

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

In the Matter of)	
)	
Year 2000 Biennial Regulatory Review -)	WT Docket No. 01-108
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to Modify or Eliminate Outdated Rules Affecting)	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)	

**AT&T WIRELESS SERVICES, INC.
PETITION FOR RECONSIDERATION**

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**AT&T WIRELESS SERVICES, INC.
PETITION FOR RECONSIDERATION**

Pursuant to Section 1.429 of the Commission's rules,^{1/} AT&T Wireless Services, Inc. ("AWS") hereby submits this Petition for Reconsideration of certain aspects of the Commission's *Part 22 Order* issued in the above-captioned proceeding.^{2/} Specifically, AWS requests that the Commission reduce the sunset period for the cellular analog requirement from five years to no more than 30 months. In addition, AWS urges the Commission to reinstate the electronic serial number ("ESN") "hardening" rule and to extend the requirement to all CMRS providers.

INTRODUCTION AND SUMMARY

As the Commission itself acknowledges, many of its current cellular rules force carriers to comply with standards that were developed for the marketplace as it existed more than 20 years ago. Indeed, in the case of the requirement that cellular carriers retain Advanced Mobile Phone Service ("AMPS") technology, the Commission explicitly recognizes that the rule no

^{1/} 47 C.F.R. § 1.429.

^{2/} *Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services*, 17 FCC Rcd 18401 (2002) ("*Part 22 Order*").

longer serves the purposes for which it was adopted and is unnecessary to promote competition in the wireless market. While the Commission has decided to eliminate the analog rule pursuant to Section 11 of the Communications Act, it has established an unnecessarily excessive five-year sunset period.

Section 11 reflects Congress' main premise in enacting the Telecommunications Act of 1996 that, as competition develops, the need for regulation diminishes. Section 11 places the burden on the Commission to demonstrate that a rule is no longer necessary as a result of meaningful economic competition between providers of such service. If the Commission makes this determination, the statute explicitly states that the Commission *shall* repeal the rule. In addition, the Commission has interpreted Section 11 to require it to consider whether the rule's *original purposes* can be achieved without the rule. As the Commission has determined on numerous occasions, there is abundant competition in the CMRS industry and the analog rule has fully achieved its purpose of ensuring that consumers have access to low-cost, compatible handsets. Moreover, other laws serve to ensure that the needs of hearing impaired and emergency-only callers will continue to be served. Thus, there is no justification for retaining the analog requirement beyond a brief transition period.

By contrast, the Commission's reasons for adopting the ESN hardening rule still exist and, in fact, are even more compelling today. Unless each mobile handset has a unique factory-set ESN that cannot be manipulated or transferred without rendering the phone inoperative, stolen handsets can be re-registered on a carrier's network in a new customer's name without detection. Not only does the Commission's elimination of the ESN rule increase the carrier's risk of fraud, it could make wireless subscribers a much more attractive target for thieves seeking to resell expensive "next generation" handsets to unsuspecting customers. In addition, the

potential re-introduction of a large number cloned phones into the U.S. wireless market could create problems associated with emergency calling and law enforcement wiretap efforts.

Accordingly, the Commission should reinstate the ESN rule and apply it to all CMRS providers.

I. A FIVE-YEAR SUNSET PERIOD FOR THE ANALOG RULE IS FAR TOO LONG

A. The Commission’s Own Findings on the Degree of Competition in the Wireless Industry Militate Strongly Against Retaining the Analog Requirement for Five Additional Years

Section 11 of the Communications Act provides that “[t]he Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest” based on the existence “of meaningful economic competition between providers of such services.”^{3/} In the *Part 22 Order*, the Commission made precisely this determination. Specifically, the Commission concluded that in light of the vigorous competition in the CMRS marketplace, “the analog requirement is no longer necessary to ensure that consumers have a choice of more than one wireless service provider.”^{4/}

Citing its *CMRS Seventh Competition Report*, the Commission explained that 94 percent of the U.S. population resides in areas in which three or more operators offer mobile telephony service and 80 percent lives in counties with at least five wireless providers.^{5/} Further, according to the Commission, the wireless industry currently provides “increased competition, innovation,

^{3/} 47 U.S.C. § 161.

