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	)	WT Docket No. 01-108
to Modify or Eliminate Outdated Rules Affecting	)	
the Cellular Radiotelephone Service and other	)	
Commercial Mobile Radio Services	)	
	)	

OPPOSITION OF

AMERICAN HONDA MOTOR CO., INC.,
ATX TECHNOLOGIES, INC.,
DEERE & COMPANY,
GENERAL MOTORS CORPORATION,
MERCEDES-BENZ USA, LLC,
ONSTAR CORPORATION,
TOYOTA MOTOR NORTH AMERICA, INC.,
AND VOLKSWAGEN OF AMERICA, INC.

TO THE
PETITION FOR RECONSIDERATION OF
AT&T WIRELESS SERVICES, INC.

April 1, 2003

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SUMMARY

AWS' Petition is little more than a complaint about the effective date the Commission established for the elimination of the analog cellular requirement. It is well established that the Commission has broad discretion in setting effective dates for its rules, where, as here, the authorizing statute does not impose any deadline. Moreover, AWS' criticisms of the Commission's Section 11 analysis are without merit. AWS' argument that Section 11 prevents the Commission, when evaluating whether a rule should be retained, from considering factors other than the rule's original purpose, has been explicitly rejected by the D.C. Circuit. In addition to the plain language of the statute, it is clear that Congress could not have intended such a restriction. Such a restriction would have required the Commission to waste its limited resources by initiating a new rulemaking proceeding to reinstate a rule that it was "forced" to repeal pursuant to Section 11.

Similarly, AWS' suggestion that the Commission violated Section 11 by not adequately considering the state of CMRS competition mischaracterizes the Commission's analysis. Even a cursory reading of the *Part 22 Order* reveals that the Commission gave great weight to its findings regarding CMRS competition.

AWS also fails to present any new facts challenging the validity of the record on which the Commission's decision was based. AWS merely asserts, without any support, that the existence of Section 255 alone will ensure adequate service to persons with hearing disabilities, that carriers do not need five years to extend their digital networks and that millions of donated digital phones are already available for 911-only users. The Commission has already considered these issues and determined, based on an expansive record, that a five-year transition period is

nevertheless needed to prevent a loss of mobile service accessibility to persons with hearing disabilities and to users of unsubscribed mobile phones used for emergency-only purposes.

The Commission also determined that a five-year transition period would largely mitigate any harm to the telematics industry from the elimination of the analog cellular requirement. The record reflected the significant public interest benefits of telematics and the fact that analog service is critical to the ubiquitous provisioning of these services. A robust digital telematics solution, capable of transmitting voice and data simultaneously, has not yet become available. Any transition period of less than five years would not provide sufficient time to develop, test, validate and install new digital telematics equipment, given the long product cycle, the long design cycle and the relative durability of automobiles. The impact of the digital transition on telematics services provides another adequate basis for the Commission's decision to implement a five-year transition period, and for the rejection of AWS' Petition.

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American Honda Motor Co., Inc., ATX Technologies, Inc., Deere & Company, Mercedes-Benz USA, LLC, OnStar Corporation, Toyota Motor North America, Inc., and Volkswagen of America, Inc. (collectively, "Joint Commenters"), hereby file this Opposition to the Petition for Reconsideration ("Petition") filed January 16, 2003 by AT&T Wireless Services, Inc. ("AWS") in the above-referenced docket. Each of the Joint Commenters is engaged in the provision of telematics services. The Joint Commenters strongly urge the Commission to deny

AWS' Petition to the extent it seeks a reduction in the five-year transition period, established in the Commission's *Part 22 Order*, 1/ for the elimination of the analog cellular requirement. 2/

As described in more detail below, AWS attacks the Commission's decision by advancing erroneous legal arguments, and repeats unsupported assertions made in its comments that the Commission has already considered and rejected. In short, the Petition provides nothing to suggest that the transition period set by the Commission was unwarranted. In fact, the record provides ample support for the Commission's determination that individuals with hearing disabilities and owners of unsubscribed analog phones used for emergency-only calling would suffer a loss in access to mobile services without at least a five-year transition period. The Commission also recognized, based on the record, that a five-year phase-out of the analog cellular requirement would provide the telematics industry with time to transition to a digital environment. Indeed, as explained below, any transition period of less than five years would threaten the elimination of telematics services and the concomitant benefits they provide.

I. AWS SETS FORTH A FLAWED INTERPRETATION OF SECTION 11

A. The FCC Has Broad Discretion Under Section 11 to Establish Effective Dates for the Elimination of its Rules

AWS' Petition is essentially nothing more than a complaint about the effective date the Commission established in its *Part 22 Order* for the elimination of the analog cellular requirement. Contrary to AWS' suggestion, however, there is nothing in the text of Section 11 that restricts the Commission's discretion to set a reasonable transition period in this instance.

