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OFFICE OF THE SECRETARY

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November 23, 1993

Mr. William F. Caton  
Acting Secretary,  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

Via Messenger

Re: GN Docket No. 93-252

Dear Mr. Caton:

Submitted herewith on behalf of Roamer One, Inc. is an original and nine (9) copies of its Reply Comments with respect to the above docket.

Kindly contact this office directly with any questions or comments concerning this submission.

Respectfully submitted,

*William J. Franklin*

William J. Franklin  
Attorney for Roamer One, Inc.

Encs.

cc: Roamer One, Inc.

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of Sections 3(n)	)	GN Docket No. 93-252
and 332 of the Communications	)	
Act	)	
	)	
Regulatory Treatment of	)	
Mobile Services	)	

To: The Commission

**REPLY COMMENTS OF ROAMER ONE, INC.**

Roamer One, Inc. ("Roamer One"), by its attorney and pursuant to Section 1.415 of the Commission's Rules, hereby replies to the comments filed with respect to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.<sup>1/</sup> As set forth herein and in its Comments, Roamer One urges the Commission to be sensitive to the specific technical, economic, and regulatory constraints of the 220 MHz mobile service, and classify this developing service as commercial mobile service on a case-by-case basis only to the limited extent that it directly competes with 800 MHz and 900 MHz SMR commercial mobile systems.

**I. VALID TECHNICAL AND REGULATORY REASONS SUPPORT CLASSIFYING 220-222 MHz MOBILE SERVICE AS A PRIVATE MOBILE SERVICE.**

Standing virtually alone among the commenting parties, Roamer One's Comments were focused on the Commission's regulatory treatment of 220 MHz licensees, and issues ancillary thereto. Roamer One's Comments (at 2-5) demonstrated Roamer One's exper-

<sup>1/</sup> 8 FCC Rcd \_\_\_\_\_ (FCC 93-454, released October 8, 1993) ("NPRM").

tise in this unique and developing frequency band. Roamer One's Comments established the following points:

- For technical and regulatory reasons, the 220 MHz authorizations differ substantially from those at 800 MHz and 900 MHz.<sup>2/</sup>
- The 220 MHz radio services have not developed, and no one knows how they will be used, or by whom.<sup>3/</sup>
- For these reasons, local 220 MHz licensees should be classified as "commercial mobile service" providers or "private mobile service" providers on a case-by-case basis.<sup>4/</sup>

No other party to the proceeding contributed substantial comments regarding the proper regulatory treatment of 220 MHz licensees.<sup>5/</sup> Thus, Roamer One's comments provided the only detailed 220 MHz-specific information in the record to date.

The great majority of commenting parties erred by woodenly lumping all SMR-type services (800 MHz, 900 MHz, and 220 MHz) into a single regulatory category.<sup>6/</sup> This categorization ig-

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<sup>2/</sup> Roamer One Comments at 3-5.

<sup>3/</sup> Id. at 3-4, citing Competitive Bidding, 8 FCC Rcd \_\_\_\_\_ (FCC 93-455, released October 12, 1993) (¶133 n.123) (Notice of Proposed Rulemaking).

<sup>4/</sup> Id. at 12-14.

<sup>5/</sup> Indeed, only two other parties even mentioned the 220 MHz band at all, and each of them devoted only one (1) sentence to the topic. See Comments of Mobile Telecommunication Technologies Corp. at 10-11; Comments of Telephone and Data Systems, Inc. at 17 (supports Commission without explanation).

<sup>6/</sup> The commenting parties divided on the proper application of the "functional equivalent of commercial mobile service" test as found in Section 332(d)(3). A substantial minority portion of the comments agreed with Roamer One (Comments at 10-12) that Congress intended that the phrase "private mobile services" should be read inclusively. For example, the Comments of Reed Smith Shaw & McClay (at 6-9) support Roamer One's position with a  
(continued...)

nores the substantial regulatory and technical differences between 220 MHz authorizations on the one hand, and 800/900 MHz, on the other. The Commission is charged with assuring that "comparable services are regulated in an identical manner."<sup>2/</sup>

The converse of this responsibility is that the Commission has no obligation to regulate non-comparable services identically. Indeed, Roamer One's Comments demonstrated that "commercial mobile service" regulation that might be appropriate or statutorily required for ESMR, wide-area SMR, and perhaps limited-area SMR licensees at 800 MHz and 900 MHz would not serve the public interest if applied to 220 MHz licensees.

Accordingly, the Commission should classify 220 MHz licensees as "commercial mobile service" providers or "private mobile service" providers on a case-by-case basis, depending on their particular service offerings and mode of operation.

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<sup>5/</sup>(...continued)  
comprehensive analysis of the legislative history of Section 332(d)(3).

