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May 7, 1996

EX PARTE

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

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MAY - 7 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

RE: Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services (WT Docket No. 96-6)

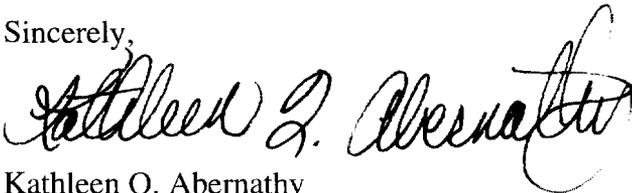
Dear Mr. Caton:

On Monday, May 6, 1996, AirTouch Communications submitted the attached material to Sandra Danner, Barbara Esbin, and Jennifer Warren of the Wireless Bureau. Please associate this material with the above-referenced proceeding.

Two copies of this notice are being submitted to the Secretary in accordance with Section 1.1206(a)(1) of the Commission's Rules.

Please stamp and return the provided copy to confirm your receipt. Please contact me at 202-293-4960 should you have any questions or require additional information concerning this matter.

Sincerely,


Kathleen Q. Abernathy

Attachment

cc: Sandra Danner
Barbara Esbin
Jennifer Warren



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May 6, 1996

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Memorandum

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

I. Ancillary and Auxiliary Fixed Services

We have researched whether terms such as "auxiliary," "incidental," and "ancillary" have been defined or described by any of the Commission's rules or decisions. In addition, we have reviewed current FCC rules and policies governing the extent to which CMRS providers may offer ancillary or auxiliary fixed services.

We found no cases clearly defining these terms, in cellular or other service contexts.¹ However, in less precise fashion, the Commission has addressed the

¹ In the *broadcast* context, with respect to nonbroadcast services provided on radio and television channels, we found that terms such as "ancillary" and "secondary" services were utilized; however, no clear *quantitative* description of what permissible level of such services was not found. To elaborate, broadcast rules permit the transmission of data, processed information, or any other communication on the television "vertical blanking interval" service. 47 C.F.R. § 73.646. (The "vertical blanking interval" ("VBI") is that portion of the television video signal that appears as a black bar when the picture rolls.) This service is *ancillary* and thus is not required to promote the licensee's public service programming obligation. *Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Transmission of Teletext by TV Stations*, BC Docket No. 81-741, *Report and Order*, 53 Rad. Reg. (P & F) 2d 1309, 1322 (1983). A broadcaster that elects to offer VBI service for private or common carriage remains a broadcaster for all other purposes. *Id.* at 1327. (The Commission does not entertain competing applications for use of VBI facilities, nor does it require licensees to obtain additional approval for related technical facilities. *Amendment of Parts 2, 73 and 74 of the Commission's Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations*, MM Docket No. 84-169, *Report and Order*, 101 F.C.C.2d 973, 977 (1985).)

In addition, broadcasters may offer "*subsidiary*" communications services, defined as services transmitted on a subcarrier within the FM baseband signal, but do not include services which enhance the main program broadcast service, or exclusively relate to station operations. 47 C.F.R. § 73.295. *See also* § 73.667 (television subsidiary communications services). Subsidiary services

provision of auxiliary common carrier services and fixed incidental services by cellular providers, and fixed ancillary services by PCS licensees. As discussed herein, in the *Part 22 Revision and Update* proceeding, the FCC *did* reject a proposal to impose a strict numerical percentage limit on allowable “*incidental*” service use. In doing so, the Commission stated that it *did not want to impose* “*artificial constraints [on licensees] with an arbitrary percentage.*”² This is the only “quantitative” discussion of the targeted terms uncovered in our research.

