

JUL - 9 1998

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

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Parts 2 and 15 of the	)	ET Docket No. 98-76
Commission's Rules to Further Ensure	)	RM-9022
That Scanning Receivers Do Not	)	
Receive Cellular Radio Signals	)	

**COMMENTS OF AT&T WIRELESS SERVICES, INC.**

AT&T Wireless Services, Inc., ("AWS"), pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits its Comments regarding the Federal Communications Commission (the "Commission") Notice of Proposed Rulemaking ("NPRM") to Amend Parts 2 and 15 of the Commission's Rules to Further Ensure that Scanning Receivers Do Not Receive Cellular Radio Signals. 63 Fed. Reg. 31684 (June 10, 1998). AWS broadly supports the Commission's proposed rules and offers these Comments to assist the Commission to, as it notes itself, "close any loop-holes" in the current scanning receiver rules.

At the outset, AWS notes that the NPRM does not refer to the Wireless Telephone Protection Act of 1998, 105 P.L. 172; 112 Stat. 53, which became law on April 23, 1998. This Act makes it unlawful to, knowingly and with intent to defraud,

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use, produce, traffic in, have control or custody of, or possess a scanning receiver.

"Scanning receiver" is defined in 18 U.S.C. § 1029(e)(8). As noted specifically below, the Commission should strive to make its proposed rules complement the new criminal provisions related to scanning receivers.

**A. Scanning Receiver Standards to Prevent Reception of Cellular Signals**

The Commission proposes to establish standards for scanning receivers so that such equipment will not pick up cellular transmissions under typical operating conditions. AWS supports the Commission's proposal for an effective signal rejection standard. From a wireless carrier's perspective, maintaining the privacy and security of wireless communications is critical both to subscribers who use such services and to the continued growth of the wireless industry.

**B. Prevention of Scanner Modifications**

**1. Hardening Control Circuitry**

AWS supports the proposition that, as a condition of equipment authorization, tuning and control circuitry must be made inaccessible by manufacturing methods so that any attempt to modify the receiver will render it inoperable. Even though the Commission's current rules require that scanners be designed so that they are incapable of operating, or readily being altered to operate, within frequencies

allocated to cellular service, the practice of modifying scanners to do just that still is widespread.

Second, AWS proposes that the Commission require that all scanners manufactured after the effective date of the rule and submitted for equipment authorization contain a clear "WARNING" that modification of the scanner to receive protected frequencies is both a violation of the Commission's rule and federal law. The warning label will act as a deterrent in the first instance, but more important, it will provide notice and therefore circumstantial evidence of malicious intent for criminal prosecutions under state and federal anti-wiretap and cloning laws. When coupled with the Commission's clarification of the definition of "manufacturing", which AWS discusses below, this proposed rule should be effective.

## **2. Clarifying the Definition of "Manufacturing"**

On October 28, 1992, the Telephone Disclosure and Dispute Resolution Act (TDDRA), Public Law 102-556, became law. Section 403 of the TDDRA amended Section 302 of the Communications Act of 1934 by requiring that the Commission prescribe and make effective regulations denying equipment authorization for any scanning receiver that is capable of: (1) receiving transmissions in the frequencies allocated to the domestic cellular radio service; (2) readily being altered by the user to receive transmissions in such frequencies; or, (3) being equipped with decoders that

convert digital cellular transmissions to analog voice audio. Further, "manufacturing" such scanners one year after the effective date of the TDDRA was prohibited.

The Commission enacted final rules to implement the TDDRA in April 1993. See Radio Scanners That Receive Cellular Telephone Transmissions, 58 Fed. Reg. 25574 (April 27, 1993). Thus, "manufacturing" a scanner to receive cellular frequencies is a violation of the Commission's rules. 47 C.F.R. § 15.37(f). The Commission has stated publicly that it considers *modification* of scanners to receive cellular frequencies on a substantial scale to constitute "manufacturing" in violation of Commission rules. See Public Notice DA 97-334, dated February 13, 1997.

The Commission now proposes to amend Section 15.121 to include the "modification as manufacture" concept, and to make clear that "substantial scale" reaches any entity or organization that modifies scanning receivers as a business or on an ongoing basis. AWS supports these rule changes, but urges the Commission to go farther.

There is no reason to permit *any* modification by *any* person or entity of *any* scanner for the purpose of receiving cellular communications. As the Commission knows, use of scanners by individuals to intercept and divulge or use beneficially wireless telephone conversations is prohibited by Section 705 of the Communications Act. (Other Federal and State statutes also prohibit such interceptions.)

AWS recognizes that there are many hobbyists that use and enjoy scanners. However, it is not a hobby to modify a scanner to intercept private communications. It is a felony. The Commission's proposed rules, by apparently excluding individuals from the modification rule, could be read as a license to permit the unlawful activity. Indeed, it could be raised as a defense in a criminal proceeding, especially in front of a jury.

AWS believes the correct interpretation of the term "manufacture" in the TDDRA is "to make," yet the Commission seems to imply some commercial aspect to the prohibition. Section 403 of the TDDRA was passed expressly to protect the privacy of cellular communications without regard to any commercial reasons for manufacturing scanners. Nothing in the TDDRA suggests that there is a "business only" aspect to the law.

