

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

In the Matter of)	
)	
Year 2000 Biennial Regulatory Review)	
- Amendment of Part 22 of the)	
Commission's Rules to Modify or)	WT Docket No. 01-108
Eliminate Outdated Rules Affecting)	
the Cellular Radiotelephone Service)	
and other Commercial Mobile)	
Radio Services)	

To: The Commission

**COMMENTS OF
THE RURAL TELCOMMUNICATIONS GROUP**

The Rural Telecommunications Group (“RTG”),¹ by its attorneys, respectfully submits these comments in response to the Notice of Proposed Rulemaking (“NPRM”)² released by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding.

¹ The Rural Telecommunications Group is a group of rural telecommunications providers who have joined together to speed the delivery of new, efficient, and innovative telecommunications technologies to the populations of remote and underserved sections of the country. RTG's members provide wireless telecommunications services, such as cellular telephone service, Personal Communications Services (“PCS”), and Multichannel Multipoint Distribution Service (“MMDS”) to their subscribers. Many of RTG's members also hold Local Multipoint Distribution Service (“LMDS”) licenses and have started to use LMDS to introduce advanced telecommunications services and competition in the local exchange and video distribution markets in rural areas. Other RTG members seek to acquire spectrum or to be able to utilize the spectrum of others. They have found it difficult to acquire spectrum through auctions or to structure management or lease arrangements due to existing FCC rules, policies and case precedent. RTG's members are all affiliated with rural telephone companies or are small businesses.

² *In re Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services*, WT Docket No. 01-108, Notice of Proposed Rulemaking, (rel. May 17, 2001) (“NPRM”).

RTG supports the FCC's effort to streamline and eliminate unnecessary regulation through its biennial review. Immediately eliminating the analog cellular compatibility standard, however, would substantially disadvantage many rural cellular consumers by undermining their mobile service before rural operators are able to transition to digital alternatives. Rather than a flash cut change to the analog requirement, the FCC should maintain the cellular compatibility standard,³ but establish a five (5) year nationwide sunset date for the rules. A future sunset date allows consumers and providers, especially those in rural areas, time to transition to digital service.

The Commission should also maintain the incidental services rule,⁴ but eliminate the specific conditions on the general rule and apply the general rule to all CMRS carriers. If the FCC were to eliminate the incidental services rule, many CMRS carriers could be subject to additional state regulation, which would be unnecessary in a competitive market for mobile services and subject CMRS operators to several levels of state and federal regulation.

I. THE FCC SHOULD MAINTAIN THE ANALOG CELLULAR COMPATIBILITY STANDARD FOR AT LEAST FIVE YEARS

The current FCC rules require a cellular carrier to provide AMPS-compliant analog service to "all" analog customers or roamers in good standing within its territory and to comply with FCC technical standards.⁵ The Commission is now proposing to

³ 47 U.S.C. §§ 22.901 and 22.933.

⁴ 47 U.S.C. § 22.323.

⁵ 47 U.S.C. § 22.901.

modify or immediately eliminate these requirements.⁶ Rather than immediately eliminate the rule, the Commission should phase out the analog requirement over five (5) years.

RTG is concerned that the FCC's proposal to immediately eliminate these rules will harm analog consumers and carriers because many rural carriers still utilize analog services and will not be able to transition to digital operations for several years. If the Commission eliminated these rules on a flash cut basis, most of the largest carriers would abandon the use of analog technology immediately, leaving over 41 million analog cellular subscribers potentially without nationwide roaming capability.⁷ Their cellular service would then work only in their specific communities or on their cellular operators' networks, or require an immediate handset upgrade.

In 1981, the Commission first established the AMPS standard for all cellular carriers.⁸ In 1988, the Commission adopted the "cellular flexibility" rule, which allowed cellular carriers to provide alternative technology standards, as long as they maintained AMPS compatibility.⁹ These decisions have led to a significant imbedded base of analog cellular networks. The Commission cannot now adopt a sudden change to the requirement that will, in effect, require small and rural carriers to immediately abandon analog operations in order to offer roaming.

⁶ NPRM at ¶¶ 24-25.

⁷ *In re Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Fifth Report*, 15 FCC Rcd 17,660 (2000). Even though analog network users are declining, according to FCC estimates, 41.9 million U.S. mobile voice customers still depend in whole or in part on analog networks.

⁸ *In re An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, Report and Order*, 86 FCC 2d 469 (1981).

⁹ *In re Amendments of Part 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service, Report and Order*, 3 FCC Rcd 7033 (1988).

The creation of nationwide analog networks has had a positive impact on the ability of consumers to roam, an ability that the Commission recognizes as in the public interest. As the FCC has noted, "...roaming capability may be a key competitive consideration in the wireless marketplace, and that newer entrants may be at a competitive disadvantage vis-à-vis incumbent wireless carriers if their subscribers have no ability to roam on other networks."¹⁰ If the Commission were to immediately eliminate the analog cellular compatibility standard, smaller and rural carriers, who operate a high proportion of the analog networks, would be forced to spend billions of dollars to upgrade their networks in order to maintain roaming capability.

