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November 5, 2003

**VIA ELECTRONIC FILING**
Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, D.C. 20554

Re: *RM-10403 - - NOTICE OF EX PARTE COMMUNICATION*

Dear Ms. Dortch:

On behalf of WaveRider Communications, Inc. ("WaveRider"), we are writing to report that WaveRider's Vice President-Engineering, Jim Chinnick, and undersigned counsel met on November 3, 2003 with Paul Margie, Legal Advisor to Commissioner Michael J. Copps, to discuss WaveRider's opposition to the above-referenced petition for rulemaking filed by Progeny LMS, LLC ("Progeny"). Except as discussed below, the positions discussed during the meeting are set forth in the prior filings by WaveRider and its customers in this proceeding.[1]

As the Commission is aware, WaveRider is the world's largest vendor of equipment used to provide license-exempt broadband service in the 902-928 MHz band. Indeed, in the United States alone WaveRider has installed approximately 1,000 wireless broadband networks in 48 states, many of which serve rural or other areas that have little or no broadband service. The success of WaveRider's products is due largely to the superior propagation characteristics of the 902-928 MHz band – WaveRider's outdoor antennas are capable of delivering non line-of-site coverage at ranges up to five miles, with up to 2 Mbps of throughput. As a result, WaveRider's customer base has expanded to include smaller independent telephone companies and utilities

[1] *See Ex Parte* Letter from Robert D. Primosch, Esq., Counsel for WaveRider Communications, Inc., RM-10403 (filed Mar. 7, 2003); *Ex Parte* Letter from Robert D. Primosch, Esq., Counsel for WaveRider Communications, Inc., RM-10403 (Sept. 26, 2002); Comments of WaveRider Communications, Inc., RM-10403 (filed May 14, 2002); *Ex Parte* Letter from Northwest Internet Services, RM-10403 (filed May 23, 2003); *Ex Parte* Letter from Joink, Inc., RM-10403 (filed May 8, 2003); *Ex Parte* Letter from ISP Wireless Group, RM-10403 (filed May 7, 2003); *Ex Parte* Letter from City of Buffalo, Minnesota, RM-10403 (filed May 7, 2003); *Ex Parte* Letter from REA-ALP Internet Services, RM-10403 (filed May 5, 2003).

who seek to provide broadband to their local communities. Some recent examples include the following:

- In October 2003, Cross Wireless, a division of Cross Telephone Company that provides rural GSM-based cellular service, announced plans to deploy WaveRider's 902-928 MHz equipment to power its new Datz wireless broadband service (www.Datzfast.com) in ten rural communities in Oklahoma. Currently the Cross system is installed in six communities, including Muskogee, Tahlequah, Stigler, McAlester, Shawnee and Tecumseh. Cross plans to install WaveRider-based networks in the four remaining communities by the end of this year.

- In September 2003, Internet 2000 (www.i2k.net), a regional broadband and dial-up Internet service provider based in Wyoming, Michigan, announced plans to use WaveRider's equipment to expand its network into eleven Michigan communities, including Rogers City, Atlanta, Bangor, Coloma, Houghton Lake, Lawton, New Buffalo, Onaway, Prudenville and Watervilet. In total, Internet 2000 provides wireless broadband service via points of presence in 45 locations throughout Michigan.

- In June 2003, Dynamic Broadband (www.dybb.com/index.htm), a regional wireless Internet service provider based in Marshalltown, Iowa, announced that it will use WaveRider's equipment to expand its wireless networks in Sioux City, Marshalltown, Clinton, Indianola, Waterloo, Cedar Rapids and Des Moines, IA. Dynamic Broadband was formed in June 2000 by Central Iowa Power Cooperative (CIPCO, based in Cedar Rapids), RACOM Corporation and Syscomp (both based in Marshalltown), and provides wireless broadband service to both business and residential customers in communities throughout the upper Midwest.

