

**THE BALLER LAW GROUP**

A PROFESSIONAL CORPORATION  
1820 JEFFERSON PLACE, N.W.  
SUITE 200  
WASHINGTON, D.C. 20036  
(202) 833-5300  
FAX: (202) 833-1180

RECEIVED

OCT 31 1996

Federal Communications Commission  
Office of Secretary

**Writer's Direct Dial:**  
**(202) 833-1144**

**Internet Address:**  
**JimB@Baller.com**

October 31, 1996

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

DOCKET FILE COPY ORIGINAL

Re: Reply Comments in Support of Petition for Clarification or Reconsideration  
CC Docket Number 96-98

Dear Secretary Caton:

Enclosed are an original and six copies of the American Public Power Association's reply comments in support of its petition for clarification or reconsideration of a portion of the Commission's First Report and Order on Local Competition.

We are also sending two copies to Janice Myles, Federal Communications Commission, Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C. 20554, and one copy to the International Transcription Service.

Kindly return a date-stamped copy to the messenger.

Sincerely,

  
James Baller

cc: Janice Myles  
International Transcription Service

10/31/96  
11:17 AM  


RECEIVED

OCT 31 1996

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

Federal Communications Commission  
Office of Secretary

In the Matter of: )  
)  
Implementation of the Local ) CC Docket No. 96-98  
Competition Provisions of the )  
Telecommunications Act of 1996 )

To the Commission:

**REPLY COMMENTS OF THE  
AMERICAN PUBLIC POWER ASSOCIATION  
IN SUPPORT OF ITS  
PETITION FOR CLARIFICATION OR RECONSIDERATION  
OF THE COMMISSION'S FIRST REPORT AND ORDER**

In the opening round of petitions for clarification or reconsideration of the First Report and Order on Local Competition, the American Public Power Association ("APPA"), UTC, The Telecommunications Association, the Association of American Railroads ("AAR") and the Lower Colorado River Authority ("LCRA") all urged the Commission to make clear that the term "telecommunications service" does not include selling or leasing excess capacity on private or wireless networks *unless*, as § (3)(51) of the Act requires, such sales or leases are made "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." The petitioners were concerned that a parenthetical sentence in the Commissioner's discussion of "telecommunications service" could be read out of context to mean that the act of selling or leasing excess capacity or other telecommunications facilities, without more, could subject a person to the obligations imposed by the Act on carriers of "telecommunications service." Such an interpretation, the petitioners maintained, would be inconsistent with both the Act and the Commissioner's own statements immediately preceding the sentence in question and could

discourage utilities, railroads and others from making telecommunications infrastructure available to persons seeking to become carriers of telecommunications service.

APPA endorses the comments of UTC, AAR and LCRA and offers this reply to carry one step further a suggestion that AAR and LCRA made in their comments. Specifically, AAR and LCRA noted that the Interconnection Order does not define the term “to such classes of users as to be effectively available directly to the public, regardless of the facilities used,” and they urged the Commission to define the term in a way that would not subject railroads or electric utilities to interconnection requirements. APPA agrees, and recommends that the Commission look for guidance to its Second Report and Order in the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, 9 FCC Red 1441, 1994 WL 76285.

As the Commission is aware, the term “to the public or such classes of users as to be effectively available to the public” as used in the definition of “telecommunications service” in § 3(51) of the Act is similar to terms used in a portion of the definition of “commercial mobile radio service” (“CMRS”) in § 332(d)(1) of the Communications Act. There, CMRS is defined as “any mobile service (as defined in section 3(n)) that is provided for profit and makes interconnected service available *(A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public*” (emphasis added).

In interpreting the term “to the public” in the definition of CMRS, the FCC found that “a service is available ‘to the public’ if it is offered to the public without restriction on who may receive it.” Second Report and Order at ¶ 65. In interpreting the term “to such classes of eligible users as to be effectively available to a substantial portion of the public,” the FCC found that a service does not qualify “if it is provided solely for internal use or is offered only to a significantly restricted class

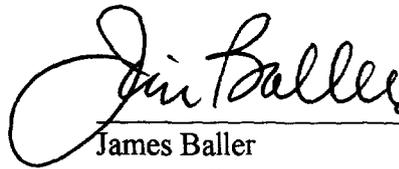
of eligible users, as in the following services: (1) Public Safety Radio Services; (2) Special Emergency Radio Service; (3) Industrial Radio Services (except for Section 90.75, Business Radio Service); (4) Land Transportation Radio Services; (5) Radiolocation Services: (c) Maritime Service Stations; and (7) Aviation Service Stations.” *Id. at.* ¶ 65 (footnotes omitted).

Services such as those listed are not covered by the definition of CMRS, the Commission concluded, because they are “made available on only a limited basis to insubstantial portions of the public.” “In contrast,” the Commission observed, Business Radio Service is “effectively available to a substantial portion of the public” and thus covered by the definition of CMRS because it is offered on a “virtually unrestricted” basis, with eligible users generally including “any persons engaged in the operation of commercial activities, educational, philanthropic, or ecclesiastical institutions, clergy activities, and hospitals, clinics, or medical associations.” *Id. at.* ¶ 68.

In the Second Report and Order, the Commission thus found that an entity can furnish mobile radio service *directly* to potentially *sizable* numbers of users within restricted classes without being deemed to have made such services “effectively available” to a substantial portion of the public. Here, the publicly-owned electric utilities that APPA represents are using, or are considering using, telecommunications facilities primarily to meet their own internal requirements, to support the activities of other governmental entities, to serve the needs of a small number of private users on a private-carriage basis, and/or to make excess capacity available to a restricted number of persons who would *themselves* be the ones offering “telecommunications service” for a fee directly to the public and should therefore be the persons subject to the Act’s burdens and benefits. Guided in part by its Second Report & Order, the Commission should make clear that none of the uses enumerated above is “effectively available directly to the public” within the meaning of § 3(51).

Finally, given the importance of prompt resolution of this issue to members of APPA, UTC, AAR and LCRA, APPA urges the Commission to issue its clarification as soon as possible, especially if APPA is correct that there is no issue of substance involved but merely one of wording. If it appears to the Commission that a substantial delay might result if it sought to address all outstanding issues on reconsideration in a single order, APPA urges the Commission to segregate the clarification that APPA, UTC, AAR and LCRA seeks from the other issues and address it in a special notice, errata sheet or other comparable official release.

Respectfully submitted,

A handwritten signature in cursive script that reads "Jim Baller". The signature is written in black ink and is positioned above a horizontal line.

James Baller  
Lana Meller  
The Baller Law Group  
1820 Jefferson Place, N.W.  
Suite 200  
Washington, D.C. 20036  
(202) 833-5300  
(202) 833-1180 (FAX)  
JimB@Baller.com (INTERNET)  
Attorneys for the  
American Public Power Association

October 31, 1996