^{4/} *Part 22 Order* ¶ 11.

^{5/} *Part 22 Order* ¶ 11 (citing *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 17 FCC Rcd 12985 (2002) (“*CMRS Seventh Competition Report*”).

lower prices for consumers, and increased diversity of service offerings.”^{6/} The Commission also noted that wireless providers continue “to deploy their networks in an increasing number of markets, expand their digital networks, and develop innovative pricing plans.”^{7/} Because the Commission has determined that there is *actual, current, and meaningful* economic competition in the wireless sector -- not merely potential, future or nascent competition -- there is simply no basis under Section 11 of the Act for retaining the analog rule for five more years.

This is especially the case given the robust nature of the wireless industry and the rapid consumer acceptance of new wireless technologies. Taking a historical perspective, it is apparent that over the course of five years, wireless service and technology can change so fundamentally that the former market is hardly recognizable. For example, the “new” analog equipment deployed in the late 1990s to serve a predominantly analog customer base was largely replaced with “new” digital technology by 2000.^{8/} And, in just one year after that, the percentage of digital customers in the United States jumped from 72 to 80 percent.^{9/}

This rapid marketplace evolution continues today. AWS currently is in the process of converting its digital TDMA network to 2.5 generation GSM/GPRS technology, and many

^{6/} *CMRS Seventh Competition Report* at 4, C-9. The Commission has stated that its annual competition reports, such as the *CMRS Seventh Competition Report*, are useful tools for examining competitive market conditions. *See 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Service*, 16 FCC Rcd 2763, ¶ 29 (2001) (“*Spectrum Cap Order*”).

^{7/} *CMRS Seventh Competition Report* at 4.

^{8/} *See, e.g., CMRS Seventh Competition Report* at 25; Andrea Ahles, *Riding the Wireless Wave Mobile Phone Sales Propel Nokia to No. 1*, THE FORT WORTH STAR-TELEGRAM (May 22, 2000) (emphasizing that Nokia must have a quick product launch cycle to meet the replacement demands of mobile phone users); *see also* Molly Feldman, Vice President – Tax Verizon Wireless, *Tax Code and the High-Tech Economy*, Congressional Testimony before the House Committee on Ways and Means (Sept. 26, 2000) at 5 (stating that “[w]ireless companies are continuously replacing equipment due to functional or technical obsolescence”).

^{9/} *CMRS Seventh Competition Report* at 25.

wireless carriers, AWS included, will be rolling out third generation systems in some markets by 2004. Moreover, as the Commission itself concluded, to take advantage of these new technologies and services, subscribers generally recycle their handsets every 18 to 30 months.^{10/} Retaining the analog rule for a period twice as long as the lifespan of a typical handset is unsupportable; five years is not just a generation in the wireless industry, it is two or three generations.

B. The Analog Requirement Should Be Eliminated Promptly Because the Rule No Longer Serves its Original Purposes

In determining whether a rule should be eliminated, the Commission has interpreted Section 11 to require it to consider not only whether there is meaningful economic competition in the relevant market, but also “whether the concerns that led to the rule or the rule’s original purposes may be achieved without the rule or with a modified rule.”^{11/} That finding cannot be made with regard to the analog rule; indeed, the Commission concluded exactly the opposite in the *Part 22 Order*. While the AMPS requirement may have been useful in the early stages of the wireless industry to promote compatibility in all cellular markets, the Commission found in 2002 that the rule “has substantially achieved its purpose of ensuring that the public has access to low-cost, compatible equipment and to nationwide roaming.”^{12/} In other words, the analog rule is “no longer necessary to achieve its purposes.”^{13/}

While the Commission has made clear that the *original* concerns that prompted its adoption of the analog requirement no longer exist, it has decided to retain the rule for five years premised on *new* objectives. Specifically, the Commission now contends that a lengthy sunset

^{10/} *Part 22 Order* ¶ 25.

