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May 5, 1998

EX PARTE OR LATE FILED

Ms. Magalie Roman Salas, Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

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U.S. DEPARTMENT OF JUSTICE  
OFFICE OF THE SECRETARY

**Re: EX PARTE CONTACT 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**

Jolynn Barry Butler  
President  
Ohio Public Utilities Commission

Jim Sullivan  
First Vice President  
Alabama Public Service Commission

Bob Rowe  
Second Vice President  
Montana Public Service Commission

Margaret A. Welsh  
Executive Director

Dear Ms. Salas:

Pursuant to the FCC's *ex parte* rules, 47 C.F.R. § 1.1206(1), I am submitting, for the record, copies of this letter for filing in the above-captioned proceedings. Copies have been e-mailed to the offices of all FCC Commissioners and the Chief of the Common Carrier Bureau. *NARUC respectfully requests any waivers necessary to file this notice out-of-time.*

One Friday during February of this year, I met with Jeanine Poltronieri and Rosalind K. Allen of the FCC's Wireless Bureau to discuss this docket. I reiterated NARUC's arguments as laid out in our March 1 and March 25, 1996 comments filed in this proceeding, pointing out that generally, NARUC opposes the expansion of the definition of CMRS to include fixed wireless local loop services.

Most of the discussion focused on the Wireless' Bureau's proposed recommendation to the Commission for resolution of this proceeding.

Ms. Poltronieri and Ms. Allen suggested that the WTB was considering recommending that the FCC abandon the "rebuttable presumption of CMRS status" approach suggested in the FNPRM and instead use an "interpretive ruling" as a procedure vehicle to provide general guidance that an offering on a network configured to fully integrate fixed and mobile functions for common and interchangeable use by a single customer, would be CMRS. They suggested that, as the "order" would be an "interpretive ruling," States will remain free to examine the regulatory status of particular systems

I complimented both Ms. Poltronieri and Ms. Allen on the Bureau's extensive efforts to keep NARUC, and its member States, informed on this proceeding, *and expressed my personal appreciation for the briefing.* In response the proposal, I suggested the following:

- 1 - NARUC's position is that the FCC should simply take no action in this docket for the reasons originally outlined in NARUC's pleading [and reiterated below];
- 2 - The proposed "rebuttable presumption," insofar as it shifts the burden of going forward with evidence to the States was unlikely to be sustained in any appeal;

National Association of  
Regulatory Utility  
Commissioners

1100 Pennsylvania Ave., N.W.  
Suite 603  
Washington, D.C. 20004

MAILING ADDRESS  
Post Office Box 684  
Washington, D.C. 20044-0684

202.898.2200  
202.898.2213 Fax  
<http://www.naruc.org>

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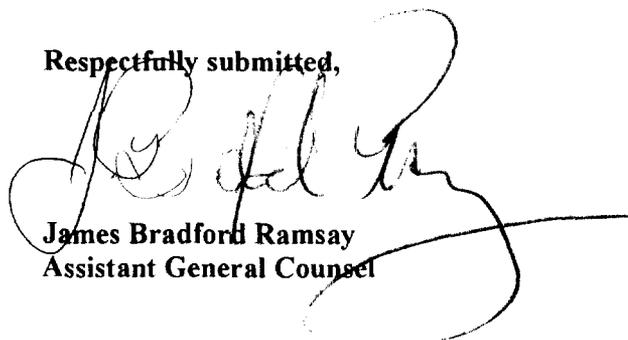
- 3 - If the FCC is determined to act in this docket, *in my opinion*, most of NARUC's members would *prefer* the WTC's alternative - an "interpretive ruling with no presumption stated" - *over* the "explicit" shift of the burden of going forward embodied in the NPRM's "rebuttable presumption and a final rule.
- 4 - The FCC should be very cautious in taking any action that could undercut State pro-competitive action. To my knowledge, no CMRS carrier has posited any specific State regulations that inhibit competition, presented a current circumstance where entry has actually been inhibited or explained how suspending State authority would actually protect competition. Indeed, since Section 332 was revised in 1993, the only significant CMRS litigation in federal courts involving the scope of State regulatory authority over CMRS action was in Ohio and involved the CMRS provider suing the State Commission *for trying to impose pro-competitive conditions on its offerings of wholesale service*. The PUCO was trying to promote resale competition. The carrier's wholesale rate to resellers and its retail rate to customers was exactly the same and it did not want to change..
- Because State regulation of CMRS and wireline services differs significantly, the NPRM proposal has the undesirable impact of favoring a particular technology for local access. While NARUC supports the efficient use of technology in the provision of local exchange service, we oppose Federal policy that is not technology-neutral and has the impact of favoring deployment of one technology over another.
  - In addition, it does not appear the posed expansion of the definition of CMRS to include fixed wireless local loop services is necessary to allow innovative use of spectrum. Under the FCC's view of 47 U.S.C. § 303, as discussed in the NPRM at ¶ 7, the FCC could allow companies to use the spectrum in the manner suggested without sweeping the interconnected fixed services under the "CMRS" rubric. Under such an approach, the fixed services offered would remain subject to the existing State regimes applicable to such services.
  - Moreover, expanding the limited incidental "fixed use" exceptions previously allowed in the manner suggested by the NPRM, threatens the States' regulatory flexibility which is needed to implement local competition and pricing policies consistent with local market conditions.

