

In contrast to the OSP situation addressed by TOCSIA, the user has not been deprived of his or her choice of carrier or deceived about the identity of the carrier rendering service; rather, WATERCOM provides the threshold, facilities-based essential service which is not subject to alternative access by the user. The billing/operator function, which is the crux and the *raison d'être* of the OSP, is incidental to the mobile service portion of the call; and the user will be subject to the mobile service charge regardless of the routing of the call from the point of interconnection of the WATERCOM network with the landline network to the called party.<sup>11/</sup>

Clearly, TOCSIA was intended to assure consumers the right to choose their primary, serving carrier. It was not intended to afford users the option to bifurcate responsibility for their calls in order to control routing of a consequential element of the end-to-end service. Nor was TOCSIA intended to interject a second OSP into call routing. The Bureau characterizes WATERCOM as an OSP due to its providing of billing services. Thus, since WATERCOM is entitled to bill for its radiolink service, the Bureau's interpretation would result in interjecting a second OSP into the call. This creates call disruption, not consumer protection. The Act must be interpreted in such a manner as to give force and effect to the underlying Congressional intent, United States v. American Trucking Ass'n, 310 U.S.

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<sup>11/</sup> See Declaratory Ruling at n.44.

534, 542 (1940), and to avoid reaching unintended results inconsistent with the statutory scheme, In Re Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643 (1987). TOCSIA simply cannot be read to require that mobile radio traffic must be segregated into component parts in order to afford customers the option to select service providers for part of the call anymore than the antitrust restrictions on tying arrangements can be utilized to require General Motors to give new car purchasers a choice of selecting generic in lieu of company-branded batteries, sparkplugs, filters and other automotive components.

If the underlying position of the Bureau is that mobile service carriers must provide equal access to interexchange carriers,<sup>12/</sup> it should do so directly and not through misapplication of TOCSIA and imposition of the operational burdens imposed by TOCSIA. In point of fact, however, WATERCOM does provide customers with IXC access, via the IXCs' 800 number service.<sup>13/</sup> WATERCOM offers a postalized, three-tier rate arrangement. WATERCOM offers an end-to-end rate to any station located in the 50 states, the District

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<sup>12/</sup> See Declaratory Ruling at ¶ 23 and n.34.

<sup>13/</sup> The Bureau misinterprets WATERCOM's tariff wherein it characterized WATERCOM as bundling its airtime and long distance charges to the effect and that a consumer "will apparently incur a higher total charge for a call if he or she chooses his or her own carrier." Declaratory Ruling at n.34. While the Bureau does not reach the issue of the legality of bundling radiolink and connecting landline services, it is apparent that this issue underlies the Bureau's imposition of OSP regulation upon service providers.

of Columbia, Puerto Rico and the U.S. Virgin Islands, a second end-to-end rate for connection to any other area to which service is available, and a rate for 800 calls. Thus, any subscriber may enjoy WATERCOM's lowest rate by calling to an 800 number and utilizing the customer's carrier of choice and independent billing arrangements for completion to the called number.<sup>14/</sup>

In its Comments on the GTE Petition, WATERCOM noted that it publicizes to users on the public vessels, either at the telephones or via the instruction cards in the state rooms, WATERCOM's identity as the service provider and the rates charged. Call-branding, as required of OSPs, would add nothing to the information already available to users; and those in a mobile environment certainly have no reasonable expectation that they will be having access to their customary IXC for the ship-to-shore call. Similarly, the requirement for handling emergency calls is incongruous in a mobile environment: emergency calls are addressed to the Coast Guard or through the Maritime Distress and Safety System. The availability of 9-1-1 service from a vessel reaching a shore station possibly 30 or 40 miles distant and a connecting LEC which may be another 5 or 10 miles away

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<sup>14/</sup> Providing 10-XXX access to IXCs would entail major reprogramming of WATERCOM's switches at each of its 54 shore stations plus the OCC. Indeed, 13 of the LECs with which WATERCOM interconnects are under deferred equal access due to having switches that cannot process 10-XXX access codes. WATERCOM has received no customer request for such access, and the cost of such reprogramming would be prohibitive in light of the fact that the traffic at issue constitutes less than 1% of WATERCOM's total call volume.