^{11/} *Part 22 Order* ¶ 4 (citing *Spectrum Cap Order* ¶ 25).

^{12/} *Part 22 Order* ¶ 8.

period is necessary to protect consumers with hearing disabilities and emergency-only callers that ostensibly lack digital alternatives.^{14/} Under the Commission’s own interpretation of Section 11, however, the Commission may consider only the purposes for which the rule was adopted -- not *post hoc* justifications -- in deciding whether to retain a regulation.

Moreover, as AWS and other commenters previously demonstrated, retention of the analog rule is not necessary to address concerns about hearing-impaired or emergency-only callers.^{15/} In particular, Section 255 of the Act expressly requires cellular carriers to ensure that their facilities and services are accessible to individuals with disabilities.^{16/} Cellular providers must continue to abide by this statutory obligation regardless of whether the analog rule remains effective. Similarly, emergency-only callers do not need five years to transition to digital service. Given that “a consumer uses a handset on average for 1.5 to 2.5 years before acquiring a new one,”^{17/} there already are millions of digital handsets available through donor programs. Further, virtually all cellular carriers in the country, even those serving rural markets, have recognized that they cannot remain competitive or meet customer demand using analog technology, and many are in the process of converting to digital networks today. Thus, to the extent they have not done so already, manufacturers of emergency-only devices will have to begin selling digital versions of their phones very soon. Similarly, a period of five years is not necessary for digital carriers to enhance coverage in those few areas currently served only by analog signals.

^{13/} *Part 22 Order* ¶ 8.

^{14/} *Part 22 Order* ¶ 8.

^{15/} *See, e.g.,* AWS Comments at 3-4; Cingular Comments at 9; TIA Comments at 4-5.

^{16/} 47 U.S.C. § 255.

^{17/} *Part 22 Order* ¶ 25.

C. The Analog Rule Imposes Discriminatory Burdens on Cellular Carriers

AWS' concerns about remaining tied to a dinosaur technology are not based on speculative or tangential harms. To the contrary, as the Commission explicitly recognizes, "in many instances, the analog requirement harms competition by imposing unnecessary operating costs and impeding the spectral efficiency of the two cellular providers in the market."^{18/} This rule, which does not apply to PCS or SMR providers, requires digital cellular licensees to set aside valuable spectrum for analog facilities and maintain two mobile telephony networks solely to comply with the Commission's rules.^{19/} In addition, the analog requirement prevents cellular licensees from providing the full panoply of advanced services and "may result in certain carriers being capacity constrained in certain geographic markets depending on the amount of spectrum dedicated to AMPS, usage by AMPS customers, type of digital technology, and how intensively their digital customers utilize their services."^{20/}

Consumers of wireless services do not differentiate among cellular, PCS, and SMR providers, and the Commission would be hard pressed to find more than a few customers that even know what frequencies their home carriers operate on. Yet, simply by virtue of the fact that cellular service was launched with analog technology two decades ago, wireless carriers that hold spectrum licenses in the 824-849/869-894 MHz bands alone -- as opposed to the 806-822/851-866 MHz or the 1900 MHz bands -- must comply with costly and anticompetitive rules.^{21/} Notwithstanding the Commission's apt conclusion that this arbitrary distinction

^{18/} *Part 22 Order* ¶ 12.

^{19/} *Part 22 Order* ¶ 12.

^{20/} *Part 22 Order* ¶ 12.

