



N A R U C
National Association of Regulatory Utility Commissioners

NOTICE VIA ELECTRONIC FILING

December 2, 2014

The Honorable Chairman Tom Wheeler
Office of the Chairman
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

RE: *In the Matter(s) of Maritime Communications/Land Mobile, LLC Debtor-in-Possession Application to Assign Licenses to Choctaw Holdings, LLC, WT Docket No. 13-85, FCC File No. 0005552500, Maritime Communications/Land Mobile, LLC Debtor-in-Possession Application to Modify and Partially Assign License for Station WQGF318 to Southern California Regional Rail Authority, FCC File Nos. 0004153701 and 0004144435, Application for New Automated Maritime Telecommunications System Stations, FCC File No. 0003203355, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, EB Docket No. 11-71, FCC File Nos. 0004030479, 0004144435, 0004193028, 0004193328, 0004354053, 0004309872, 0004310060, 0004314903, 0004315013, 0004430505, 0004417199, 0004419431, 0004422320, 0004422329, 0004507921, 0004153701, 0004526264, 0004636537, & 0004604962.*

Chairman Wheeler,

On November 19, 2014, at its annual meeting in San Francisco, California, the National Association of Regulatory Utility Commissioners (NARUC) passed a resolution captioned ***Resolution on Utilities' Access to Spectrum to Promote Public Safety***. A copy of that resolution is appended to this letter. The resolution specifically requests, that the FCC:

- []) [R]e-examine the precedential effects of its finding that SCADA and smart grid systems are not dedicated to protecting the public safety and the prevention of human injury and property damage in the above-captioned proceedings; and***
- []) [A]llow utilities and other Critical Infrastructure Industries (CII) access to spectrum licenses when they support the specific uses of SCADA and smart grid systems needed to protect the safe, reliable and secure delivery of essential electric, gas and water services, upon which the public at large depends upon for electricity, light, heat, communications and water and which police, fire, emergency rescue and homeland security entities depend upon to carry out their public safety services.***

In support of these positions, NARUC states as follows:

NARUC is a nonprofit organization founded in 1889. Its members include the government agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with

regulating the activities of telecommunications,¹ energy, and water utilities. NARUC is recognized by Congress in several statutes² and consistently by the Courts³ as well as a host of federal agencies, as the proper entity to represent the collective interests of State utility commissions. Current FCC precedent undermines resiliency and reliability of critical infrastructure industries. State regulators have a direct and tangible interest in the safety, reliability and security of electric, gas, and water utilities and other CII, and they have authorized utilities to invest billions of dollars (including funds derived from federal grants from the U.S. Department of Energy) in SCADA and smart grid systems to promote, among several public interest objectives, the safety, reliability and security of utilities and other CII. Those interests are directly implicated by the FCC's actions in these proceedings.

NARUC appreciates the opportunity to share its members' concerns about the FCC's recent Memorandum Opinion and Order (MO&O) finding that certain operations by electric utilities and oil and gas companies are business-related and not primarily grounded in public safety.⁴ The MO&O considered separate applications to assign small portions of Maritime Communications/Land Mobile LLC's (MCLM) AMTS licenses to twelve CII companies, including electric utilities, oil and gas companies, and a railroad.⁵ The FCC concluded it was in the public interest to remove from the hearing an application to assign spectrum from MCLM to the Southern California Regional Rail Authority for Positive Train Control but rejected similar requests to remove pending applications to assign spectrum to electric utilities and oil and gas companies for Supervisory Control and Data Acquisition (SCADA), smart grid, and other critical uses.

The Commission recognized electric utilities and oil and gas companies:

[A]re critical infrastructure industry entities under the Commission's Rules. We acknowledge as well that important public benefits stem from the operation of, for

¹ NARUC's member commissions have oversight over intrastate telecommunications services and particularly the local service supplied by incumbent and competing local exchange carriers (LECs). These commissions are obligated to ensure that local phone service is provided universally at just and reasonable rates. They have a further interest to encourage LECs to take the steps necessary to allow unfettered competition in the intrastate telecommunications market as part of their responsibilities in implementing: (1) State law and (2) federal statutory provisions specifying LEC obligations to interconnect and provide nondiscriminatory access to competitors. See, e.g., 47 U.S.C. § 252 (1996).

