Before the

FEDERAL COMMUICATIONS COMMISSION

Washington, DC 20544

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In re:

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Revision of Part 22 Of the Commission Rules Governing the Public Mobile Services	CC Docket 92115

To: FCC Commissioner

PETITION FOR RECONSIDERATION
TO PROPOSED CHANGES TO
FAR 22.919

Ron Foster, President

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For
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December 15, 1994

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PRELIMINARY STATEMENT

We do not feel that the changes to FAR 22.919 is in direct conflict with EIA/TIA Standards, CC Docket 70-318, CFR 22.915(a) and will not have any negative impact on cellular fraud. Thieves will continue to be thieves! We view these changes as an instrument to allow further monopolization of the cellular business. The practice of legitimately changing ESNs, at the customers request, to have two cellular telephones on the same number, in no way jeopardizes the integrity of the network. It does, however, cause a competitive environment to exist, which the CTIA and carriers wish to eliminate.

Existing rules are sufficient, if the FCC would only enforce them! However, even with this new rule, the FCC has failed to enforce past mandates in regard to ESN design. Now it wishes to declare all phones with altered ESNs illegal but at the same time take no action on the telephones manufactured that did not meet type acceptance requirements originally set forth by the Commission. We view this as unfair and uneven application of FCC rules.

We have no illusions that anything presented here will change the position of the FCC. No doubt arguments will have to be presented before a Federal Court to determine the publics best interest and competitive fairness of these new rule changes.

SUMMARY STATEMENT

After reading the proposed changes FAR 22.919, we find serious contradictions and other areas that pose legal questions in implementing the proposed changes. It is our understanding that the FCC is committed to fostering a competitive environment, ensure the public's interest is addressed, and establish technical standards. We are convinced that none of the affore mentioned issues were seriously considered. It is blatantly apparent that the CTIA has had an undue influence on the re-writing of these new rules governing ESN changes. The changes favor only the interest of the carriers and promote a monopolistic environment. Services that provide two telephones on the same number offer the consumer a better and more economical means of having this benefit. It was a great surprise that the FCC was so accommodating this special interest group. Especially in view of past court rulings regarding CPE equipment and equal access to the communications network. Furthermore, the new rule is anti-competitive and fails to substantiate any valid reason for denying the change of an ESN in cellular telephones for legitimate reasons. The assertion that it will prevent fraud is ludicrous! Thieves do not read the FCC rules! Thieves will continue to steal and this change to the previous rules will have no negative impact on anyone except the honest dealers providing "two phones on the same cellular number" service, which the public demands.

Gentlemen, this is not about fraud, but rather the greed of the common carriers. It is our opinion that in this case, the FCC is not uniformly applying it's rules. This is due in part to

serious contradictions in the re-write and an obvious bias towards the CTIA and the carriers, which it represents.

Companies providing services similiar to C2+ provide a more economical and flexible system the is indeed in the public's best interest.

We do believe, however, that the FCC should have some form of control over those individuals or companies performing the service of changing ESNs to accommodate an overwhelming demand by cellular users for two phones on one number. This could be as simple as required registration with the FCC and carriers in a given market.

Rampant fraud exist today because the FCC has ignored its own mandate regarding ESN design. Had the FCC enforced it's own rules, no one, including the thieves, legitimate providers of service and manufacturers would have the capability to change the ESN.

The CTIA supposedly represents the interest of all parties involved in cellular communications, including the estimated 20 million subscribers and another 50-100 thousand service related employees. The public interest demands that alternatives to services provided solely by the carriers be available at <u>their</u> discretion. The notion that only the carriers can provide adequate service is nonsense which has been proven numerous times by landmark decisions of the courts. The carriers hide behind the skirt of the CTIA and collude to drive any interest, other than their own, out of the cellular business. From our standpoint, the CTIA does not represent the interest of the public.

Contained in the following pages are our comments and recommendations regarding the proposed changes to FAR 22.919.

COMMENTS ON THE DISCUSSION SECTION

PARAGRAPH 54

We object to the FCC's continued use of the word "fraudulent" in connection with ESN changes. The dictionary defines fraud as "the intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right". By definition, the practice of having two or more phones on the same number is clearly not fraud. This is especially true when the customer, who OWNS the telephone request the service. In no instance is the carrier deprived of charges for airtime or toll services. The carrier has no right to demand an extra change per month for an additional telephone. This amounts to an unjust tariff on CPE. Actually, the carrier enjoys the opportunity for additional revenue from an another telephone on the network!

We do not agree with the statement that "any alteration of the ESN" renders the telephone useless for billing purposes. When a legitimate ESN change is performed for a registered customer, there is NO change in the billing procedure. Air time is charged for both phones used on the same number.

Under the new rules it appears that every ESN change is fraudulent in nature. This would include changes made by the cellular companies using the Motorola express service. We

vigorously disagree with the analogy that the ESN is like a vehicle identification number. More correctly, it is like an automobile tag. It can be moved from vehicle to vehicle legitimately, or stolen and misused by the criminal element. Could the Department of Transportation provide rules that would eliminate this problem for automobiles? Of course not! Neither should the FCC suggest that fraud can be deterred by denying the legitimate change of ESNs. More stringent fines and punishments are available to authorities to combat crime via US Title 18, the Federal Access Fraud Law, used to prosecute persons involved in toll fraud and airtime theft. Furthermore, changing 32 bits of information in an ESN does not change the operation or safety aspects of the cellular telephone and should not change the type acceptance.