A copy of NARUC's resolution on this issue and the text of our reply comments in this proceeding - addressing the "parity" arguments of various commenters - is appended.

NARUC supports technology neutral regulation of services and, as explained, *supra*, opposes the expansion of the definition of CMRS to include fixed wireless local loop services and the resulting preemption of State authority over intrastate fixed wireless communications as bad public policy.

If you have any questions about this or any other NARUC pleading or position, please do not hesitate to call me at 202-898-2207.

Respectfully submitted,



James Bradford Ramsay  
Assistant General Counsel

## APPENDIX A - TEXT OF NARUC'S REPLY COMMENTS

Approximately 45 parties filed initial comments in these proceedings. A few parties implied, as did NARUC, that allowing spectrum licensees to use their allocations to provide "fixed wireless local loop services" ("FWLL"), does not require the FCC to sweep such interconnected services under the rubric of "Commercial Mobile Radio Services" ("CMRS").

Similarly, a number of parties basically supported NARUC's contention that, by suggesting that fixed wireless local loop service, a clear analogue for "fixed" wireline local loop service, be treated as CMRS, the FCC was inappropriately awarding an arbitrary regulatory advantage which would subvert the natural operation of market forces and lead to inefficient deployment of network technologies.

Predictably, those implying preemption of State regulation of fixed services is warranted raised the boilerplate industry policy arguments re: the need to promote CMRS services and assure regulatory parity. However, few even attempted a detailed legal analysis to support their positions. This is not surprising. As NYNEX notes on page 8 of its comments, there is no Congressional authority for excluding State authority over FWLL services. Historically, even the FCC has acknowledged, at least in the case of BETRs services, FWLL services simply do not conform to § 153's definition of "mobile services". As OPASTCO correctly points out at 6 of its comments, if a carrier is offering FWLL service, that service should not be considered "mobile"; the fact the service is radio-based is simply irrelevant.

Upon close examination, even policy arguments suggesting that "regulatory parity" requires treatment of such FWLL services under the CMRS rubric, with the related preemptive impact on State regulation, are suspect. For example, Sprint Spectrum, at 5 of its comments, argues there is no reason to violate the plain intent of Congress calling for symmetrical regulation of CMRS services, by creating a different scheme of regulation for fixed services offered over CMRS frequencies. A close examination of this sentence reveals the obvious contradictions. First "mobile services" and "fixed" radio based services have always been treated differently. The attempt to compare CMRS, a service based on the statutory definition of "mobile services", with "fixed" WLL services turns the second clause of Sprint's argument into a non sequitur. Second, from an economic perspective, the Congressional goal of symmetrical regulation of like services is better served by treating FWLL like its "fixed" wireline analogues - not by renaming fixed services "mobile" just because they are provided via a CMRS providers' frequency allotment. Third, as a review of the history and text of § 332 will demonstrate, Congress's efforts to impose "regulatory parity" targeted differential FCC regulation of wireless mobile services, not the underlying State regulation of either fixed or mobile wireless services. Indeed, differential State CMRS regulation is expressly contemplated by § 332's reservation of State authority to impose "other terms and conditions."

Finally, Western Wireless Corporation, at page 4 of its comments, and Celpage, Inc. at page 8 of its comments, suggest that new § 253, 47 U.S.C. § 253 (1996), makes "restrictive" State regulation of FWLL services impermissible.

It is clear from § 152(b) and numerous other express reservations of State authority, that Congress did not intend to eliminate State regulation of intrastate services. Indeed, even § 253(b), the section relied upon by these two commentators, expressly reserves State authority to impose rules to protect service quality, universal service and the consumer generally. Because any regulation that applies to a new entrant requires that carrier to incur compliance costs, all such regulation can be fairly characterized as making the provision of the regulated service more difficult. Accordingly, § 253(a) must be read to address only State regulations that have the effect of absolutely prohibiting the provision of the new service, e.g., exclusive franchise requirements. That section should not be read to apply to "restrictive" State rules that merely make provision of a service more difficult, by, *inter alia*, imposing "compliance costs" in a nondiscriminatory fashion upon all providers of that service.

NARUC respectfully suggests that State regulations that currently apply to FWLL services like BETRs cannot, by definition, fall within the § 253 prohibition.

**CONCLUSION** For the reasons stated above, and in our March 1, 1996 initial comments, NARUC continues to "...support technology neutral regulation of services and oppose[] the expansion of the definition of CMRS to include [FWLL] services."

**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.

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Sponsored by the Committee on Communications Adopted February 28, 1996