The large telephone companies, always having been common carriers, argued that virtually all mobile service is commercial mobile service. In part, they support this position with the illustration that a company offering mobile service only to taxi cabs serves all the public that owns or operates taxi cabs, i.e., it has service that is "effectively available to a substantial portion of the public." If this logic were to be accepted, a company providing mobile service to but a single residence would be a "commercial mobile service" provider because it serves all the public that lives in that residence. The absurdity of this result illustrates the fallacy of the telcos' logic. A better analysis would conclude that making mobile service available to virtually all the public within a substantial, publicly accessible service area is a prerequisite to becoming a "commercial mobile service" provider.

<sup>2/</sup> See Comments of GTE at 8.

**II. THE COMMENTING PARTIES SUBSTANTIALLY SUPPORTED ROAMER ONE'S DEFINITION OF "INTERCONNECTED SERVICE."**

Roamer One proposed (Comments at 5-8) that the Commission use the following test to define "interconnected service", as that term is used in Section 332(d):

Mobile service becomes "interconnected service" when the end user can perceive that the service used the PSTN as an integral part of its service offering.

This test readily separates those service offerings in which the PSTN usage is a happenstance, i.e., the licensee chose to use the PSTN (rather than a private microwave link or control transmitter) for the licensee's own purposes without any end user awareness of the PSTN usage, from those in which the PSTN usage is an integral part of the mobile service offering.

Indeed, if this test is not adopted, the Commission could well reach the irrational result in which one private-radio licensee who used the PSTN for a dial-up transmitter control would become a commercial mobile service provider, while another private radio licensee providing the same service would remain a private mobile service provider because it used a control link for its transmitters. This would be a technology-dependent result of the type which many commenting parties oppose.

Although the commenting parties proposed differing formulations of this test,<sup>8/</sup> the great weight of comments supported the result reached by Roamer One's test.

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<sup>8/</sup> See, e.g., Comments of Pactel Corporation at 9 (subscriber access to PSTN is proper test of interconnection).

### III. THE COMMISSION LACKS JURISDICTION OVER NON-LICENSEE, FOR-PROFIT MANAGERS OF PRIVATE MOBILE SYSTEMS.

Several parties suggested that licensees otherwise properly classified as "private mobile service" providers could nevertheless become classified as "commercial mobile service" providers if they hired a non-licensee for-profit system manager.<sup>2/</sup> This suggestion presents difficult practical problems, exceeds the Commission's jurisdiction under the Communications Act, and must be rejected.

This suggestion would create unreasonable discrimination between licensees, and interfere with their management decisions. The Commission has permitted management contracts for all types of mobile radio systems, both public and private. Under these contracts, the licensee must retain ultimate control over its facilities, with the system manager merely implementing its directives. The system manager, therefore, is indistinguishable from a licensee's own employees, virtually all of whom are "for-profit" by virtue of their salary paid by the licensee.

Further, this suggestion could well "prove the exception that eats the rule." Virtually all Commission licensees must contract with for-profit entities in the course of constructing and operating a radio facility: engineers, site owners, equipment vendors, maintenance companies, even communications counsel. Does the Commission really wish to define a certain amount of contracted services as permissible, with one more contract as too

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<sup>2/</sup> See, e.g., Comments of the Public Service Commission of the District of Columbia at 4.

much, "commercializing" an otherwise-private mobile service provider? The only way to avoid this problem is to define all licensees who contract with for-profit entities as "commercial mobile service" providers, clearly not the Congressional intent.

Finally, the Commission lacks statutory jurisdiction over non-licensee managers of radio systems. Section 2(a) of the Communications Act, 47 U.S.C. §152(a), in relevant part limits the Commission's jurisdiction to:

[A]ll interstate and foreign communications by ... radio and all interstate and foreign transmission of energy by radio ... and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations....

By definition, a non-licensee manager is not the person "engaged ... in such communication ... by radio."<sup>19/</sup> Thus, the Commission cannot use an otherwise proper management contract, entered into with a management company over which the Commission lacks statutory jurisdiction, as the jurisdictional basis for reclassifying the licensee as a "commercial mobile service" provider.

#### **CONCLUSION**

Accordingly, Roamer One, Inc. respectfully requests the Commission to limit its proposed classification of 220 MHz systems as commercial mobile service providers on a case-by-case basis and only to the extent that such systems are the direct

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<sup>19/</sup> Congress recognized this limit to the Commission's jurisdiction when it amended the Communications Act to give the Commission limited jurisdiction over non-licensee tower owners. See Section 503(b)(5) of the Communications Act (forfeiture provisions for non-licensee tower owners).

competitors of 800 MHz and 900 MHz systems similarly classified as commercial mobile service providers. In all other cases, 220 MHz systems should be classified as private mobile service providers. Additionally, the Commission should permit likely private mobile service providers to obtain foreign investment funds during the pendency of this rulemaking.

Respectfully Submitted,

**ROAMER ONE, INC.**

By: William J. Franklin  
William J. Franklin  
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**CERTIFICATE OF SERVICE**

I, Andrea Kyle, a secretary in the law firm of William J. Franklin, Chartered, hereby certify that a copy of the foregoing Reply Comments was mailed via first-class U.S. mail, postage prepaid, this 23rd day of November, 1993 to the following:

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