, the Commission has fundamentally changed the character of its SMR regulation.⁶ These changes significantly eroded the distinction between SMR services and certain common carrier services while maintaining inconsistent regulatory schemes.

Most recently, on February 13, 1991, NARUC believes the Commission eliminated any remaining significant distinctions when it granted FCI authority to deploy a proposed "Enhanced" SMR Service. This ESMR service radically diverges from the historical SMR concept in both architecture and purpose - clearly moving any carrier providing such service from within the statutory definition of common carrier. According to FCI's

⁵ Id. at 2300.

⁶ For example, even before this proceeding, end user eligibility requirements were virtually eliminated. Amendment of Part 90, Subparts M and S, of the Commission's Rules, PR Docket No. 86-404, Report and Order, 3 FCC Rcd. 1838, 1839-42, Paragraphs 15-35 (1988). The Commission disavowed the channel recovery program. Id. at page 1845, paragraph 64. Liberal interconnection is now allowed. See, Amendment of Parts 89, 91, 93, and 95 of the Commission's Rules to Prescribe Policies and Regulations to Govern Interconnection of Private Land Mobile Radio Systems with the Public Switched, Telephone Network, Docket No. 20846, First Report and Order, 69 FCC 2d 1831 (1978); Second Report and Order, 89 FCC 2d 741 (1982); and Memorandum Opinion and Order, 93 FCC 2d 1111 (1983).

application, it will (i) be based on multiple low-power cells, exclusive frequency assignments and service area-oriented interference protection, (ii) be designed for frequency reuse, (iii) concentrate on communications between multiple mobile units in discrete "cellular-based" service areas, (iv) feature automatic call handoff among cells, and (v) expand its range of services considerably beyond dispatch to target and compete for cellular-type mobile data communications and interconnected mobile telephone service.

Moreover, it is apparent that the FCC will continue to rely on the "FCI" analysis of Section 332 to distinguish between private and common carriage. See, for example, the Private Radio Bureau's recent Letter Orders 7320-12 & 7300-01 in FCC File No. LMK-91260, granting MRNE's request for authority to provide a service functionally equivalent to FCI's ESMR - while eschewing any discussion of Section 332 and instead relying upon the Commission's opinion in the FCI proceeding. As a practical matter, this interpretation allows the FCC to define private carrier status in any fashion as long as its regulations assure that the subject carriers's bills to subscribers do not expressly mark up telephone charges.

Since the FCC's FCI Order, NARUC has argued at some length in three separate proceedings, that, at the very least, the FCC's authorization of FCI's ESMR and similar services moves those offerings out of the private carriage category.

III. DISCUSSION

Congress specifically differentiated between private carrier services and cellular service when it enacted Section 332. The Senate sponsors of the legislation pointed out that private land mobile carriers do "not include common carrier operations like the new cellular systems." ⁷

The purpose behind the interconnection restrictions is to "assure that [private carrier] frequencies allocated essentially ...[to]...provid[e] dispatch services are not significantly used to provide common carrier message service [like cellular]." ⁸

In NARUC's view, the Commission's current interpretation of the Section 332 test, as exemplified in the FCI proceeding, defies Congressional intent and is legally untenable. Indeed, NARUC recently argued in the still pending MRNE proceedings, that the factual aftermath of the FCC's analysis in the FCI proceeding, including the instant NPRM, presents compelling evidence of the inadequacy of the approach adopted in that case - suggesting, in light of the "changed circumstances", that a petition to reopen the record in that proceeding might be appropriate.

⁷ See, Statement of Mr. Goldwater, for himself, Mr. Packwood, Mr. Schmitt, Mr. Pressler, Mr. Stevens, Mr. Cannon, Mr. Hollings, and Mr. Inoye upon introduction of S. 929, April 8, 1981, 127 Cong. Rec. S3702-03 (daily ed. April 8, 1981).

⁸ H.R. Rep. No. 76, 97th Cong., 2d. Sess. 56, reprinted in 1981 U.S.Code Cong. and Ad. News, 2261, 2300.

The record in the Fleet Call proceeding, which purportedly contains substantial evidence supporting the FCC's "analysis" of the Section 332 private vs. common carrier test and related conclusions, relies heavily upon the existence of end user licensing.