² See 47 U.S.C. §410(c) (1971) (Congress designated NARUC to nominate members of the FCC Federal-State Joint Boards); See also 47 U.S.C. §254 (1996). .

³ See, e.g., U.S. v. Southern Motor Carrier Rate Conference, Inc., 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985) (where the Supreme Court notes: "Throughout this litigation, the NARUC has represented the interests of the Public Service Commission's of those States in which the defendant rate bureaus operate." 471 U.S. 52, n. 10. See also, Indianapolis Power and Light Co. v. ICC, 587 F.2d 1098 (7th Cir. 1982); Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1976); Compare, NARUC v. FERC, 475 F.3d 1277 (D.C. Cir. 2007); NARUC v. DOE, 851 F.2d 1424, 1425 (D.C. Cir. 1988); NARUC v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985).

⁴ See Maritime Communications/Land Mobile, LLC, Memorandum Opinion and Order, FCC 14-113, (rel. Sept. 11, 2014), available online at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-133A1.docx .

⁵ See Maritime Communications/Land Mobile, LLC, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, EB Docket No. 11-71,26 FCC Red 6520 (2011), available online at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-64A1.pdf.

example, SCADA systems by oil and gas companies and smart grid systems by electric cooperatives and other utilities. Although the CII Companies' proposals to use the spectrum licenses for SCADA, smart grid and similar applications would be beneficial to the public, unlike PTC, those other services are not dedicated to communications to prevent human injury and property damage, but are also used for day-to-day facilities management and other purposes that primarily serve the business needs of the licensee. MO&O at ¶ 36

NARUC's November resolution points out this finding on its face:

Ignore[s] State utility regulatory mandates for smart grid systems that use wireless communications systems, on the basis, as explained in the OSC/HDO (at ¶37), that they were not federal statutory mandates which were "grounded principally in a specific public safety concern with an imminent statutory deadline," like the federal mandate for railroads to implement PTC systems; *and*

[Effectively minimizes] the relevance and significance of utilities and CII using licensed spectrum in wireless communications systems for SCADA and smart grid systems to meet federal regulatory mandates, including but not limited to: U.S. Pipeline Hazardous Materials Safety Administration requirements governing control room management of pipelines (49 CFR §192.631); U.S. Environmental Protection Agency standards for hazardous air pollutants (40 CFR §§63.1 et seq.); and North American Electric Reliability Corporation standards applicable to electric utilities' smart grid and other electric distribution operations (Standard COM-001-1.1 Telecommunications & Standard COM-002-2 Communications and Coordination).

This finding that electric and gas utilities and other CII companies require use of these frequencies primarily to serve their business needs - and not public safety - lacks record support. The fact is these frequencies are used by energy utilities to protect public safety, *e.g.*, to monitor and detect the leakage of lethal gases, to comply with the President's cybersecurity goals, to evaluate damage during and after hurricanes and other natural disasters to prioritize and restore service as quickly as possible, and for a host of other critical applications crucial to support the production, transmission, and distribution of energy services for police stations, fire stations, hospitals, nursing homes, military bases, and residential consumers with life-saving electric-powered medical devices.

Even non-emergency utility use of this spectrum prevents both human injury and property damage by, *e.g.*, assuring reliable water supplies for human and animal consumption, providing reliable energy to generate air conditioning and heating for sensitive human populations and temperature-sensitive poultry and livestock, and refrigeration of food and dairy to prevent disease and spoilage, etc.

Extended interruptions in energy delivery - that could be limited by use of SCADA and smart grid technologies- can lead to deaths and serious injuries, the loss of property and livestock, and billions in lost revenue.

