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

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Federal Communications Commission
Office of Secretary

In the Matter of Amendment of the Commission's Rules To Permit Flexible Service Offerings In the Commercial Mobile Radio Services	WT Docket No. 96-6

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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 (1996), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits the following comments in response to the "First Report and Order and Further Notice of Proposed Rulemaking" ("FNPRM") adopted August 1, 1996 and released June 27, 1996, in the above-captioned proceeding.[1] NARUC opposes the establishment of a rebuttable presumption that services which, by definition are "fixed", are to be deemed Commercial Mobile Radio Services ("CMRS") merely because they utilize spectrum allocated by the FCC for CMRS services.

In support of its comments, NARUC states as follows:

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[1] In the Matter of Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, "First Report and Order and Further Notice of Proposed Rulemaking", WT Docket No. 96-6, 11 FCC Rcd 8965; 3 Comm. Reg. (P & F) 1190 (1996) [FCC 96-283 - 61 Fed. Reg. 42721 (8/26/96)]

I. BACKGROUND

In the original January 25, 1996 Notice of Proposed Rule Making in this proceeding,[2] the FCC sought comment on proposals for expanding permitted offerings of fixed wireless service by CMRS providers. That notice also sought comment with regard to the regulatory treatment for such services under Section 332 of the Communications Act of 1934, as amended, 47 U.S.C. § 332 (1993). In the First Report and Order ("1st R&O") accompanying this further Rulemaking, the FCC determined that the public interest would be served by giving licensees maximum flexibility in the uses of CMRS spectrum and amended its rules to allow CMRS providers "..to offer fixed wireless services on their assigned spectrum on a co-primary basis with mobile services." FNPRM at ¶ 2, This revision eliminates "...the classification of fixed services as limited to auxiliary or ancillary uses in these bands." Id. According to the FCC:

> "in addition to developing mobile services, [CMRS providers] are seeking to provide a wide range of fixed service offerings to consumers, and in many instances to combine fixed and mobile technologies into integrated service packages. Potential fixed wireless services include not only "wireless local loop," i.e., fixed wireless links to connect residences, apartment buildings, office buildings and other structures with wireline local exchange networks, but also fixed wireless architectures that can link end users to cellular switches, and remote base stations. By giving CMRS providers greater flexibility to provide these fixed services, whether separately or in combination with mobile services, we establish a framework that will stimulate wireless competition.... " FNPRM at ¶ 3.

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[2] Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, Notice of Proposed Rule Making, WT Docket No. 96-6, 11 FCC Rcd 2445 (1996).

Although the 1st R&O allows licensees to offer fixed services over CMRS spectrum, it deferred to the accompanying FNPRM the question of the appropriate regulatory treatment of licensees providing such services. The FNPRM suggests that the regulatory treatment of licensees offering the types of ancillary, auxiliary and incidental fixed services offered by CMRS providers under the old rules would not change. However, for new and broader "fixed uses", the notice proposes establishing a presumption that licensees offering other fixed services over CMRS spectrum should be regulated as CMRS.

III. DISCUSSION

Historically, the FCC has interpreted the statutory definition of mobile services to include auxiliary, ancillary, secondary, or incidental fixed services. However, the FCC has excluded services that are solely fixed in nature.[3] Specifically, the FCC already determined that a mobile service station capable of transmitting while the platform is moving is included in the definition of mobile services. Platforms that cannot be moved while services are offered are not. Thus, satellite services provided to or from a transportable platform that cannot be used in a mobile mode are excluded from the definition of mobile services.

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[3] See, In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1424-1425, at ¶ 38 (1994) ("Second Report and Order").

Moreover, in defining Basic Exchange Telephone Radio Service ("BETRS"), the FCC agreed that "the substitution of a [fixed] radio loop for a wire loop in the provision of BETRS does not constitute mobile service...this service was intended to be an extension of intrastate basic exchange telephone service. Thus the [fixed] radio loop merely takes the place of wire or cable."[4]

In the face of these prior determinations, and the recent wholesale amendment of the Communications Act which, significantly, allowed continued State authority over intrastate wireline and wireless services, this FNPRM suggests that if a concededly stationary "wireless loop" integrated with landline facilities is offered as an integral part of the CMRS services offered by a CMRS provider, that service should be classified as CMRS, as long as the carrier otherwise offers interconnected, for-profit mobile service to the public. Not only "wireless local loop" services which do not differ from current BETRs services in any significant fashion, "i.e., fixed wireless links to connect residences, apartment buildings, office buildings and other structures with wireline local exchange networks," but also fixed wireless architectures that can link end users to cellular switches, and remote base stations should be deemed CMRS, just because they are offered on a co-primary basis on spectrum allocated to CMRS services.

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[4] Id. at ¶ 38, citing Basic Exchange Telecommunications Radio Service, Report and Order, 3 FCC Rcd 214, 217 (1988) {Emphasis Added}.