The Commission correctly notes that dual and triple mode phones are available for roaming.¹¹ However, an immediate requirement to transition to these phones to maintain roaming on digital networks could decrease availability of these phones and increase their costs to the 38 percent of U.S. subscribers who depend on analog networks. Moreover, the Commission's impending enhanced 911 (E911) requirement may result in many consumers purchasing Automatic Location Identification (ALI)-capable handsets this year, particularly in rural communities.¹² A change in the analog requirement would require yet another immediate handset change in order for a customer to continue roaming.

¹⁰ *In re Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, Second Report and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 9462 (1996) at ¶ 13.

¹¹ NPRM at ¶ 24.

¹² *In re Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Fourth Memorandum Opinion and Order, Fourth Memorandum Opinion and Order*, 15 FCC Rcd 17442 (2000).

In addition to the disruption of roaming ability, the Commission correctly notes that eliminating the analog cellular rules would detrimentally impact many existing public services and programs, including TTY programs, E911 programs, and General Motor's OnStar service.¹³ All of these services work, at least in part, on analog cellular technology.

Section 255 of the Communications Act requires all telecommunications providers to ensure their services are accessible to and usable by individuals with disabilities.¹⁴ Analog networks provide an existing means for carriers to serve individuals with disabilities until digital networks can meet disability requirements. The Commission maintains a waiver of Section 255 for digital operations pending the industry's implementation of solutions that would allow for compatibility between TTY and digital systems.¹⁵ The FCC should not adopt a rule change that would require a waiver by new digital operators, instead of these existing analog operators continuing to serve the disabled community. Until digital networks can fully meet the panoply of disability requirements, the FCC should take no action that decreases the use of analog networks.

While most carriers have plans to eventually upgrade their networks to digital the FCC should allow small and rural carriers to do so over time. Eliminating the rule would effectively force these carriers to do so in order to maintain roaming capabilities as the large carriers immediately phase-out analog capability. At a time when wireless carriers

¹³ NPRM at ¶¶ 28-30.

¹⁴ 47 U.S.C. § 255(c).

¹⁵ *In re Revisions of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, FCC 00-436, CC Docket No. 94-102 (2000).

are spending billions of dollars to meet many current regulatory obligations,¹⁶ RTG believes that immediately eliminating the analog rules would impose a huge financial burden on small and rural carriers. These carriers are most dependent on roaming, but least able to make the investment in digital networks that would result from a flash cut end to the analog capability requirement.

Instead, the Commission should maintain the analog cellular compatibility standard for five (5) years. By establishing a five-year nationwide sunset for these rules, the Commission will allow analog cellular operators time to transition their services to digital. A five-year sunset would provide carriers with adequate time to plan and budget for upgrades to their networks. A transition period would also provide consumers with more time to learn of and prepare for this transition.

II. THE FCC SHOULD MAINTAIN ITS INCIDENTAL SERVICES RULE WITH SOME MODIFICATIONS

The Commission questions the continuing necessity for maintaining an “incidental services” rule. As RTG understands it, the crux of the Commission’s position is that since it allows cellular and PCS operators to offer fixed services on a co-primary basis with mobile services in accordance with section 22.901(d) of the rules, the right to offer “incidental” fixed services is necessarily subsumed within the rights provided by this rule.¹⁷ While RTG agrees that the right to provide “incidental” services may be incorporated within the broader co-primary rights of section 22.901, the incidental services rule has independent significance in determining how incidental fixed services

¹⁶ Wireless companies are now upgrading their networks, as required by the Commission, to comply with E911, CALEA, and number portability rules.

¹⁷ *NPRM* at ¶ 61.

will be regulated. Specifically, by providing incidental services under section 22.323, a wireless carrier gains the protection of a regulatory “safe harbor” against certain types of state regulation.

The Commission itself recognizes that incidental fixed services should be regulated as CMRS.¹⁸ The Commission has not, however, made a definitive conclusion as to the regulatory treatment of co-primary fixed services offered on CMRS spectrum.¹⁹ To date, the Commission has concluded that it would neither establish a “bright line” test nor a rebuttable presumption as to how it would regulate co-primary fixed services.²⁰ Therefore, RTG believes that it is necessary to retain a bright line distinction in the rules between the regulatory status of incidental fixed services that are clearly regulated as CMRS, and co-primary fixed services that are subject to case-by-case determinations as to appropriate regulation.

The Commission can best delineate this important regulatory distinction between co-primary and incidental operations by maintaining distinct rules. The existence of two distinct rules supports the Commission’s policy goal of reducing and eliminating regulations on competitive mobile services by avoiding confusion among state and local regulators as to the regulatory treatment of these service offerings.