The term “auxiliary” arises in the cellular context and involves the offering of common carrier services in situations where cellular spectrum is not being fully utilized. In 1988, cellular service providers were permitted to offer “auxiliary” common carrier services (for example, paging), primarily in rural areas where demand for cellular service was less than the full amount of spectrum available.³ Also, at that time, the Commission determined that the only fixed service cellular carriers could provide was BETRS.⁴

In the rewrite of its Part 22 rules,⁵ the Commission revised the rules regarding the provision of *auxiliary* services on cellular frequencies. Under the new rules, cellular licensees may provide auxiliary common carrier services, provided that cellular service remains available to subscribers whose mobile equipment conforms to

are considered “*secondary*” or “*ancillary*” and “such transmissions do not warrant the protective regulation accorded to primary broadcast services.” *See In the Matter of the Use of Subcarrier Frequencies in the Aural Baseband of Television Transmitters*, MM Docket No. 21323, *Second Report and Order*, 55 Rad. Reg. (P & F) 2d 1642, 1648 (1984).

² *Revision and Update of Part 22 of the Public Mobile Radio Service Rules*, CC Docket No. 80-57, *Report and Order*, 95 F.C.C.2d 769, 817, 819 (1983) (“*Part 22 Revision and Update*”). *See* discussion *infra* at 3-4.

³ *Amendment of Parts 2 and 22 of the Commission’s Rules to Permit Liberalization of Technology and Auxiliary Service Offerings*, Gen. Docket No. 87-390, *Report and Order*, 3 F.C.C.R. 7033 (1988).

⁴ *See* discussion of BETRS regulatory classification *infra* at Part III.

⁵ *Revision of Part 22 of the Commission’s Rules Governing the Public Mobile Services*, CC Docket No. 92-115, *Report and Order*, 9 F.C.C.R. 6513 (1994) (“*Part 22 Rewrite*”).

the cellular system compatibility specifications.⁶ Additionally, the revised rules incorporate the Commission's decision in the *New Personal Communications Services* proceeding to permit cellular licensees to offer PCS type services -- wireless PBX, data transmission, and telepoint services -- as auxiliary services to their cellular systems.⁷

The Commission also removed the restriction limiting the provision of fixed services to BETRS only, and asserted its right to determine those entities that may be licensed for fixed services.⁸ The Commission noted that under the former rules, it routinely granted waiver requests to provide incidental fixed services, and that carriers providing incidental fixed services must comply with any state certification requirements.

Section 22.323 establishes general limitations on the extent to which *incidental* services may be offered by public mobile service licensees. No percentage amount of service is specified, but the rules provide that the cost of services for mobile-only subscribers must not be increased and that the quality, growth and

⁶ 47 C.F.R. § 22.901(d). The revised rules eliminate previous auxiliary service notification requirements. Section 22.901(d) further provides that licensees must ensure that interference to the service of other cellular systems will not result from the implementation of auxiliary services. Auxiliary service operations are exempt from the channeling requirements of § 22.905, the modulation requirements of § 22.915, the wave polarization requirements of § 22.367, the compatibility specification in § 22.933, and the emission limitation of §§ 22.357 and 22.917, except for emission limitations that apply to emissions outside the assigned channel block.

⁷ *Amendment of the Commission's Rules to Establish New Personal Communications Service*, GN Docket 90-314, *Second Report & Order*, 8 F.C.C.R. 7700, 7747 (1993) ("*Second Report and Order*").

⁸ It had been argued in that proceeding that removal of the restriction would infringe on states' rights because a cellular carrier offering a fixed service is the equivalent to the offering of an exchange service, and that entry into exchange service is a determination left to the states under the Communications Act. However, the Commission rejected this argument on preemption grounds, based on its determination that the intrastate and interstate components of such a service offering are inseparable, and that state regulation would impede federal policies. *Part 22 Rewrite*, 9 F.C.C.R. at 6571.

availability of the primary mobile service must remain unaffected.⁹ Moreover, as mentioned above, in the *Part 22 Revision and Update* proceeding the Commission specifically *rejected* a proposal to restrict the provision of incidental service to a particular percentage -- 10 percent of the total airtime usage of the applicable frequency. In doing so, the Commission stated that:

the provision of incidental services should be a business decision of a licensee in a competitive marketplace. We will not impose artificial constraints with an arbitrary percentage.¹⁰

