

**Testimony of the Honorable Tony Clark  
Commissioner, North Dakota Public Service Commission**

*on behalf of the*

**National Association of Regulatory Utility Commissioners (NARUC)**

*before the*

**Committee on Energy and Commerce  
Subcommittee on Telecommunications and the Internet  
of the  
United States House of Representatives**

**Hearing on Wireless Innovation and Consumer Protection**

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## *Summary*

The wireless industry is rapidly growing and quickly replacing traditional land-line phone service in many people's lives. The increasing consumer reliance solely on wireless is a testament to improvements in their service over the years. However, increased consumer reliance solely upon wireless also brings a higher level of consumer expectation and scrutiny.

Data issued by entities as diverse as State Attorneys General and the Better Business Bureau indicate that complaints about wireless telephone service and supplies are amongst the top complaints received within recent years. From NARUC's perspective, it makes little sense to eliminate avenues of consumer relief at the State level solely on the basis of the particular technology used. In the case of wireless, it makes even less sense because the industry has prospered so well under the division of authority that now exists.

State commissions are effective protectors of consumer interests and serve as a valuable complement to federal rules and action. To deal with wireless consumer concerns NARUC seeks a partnership not preemption. The "functional federalism" model endorsed by NARUC ensures multiple "cops on the beat" and is a win-win for consumers.

The four key points that NARUC urges the Committee include in any legislation addressing wireless consumer issues are:

- 1) Rules must be technology neutral and ensure a level, competitive playing field regardless of technology
- 2) Functional federalism – any federal framework should look to the core competencies of agencies at each level of government and allow for regulatory functions on that basis, in effect putting multiple cops on the beat to protect consumers, in this case the principle dictates that national rules must allow for state enforcement of those rules
- 3) Federal rules must allow States to address emerging consumer threats - Limiting State action would "handcuff" cops protecting consumers
- 4) Case-by-case review of State rules – Carriers should be allowed to petition the FCC to challenge perceived onerous State rules above the federal floor on a case by case basis – balances needs of industry while maintaining appropriate consumer protections

## *Introduction*

Chairman Markey, Ranking Member Upton and members of the Subcommittee, thank you for the opportunity to testify today regarding *Wireless Innovation and Consumer Protection*.

I am Tony Clark, commissioner with the North Dakota Public Service Commission and a member of the National Association of Regulatory Utility Commissioners (NARUC). I serve as chairman of NARUC's Committee on Telecommunications. NARUC represents State utility commissioners in all 50 States and US territories, with oversight over telecommunications, energy, water and other utilities.

Some State commissioners, like me, stand for election as each of you do. Others are appointed by our governors. *But every single State Commissioner, as a leader in each of your States, is, like you, ultimately accountable to the voters.* Your State commissioners share your commitment to assuring that each of your constituents receives the benefits of broadband convergence, new wireless technologies and intense competition. In almost all cases, the Commissioners on your State commission will have an intense and almost complete identity of interest with you on policy goals for your respective States. Many of you know your State commissioners and all of us have worked hard, not just at our day jobs, but to be honest brokers on how national policies impact each of our States. I know it is hard to sort through all these questions, but I would humbly suggest that partnership with the States is key, and I would urge you when considering any new legislation to keep that partnership in mind.

We commend you and the committee for holding this hearing on protecting consumers – a goal and responsibility States share with Congress. We particularly appreciate your setting aside time to hear from your “beyond the Beltway” colleagues.

Wireless communications is a rapidly growing and technologically evolving market. Mobility along with improved call quality and new functions offered by wireless carriers make this service attractive to consumers and is leading many to “cut the land-line cord.” The increasing consumer reliance solely on wireless is a testament to improvements in their service over the years. However, increased consumer reliance solely upon wireless also brings a higher level of consumer expectation and scrutiny. Data issued by entities as diverse as State Attorneys General and the Better Business Bureau indicate that complaints about wireless telephone service and supplies are amongst the top complaints received within recent years.

While we note that there has been improvement in recent years, we also note that this improvement has been the result of both market forces and regulatory initiatives, such as number portability and the industry’s voluntary code of conduct, developed at the behest of groups like NARUC. In any event, we would stress that market forces in even the most competitive market cannot eliminate bad actors, anticompetitive practices, or public safety concerns that may need continued policing.

Under current law, State commissions handle thousands of consumer complaints every year, and generally provide individual relief to each complaint, often resolving complaints in a matter of weeks or even days through informal processes. In addition, we are able to address new and novel concerns as they arise.