SCADA, smart grid, and other applications by electric utilities and oil and gas companies serve critical public safety functions. As the FCC noted in the MO&O, a host of regulatory and statutory mandates apply to wireless communications by electric utilities and oil and gas companies, including but not limited to Pipeline Hazardous Materials Safety Administration requirements governing control room management of pipelines, Environmental Protection Agency monitoring standards, North American Electric Reliability Corporation standards applicable to utilities, and smart grid and other operations key to homeland security. MO&O at ¶ 110

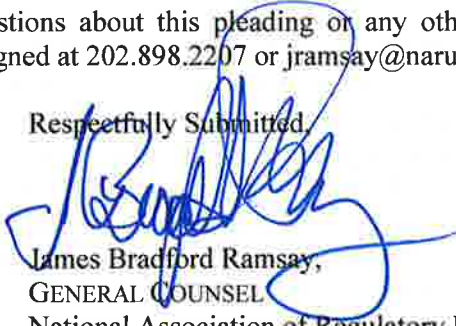
In October, two rural electric cooperatives, joined by a liquids transport company, filed Petitions for Reconsideration of the FCC's decision.⁶ Subsequently, on October 31, 2014, The American Petroleum Institute, the Edison Electric Institute, The National Rural Electric Cooperative Association, The National Rural Telecommunications Cooperative, the Energy, Telecommunications and Electrical Association, and the Utilities Telecom Counsel sent a letter to you on this issue.⁷

All four pleadings, like NARUC's resolution, urge the FCC to revisit its decision that operations by these types of critical infrastructure companies are not grounded in public safety.

NARUC respectfully requests any waivers that are needed to file this letter and attached resolution as comments out-of-time or alternatively moves that these comments be made a part of the record of this proceeding. NARUC was unable to meet the filing deadlines because of timing difficulties associated with its association procedures for adopting policy resolutions.

If you have any questions about this pleading or any other NARUC position, please do not hesitate to contact the undersigned at 202.898.2207 or jramsay@naruc.org.

Respectfully Submitted,



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⁶ See Oct. 8, 2014 *Motion of Shenandoah Valley Electric Coop. for Reconsideration, or in the Alternative, Petition for Leave to Intervene*, online at: <http://apps.fcc.gov/ecfs/document/view?id=60000971828>; Oct. 14, 2014 *Dixie Electric Membership Corporation Petition for Reconsideration*, online at: <http://apps.fcc.gov/ecfs/document/view?id=60000973288>; and Oct. 14, 2014 *Enbridge Petition for Reconsideration*, at: <http://apps.fcc.gov/ecfs/document/view?id=60000973270>, all filed in WT Docket 13-85 & EB Docket 11-71.

⁷ See October 31, 2014 *Letter to FCC Chairman Wheeler from The American Petroleum Institute, the Edison Electric Institute, The National Rural Electric Cooperative Association, The National Rural Telecommunications Cooperative, the Energy, Telecommunications and Electrical Association, and the Utilities Telecom Counsel*, filed in WT Docket No. 13-85 & EB Docket No. 11-71, at: <http://apps.fcc.gov/ecfs/document/view?id=60000977912>.

Resolution on Utilities' Access to Spectrum to Promote Public Safety

WHEREAS, Utilities and other critical infrastructure industries (CII) provide electric, gas, water and oil services that are essential for light, heat, communications and water for the health and welfare of the public at large and for police, fire and rescue to carry out their public safety services; *and*

WHEREAS, Utilities and other CII rely on their own extensive private communications networks to support the safe, reliable and secure delivery of these essential electric, gas, water and oil services; *and*

WHEREAS, Utilities and other CII use these private internal communications systems for applications such as Supervisory Control and Data Acquisition (SCADA) and smart grid communications systems, which are mission critical systems that are necessary to ensure the operational safety, reliability and security of electric, gas, water and oil transmission and distribution infrastructure; *and*

WHEREAS, Utilities and other CII frequently need these private internal communications systems to meet high standards for reliability, resiliency and security in order to maintain the safe, reliable and secure delivery of essential electric, gas, water and oil services; *and*

WHEREAS, Utilities and other CII frequently need direct access to spectrum, licensed by the Federal Communications Commission (FCC), to enable their private internal communications systems to meet their high standards for coverage, capacity and mobility, as well as reliability, resiliency and security; *and*

WHEREAS, Utilities and other CII lack an allocation to dedicated licensed spectrum to support their private internal communications systems; *and*