Although the Commission has not specifically defined what constitutes permissible "incidental service," it has characterized such service as service to fixed points, and communications services not incompatible with licensed mobile operations.¹¹ Examples of incidental services cited by the Commission include the provision of weather information, stock quotations, and service to vessels.¹²

PCS licensees may also provide fixed services on their assigned spectrum if such services are "*ancillary*" to their mobile operations.¹³ When the Commission established regulations regarding use of PCS spectrum it was concerned about possible scarcity of spectrum and thus stated that it was "allowing fixed use of PCS spectrum only on an ancillary basis to the mobile services" because "there is only a limited amount of spectrum to meet the primary purpose of serving people on the move. Moreover, . . . fixed services generally can be accommodated in other frequency bands or through other media."¹⁴ Most recently, however, the Commission remarked that:

⁹ Unlike the provision of auxiliary common carrier service, the Commission must be notified by letter prior to the provision of incidental services.

¹⁰ *Part 22 Revision and Update*, 95 F.C.C.2d at 819.

¹¹ *Amendment of Subpart K, Part 22 of the Commission's Rules, to Facilitate the Development of Cellular Radio Telecommunications Service in the Rural Areas of the Country*, RM-4882, *Memorandum Opinion and Order*, 102 FCC.2d 470, 473 (1985).

¹² *Part 22 Revision and Update*, 95 F.C.C.2d at 816, 819.

¹³ 47 C.F.R. § 24.3.

¹⁴ *Id.*

although our rules specify that fixed services provided under PCS must be ancillary to mobile operations, we have attempted to provide licensees with flexibility to determine how this spectrum is used and we would entertain waiver requests to provide primary fixed service in this spectrum for certain applications if a licensee demonstrates that a fixed service best meets the demands of an area.¹⁵

Further, an FCC Staff letter clarifying permissible uses of PCS spectrum stated that the Commission's intent in defining PCS was to include:

fixed services ancillary to *or in support of* the provision of a wide range of portable and mobile wireless services and new and creative applications . . . The staff believes that examples of permissible fixed services include links connecting PCS base stations and other network operations facilities; transmission of PCS network control and signaling information; and facilities linking users' premises to PCS networks."¹⁶

In sum, while there has been some discussion by the Commission regarding auxiliary, incidental, and ancillary services, the Commission has not, by rule or otherwise, specifically pronounced how such services are to be defined, and to what extent fixed services may be offered by CMRS licensees.

¹⁵ *Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use*, ET Docket No. 94-32, *First Report and Order and Second Notice of Proposed Rule Making*, 10 F.C.C.R. 4769, 4781 (1995).

¹⁶ Letter to A. Thomas Carroccio, Esq. from Regina M. Keeney, Chief, Wireless Telecommunications Task Force, Nov. 15, 1994 (emphasis added).

II. State Petitions Under § 332

In some instances, fixed services offered by CMRS providers may resemble basic land line exchange services if they become the functional equivalent of wireline telephone local exchange service. There already exists a statutory scheme which protects consumers and the public in situations where a CMRS provider offering fixed services becomes like a local exchange carrier. In such cases, states may appropriately petition the Commission under 47 U.S.C. § 332 and be given rate regulatory authority over such services where the fixed service constitutes the only basic telephone service equivalent in a given area.¹⁷ The legislative history of Section 332(c)(3)(A) indicates that the language regarding replacement for land line telephone exchange service was intended to permit States to regulate radio services provided for basic telephone service if subscribers have no alternative means of obtaining basic telephone service.¹⁸

III. Regulation of BETRS as a Fixed Service

The FCC established BETRS in 1988 as an extension of intrastate basic exchange telephone service utilizing a radio link in place of wire or cable.¹⁹ A BETRS provider must either be a State certified local exchange carrier or have some other State authorization to provide basic exchange radio service.²⁰ In addition, BETRS has

¹⁷ 47 U.S.C. § 332(c)(3)(A).

¹⁸ H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 491 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1182. The Commission has construed this provision to mean that permitting state regulation in such cases would promote Congressional universal service objectives. *See Petition of Arizona Corporation Commission to Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services*, PR Docket No. 94-104, *Report and Order and Order on Reconsideration*, 10 F.C.C.R. 7824, 7838 (1995).