1/ 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, *Report and Order*, 17 FCC Rcd 18401 (2002) ("*Part 22 Order*").

2/ *See* 47 C.F.R. §§ 22.901(d) and 22.933.

The Commission addressed the timing of rule repeals and modifications undertaken pursuant to Section 11 in its *2000 Biennial Review*. 3/ Looking to the plain language of the statute, the Commission explained that although Congress mandated in Section 11 that the determination of whether a rule is no longer in the public interest must be made within a specified time period, it did not impose a similar time restriction for the actual repeal or modification of the rule. 4/ More recently, in its *2002 Biennial Review*, the Commission reaffirmed its earlier pronouncement by rejecting comments urging it to make the repeal of rules effective within the same year that a determination under Section 11 is made. 5/

The D.C. Circuit has also consistently upheld the discretion of administrative agencies to set appropriate effective dates with respect to their rules. As that court has recognized, the Administrative Procedures Act ("APA") sets no mandatory time-frame for establishing effective dates in rulemakings. 6/ The court has long held that "[w]hen the statute authorizing agency action fails to specify a timetable for effectiveness of decisions, the agency normally retains considerable discretion to choose an effective date." 7/ Similarly, the court more recently stated that "[f]ailure to provide a statutory timetable may indicate that Congress

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3/ *See* 2000 Biennial Regulatory Review, *Report,* 16 FCC Rcd 1207 (2001) ("*2000 Biennial Review"*).

4/ *Id*. at ¶ 12 (differentiating Section 11(a) from 11(b)).

5/ *See 2002 Biennial Review* at ¶ 33. The Commission also pointed out that Congress imposed mandatory deadlines in other sections of the Act, and presumably would have done so for the actual repeal of a rule if it had intended to constrain the Commission's discretion. *See id.*

6/ *Recording Industry Association of America v. Copyright Royalty Tribunal*, 662 F.2d 1, 14 (D.C. Cir. 1981).

7/ *Id.*

sought to leave the timing of reform to agency discretion." 8/ As noted above, Section 11 contains no timetable for the repeal or modification of rules subject to Section 11 review. 9/

Moreover, the D.C. Circuit has routinely recognized "traditional agency discretion to alter priorities and defer action due to legitimate statutory considerations," 10/ and has held that a court's review of any delayed agency action is "limited to examining an agency's reasons for deferred action and determining whether that delay is inconsistent with the agency's discretion under the applicable statutory scheme." 11/

As discussed in more detail below in Section II, the Commission's decision to delay the effective date of its elimination of the analog cellular requirement, based on concerns regarding the hearing impaired 12/ and 911-only callers, 13/ was well within its discretion and was consistent with the broader goals of the Communications Act.

8/ *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001).

9/ *See supra* note 4.

10/ *National Congress of Hispanic American Citizens v. Usery,* 554 F.2d 1196, 1200 (D.C. Cir. 1977).

11/ *Sierra Club v. Gorsuch*, 715 F.2d 653, 658-59 (D.C. Cir. 1983).

12/ The Commission established the five-year transition period based largely on the needs of the deaf and hearing impaired, who are at the greatest risk of losing service when the analog cellular requirement is eliminated. In taking this action, the Commission was cognizant of its obligation to ensure effective implementation of Section 255 of the Act, which requires carriers to make their facilities and services accessible to individuals with disabilities. *See Part 22 Order* at ¶¶ 31-32.

13/ Consistent with the Act's purpose of "promoting safety of life and property through the use of wire and radio communications," 47 U.S.C. § 151, the Commission also focused in its decision on the needs of users who rely on donated mobile handsets to have access to 911-only service. The Commission determined that a five year transition period was needed to ensure that enough donated digital phones will be available to support donated phone programs. *See Part 22 Order* at ¶¶ 23-25.

There is no reason to believe that the five-year transition period the Commission adopted would not withstand judicial scrutiny under the highly deferential standard referenced above. As discussed in further detail below in Section II, the record in this proceeding supports such a transition period, and AWS presented no evidence in its Petition that the Commission's conclusion was arbitrary and capricious.

B. The Commission's Examination of a Rule Under Section 11 Is Not Limited to the Rule's Original Purpose

1. The D.C. Circuit Has Previously Rejected the Argument Proffered by AWS

AWS asserts that when the Commission examines a rule pursuant to Section 11, it "may consider only the purposes for which the rule was adopted – not *post hoc* justifications – in deciding whether to retain a regulation." 14/ This analysis is plainly erroneous and inconsistent with clear court and Commission precedent. In its Section 11 decisions, the Commission can – and should – consider public interest considerations that are not necessarily related to a rule's original purpose.