WHEREAS, Utilities and other CII have sought to acquire spectrum licenses on the secondary market from licensees who are willing to sell those spectrum licenses to them; *and*

WHEREAS, Utilities and other CII have been prevented by the FCC from receiving reassignment approval for and from acquiring certain spectrum licenses from a licensee, without the utilities and other CII being subject to inclusion in a hearing to review the licensee's basic character qualifications to hold the licenses; *and*

WHEREAS, The FCC has released two separate decisions (*See* Maritime Communications/Land Mobile, LLC, *Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing*, EB Docket No. 11-71, 26 FCC Red 6520 (2011) (*OSC/HDO*); *see also* Maritime Communications/Land Mobile, LLC, *Memorandum Opinion and Order*, WT Docket No. 13-85, released September 11, 2014 (*MCLM MO&O*)) in which it denied requests from utilities and CII to be removed from a hearing on a licensee's basic character qualifications in order to expeditiously acquire a portion of the licensee's spectrum licenses -- while the FCC has in these decisions granted requests from certain railroad entities for the same relief; *and*

WHEREAS, The FCC explained in the MCLM MO&O (at ¶36) that its disparate treatment of the utilities and CII in comparison to the railroad entities in these decisions was justified by stating that: "Although the CII Companies' proposals to use the spectrum licenses for SCADA, smart grid and similar applications would be beneficial to the public, unlike PTC [positive train control], those other services are not dedicated to communications to prevent human injury and property damage, but are also used for day-to-day facilities management and other purposes that primarily serve the business needs of the licensee;" *and*

WHEREAS, The FCC has ignored State utility regulatory mandates for smart grid systems that use wireless communications systems, on the basis, as explained in the OSC/HDO (at ¶37), that they were not federal statutory mandates which were “grounded principally in a specific public safety concern with an imminent statutory deadline,” like the federal mandate for railroads to implement PTC systems; *and*

WHEREAS, The FCC has minimized the relevance and significance of utilities and CII using licensed spectrum in wireless communications systems for SCADA and smart grid systems to meet federal regulatory mandates, including but not limited to: U.S. Pipeline Hazardous Materials Safety Administration requirements governing control room management of pipelines (49 CFR §192.631); U.S. Environmental Protection Agency standards for hazardous air pollutants (40 CFR §§63.1 et seq.); and North American Electric Reliability Corporation standards applicable to electric utilities’ smart grid and other electric distribution operations (Standard COM-001-1.1 Telecommunications & Standard COM-002-2 Communications and Coordination); *and*

WHEREAS, State regulators have a direct and tangible interest in the safety, reliability and security of electric, gas, and water utilities and other CII, and they have authorized utilities to invest billions of dollars (including funds derived from federal grants from the U.S. Department of Energy) in SCADA and smart grid systems in order to promote, among several public interest objectives, the safety, reliability and security of utilities and other CII, many of which were authorized pursuant to State statutory mandates and deadlines; *now, therefore be it*

RESOLVED, That the National Association of Regulatory Utility Commissioners, convened at its 126th Annual Meeting in San Francisco, California, recommends that the FCC reexamine the precedential effects of its finding that SCADA and smart grid systems are not dedicated to protecting the public safety and the prevention of human injury and property damage; *and be it further*

RESOLVED, That NARUC urges the FCC to allow utilities and other CII access to spectrum licenses when they support the specific uses of SCADA and smart grid systems needed for protecting the safe, reliable and secure delivery of essential electric, gas and water services, upon which the public at large depends upon for electricity, light, heat, communications and water and which police, fire, emergency rescue and homeland security entities depend upon to carry out their public safety services.

Sponsored by the Committee on Telecommunications

Recommended by the NARUC Board of Directors November 18, 2014

Adopted by the NARUC Committee of the Whole November 19, 2014

CERTIFICATE OF SERVICE

I, James Bradford Ramsay, hereby certify that on this 2nd day of December, 2014, a copy of the foregoing letter was [i] filed with the Commission, [ii] served on the parties listed below via First Class U.S. Mail, and [iii] e-mailed to the address listed below.


James Bradford Ramsay

Federal Communications Commission

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