¹⁹ *Basic Exchange Telecommunications Radio Service*, CC Docket No. 86-495, *Report and Order*, 3 F.C.C.R. 214 (1988) (“BETRS Order”).

²⁰ *Id.* at 217. The FCC will not conduct auctions to resolve mutual exclusivity between initial BETRS and common carrier mobile service applications. *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, PP Docket No. 93-253, *Second Report and Order*, 9 F.C.C.R. 2348, 2356 (1994). The FCC has also adopted first-come, first-served filing procedures for BETRS.

been determined to be a *fixed* rather than a mobile service and is therefore not subject to Section 332 of the Act.²¹

It appears that at this time BETRS is more appropriately classified as a “mobile service” under the analysis used in the *Flexibility NPRM*. In that proceeding the FCC apparently contemplates that CMRS carriers will be permitted to provide basic exchange service which is virtually indistinguishable from BETRS.²² For example, the FCC states that a purpose of the *Flexibility NPRM* is to clarify the scope of fixed services that may be provided by CMRS carriers in order to facilitate such carriers using “radio links to replace existing wireline service or to bring service to rural or less attractive areas otherwise not being adequately served by wireline providers.”²³ Since BETRS is also intended to bring basic exchange service to rural and less attractive areas and it is therefore substitutable for the fixed wireless loop service to be provided by CMRS carriers.²⁴

While the FCC recognizes that BETRS and CMRS carriers may both provide basic exchange service, the FCC simultaneously proposes different regulatory treatment depending upon whether the service is provided by BETRS or a CMRS carrier. Therefore, it may be more appropriate for BETRS to receive the same regulatory treatment as basic exchange service provided by CMRS carriers.

IV. Scope of State Jurisdiction under Section 221(b) of the Communications Act

Section 221(b) provides that the states retain jurisdiction over “charges, classifications, practices, services, facilities or regulations for or in connection with . . . telephone exchange service” where “such matters are subject to regulation by a State commission or by local governmental authority” even though “a portion of such exchange service constitutes interstate or foreign communication.” The term

Part 22 Rewrite, 9 F.C.C.R. at 6517

²¹ *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1424-25 (1994) (“*CMRS Second Report and Order*”).

²² *Flexibility NPRM* at ¶¶ 5-9.

²³ *Id.* at ¶ 5.

²⁴ *BETRS Order* at 217.

“telephone exchange service” is a statutory term of art, and means service within a discrete local exchange system.²⁵

Although the language of § 221(b) is sweeping, the Act’s legislative history and subsequent case law explicitly recognize that § 221(b) is to be *narrowly construed*.²⁶ In short, § 221(b) limits FCC jurisdiction only with regard to local exchange service in metropolitan areas, such as New York, Washington, D.C., or Kansas City, that extend across state boundaries.²⁷

The first appellate decision²⁸ regarding the proper scope of § 221(b) is *North Carolina Util. Com’n v. FCC*.²⁹ In that case, petitioners challenged an FCC declaratory order asserting jurisdiction over the interconnection of customer-owned telephone terminal equipment used for intrastate communications to facilities connected to the interstate telephone line network arguing that, among other things, the FCC declaratory order violated § 221(b).³⁰ The Court upheld the FCC declaratory order and rejected the petitioners’ § 221(b) argument finding that the provision:

is intended to do no more than to prevent the circumstance that a single telephone exchange serves an area that includes parts of more than one state from enlarging the

²⁵ See 47 U.S.C. § 153(r).

²⁶ See *Puerto Rico Telephone Co. v. FCC*, 553 F.2d 694, 698-99 (1st Cir. 1977), citing 78 Cong. Rec. 8823 (remarks of Representative Rayburn); 78 Cong. Rec. 10314 (remarks of Senator Dill); S. Rep. No. 781, 73rd Cong., 2d Sess., 5 (1934); accord H.R. Rep. 1850, 73rd Cong., 2d Sess., 7 (1934).