As the Commission noted in its *Part 22 Order*, the D.C. Circuit has previously rejected the argument that the Commission's Section 11 review must be limited to the purposes for which a rule was originally imposed. 15/ In *Fox Television*, the D.C. Circuit held that in the biennial review of its broadcast ownership rules mandated by Section 202(h) of the Telecommunications Act of 1996, 16/ the Commission may examine other factors in addition to

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14/ *See* Petition at 6.

15/ *See Part 22 Order* at n.16 (citing *Fox Television Stations, Inc. v. Federal Communications Commission,* 280 F.3d 1027 (D.C. Cir. 2002) (*"Fox Television"*)).

16/ Pub. L. No. 104-104, § 202, 110 Stat. 56 (1996).

the original purpose of a rule. 17/ The court considered and rejected an argument that the Commission had impermissibly justified retaining its cable/broadcast cross-ownership rule using a rationale different from the one on which the rule was originally based, finding that "[n]othing in 202(h) suggests the grounds upon which the Commission may conclude that a rule is necessary in the public interest are limited to the grounds upon which it adopted the rule in the first place." 18/ Although *Fox Television* focused on Section 202(h), the court's analysis is equally applicable to Section 11. 19/ The language of Section 202(h) largely mirrors the language of Section 11. 20/ Section 202(h) also requires the Commission to conduct its review pursuant to Section 11, thereby effectively incorporating Section 11's requirements by reference.

The Commission has previously stated that it relies on the plain meaning of the statutory text in fulfilling its obligations under Section 11. 21/ The plain language of Section 11 leads to the same conclusion the D.C. Circuit reached in *Fox Television*: nothing in the text of the statute requires the Commission to limit its analysis of whether to retain or modify a rule to

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17/ *Fox Television*, 280 F.3d at 1050.

18/ *Id.* (characterizing petitioner's argument as being "clearly without merit").

19/ The Commission recently noted that Section 202(h) and Section 11 are "analogous." *See* 2002 Biennial Regulatory Review, *Report*, FCC 02-342, GC Docket No. 02-390 (rel. Mar. 14, 2003) at ¶ 32 ("*2002 Biennial Review Report")*.

20/ Section 202(h) states that the "Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under Section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as a result of the competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest."

21/ *See* 2000 Biennial Regulatory Review, Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Report and Order,* 16 FCC Rcd 22678, 22678-79 ¶ 25 (2001) ("*Spectrum Cap Order*").

the rule's original purpose. Consideration of the rule's original purpose is necessary, of course, but does not preclude consideration of other public interest factors.

2. AWS' Interpretation of Section 11 Would Unnecessarily Burden the Commission's Limited Resources with Inefficient Rulemaking Procedures

If there remains any doubt that the Commission reached a reasonable and thoroughly permissible result in the *Part 22 Order*, the Commission need only consider the potential administrative burdens that AWS' proposed interpretation of Section 11 would impose. If the Commission adopted AWS' argument and determined, based on the record, that the rule continued to serve the public interest for reasons unrelated to its original purpose, the Commission could not simply retain the rule, but would have to repeal it and then initiate a new rulemaking proceeding in order to reinstate the rule. This could trigger all of the notice and comment requirements of the APA, which of course would demand a significant expenditure of the Commission's limited resources. Interested private parties (regardless of their support for or opposition to a rule) would also be adversely impacted, as they would undoubtedly feel a need to duplicate their advocacy efforts already put forth in the biennial review proceeding.

It is difficult to imagine that Congress could have intended to impose such a needless burden on the Commission simply to retain a useful rule found to be in the public interest. Yet if the Commission were limited in its Section 11 review to analyzing the rule's original purpose, this would most likely be the result.

3. The Part 22 NPRM Indicated the Commission's Intention to Consider Multiple Factors, Yet AWS Failed to Proffer Its Restrictive Interpretation of Section 11 in its Comments

Finally, it should be noted that AWS raises its "original purpose" argument for the first time in its Petition, even though it could have raised it during the comment periods in this proceeding. AWS was well aware when the *Part 22 NPRM* was issued that the Commission

would consider factors beyond those examined when the analog cellular requirement was initially imposed in deciding whether to eliminate the requirement. The *Part 22 NPRM* made this intention clear, as the Commission sought comment on a wide variety of issues unrelated to the question of whether the analog cellular requirement was still necessary to enable roaming and facilitate competition. 22/ Indeed, the Commission specifically sought comment on the effect of a possible repeal on the hearing impaired and users of emergency-only mobile phones – matters on which it ultimately based its decision. 23/ It also sought comment regarding the impact of a possible repeal on telematics services. 24/ Never once in its comments and reply comments did AWS suggest that the Commission's focus on issues other than roaming and competition was inappropriate.