^{21/} *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, ¶ 13 (1994) (In amending Section 332 of the

“impede[s] the ability of the cellular carrier to compete vis-à-vis other mobile telephony providers who are not subject to the requirement,” the *Part 22 Order* permits the discrimination to continue until the end of 2007.^{22/}

In its recently commenced rulemaking proceeding on third generation wireless service rules, the Commission explained that one of the International Telecommunications Union’s (“ITU’s”) principal objectives for advanced wireless systems is to improve efficiency and commonality by minimizing the number of different radio interfaces used by global carriers.^{23/} The Commission concurred with the ITU’s goals and stated that key among its own objectives for the new millennium is “allowing licensees greater freedom to determine the specific technologies to be used and services to be offered.”^{24/} The Commission noted that, unlike their European counterparts, “[e]xisting CMRS licensees in the United States are not limited to 1980s- or 1990s-era technologies, and many are already upgrading their facilities to employ state-of-the-art technologies, driven by entrepreneurial initiative and marketplace dynamics.”^{25/}

In addition, the Commission’s Spectrum Policy Task Force recently recommended that “[s]pectrum users should be allowed to choose the technology that is best-suited to their proposed use or service.”^{26/} The *Spectrum Policy Report* found that the increased use of digital technology enables changes in spectrum policy because “[d]igital signals are inherently more

Act, “Congress saw the need for a new approach to the classification of mobile services to ensure that similar services would be subject to consistent regulatory classification.”).

^{22/} *Part 22 Order* ¶ 12.

^{23/} *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, 17 Rcd 24135, ¶ 3 (2002) (“*3G NPRM*”).

^{24/} *3G NPRM* ¶ 4 (citation omitted).

^{25/} *3G NPRM* ¶ 4.

^{26/} Spectrum Policy Task Force, *Report*, ET Docket No. 02-135, at 17 (November 2002) (“*Spectrum Policy Report*”).

robust, and resistant to interference, than analog signals.”^{27/} Further, the Spectrum Efficiency Working Group, which compiled the data on which the *Spectrum Policy Report* was based, stated that there are real advantages in many situations for the use of digital technology and it therefore recommended “that the transition to digital transmission techniques should be promoted and hastened by policy, and if necessary, by rules.”^{28/}

In contrast to these stated international and domestic principles, the Commission’s excessive five-year sunset of the analog rule undermines spectral efficiency and commonality among providers of wireless services by requiring U.S. cellular carriers alone to continue to design their state-of-the-art networks to incorporate a parallel system using a 20-year old technology. Given that the analog rule no longer serves its original purposes of promoting competition and public access to compatible equipment, the balance of harms and benefits plainly tips in favor of an expeditious repeal of the requirement.

II. THE COMMISSION SHOULD REINSTATE THE ESN HARDENING RULE AND EXTEND IT TO ALL CMRS PROVIDERS

Before it was repealed in the *Part 22 Order*, Section 22.919 of the Commission’s rules required each cellular mobile handset operating in the 850 MHz band to have a unique factory-set ESN that was not alterable, transferable, removable, or otherwise able to be manipulated.^{29/} In addition, the rule required manufacturers to design the handset so that any attempt to tamper with the ESN would render the transmitter inoperative.^{30/} Unlike the analog requirement, the ESN

^{27/} *Spectrum Policy Report* at 13.

^{28/} Spectrum Policy Task Force, *Report of the Spectrum Efficiency Working Group*, ET Docket No. 02-135, at 26 (Nov. 15, 2002).

^{29/} 47 C.F.R. § 22.919(c).

^{30/} 47 C.F.R. § 22.919(c).

hardening rule remains essential to fulfill its original purposes. Specifically, the rule is necessary to address wireless “cloning” fraud and to reduce the incentives to steal handsets.

Because most of AWS’ TDMA digital handsets are dual-band and can be used on both 850 MHz cellular and 1900 MHz PCS frequencies, manufacturers currently abide by the ESN design rules regardless of whether the handset will be used on a cellular or PCS system. Thus, if a cellular TDMA or analog phone is stolen today, it has a limited life; as soon as the customer reports it missing, the carrier deactivates the phone in its network based on the ESN. When the thief attempts to remove or tamper with the ESN, the handset is rendered inoperative.