For example, in the FCI proceeding, FCI argued that "ESMR differs both functionally and technically from cellular technology in several critical ways."⁹ As support for this proposition, FCI claimed, inter alia, that "ESMR, like other SMR systems, will serve only licensed, eligible end users" - specifically arguing that "...[t]o the extent that ESMR succeeds in attracting customers away from cellular systems, it will not be because they see ESMR as a functional equivalent to cellular They would not ... endure the burden of end user licensing, which is not part of cellular...service..." [Emphasis Added]¹⁰

Accordingly, NARUC believes that if the FCC determines to eliminate the end-user licensing requirements in this docket, at a minimum, it must examine the impact of that decision upon the private carrier status in both the FCI and MRNE proceedings. NARUC urges the FCC to use this proceeding to comprehensively reassess its application of the private carriage standard and promote balanced treatment for all services by assuring that states retain the authority to regulate, when circumstances

⁹ FCI Reply Comments in File No. LMK 90036, at 11.

¹⁰ FCI Waiver Request in File No. LMK 90036, at 36.

require, all entities providing "common carrier type" services within their respective jurisdictions.

II. CONCLUSION

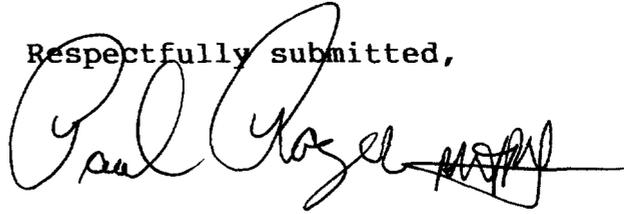
In light of the FCC's findings and proposals in (i) the FCI and MRNE proceedings, and (ii) other recent and related dockets, the FCC should carefully examine whether the elimination of the end user licensing requirement, under its own analysis - as exemplified in the FCI order, effectively eliminates private carrier status for SMR carriers. At a minimum, if the FCC removes the end-user requirements, the FCC should reopen the Fleet Call, Mobile Radio New England, and related proceedings and re-evaluate its "private carrier" findings based upon these changed circumstances.

In addition, to assure an adequate record on which to base a decision in this proceeding, NARUC respectfully requests that the FCC incorporate NARUC's pleadings in the Fleet Call and Mobile Radio New England proceedings cited above into the record in this proceeding. If the Commission indicates it is necessary, NARUC will be pleased to refile duplicate copies.

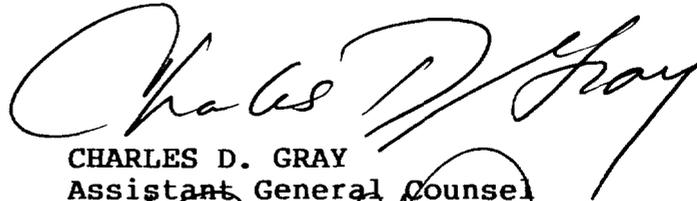
Moreover, NARUC encourages the Commission to open a proceeding to reclassify spectrum or use some other reasonable and legal method/procedure to allow systems like MRNE, FCI and

others to provide competition to cellular service without having a preemptive effect on State regulation.

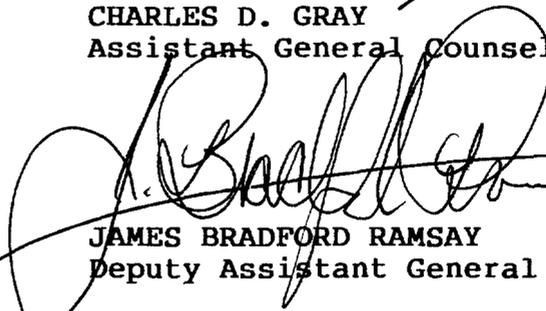
Respectfully submitted,



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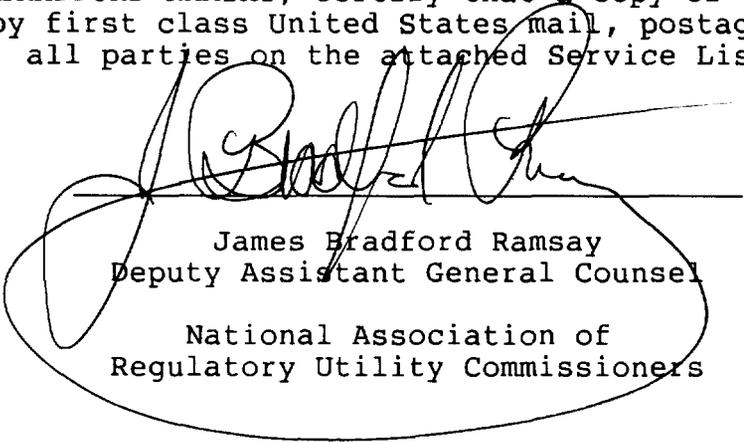
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CERTIFICATE OF SERVICE

I, JAMES BRADFORD RAMSAY, certify that a copy of the foregoing was sent by first class United States mail, postage prepaid, to all parties on the attached Service List.



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June 9, 1992

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