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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the matter of	)	
	)	
Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services	)	CC Docket No. 92-115
Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-Common Carrier Service	)	CC Docket No. 94-46 RM-8367
Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Land Mobile Service	)	CC Docket No. 93-116

To: The Commission

OPPOSITION TO MOTION FOR STAY

1. The Cellular Telecommunications Industry Association ("CTIA") submits this Opposition to the Motion for Stay of the January 1, 1995, effective date of amendments made to Commission Rule 22.919, 47 C.F.R. § 22.919, in the Report and Order in this proceeding, __ FCC Rcd _____, 76 RR 2d (P&F) 1 (1994).[1] TIA has failed to demonstrate that its request meets the standard for granting a stay as described in Virginia Petroleum Jobbers Association v. F.P.C., 259 F.2d 921 (D.C. Cir. 1958), and Washington Metropolitan Area Transit Commission v. Holiday Tours,

[1]CTIA is a trade association whose members provide commercial mobile services, including over 95 percent of the licensees providing cellular service to the United States, Canada, Mexico and the nation's largest providers of ESMR service.

Inc., 559 F.2d 841 (D.C. Cir. 1977). Specifically, TIA has failed to demonstrate that it is likely to prevail on the merits of its pending reconsideration request and that it will be irreparably injured if the rule takes effect as scheduled. Furthermore, cellular service providers and their customers, as well as the public at large, will suffer substantial harm if the stay is issued.

I. Background

2. In 1992, the Commission initiated a proceeding designed to review and revise Part 22 of its Rules.[2] One proposal concerned the accessibility of the Electronic Serial Numbers (ESNs) of mobile units. The Commission proposed specific anti-fraud design specifications aimed at ensuring that attempts to tamper with the ESN would render the device inoperative. After analyzing the sixty-one comments and reply comments filed by equipment manufacturers, cellular service providers and other interested parties--but not TIA--in response to the Notice, on August 2, 1994, the Commission subsequently adopted a rule requiring, inter alia, that the ESN must be programmed into the equipment at the factory and that the ESN not be alterable, removable, or in any way able to be manipulated in the field.[3]

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[2]See Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, 7 FCC Rcd 3658 (1992) ("Notice").

[3]The text of the Report and Order was released on September 9, 1994, and published in the Federal Register over two months later. See 59 Fed. Reg. 59502 (November 17, 1994).

3. On December 19, 1994, TIA filed a Petition for Clarification and Reconsideration ("Petition for Reconsideration") and a Motion for Stay of new Rule 22.919(c).[4] That provision was amended to remove the term "readily alterable" from the old ESN protective language and replace it with the requirement that ESNs "must be factory set and must not be alterable, removable or otherwise able to be manipulated." TIA's Petition for Reconsideration requests that manufacturers' authorized field agents be permitted to transfer ESNs in connection with the service and service upgrade of equipment that receives type acceptance approval after January 1, 1995, and that the Commission adopt an alternate, industry-developed methodology as a means of combatting cellular fraud in lieu of ESN protections. In its Motion for Stay, TIA requests that the Commission stay Rule 22.919(c) until the resolution of the Petition for Reconsideration.

II. TIA Fails to Justify a Stay of Rule 22.919

4. In order to support a request for stay, petitioners must demonstrate (1) that they are likely to prevail on the merits; (2) that they will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay.[5] TIA has failed to satisfy any of the four prongs of this test.

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[4]While TIA's Motion for Stay is timely filed pursuant to the Commission's rules, it is surprising that TIA would wait to file this pleading at the last possible moment--less than two weeks before the effective date of the new rules, particularly when that time period includes the Christmas and New Year's holidays.

[5]See Holiday Tours and Virginia Petroleum, supra.

5. First, TIA fails to demonstrate that it is likely to prevail on the merits. The Petition for Reconsideration offers no specific examples of factual or legal error of such magnitude that the Commission would be required to reverse the decision it reached in the Report and Order. Rather, TIA--who apparently chose not to respond to the Notice in this proceeding--merely reargues the policy underlying the Commission's decision, neglecting the fact that the Commission reached its decision after examining the extensive record in this proceeding.[6] Indeed, the Commission specifically considered and declined to adopt recommendations from equipment manufacturers that the proposal be modified to permit alteration of ESNs by local service centers.[7] The mere fact that TIA disagrees with the Commission's decision does not constitute a likelihood that it will prevail on the merits.[8]

6. Second, TIA fails to demonstrate that its members will face irreparable harm if the stay is granted. TIA attempts to argue that the costs that manufacturers and consumers will incur in complying with the new Rule 22.919 constitute irreparable harm. It also argues that consumers will be inconvenienced by having to return faulty telephones to manufacturers for any changes in ESNs,

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[6]The Commission specifically acknowledged that proposed Rule 22.919 received "substantial attention from the commenters." Report and Order at A-41.