We are concerned because the wireless industry in particular has lobbied to create a technology-specific preemption standard for their telecommunications services. Indeed, the overwhelming majority of States have already, by legislative fiat or State commission action, eliminated all traditional regulatory oversight of the wireless industry. In many of those states, however, the Commission and Attorneys General still play a role in resolving consumer complaints. And in those States and others, the very fact that the State retains jurisdiction, even when unexercised, acts as a deterrent for consumer abuse and an incentive to cooperate with informal complaint resolution procedures.

As a response to this concern that we have raised, industry representatives have said that they still support State Attorneys General having authority to enforce general laws of applicability over the industry. We respectfully argue that this sounds a whole lot more impressive than it actually is. In fact, 41 State Attorneys General agreed, signing a letter to Congress last year that urged a defeat of the kind of preemption legislation proposed last year.

While fraud enforcement actions have their place in jurisprudence, it is a pitifully poor way to police a market like telecommunications. Just take, for example, the issue of bill slamming and cramming. It is clearly wrong and laws prohibiting it are clearly telecom specific. And yet federal legislation that would only permit State laws of general applicability in the wireless arena would wipe these laws from the books of 50 States as they pertain the wireless providers. Is this really good public policy? Do we want to have to bring a full fraud case for every wireless bill dispute that arises, while handling wireline slamming and cramming complaints administratively? It makes no sense and illustrates the problem with broad federal preemption based on a specific technology.

From NARUC's perspective, it makes little sense to eliminate avenues of consumer relief at the State level solely on the basis of the particular technology used. In the case of wireless, it makes even less sense because the industry has prospered so well under the division of authority that now exists. And while some have argued that wireless is "too interstate" to face telecom-based State consumer protections, our experience is that the carriers have little trouble finding their way to Boston or Lansing or Sacramento when they are asking for something, such as certification to receive universal service dollars or interconnection to the wireline networks.

Finally, we believe that a law change at this juncture would add significant legal confusion over a federal act that is only now beginning to see some legal stability after years of litigation. For example, how would a wireless-specific State preemption impact how States enforce Eligible Telecommunications Carrier obligations? How would it

address State commission oversight and administration of duties related to section 251 interconnection or universal service? No one knows, but there would surely be legal wrangling to define it as soon as new legislation is passed. And the money spent on litigation is money that will not be spent on consumer services, or new products and innovation. Considering the lack of any substantial, demonstrated problem that is trying to be fixed, we can see little reason for a legislative change.

### ***Partnership...Not Preemption***

In November 2004, NARUC convened a Task Force to examine our own role and our view of the future of federalism and telecommunications. After internal polling, extensive discussions and consultation with consumers and industry stakeholders, NARUC ultimately adopted a whitepaper on Federalism in 2005. The document, combined with a more recently released wireless whitepaper, we believe sets NARUC on a very pragmatic, moderate path in dealing with the wireless jurisdictional relationship. While we do not believe limiting States to laws of general applicability is a feasible path forward, neither do we argue for a return to rallying around old jurisdictional flags and crying “States rights.” Instead, we believe we offer a constructive way of viewing the federal-State wireless relationship. In the end, we came to two important conclusions.

The first was that, with the pace of innovation accelerating, all government policies must strive to be as technology neutral as possible. Whenever technological change and restructuring sweeps through an industry, there is pressure to give new technologies special status under the law because they don’t appear to fit the “old”

regulations. The problem with this approach is that the new services compete directly with traditional services, and by creating brand new regulatory silos, you distort the market, encouraging regulatory arbitrage instead of true innovation. The better approach, in our view, is to ask how these new technologies change the environment for *all* players, and reexamine the first principles behind the regulations that are on the books for everyone.

The second conclusion was the development of our “functional federalism” concept, which is the idea that if Congress is going to rewrite the Telecommunications Act, it doesn’t have to be bound by traditional distinctions of “interstate” and “intrastate,” or figure out a way to isolate the intrastate components of each service. Instead, a federal framework should look to the core competencies of agencies at each level of government – State, federal and local – and allow for regulatory functions on the basis of who is properly situated to perform each function most effectively.

In that model, States generally excel at responsive consumer protection, efficiently resolving intercarrier disputes, ensuring public safety, assessing the level of competition in local markets and tailoring national universal service and other goals to the fact-specific circumstances of each State. In essence, a functional federalism approach assures there are multiple cops on the beat.