In accordance with the GSM industry standards, manufacturers also embed a unique serial number in all 1900 MHz GSM handsets called the International Mobile Equipment Identity (“IMEI”) number. Further, for GSM phones manufactured after June 2002, the GSM standards provide that “[t]he IMEI shall not be changed after the [mobile equipment’s] final production process. It shall resist tampering, *i.e.* manipulation and change, by any means (*e.g.* physical, electrical and software).”^{31/} While, in the United States, the IMEI does not currently serve the same authentication purposes as the ESN, as discussed below, there are a number of compelling reasons for requiring the addition of technology that would disable the phone if the IMEI is tampered with. Therefore, AWS asks the Commission not only reinstate the ESN hardening rule, but to extend it to all CMRS devices regardless of the technology used or the frequency bands in which they operate.

If, as a result of the Commission’s elimination of the ESN rule, some TDMA or analog handset vendors decide that a hardened ESN is no longer necessary, the increased value of the

^{31/} Digital Cellular Telecommunications System (Phase 2+); Security Aspects (GSM 02.09 version 8.0.0 Release 2000), at section 3.5.3, *available at* http://www.3gpp.org/ftp/Specs/archive/02_series/02.09/0209-800.zip.

handsets to thieves will raise the incentive to steal them to unacceptable levels. For instance, without a tamper-proof ESN, a thief could steal an AWS customer's phone, change the ESN, and re-register it on AWS' network. AWS would have no way of knowing that the handset was stolen even if it had been reported as such, and the phone would continue to function properly. The other measures cited by the Commission that have been established to combat cloning fraud in recent years, such as the Wireless Telephone Protection Act of 1998 and the development of authentication protocols, would do little to deter criminals from altering ESNs since the new ESNs could not be connected to the original stolen phones.^{32/}

The enhanced usefulness of stolen handsets also would make wireless customers a much more attractive target for muggers and other street criminals. Today, the revenue derived from most handset theft in the United States is primarily restricted to the amount that can be charged for a limited period of long distance and international calling, and often a phone is deactivated before a customer for such services can be found. If the ESN or IMEI can be changed without affecting the phone's electronics, however, the Commission should expect an enormous jump in the illicit secondary market for handsets. As wireless devices incorporate more features and become more expensive, the incentives to steal the handsets will only increase. At the same time, the ability of police and prosecutors to prove handsets are stolen would be severely hampered once the ESN or IMEI is changed.

The situation in which the British wireless industry currently finds itself as a result of lax rules on handset identification underscores the need for the Commission to reinstate the ESN hardening rule and expand it to all CMRS devices, including 1900 MHz PCS handsets, as soon as possible. Specifically, based on statistics showing that 28 percent of the robberies in England,

^{32/} *Part 22 Order* ¶ 34.

and a third of all street crimes in London, involved the theft of mobile phones alone, two months ago British lawmakers ordered the establishment of new common database through which stolen phones can be tracked by reference to their IMEI.^{33/} The Executive Secretary to the Mobile Industry Crime Action Forum noted that this new law will help prevent the use of stolen handsets on networks in the United Kingdom and is intended to assure customers “that if their phone is stolen it will be worthless to the thief.”^{34/}

While the British law provides the means for carriers to deactivate handsets that have been reported as stolen, it will not be effective if the IMEI in a GSM phone is altered by the thief. Notwithstanding the requirement in the GSM industry standards that the IMEI must be tamper-resistant, thieves often find ways to change handset identifications outside the initial manufacturing process. Thus, absent a requirement that IMEI tampering disable the phone, the new British IMEI database is unlikely to have the full deterrent effect on crime that the government and industry hope for.