²⁷ See *Public Utility Com’n of Texas v. FCC*, 886 F.2d 1325, 1331 n.5 (D.C. Cir. 1989).

²⁸ There is an earlier federal district court decision, *Southwestern Bell Telephone Co. v. United States*, 45 F. Supp. 403 (W.D. Mo. W.D. 1942), holding that Section 221(b) prevents the FCC from regulating interstate interzone message rates in the Kansas City District Exchange Area.

²⁹ *North Carolina Util. Com’n v. FCC*, 537 F.2d 787 (4th Cir. 1976).

³⁰ *Id.* at 795.

jurisdiction of FCC of the business and facilities of that exchange.³¹

The Court's analysis of § 221(b) was reconsidered and upheld by the Fourth Circuit a year later in a related decision, *North Carolina Util. Com'n v. FCC*.³²

The Fourth Circuit's analysis of Section 221(b) was adopted and further refined in *Puerto Rico Tel. Co. v. FCC*,³³ an appeal of an FCC declaratory order determining that the telephone company was bound under its FCC tariff to permit the interconnection of PBX equipment to its interstate telephone system. In affirming the FCC's declaratory order, the Court held that § 221(b) had no bearing on this matter because it is "applicable only to attempted FCC regulation of local service in a *multistate metropolitan area*."³⁴ *Puerto Rico* is the first decision to make clear that § 221(b) applies only in the rare circumstance involving local exchange services in metropolitan areas that happen to overlap state lines. Subsequent decisions uniformly affirm the Court's judgment in *Puerto Rico* that § 221(b) was intended to preserve state regulation only in such circumstances.³⁵

In addition, Section 221(b) is also limited in application to "telephone exchange service." Therefore, courts have determined that § 221(b) is *not* a limitation on FCC jurisdiction over conventional cable television channel distribution or special mobile radio systems.³⁶

³¹ *Id.* (footnote omitted).

³² *North Carolina Util. Com'n v. FCC*, 552 F.2d 1036, 1045 (4th Cir. 1977).

³³ *Puerto Rico Tel. Co. v. FCC*, 553 F.2d 694 (1st Cir. 1977).

³⁴ *Puerto Rico*, 553 F.2d at 699 (emphasis added).

³⁵ *See, e.g., Public Utility Com'n of Texas v. FCC*, 886 F.2d 1325, 1331 n.5 (D.C. Cir. 1989); *State Corp. Com'n of State of Kansas v. FCC*, 787 F.2d 1421, 1428 (10th Cir. 1986); *Computer and Communications, etc. v. FCC*, 693 F.2d 198, 216-17 (D.C. Cir. 1982); *New York Tel. Co. v. FCC*, 631 F.2d 1059, 1064-65 (2d Cir. 1980).

³⁶ *See, e.g., National Ass'n of Reg. Utility Com'rs v. FCC*, 533 F.2d 601, 607 (D.C. Cir. 1976); *National Ass'n of Reg. Utility Com'rs v. FCC*, 525 F.2d 630, 646 (D.C. Cir. 1976).

In any event, § 221(b) does not limit FCC jurisdiction over the entry of or rates charged by any commercial mobile service or any private mobile service provider. Section 332 of the Act, relating to mobile services, provides in pertinent part:

Notwithstanding Sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service. . . .³⁷

The use of the word “notwithstanding” indicates that these provisions of the Act are not intended to limit the preemptive effect of § 332(c)(3)(A) with respect to state jurisdiction over CMRS rate and entry matters. This does not mean, however, that the states are entirely prohibited from regulating mobile services. As discussed in Part II of this memorandum, the states are free to petition the FCC for authority to regulate the rates for any commercial mobile service provided the state can demonstrate that certain conditions exist.³⁸

I hope the foregoing discussion is responsive to the various issues you raised. Please contact me if you have questions regarding the matters addressed in this memorandum.

³⁷ 47 U.S.C. § 332(c)(3)(A).

³⁸ 47 U.S.C. § 332(c)(3).