The developments discussed above and elsewhere in the record confirm what the Commission has known for some time: license-exempt spectrum is emerging as a critical tool for creating broadband infrastructure to rural and other underserved areas that have little or no such service available to them. Indeed, the Commission's recent *Notice of Proposed Rulemaking* ("*NPRM*") on reforming certain rules in Part 15 (ET Docket No. 03-201) was initiated with companies like WaveRider in mind:

> One of the more interesting developments is the emergence of wireless Internet service providers or "WISPs". Using unlicensed devices, WISPs around the country are providing an alternative high-speed connection in areas where cable or DSL service have been slow to arrive. We believe that the increased flexibility proposed herein will help to foster a viable last mile solution for

> delivering Internet services, other data applications, or even video and voice services to underserved, rural or isolated communities.[2]

Chairman Powell made similar observations in his statement in support of the NPRM:

> What's exciting about all of this is that wireless Internet service providers (WISPs), like Roadstar, are springing up all over the country – from Bluemont, Virginia to Coffman Cove, Alaska. It's the dawn of a new facilities-based broadband industry; a new industry spawned in part by the Commission's unlicensed rules.[3]

In sum, as observed by the Commission's Spectrum Policy Task Force, "a level of certainty regarding one's ability to continue to use spectrum, at least for some foreseeable period, is an essential prerequisite to investment and lead time."[4] Such uncertainty inevitably will result from a *Notice of Proposed Rulemaking* on Progeny's proposal, since it will raise doubts among equipment vendors, WISPs, subscribers and the financial community as to whether and to what extent the 902-928 MHz band will continue to be available for license-exempt broadband service.[5] That scenario would be a bitter pill for WISPs who are or will soon be in the spectrum, especially coming on the heels of the Commission's recent day-long program devoted to WISPs

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[2] *Modification of Parts 2 and 15 of the Commission's Rules for Unlicensed Devices and Equipment Approval*, ET Docket No. 03-201, at ¶ 2 (rel. Sept. 17, 2003).

[3] *Id.*, Separate Statement of Chairman Michael K. Powell at 1.

[4] Report of the Spectrum Policy Task Force, Federal Communications Commission, ET Docket No. 02-135, at 23 (Nov. 2002). The Commission has noted on several other occasions that regulatory uncertainty can discourage investment, and that unnecessary regulatory uncertainty therefore should be avoided. *See, e.g., Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798, 4802 (2002); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, 17 FCC Rcd 3019, 3022-23 (2002); *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1421 (1994); *Kirby Corp. v. Pena*, 109 F.3d 258, 266-67 (5th Cir., 1997); *Houston Lighting and Power Co. v. United States*, 606 F.2d 1131, 1145 (D.C. Cir., 1979); *Chemical Bank New York Trust Co. v. S.S. Westhampton*, 358 F.2d 574, 580 (4th Cir. 1965).

[5] WaveRider is not the only wireless broadband vendor who will be directly affected by this matter. For example, Alvarion and Trango Broadband recently introduced equipment specifically for the 902-928 MHz band, and it is expected that other vendors will follow suit in 2004. *See, e.g.,* "Alvarion Unveils New BreezeACCESS System for 900 MHz Allowing Carriers to Reach More Customers," Alvarion, Inc. Press Release (June 23, 2003) (available at http://www.alvarion.com/RunTime/CorpInf._30130asp?fuf=343&type=item); "Trango Broadband Introduces 900 MHz and 2.4 GHz Fixed Broadband Wireless Network Systems," Trango Broadband Press Release (Oct. 27, 2003) (available at http://www.trangobroadband.com/about/pr_announc900_2400.htm).

and the service they provide to rural areas.[6] Moreover, it is dubious whether there even is anything for the Commission to propose here, since Progeny has yet to address any of the serious technical and analytical flaws detailed by WaveRider in its March 7 comments on the Progeny's October 10, 2003 White Paper.[7] Given the state of the record, there is no legitimate legal or public policy reason for the Commission to put the interests of a single licensee ahead of an entire industry that that is putting the 902-928 MHz to productive use in communities that need broadband service.[8] Progeny's petition for rulemaking should be denied.

Should there be any questions concerning this submission, please contact the undersigned.

Very truly yours,

/s/ Robert D. Primosch
Robert D. Primosch
Counsel for
WaveRider Communications, Inc.

cc (via e-mail):
David Furth
Julius Knapp
Alan Scrime
Paul D'Ari
Karen Rackley
Richard Arsenault
Neil McNeil

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[6] *See, e.g.,* Remarks of Chairman Michael K. Powell at the FCC Rural Wireless ISP Showcase and Workshop, Washington, D.C. (Nov. 4, 2003).

[7] For ease of reference, a copy of WaveRider's March 7 filing is attached hereto.

[8] *See National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1212 (D.C. Cir. 1984) (the Communications Act "requires the Commission to promote the public interest, not to protect individual licensees") (citation omitted).