The advent of street crime specifically targeted at wireless users is especially ironic considering that many customers purchase mobile phones solely to enhance their sense of security. Parents in this country should not have to worry that the phones they give to their children to keep in contact while at school, the mall, and traveling will cause their children to become the victims of crime. Nor should our citizens be concerned that when they dial 911 to report suspicious behavior, the only thing the thief wants is their mobile phone. While the ESN hardening rule obviously is not a complete panacea to handset theft, it is a relatively simple means to help prevent the creation of a domestic version of the English street crime crisis.

^{33/} *New Database Makes Stolen Phones Useless to Thieves*, Press Notice, Mobile Industry Crime Action Forum, available at http://www.gsmworld.com/news/press_2002/press_22.shtml (“Press Notice”).

In addition to enhancing the value of handsets to thieves, failure to retain a strong rule on ESN/IMEI uniqueness and security could complicate both public safety and law enforcement efforts. While the authentication processes employed by most the wireless carriers generally prevent the simultaneous operation of two handsets with the same ESN, 911 calls are not authenticated before they are passed to the PSAP. Therefore, if a 911 call is placed through a cloned phone, the PSAP's attempt to reach the person in need of emergency attention likely will fail even if call-back data is provided. Further, because wireless carriers usually designate 911 calls as originating from non-initialized handsets by transmitting certain digits from the ESN or IMEI to the PSAP (instead of a call-back number), an increase in phones with duplicate ESNs/IMEIs operating on a network would compound problems with tracing harassing or threatening 911 calls. Similarly, police attempts to implement wiretap orders for a cloned wireless phone or to demonstrate in court that they have listened to a particular conversation may be frustrated if the subscriber information they have obtained does not match the carrier's information associated with the relevant ESN/IMEI.

There is no basis for the Commission's concern that the ESN rule interferes with the use of "smart card" technology.^{35/} The ESN (or IMEI) is on the handset itself -- it is equivalent to the vehicle identification number on an automobile -- and an entirely different identification number appears on the smart card. Therefore, a smart card can be inserted and changed as often as the customer desires without having any effect on the phone's operation. Although the Commission is correct that smart cards are useful for authentication and fraud detection purposes,^{36/} they

^{34/} Press Notice at 2.

^{35/} *Part 22 Order* ¶ 35.

^{36/} *Part 22 Order* at n.109.

cannot and will not deter the re-registration and reuse of stolen phones with altered ESNs or IMEIs.

Finally, while unrelated to the rule's original purposes, AWS notes that the establishment of a strong ESN/IMEI hardening requirement would further Congress' and the Commission's goal of encouraging growth and innovation in wireless services. Specifically, the ability to use the IMEI as an identifier for wireless devices would alleviate the problems the industry has encountered in attempting to develop third generation applications using transitory device identifiers, such as dynamic IP addresses or subscriber telephone numbers. If the identifier is subject to change when the device registers on the mobile network, then the application generally will not function properly. Moreover, using telephone numbers for the purpose of identifying wireless devices that otherwise would not require the assignment of such numbers would increase the demand on these already scarce resources. Unless and until the IMEI can be trusted as a unique, tamper-proof identity element, however, the wireless industry will avoid cultivating new wireless applications around it.

The ESN hardening rule remains necessary to combat mobile wireless fraud as well as the street crime the potential for such fraud encourages. Accordingly, to promote public safety, ensure proper functioning of enhanced 911 services, and further the development of advanced wireless applications, the Commission should reinstate the ESN rule and extend its applicability to all CMRS devices regardless of the frequencies on which they operate.

CONCLUSION

For the foregoing reasons, AWS requests that the Commission reconsider its adoption of a five-year transition period for the cellular analog rule and adopt a 30-month sunset period instead. In addition, AWS urges the Commission to reinstate the ESN hardening rule and apply it to all CMRS providers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Angela Collins, hereby certify that on this 16th day of January 2003, copies of the foregoing "Petition for Reconsideration of AT&T Wireless Services, Inc." were sent via email to the following:

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