

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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
In-Flight Phone Corp.)
)
Application for a Pioneer's)
Preference to Operate a Live)
Audio News, Information, and)
Entertainment Service for Airline)
Passengers on the 901-902 MHz and)
940-941 MHz Bands)

ET Docket No. 94-32
PP- 92-100

REPLY OF IN-FLIGHT PHONE CORPORATION
TO OPPOSITION OF TELOCATOR

In-Flight hereby replies to Telocator's proposal of yesterday that the FCC dismiss In-Flight's pending request for a pioneer's preference in the licensing of 900 MHz PCS services on grounds that the service which In-Flight proposes is not PCS under the Commission's proposed definition. Instead, Telocator asserts that In-Flight's proposed service is "broadcasting" as defined by Section 3(o) of the Communications Act, and it notes that the FCC has stated its intention to exclude all such "broadcasting" services from the definition of PCS.^{1/}

Telocator's allegation that In-Flight's proposed service is "broadcasting" as defined in Section 3(o) of the Communications Act is patently false. The FCC has stated its intention to define any communications service as PCS which meets two criteria. First, the service must be designed to "meet communications requirements of

^{1/} Formal Opp. of Telocator (Dec. 21, 1992)

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people [while they are] on the move."^{2/} Second, the service can be "[any] type[] of voice or data" offering^{3/} except "broadcasting" as that term is "defined at Section 3(o) of the Communications Act. . . ."^{4/} The multi-channel live audio service for airline passengers for which In-Flight requests a pioneer's preference plainly is PCS under the FCC's definition. First, the service clearly is a mobile offering since people can receive it only when they are in flight and thus "on the move."^{5/} In addition, the service is not "broadcasting". The FCC has held that a communications service is not broadcasting within the meaning of Section 3(o) of the Communications Act if it can be received only with special reception equipment or if it is provided pursuant to a private contractual relationship, and the courts have upheld this ruling.^{6/} Airlines and their passengers will be able to receive In-Flight's service only with a special receiver and antenna in the aircraft, and the service will be available only pursuant to

^{2/} Notice of Prop. Rulemaking, GEN. Dkt. No. 90-314, FCC 92-333 at ¶30 (rel. Aug. 14, 1992).

^{3/} Id. at App. A, Sec. 99.5 of the PCS rules as proposed.

^{4/} Id. at ¶30 and ¶30 n.23.

^{5/} Indeed, the FCC already has held that a communications service to airline passengers provided from terrestrial transmitters, as In-Flight proposes, is a mobile service. See Report and Order in GEN Dkt. Nos. 84-1232, 84-1233, and 84-1234, 2 FCC Rcd. 1825, 1841 (1986) ("This new mobile service will be accessible to all land mobile, maritime mobile, and aeronautical uses"), recon. denied. 2 FCC Rcd. 6830, 6832-33 (1987).

^{6/} Report and Order in GEN Dkt. No. 85-305, 2 FCC Rcd. 1001, 1006 (1987), aff'd Nat. Ass'n for Better Broadcasting v. FCC, 849 F.2d 665 (D.C. Cir. 1988).

contracts between In-Flight and individual airlines. Moreover, a substantial percentage of programming, such as play-by-play sports events, will be offered only to those passengers who pay a special fee to receive such programming.

Even if it were unclear (which it is not) whether In-Flight's proposed service is "broadcasting", the FCC should resolve this ambiguity by concluding that the service is not broadcasting for two reasons. First, the premise which underlies the agency's proposal to exempt "broadcasting" from the new PCS definition is inapplicable to the In-Flight service. The agency proposes to exclude broadcasting based on the valid premise that there is insufficient marketplace demand for additional live audio programming services in most mobile markets since automobile radios and portable radios already give most people access to such programming when they are on the move. This premise, while accurate in the vast majority of mobile markets, is invalid in the airline market because these radios do not -- indeed cannot -- function in aircraft. Second, this service will benefit an important struggling American industry -- commercial airlines -- by giving it another source of revenue (since contracts between In-Flight and its airline customers will provide for a sharing of profits from this service) and by allowing it to reduce operating costs (since airlines no longer will be required to maintain and operate on-board systems which deliver audio programming to passengers by tape).

Telocator's effort to convince the FCC to dismiss In-Flight's request for pioneer's preference -- indeed to make In-Flight ineligible for a 900 MHz PCS license -- is entirely self serving. As the principal trade association of the paging industry, Telocator wants the FCC to exclude In-Flight as a prospective 900 MHz license applicant because it wants the new 900 MHz PCS service to be the domain of paging companies, including Telocator members.

While Telocator's motive is understandable in seeking to exclude In-Flight as an applicant for a 900 MHz PCS license, its effort to do so by asking the FCC to adopt a narrower definition of PCS than the agency has proposed calls Telocator's integrity into question. Telocator informed the Commission just a few weeks ago that it endorsed the agency's proposal to define PCS broadly,^{7/} but by opposing In-Flight's request for pioneer's preference the association, in effect, now tells the Commission that it did not mean what it said.

CONCLUSION

The Commission should reject Telocator's blatantly selfish effort to minimize the amount of competition for Telocator members

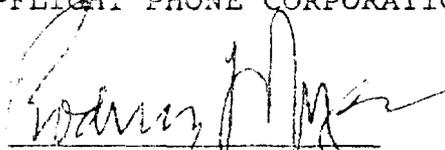
^{7/} See "Comments of Telocator on 900 MHz Personal Communications Services", GEN Dkt. No. 90-314 at 7 (Nov. 6, 1992).

in the new 900 MHz PCS service by granting In-Flight the pioneer's preference it seeks.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the attached "REPLY OF IN-FLIGHT
PHONE CORPORATION TO OPPOSITION OF TELOCATOR" was mailed on
December 22, 1992, by first class mail to the following:

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