NARUC respectfully suggests that in view of the States' longstanding jurisdictional authority over "fixed" wireless services and the recent amendments to the Communications Act, the NPRM proposal to establish a presumption against State jurisdiction cannot be supported.

Section 152(b) of the Communications Act of 1934 expressly reserves state jurisdiction over intrastate wire or radio communications. It states that "Except as provided in sections 223 through 227 of this title inclusive, and section 332..., nothing..shall be construed to apply or to give the Commission jurisdiction with respect to ...charges, classifications, practices services, facilities or regulations for or in connection with intrastate communications service by wire or radio of any carrier..."(Emphasis added.). 47 U.S.C. § 152(b) (1996). Section 332 of the Communications Act only refers to "mobile" wireless services. The only real limitation on traditional state authority over "mobile" services in § 332 is the requirement that States demonstrate, to the FCC's satisfaction, consumer harm before imposing rate regulation. Fixed services, however, are controlled solely by § 152(b) . Indeed, even the FCC does not claim the limited 1996 revisions to the definition of "mobile" services allow it to preempt State authority over BETRs - type services - services which are almost direct analogues for many of the "fixed" uses proposed in this proceeding.

Moreover, as Congress was aware of BETRs services and the differing jurisdictional treatment accorded fixed and mobile wireless services, other changes to the Communications Act as a result of the 1996 legislation, buttress the requirement for a narrow reading of FCC "CMRS" jurisdiction authority, under § 332 , over intrastate matters implicit in § 152(b).

For example, § 610, in the section entitled "Effect on Other Laws", states "[t]his Act and the amendments made by this Act shall not be used to modify, impair or supersede or authorize the modification, impairment..[of]...Federal, State, or local law unless expressly so provided in such acts or amendment." {Emphasis added}[5]

A related rule of statutory construction is the well established "presumption against finding preemption of State law in areas traditionally regulated by the States." See, California v. ARC America Corp., 490 U.S. 91, 101 (1989). As the very existence of this proceeding concedes, States have historically had regulatory authority over BETRs and similar fixed services. If Congress had intended, in § 332, to preempt such regulation, it would have expressly so stated. Cf. Hillsbourough County v. Automated Medical Laboratories, 471 U.S. 707, 175 (1985).

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[5] See also Joint Explanatory Statement of the Committee of Conference ("Joint Explanatory Statement"), at 85 ("This provision prevents affected parties from asserting that the bill impliedly preempts other laws.")

Both the express text of § 152(b), which applies to all - both "fixed and mobile" - wireless service, and these related rules of statutory construction, require the scope of any FCC's prescriptive §332 authority, which, by its own terms, applies only to "mobile" services, to be narrowly construed.

State regulatory authority over wireless services - both mobile and fixed - is a given. Carriers, not governmental regulatory authorities, carry the burden of proving they fall within a particular regulatory classification - "fixed" or "mobile". To paraphrase § 601, preemption is not to be implied. NARUC respectfully submits the presumption posed in this NPRM is just the type of "implication" prohibited by that section. Moreover, that proposal to shift the burden of proof to State commissions flies in the face of long established canons of administrative law.

In addition, its clear the establishment of such a presumption is not needed to allow innovative use of spectrum. The 1st R&O already allows companies to use the spectrum in the manner suggested without sweeping the interconnected fixed services under the "CMRS" rubric.

VI. CONCLUSION

NARUC is concerned that the FCC's proposal could impair states' ability to ensure equal protection of consumers of functionally equivalent services. Because of particular local circumstances, it is important that states be allowed to determine the appropriate regulation of fixed wireless services. Accordingly, NARUC urges the FCC to ensure the establishment of federal policies regarding wireless services that will not result in unequal regulatory treatment of new local exchange service providers. NARUC also urges the FCC not to establish a rebuttable presumption that any wireless service, including fixed wireless service, provided under a CMRS provider's license comes within the definition of CMRS and consequently should be regulated as CMRS.

Respectfully submitted,

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November 25, 1996

Appendix A - Resolution on FCC's Further Notice of Proposed Rule Making Addressing Classification of Fixed Wireless Services

WHEREAS, The Federal Communications Commission (FCC) proposes to amend its rules to permit flexible service offerings, including fixed wireless service offerings, by Commercial Mobile Radio Service (CMRS) providers, Notice of Proposed Rule Making, WT Docket 96-6, 11 FCC Rcd 2445 (1996); and

WHEREAS, The FCC proposes to establish a rebuttable presumption that any wireless service, including fixed wireless service, provided under a CMRS provider's license "would be considered to come within the definition of CMRS and consequently regulated as CMRS'; and

WHEREAS, Wireless services, including both fixed and mobile services, are a growing alternative to traditional wireline local exchange services; and

WHEREAS, The FCC's proposal could impair states' ability to ensure equal protection of consumers of functionally equivalent services; and

WHEREAS, Because of particular local circumstances, it is important that states be allowed to determine the appropriate regulation of fixed wireless services; now, therefore, be it

RESOLVED, That the National Association of Regulatory Utility Commissioners (NARUC), convened at its 108th Annual Convention in San Francisco, California, urges the FCC to ensure the establishment of federal policies regarding wireless services that will not result in unequal regulatory treatment of new local exchange service providers; and be it further

RESOLVED, That the NARUC urges the FCC not to establish a rebuttable presumption that any wireless service, including fixed wireless service, provided under a CMRS provider's license comes within the definition of CMRS and consequently should be regulated as CMRS; and be it further

RESOLVED, That the NARUC General Counsel take action necessary to file comments with the FCC conveying these NARUC positions.