[7]See Report and Order at ¶s 56, 61.

[8]The adoption of industry-developed authentication standards, as suggested by TIA in its Petition for Reconsideration, would not serve as a substitute for ESN protection, but would instead constitute an additional level of protection against fraud. See the attached Affidavit of Thomas McClure at ¶ 10.

and that the cost of shipping telephones to manufacturers, coupled with the associated inconvenience, will lead consumers to purchase new telephones rather than wait for repairs on present equipment.

7. TIA's claims of irreparable harm must be regarded as speculative, as TIA offers no evidence as to how it calculates the financial costs of compliance or the likelihood that angry consumers will dispose of expensive equipment rather than pay a shipping charge in conjunction with a repair bill. Speculation as to costs and the behavior of customers does not constitute a concrete showing of irreparable harm, as required for a stay.[9] Furthermore, even if TIA offered specific evidence of costs associated with compliance, the Commission has stated that economic loss does not, in and of itself, constitute irreparable harm.[10]

8. TIA's worst-case speculation that Rule 22.919 will add to repair costs and increase customer inconvenience is unfounded. Adoption of the new rule will not add to repair costs or inconvenience customers beyond the simple requirement that repair centers will need to contact the serving cellular carrier to re-

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[9]See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 5585, 5586 (1993), citing Reynolds Metals Co. v. F.E.R.C., 758 F.2d 669, 673-74 (D.C. Cir. 1958, per curiam); Holiday Tours and Petroleum Jobbers.

[10]See Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, 8 FCC Rcd 6393, 6394 (1993), citing Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985).

activate the telephone with a new ESN/mobile information number (MIN) combination.[11]

9. Third, TIA wrongly states that staying the effective date of Rule 22.919 will have no adverse effect on interested parties. Any delay in the effective date of the rule will delay the benefits that the rule will provide to providers of mobile telephone services and their customers. Attached to this Opposition is an affidavit from Thomas McClure, the Chairman of the Cellular Industry Fraud Task Force, in which he describes the costs of fraud. The fraudulent use of cellular telephones costs the industry approximately one million dollars every day.[12] These losses are ultimately passed through to all cellular telephone users in the form of higher service charges, and to the general public in the form of lower tax revenues to federal and state governments. Furthermore, the software used to reprogram cellular phones has been stolen and is available over the Internet and in cellular publications.[13] While ESN protections will not prevent

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[11]Under the current rules, service centers commonly repair cellular telephones by simply "swapping" the defective circuit board containing the ESN (as well as the phone's operating hardware and firmware) with a new board while the customer waits. Once Rule 22.919 becomes effective, service centers will still be able to "swap" circuit boards while the customer waits. The only difference is the new rule's requirement that the replacement circuit board must contain a factory-set ESN, not a blank ESN that permits any ESN to be transferred to it. Nothing in the new rule will prevent manufacturers from updating a cellular telephone's software and features. The only cost or inconvenience associated with the new rule is the need to contact the customer's cellular carrier to update the ESN/MIN information.

[12]Affidavit of Mr. McClure at ¶4.

[13]Affidavit of Mr. McClure at ¶ 6.

all fraud, the rule directly addresses "cloning" fraud, and as such, the rule is needed immediately. Any delay in the manufacture and distribution of new cellular equipment with ESN protections will serve only to increase the number of units on the market that can fall prey to fraudulent use.

10. Finally, despite TIA's claims, the public interest would be disserved by adoption of the stay. Aside from the costs of fraud incurred by cellular telephone subscribers, the general public is at risk from criminal activity associated with the "cloning" of ESNs. As Mr. McClure describes in the attached affidavit, "cloned" phones have been used to conduct criminal activity such as narcotic and drug trafficking.[14] "Cloning" can be greatly reduced through the use of tamper-resistant ESNs as required by Rule 22.919. Furthermore, the rule will assist federal prosecutors in prosecuting "cloning" fraud cases under 18 U.S.C. § 1029, the "Counterfeit Access Device" statute, because it makes clear that there is no authorized reason to alter or transfer an ESN.

III. Conclusion

11. The Commission has carefully weighed the public interest in deciding how best to reduce the fraudulent use of cellular equipment, and that calculus resulted in the rules adopted in this proceeding, and TIA has offered no justification for staying those rules. Therefore, for the reasons described above, CTIA

[14]Affidavit of Mr. McClure at ¶ 7.

respectfully requests that the Commission deny the Motion for Stay filed by TIA.