The incidental services rule promotes efficient use of spectrum by authorizing “Public Mobile Operators” to use their spectrum for “incidental” fixed services. The

¹⁸ *NPRM* at nt. 94, citing *CMRS Flex First Report and Order*, 11 FCC Rcd 8965, at ¶ 48 (1996). (“In the CMRS Second Report and Order, we stated that ancillary, auxiliary, and incidental services offered by CMRS providers fall within the statutory definition of mobile service, and are subject to CMRS regulation. We reaffirm that determination here.”)

¹⁹ *Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, Second Report and Order and Order on Reconsideration*, 15 FCC Rcd 14680 (2000).

²⁰ *Id.* at ¶¶ 7-8.

incidental services rule also affords provision of such services a “safe harbor” from certain state regulation. If the FCC eliminates the incidental services rule, mobile carriers will potentially be subject to additional state regulation for their incidental services.

Both Congress and the Commission have created the proper framework for the vibrant competition that exists in mobile markets. This 1993 framework is founded on a single level of federal wireless regulation and preemption of various state requirements.²¹ Congress correctly rejected subjecting CMRS licensees to multiple layers of regulation in order to stimulate development of integrated fixed and mobile networks. A mobile operator’s provision of “incidental” fixed services should not subject it to the panoply of state regulations designed for local telephone companies.

Congress rightly continued this hands-off approach to CMRS regulation in its exemptions from the substantial obligations on LECs and ILECs in the Telecommunications Act of 1996. As the FCC noted in its implementing order, “Congress recognized that some CMRS providers offer telephone exchange and exchange access services, [but] concluded that their provision of such services, by itself, did not require CMRS providers to be classified as local exchange carriers (LECs).”²² The FCC specifically preempted states from requiring CMRS providers to classify themselves as LECs or to be subject to state rate and entry regulation as a condition of

²¹ See generally, 47 U.S.C. § 332; see also *Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order and Further Notice*, 9 FCC Rcd 1411 (1994); see also *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, Notice of Inquiry*, 9 FCCR 5408 (1994).

²² *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) at ¶ 1004. (“*Local Competition Order*”).

interconnection with local exchange carriers.²³ The FCC has consistently recognized the distinction between wireline LECs and CMRS carriers providing a local service in a competitive environment. The Commission itself has sparked the flexible use of CMRS spectrum, which allows for incidental offerings of fixed wireless services,²⁴ and should take no action that threatens such use.

If the FCC eliminates the incidental services rule, it removes a “safe harbor” that keeps states from imposing additional levels of regulation upon the incidental fixed services offerings of mobile providers. State requirements would create a needless level of regulation in this competitive industry and raise barriers to the offering of incidental services. CMRS providers should be subject to only the federal regulations envisioned by Congress. The Commission should retain the incidental services rule to prevent a return to the pre-1993 era of excessive and conflicting wireless regulation.

The Commission also seeks comment on whether it should eliminate the specific conditions of the incidental services rule, should it decide to retain this rule.²⁵ Today, CMRS carriers may offer incidental services on condition that the costs and charges of subscribers who do not wish to use incidental services are not increased as a result and the quality or availability of the primary service does not materially diminish.²⁶

RTG believes that new technologies and the competitive nature of the CMRS market make these conditions unnecessary. If a CMRS carrier's charges are unreasonable

²³ *Id.*

²⁴ *In re Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8965 (1996).

²⁵ *NPRM* at ¶ 60.

²⁶ 47 C.F.R. § 22.323.

or too high, a consumer can choose another carrier whose rates and charges do not include unnecessary or unwanted services. Similarly, if a CMRS provider offers low quality service, a consumer will discontinue its service and choose another provider. The Commission can eliminate the specific conditions on the incidental services rule without harming mobile customers.

Rather than eliminating the rule in its entirety, the FCC should revise the rule to cover all CMRS licensees. The rule now states, “[c]arriers authorized to operate stations in the *Public Mobile radio services* use these stations to provide other communications services incidental ...”²⁷ The term “Public Mobile radio service” is too narrow and the FCC should modify the rule to clarify that this rule applies to all CMRS services.²⁸ For example, the rule could state: “Carriers authorized to operate stations in the commercial mobile radio services may use these stations to provide other communications services incidental to the primary commercial mobile radio service for which the authorizations were issued.”²⁹

²⁷ *Id.*

²⁸ See definition of CMRS at 47 C.F.R. § 20.3.

²⁹ The FCC should then move the rule to Part 20 of its rules as Part 20 applies specifically to all CMRS carriers.

III. CONCLUSION

The FCC should maintain the analog cellular compatibility standard, but establish a five-year nationwide sunset date for the requirement. The Commission should also maintain the incidental services rule, but eliminate certain conditions and apply the rule to all CMRS carriers.

Respectfully Submitted,

THE RURAL TELECOMMUNICATIONS GROUP

By: _____ /s/ _____

Caressa D. Bennet, General Counsel
Brent H. Weingardt, Regulatory Counsel
Rebecca L. Murphy

Rural Telecommunications Group
Bennet & Bennet, PLLC
1000 Vermont Avenue, NW
Tenth Floor
Washington, DC 20005
202-371-1500

July 2, 2001