It may be that the Commission intends to pick up individual activities through the proposed rule that provides "[a]ny modification to a scanning receiver to receive transmissions from the Cellular Radiotelephone Service frequency bands voids the certification of the scanning receiver, irrespective of the date of manufacturer of the original unit." NPRM, ¶ 11, (emphasis added). The express intent of this amendment in the NPRM, however, is to make clear that modification (*as defined in the proposed rules*) of scanners originally manufactured before the date of the current scanning

receiver rules is prohibited. Yet, the Commission does state that such modification "would constitute new manufacture in violation of Section 15.121(a). Id.

Thus, there is an ambiguity in the proposed rules that actually may serve to broaden the very "loop-holes" the Commission has sought to close. AWS urges the Commission to simply prohibit all modification of scanners to receive cellular communications, without reference to whether such modification is for commercial purposes, is on a substantial scale or occurs on an ongoing basis. Any modification for the prohibited purpose of intercepting communications should be deemed to be manufacture.

### **C. Definition of Scanning Receiver**

The Commission asks for comment on whether the current definition of scanning receiver needs to be modified to "close any perceived loop-holes that might be used to thwart the objectives of [the] scanning receiver rules." NPRM, ¶ 15. The Commission is right to be concerned because the current definition is narrowly defined based on yesterday's known technology. The technology tools of fraudsters and so-called hobbyists that would intercept private communications in violation of the law are constantly being improved. The current definition of scanning receiver (radio receivers that automatically switch between four or more frequencies) leaves much room for technological improvements to avoid the intent of the rule. And, as

the Commission notes, fully permits manual switched receivers to be used without restriction.

AWS suggests that the Commission modify its rule to be consistent with the definition of scanning receiver in 18 U.S.C. § 1029(e)(8); that is, "a device or apparatus that can be used to intercept a wire or electronic communication in violation of [the wiretap law] or to intercept an electronic serial number, mobile identification number, or other identifier of any telecommunications service, equipment, or instrument." The Commission can then remove special categories of receivers from broad definition on a case by case basis as it deems necessary. AWS notes that the definition from Section 1029 would capture Cellular Service equipment that can be programmed by the user to perform as a scanning receiver as well. See NPRM ¶ 16.

#### **D. Test Equipment**

AWS supports an exemption in the rules for test equipment. AWS agrees that the TDDRA did not intend to reach bench tools and other equipment used by carriers to test cellular systems. NPRM, ¶ 17. AWS concurs with the proposed definition of test equipment with one addition as follows:

Test equipment is defined as equipment that is not marketed, MADE AVAILABLE or sold to the general public BY THE MANUFACTURER OR ANY PERSON OR ENTITY THAT HAS CONTROL OR CUSTODY OF SUCH EQUIPMENT and is used by professional technical personnel in conjunction with

the testing of equipment or systems or for scientific investigations.

The proposed change will impose on manufacturers a requirement to ensure that their test equipment is sold only to legitimate end users and that such end users do not then sell or otherwise use such equipment in violation of the Commission's rules. Thus, by definition, any equipment that makes its way into the general public's hands is not exempt test equipment. Therefore, store front or off-the-shelf electronics sales operations that purport to sell scanners to "professional technical personnel" would be in violation of the rules.

AWS also is concerned that individuals in possession of scanners could claim that such equipment was test equipment for use in "scientific investigations." Read in conjunction with Section 1029(8) of Title 18, which requires an intent to defraud in the possession, use, production or sale of scanners, the "scientific investigations" clause could be a major loop-hole. Granted, law enforcement investigation should uncover additional circumstantial evidence of intent, but the proposed rule as written provides a substantial potential defense to illicit scanner manufacturers or users. AWS proposed that the Commission eliminate hobbyist "scientific investigations" completely by including in form or substance qualifying language that such scientific investigations must be in conjunction with a bona fide research or grant program or academic undertaking. Finally, the final rule should make clear that professional

technical personnel include carrier technicians, or other employees, agents or subcontractors thereof.

**E. Section 705 of the Communications Act of 1934**

AWS supports the inclusion of the Section 705(a) prohibitions in the Commission's rules. The rule would make it clear that no person may "manufacture, assemble, modify, import, export, sell or distribute any scanning receiver knowing or having reason to know that the scanning receiver is intended for any activity prohibited in 47 U.S.C. 705(a)." NPRM, ¶ 20.

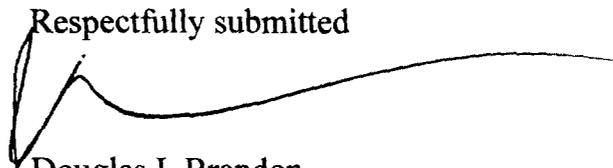
However, AWS must question why the Commission fails to link the broad prohibition it proposes to add to 47 C.F.R. ¶ 15.20 on, inter alia, "manufacture, assemble, modify" to the proposed definition of "manufacture by modification" under proposed amendment of Section 15.121(d). As noted above, AWS believes the rule should be extended to cover any individual that modifies an otherwise lawful scanner to make it capable of intercepting cellular communications. Thus, while supporting this amendment of Section 15.20, AWS also asks the Commission to further amend proposed Section 15.121(d) to cover individual manufacturing by modification.

**F. Conclusion**

AWS applauds the Commission's efforts to protect the privacy of cellular communications. The proposed rule changes are a significant step forward and will

contribute to the future growth of wireless communications by treating unlawful eavesdropping as a violation of law rather than a legitimate pastime or parlor game.

Respectfully submitted



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DATED: July 10, 1998