Respectfully submitted,

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December 27, 1994

Affidavit of Thomas W. McClure

1. My name is Thomas W. McClure. I am the Director for Fraud Management at the Cellular Telecommunications Industry Association (CTIA), 1250 Connecticut Avenue, N.W. , Washington, D.C. 20036.

2. Prior to joining CTIA in December of 1993, I spent 27 years in government service -- the last 20 years as a United States Postal Inspector involved in federal law enforcement investigations.

3. In April, 1993, I was appointed Chairman of the Cellular Industry Fraud Task Force (FTF). The FTF was established in 1992 in response to the increase in cellular fraud. The FTF was established to facilitate a coordinated, comprehensive effort by cellular carriers to detect, manage, and prevent technical and non-technical attacks on the cellular system.

4. Over the past twelve months I have personally met with cellular carriers and law enforcement agents from all across the United States to discuss the cellular industry's fraud problems. The industry's fraud losses have grown from a $100,000,000 problem in 1991 to more than $365,000,000 in 1994. Although these fraud losses are not charged directly to the cellular subscriber whose phone was cloned, the cost of fraud is passed on indirectly through increased air time rates. Additionally, fraud results in lower tax revenues to Federal and State governments.

5. The cellular industry relies on Electronic Serial Numbers (ESNs) Mobile Identification Numbers (MINs) to validate its legitimate customers. Cellular fraud requires both the ability to obtain valid ESN/MIN pairs <u>and</u> the

ability to replace original factory-set ESN with the cloned ESN. Once stolen ESN/MIN pairs are entered into cellular phones, the cloned telephone is able to unlawfully access and obtain cellular service. Cloning also allows those individuals involved in criminal activity to become somewhat invisible to detection by law enforcement agencies. This criminal activity undermines the basic fabric of our society.

6. Stolen ESN/MIN pairs are programmed into cellular telephones through the use of electronic software that allows for the reprogramming of cellular phones. The software utilized by these bandits has been published on the Internet and is sold through numerous cellular publications. This software exploits the weakness in cellular phone design associated with the ESN transfer feature.

7. At the federal level, the investigation and prosecution of Cellular fraud is conducted under 18 USC 1029, the "Counterfeit Access Device" statute. Over the past twelve months I have met and personally spoken with the United States Secret Service about cellular cloning. These agents have advised me that the ESN transfer software has been used by cellular thieves to "clone" cellular telephones. The Secret Service has seized cellular telephones that have been cloned by compromising the transfer software, and has linked these phones to the conduct of criminal activity such as narcotic and gun trafficking.

8. On October 25, 1994, the President signed into law the Telephony Bill which enhanced the language of 18 USC 1029 to include references to cellular

phones as "access devices" and specified that the use of such devices and equipment to alter cellular phones was punishable under the statute. This legislation, coupled with the Commission's adoption of Rule 22.919, has provided the tools the industry and law enforcement agencies need to help stem the tide of this crime. The Commission's action reduces the opportunity for the illegal use of ESN transfer software

9. Theft of the ESN/MIN pairs is not enough to clone a phone. It also requires the ability to reprogram the cellular phone with the stolen information. An analogy would be someone walking down the street writing down the Vehicle Identification Number(VIN) from cars. This is not a criminal act. The forging of these numbers onto another vehicle is. Cellular phones that permit ESN's to be transferred in the field contain software that permits criminals to reprogram the phone and use the cloned cellular telephone to harm legitimate customers and/or hide from law enforcement.

10. There is no single answer to cloning. Although authentication appears to be a strong fire wall, history has shown that technological changes instituted by the industry have been penetrated. The tighter control of ESN security is just one of many such fire walls the industry is instituting to combat cellular fraud.

Conclusion

11. The cellular industry's losses attributable to "cloned" phones are rising daily. The requirements established in Rule 22.919 constitute an important weapon to combat this criminal activity. The magnitude of the losses resulting from cellular cloning far outweighs the modest costs and inconvenience Rule 22.919 imposes on the manufacturers and customers.

I declare under penalty of perjury that the foregoing is true and correct.

Signed and sworn to on this the 27th day of December 1994.

Thomas W. McClure

Thomas W. McClure

DISTRICT OF COLUMBIA:
Sworn to and subscribed before me on this 27th day of December, 1994.

Toni M. Ali
Notary Public

My Commission Expires April 14, 1995

CERTIFICATE OF SERVICE

I, Dianna M. Morris, certify that I have this 27 day of December, 1994, caused to be sent by first class U.S. mail, postage prepaid, a copy of the foregoing Opposition to Motion for Stay to the following:

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