PARAGRAPH 55

There are approximately 25 million AMPS compatible telephones in the U.S. that do not meet type acceptance set forth in OST bulletin 53. The FCC cannot take a simplistic view of this situation. If every telephone with a changed ESN becomes an illegal transmitter, then the manufacturers must share in the responsibility of recalling all phones for which they have made an ESN change. Manufacturers have ignored FCC rules for years in the name of service and repair. The FCC has failed to enforce it's own rules! Motorola itself has published the procedure and diagrams so that virtually any person can do an ESN transfer!

Since the FCC is required to administer it's rules uniformly, we suggest that <u>ALL</u> phones already manufactured be exempted, including those with ESN changes by both

manufacturers and companies such as C2+. Furthermore, we do not feel that the FCC has the authority to enforce any rule "retroactively". Especially since there has been little or no enforcement of OST bulletin 53.

Such a rule punishes the consumer and companies such as C2+ and does nothing to the manufacuturers or common carriers. This is another example of non-uniformity is applying the new rule.

Thieves are not going to buy new phones with unalterable ESNs. They will continue to buy AMP compatible phones to conduct their illegal activities. We can only conclude that the new rule and previous bulletins are aimed only at companies such as C2+ and others performing similar legitimate services.

PARAGRAPH 56

We disagree with the commentors' position. We feel that it is in the public's best interest that legitimate ESN changes be allowed both in "authorized facilities" and providers using encrypted methods, such as C2+. Encrypted emulation provides security and ensures the integrity of the network. There is no valid reason for disallowing competition in the cellular business.

PARAGRAPH 57

We agree with C2+ Technology's comments and arguments.

PARAGRAPH 59

We disagree with the Commission. We believe that changing the ESN does provide an extension of the original telephone. Perhaps a more accurate description would be "duplicate". Whatever the nomenclature, this type of service provides the consumer with options not available from the carrier in certain markets. It does not interfere with the carrier's ability to correctly bill the customer nor does it create any substantial problems in the network.

We recommend that ESN changes be permitted in all markets. We have concluded that it would be in the best interest of both the carrier and the "service" provider that a customer list be provided to the carrier so that if any problems do arise they could be addressed quickly.

PARAGRAPH 60

We view this paragraph as contradictory. If the FCC makes changing the ESN a violation of it's rules, then the carrier cannot provide "permission" to do so or to allow the use of these types of phones on the network. Allowing this activity constitutes delegating "type acceptance" to the carrier. The FCC proposed changes state that any change to the ESN removes the telephone's type acceptance and makes it an illegal transmitter. Therefore, the carrier lacks authority to grant such permission.

Item (1)

1. Your statement "simultaneous use" is incorrect. Cellular telephones with the same ESN cannot transmit simultaneously!

2. The assertion that this service causes "erroneous tracking or billing" is unfounded! We have discussed this potential problem with numerous authorities and they cannot provide answers as to: why? We doubt is the carriers can substantiate this claim to any serious degree! We also note that it was not mentioned in previous comments by any party.

3. Again the term "licensee's permission" is referenced. This is a contradiction. If the FCC rules prohibit the alteration of the ESN, the carrier cannot give permission to reverse the decision (who's in charge!) ! Fraudulent transmission in this instance does not meet the definition of "fraud" since legitimate services provide this service with the customer's permission and CPE.

4. We disagree that the change of an ESN for legitimate reasons should cause the transmitter to become an illegal transmitter as described in Section 301 of the Act.

Item (2)

1. Again, we do not feel that the FCC can delegate authority to the carrier to provide permission to use telephones with altered ESNs.

2. We strongly disagree that the carrier is deprived of revenue. It is not entitled to the additional customer charge. FCC and U.S. Court decisions have repeated re-enforced that the public cannot be charged for ancillary devices that are owned by the customer. The EIA/TIA Standard states that the EIA/TIA standards and publications are designed to serve the public's interest.

The report and order in CC Docket No. 70-318 which is referenced in CFG 22.915(a) states in part as follows: "With respect to the questions of tariffing the provision of mobile units, we see no reason why mobile units used in conjuction with cellular systems should be treated differently from other customer premises equipment".

PARAGRAPH 61

We disagree. No special interest group should be exempt from FCC rules.

PARAGRAPH 62

We vigorously disagree that telephones with altered ESNs be classified as unauthorized. Furthermore, we do not feel that the FCC can enact rules retroactively.

RECOMMENDATIONS

Make no changes to the current rules. Enforce the rules now in place! Use the U.S. Criminal Codes to prosecute real fraud.

Relative to existing phones we recommend that ESNs be changed in the field under the following conditions:

1. The customer must authorize the service and sign an "affirmation of ownership", and substantiate identification with a drivers license and cellular bill.
2. The person or company performing the service must be registered with the FCC.
3. The phone must be tagged with a FCC registration number and new ESN.
4. The carrier should be notified of ESN emulation's with no penalty to the subscriber.
5. For service and repair.