Sponsored by the Committee on Communications - Adopted November 20, 1996

Appendix B - Resolution Opposing Federal Preemption Regarding Intrastate Fixed Wireless Communications Services

WHEREAS, The Federal Communications Commission (FCC) has issued a Notice of Proposed Rulemaking in WT Docket No. 96-6 to permit fixed wireless service offerings by commercial mobile radio service (CMRS) providers; and

WHEREAS, The FCC has, to date, interpreted the statutory definition of mobile services to include auxiliary, ancillary, secondary, or incidental fixed services but to exclude those services that are solely fixed in nature (e.g., Basic Exchange Telephone Radio Service (BETRS)); and

WHEREAS, The FCC's personal communications service (PCS) rules require that a carrier must seek a waiver to offer primarily fixed services, demonstrating that such service best meets the demands of an area; and

WHEREAS, The FCC proposes that broadband CMRS providers be authorized to offer fixed wireless local loop service and possibly other fixed wireless services; and

WHEREAS, The FCC proposes to treat fixed wireless local loop services as an integral part of the CMRS services offered by a CMRS provider; and

WHEREAS, The FCC proposes that CMRS regulation continue to apply if a carrier offers both fixed wireless local loop services and interconnected, for-profit mobile services; and

WHEREAS, The FCC seeks comments on the extent to which the FCC's universal service programs should be modified to encompass, or impose obligations on, CMRS providers that offer the equivalent of local exchange service; and

WHEREAS, Fixed wireless local loop services would be jurisdictionally separable, with the vast majority being intrastate; now, therefore, be it

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), convened at its 1996 Winter Meeting in Washington D.C., supports the efficient use of technology in the provision of local exchange service; and be it further

RESOLVED, That NARUC support technology neutral regulation of services and opposes the expansion of the definition of CMRS to include fixed wireless local loop services and FCC preemption of States' authority over intrastate fixed wireless communications which is not technology neutral regulation of services; and be it further

RESOLVED, That the NARUC General Counsel file comments with the FCC conveying these NARUC positions.

Sponsored by the Committee on Communications
Adopted February 28, 1996

Appendix C - Resolution Regarding the NARUC Policy Principles for the Implementation of the "Telecommunications Act of 1996"

WHEREAS, The "Telecommunications Act of 1996" (this Act) has been signed into law and includes as its goals the timely and efficient implementation of State and Federal procompetitive policies; and

WHEREAS, This Act grants specific authority to the Federal Communications Commission (FCC) and the States to develop procompetitive policies consistent with this Act; and

WHEREAS, In reaffirming the importance of federalism, this Act preserves State authority to prescribe local competition policies based on local market conditions, to the extent provided for under this Act; and

WHEREAS, This Act provides for a legitimate FCC role to prescribe policies which are cognizant of local policies and concerns; and

WHEREAS, The FCC will engage in a series of rulemakings, commencing immediately, to implement its specific responsibilities under this Act; and

WHEREAS, The NARUC views the following policy principles as critical for the achievement of this Act's goals:

- Consistent with the recognition of State authority over intrastate telecommunications contained in Section 152 of the Act and to meet the goals of the law,

- To ensure the expeditious development of competition in all telecommunications markets and avoid regulatory gridlock, general national principles should be articulated and a Federal one-size-fits-all policy should be avoided.

- Consistent with this Act's intent to transition towards a market-based telecommunications industry, Federal policies should complement, and not impede or duplicate, State efforts to foster local competition.

- To avoid creating an opportunity for forum shopping by the industry, the FCC and the States should work together to develop policies which are compatible and allow for State creativity and innovation to facilitate competition and preserve universal service; and

WHEREAS, The interconnection proceeding by the FCC will be the first major implementation proceeding under this Act that could have significant ramifications for the development of local competition; now, therefore, be it

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), convened at its 1996 Winter Meetings in Washington, D.C., authorizes the agents of the NARUC to advocate these principles to the FCC and Federal policy makers; and be it further

RESOLVED, That the NARUC looks forward to working closely with Federal policy makers to promptly undertake and implement the provisions of this Act to achieve the key objectives of the law: local competition and universal service.

Sponsored by the Committee on Communications
Adopted February 28, 1996

CERTIFICATE OF SERVICE

I, JAMES BRADFORD RAMSAY, certify that I have served a copy of the foregoing on all the parties on the attached service list by 1st class mail, postage prepaid, this 25th day of November, 1996.

James Bradford Ramsay
Deputy Assistant General Counsel