certainly is not the emergency service contemplated by TOCSIA. Finally, the "call-splashing" prohibition is irrelevant in the maritime environment since the vessel's location can be identified only as being located within a range of ± 50 miles of the serving shore station. In many instances, the vessel could be located in the waters of any of three different states. WATERCOM has attempted to harmonize its billing practices in a way that is sensible to the consumer through adoption of a postalized rate structure. Thus, users are billed for a maritime call, without specification of the geographic origin of that call. In this context, the call-splashing provisions of the TOCSIA Rules simply make no sense.<sup>15/</sup>

### III. EXEMPTION REQUEST

At its meeting on September 23, 1993, the Commission adopted a Notice of Proposed Rulemaking to implement Section 332 of the Communications Act as amended by OBRA, PR Doc. No. 93-252. 47 U.S.C. § 332(c), as adopted in OBRA, empowers the Commission to exempt commercial mobile service carriers from any Title II provision of the Act other than Sections 201, 202 or 208. Accordingly, the Commission clearly is empowered to exempt WATERCOM and others similarly situated from Section 226 of the Act. WATERCOM respectfully urges the Federal Communications Commission to exempt AMTS and other mobile service carriers from TOCSIA if the

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<sup>15/</sup> In any event, WATERCOM would not be engaged in "call splashing" since the user can call its IXC of choice directly without engaging WATERCOM to effect a transfer.

Commission declines to grant the request to find that AMTS is not subject to TOCSIA.

As previously documented, WATERCOM's charges, practices, and classifications are tariffed and are subject to Commission review. Moreover, AMTS has been determined by the Commission to be subject to market competition, and the Commission has proposed to classify maritime as a "nondominant" service in PR Docket No. 92-257. To the extent that user access to their IXC of choice is determined to be required, WATERCOM does provide such access through a rate differential between its postalized, end-to-end rates and its rates for connection to 800 service. Moreover, WATERCOM's rates and service are subject to oversight by the public vessels which make its service available to their customers. Finally, the volume of traffic is de minimis, and the cost of retrofitting to comply with TOCSIA, estimated as exceeding \$250,000,<sup>16/</sup> well would surpass the marginal incremental revenues produced by this service to WATERCOM.<sup>17/</sup> Accordingly, WATERCOM alternatively requests

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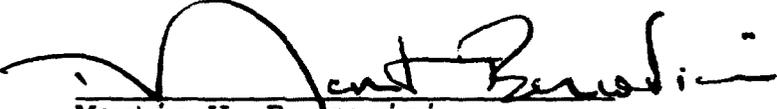
<sup>16/</sup> Each of WATERCOM's 54 shore station sites plus its OCC would be required to be retrofitted.

<sup>17/</sup> Counting each public-access vessel as a separate telephone line for equal access purposes, the cost to WATERCOM would exceed \$25,000 per line, far in excess of the \$15.00 per line cost the Commission used as a benchmark as the Commission's determination of the equal access requirements. Policies and Rules Concerning Operator Service Access, 6 FCC Rcd 4736, 4742 (1991). To avoid these costs, WATERCOM could force all public vessel calling to its operator position at the OCC rather than handling the calls through automatic interconnection. This option would increase costs and interject delays and inconvenience into call processing for both WATERCOM and the users. To

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that its service be exempted from provision of TOCSIA in accordance with 47 U.S.C. § 332(c)(1) of the Communications Act. WATERCOM defers to the Commission's judgment whether to treat this issue in the PR Docket 93-252 proceeding or to provide exemption herein, pursuant to its inherent authority to fashion administrative policies and remedies. See Bell Tel. of Pa. v. FCC, 503 F.2d 1250 (3d Cir. 1974); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

**WHEREFORE, THE PREMISES CONSIDERED**, Waterway Communications System, Inc. respectfully urges the Federal Communications Commission to further consider and determine that Automated Maritime Telecommunications Service is not subject to TOCSIA or, alternatively, to exempt such service from the requirements thereof.

  
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interject such additional handling into calls for the theoretical benefit of call-branding and 10-XXX access entailing a minor element of call processing, for a de minimis volume of traffic, would be the epitome of elevation of form over substance and would require WATERCOM to reconsider its ability to provide service to public-access vessels.