Some argue for the Federal Communications Commission to set national standards for consumer protection. NARUC is very willing to explore federal standards for consumer protection, and we believe this may be one way to address carrier concerns over potentially conflicting State regulations. After all, State regulators also want to ensure that compliance costs are minimized so that investment dollars can be focused on providing new service to consumers. However, we also want to be clear that federal standards must be accompanied by State enforcement. Experience has taught us that relying solely on the federal government for enforcement of a mass market like this would be folly. Take for example, the Do Not Call List experience. While both States and the federal government have enacted these laws, in practice, enforcement has fallen overwhelmingly to States, in fact, almost exclusively.

For illustrative purposes, consider this: North Dakota is a state of only about 640,000 people. In the first 2 ½ years of its strict state do-not-call law, the state Attorney General has enforced 53 settlements, totaling over \$64,000, and issued 7 cease and desist orders just in his state alone. Meanwhile, the entire federal government, despite receiving over one million complaints, has only issued 6 fines and filed 14 lawsuits. Even more importantly from the consumer's viewpoint, telemarketers were quick to exploit a patchwork of loopholes and "workarounds" to the federal rules and the calls kept coming. It fell to a handful of States to say that "no means no". It is not that federal officials don't care, it is just that there is simply no way they could effectively respond to individual complaints across a nation this large unless States are full partners in enforcement.

Finally, we believe that States must retain the ability to enact new consumer protections to address potential abuses. To limit the ability of States to address emerging concerns will in effect “handcuff” cops on the beat protecting consumers.

Due to their role as protectors of the consumer, State utility commissions are usually the first to learn of and act on new and novel consumer concerns. For example, States were the first to address the issues of cramming, slamming and other scams. At least 21 States had instituted Do-Not-Call lists before the federal Do-Not-Call registry was enacted. This ability to respond quickly to new issues is a key strength of State commissions. The federal government should not tie the hands of States by impeding their ability to act in the best interest of their residents. To do so would be a disservice to hard working, law-abiding citizens while leaving the door open for potential bad actors.

The bottom line is that State regulators are seeking a middle ground that relies on each level of government doing what it does best: the federal government setting standards that apply to all and the States enforcing those rules and tailoring them to specific emerging issues. It is a partnership, not preemption.

### ***Case-by-Case Review of State Rules above Federal Floor***

If federal policymakers or the wireless industry are concerned that preserving the current authority of States, under which the wireless industry has flourished, may result in onerous or discriminatory States laws, we believe this issue can be easily addressed. The FCC has procedures in place that can be applied to address industry concerns. In the

case of CPNI-consumer privacy and slamming issues, the FCC has established a process under which a carrier may petition the FCC to challenge State regulations above the federal floor it feels are overly onerous or conflict with federal rules. This system has worked very well and balances the needs of industry while maintaining appropriate consumer protections.

### *Conclusion*

The wireless industry is rapidly growing and quickly replacing traditional land-line phone service in many people's lives. This is positive in that wireless service is one that consumers want and it brings robust new technologies to the marketplace that can improve quality of life, economic development and public safety. It is also clear that consumers must continue to have avenues available that allow for timely and effective resolution of complaints and more often than not State commissions are where they turn for resolution.

State commissions are effective protectors of consumer interests and serve as a valuable complement to federal rules and action. The "functional federalism" model endorsed by NARUC ensures multiple "cops on the beat" and is a win-win for consumers.

In summation let me reiterate the four key points that NARUC urges the Committee include in any legislation addressing wireless consumer issues:

- 5) Rules must be technology neutral and ensure a level, competitive playing field regardless of technology

- 6) Functional federalism – any federal framework should look to the core competencies of agencies at each level of government and allow for regulatory functions on that basis, in effect putting multiple cops on the beat to protect consumers, in this case the principle dictates that national rules must allow for state enforcement of those rules
- 7) Federal rules must allow States to address emerging consumer threats - Limiting State action would “handcuff” cops protecting consumers
- 8) Case-by-case review of State rules – Carriers should be allowed to petition the FCC to challenge perceived onerous State rules above the federal floor on a case by case basis – balances needs of industry while maintaining appropriate consumer protections

Finally, Mr. Chairman, I would note that NARUC has committed itself to ongoing dialogue with the industry and other policy makers to ensure that the benefits of wireless innovation are preserved, while ensuring that consumers are served in the best possible way.

Chairman Markey, Ranking Member Upton, and members of the Committee, I thank you for the opportunity to testify before you today. NARUC looks forward to working with you to ensure our common goal of effectual consumer protection.

I look forward to answering any questions you may have.