Furthermore, the Commission's attention to factors beyond the original purpose of the analog cellular requirement did not represent a change in Commission policy. In its description of the staff reviews on which its *2000 Biennial Review* was based, the Commission noted that staff considered the purposes of the individual rules under review, as well as the advantages and disadvantages of the rules, thereby suggesting a scope of review that extended

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22/ *See* 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, *Notice of Proposed Rulemaking*, WT Docket No. 01-108, 16 FCC Rcd 11169, 11179, ¶¶ 23-30 (2001) ("*Part 22 NPRM*"). The Commission clearly expressed its intent to "consider the ramifications of eliminating the analog compatibility standard for [] consumers" who may not have "readily available . . . alternatives to analog for mobile services." *Id.* at¶ 23.

23/ *See id.* at ¶¶ 29-30.

24/ *See id.* at ¶ 29.

beyond the rule's original purpose. 25/ The Commission's decision in this instance is consistent with that policy.

Because the Commission has been very clear regarding the scope of its Section 11 review in general and its review in this instance, neither AWS nor any other commenter can claim to have been surprised that the Commission examined issues other than the state of roaming and competition in issuing its *Part 22 Order*. Indeed, in its own comments and reply comments AWS engaged in an active discussion on the Section 255 compliance issue in an ineffective attempt to address some of the Commission's concerns. 26/ Thus, AWS' own pleadings in the proceeding underscore the legitimacy of the Commission's Section 11 analysis and the weakness of AWS' current position.

C. The Commission's Decision to Establish a Five-Year Transition Notwithstanding Its Findings Regarding CMRS Competition Is Consistent with Its Obligations Under Section 11

In its Petition, AWS also argues that the Commission's five-year transition period is inappropriate in view of the state of CMRS competition. 27/ AWS suggests that the Commission's finding of robust CMRS competition cannot be reconciled with its decision to establish a five-year transition period. 28/ Contrary to AWS' suggestions, the Commission gave great weight to its conclusions regarding the state of competition within the CMRS industry. In fact, its decision to eliminate the analog cellular requirement was based on a finding of robust

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25/ *See* 2000 Biennial Regulatory Review, *Report,* 16 FCC Rcd 1207, 1208 n.4 (2001) ("*2000 Biennial Review Report*"). *Id.* at ¶ 14 (emphasis added).

26/ *See, e.g.,* AWS Comments at 3-4; AWS Reply Comments at 2-3.

27/ *See* Petition at 3-5.

28/ *See id.*

competition. 29/ Thus, AWS' claims that the Commission's decision did not adequately reflect the state of CMRS competition are without merit.

As discussed in more detail below in Section II, although the Commission found the existence of robust competition within the CMRS market, its obligations under Section 11 required that it also consider whether the analog cellular requirement nevertheless continued to be "necessary in the public interest." 30/ Applying this standard to assess the potential impact of the repeal of the analog cellular requirement on deaf and hard of hearing users, the Commission indicated:

> While we anticipate that market mechanisms will, for the most part, ensure access to digital services for most consumers, we agree with commenters who argue that the same economic incentives do not exist that would ensure that persons with hearing disabilities have adequate access to digital wireless service because they account for only a small percentage of mobile telephony users. 31/

It made similar findings with respect to 911-only consumers. 32/ Thus, it was for these reasons that the Commission concluded that, despite the presence of robust CMRS competition, the analog cellular requirement will continue to be "necessary in the public interest" for at least five years after the effective date of the *Part 22 Order*. Nothing in AWS' Petition contradicts these findings.

29/ *See Part 22 Order* at ¶ 10.

30/ *See* 47 U.S.C. § 161(b).

31/ *Part 22 Order* at ¶ 28.

32/ *Part 22 Order* at ¶ 24.

D. The Commission is Not Impermissibly Discriminating Against Cellular Providers

AWS also argues that the analog cellular requirement should be eliminated because it impermissibly discriminates against cellular providers. 33/ As the Commission has repeatedly stated, "parity for its own sake is not required by any provision of the Act." 34/ As noted below, cellular-specific regulation in this instance is warranted in view of the fact that the analog network is the most ubiquitous of all the existing mobile networks, 35/ a transition period of less than five years could leave deaf and hard of hearing and 911-only users without adequate mobile service, 36/ and the burdens associated with maintaining the analog cellular requirement for an additional five years are not significant enough to outweigh the public interest benefits. 37/ Accordingly, contrary to AWS' Petition, the record in this proceeding provides ample support for the limited cellular-specific regulation imposed as a result of the Commission's five-year transition provision, and there is nothing in Section 11 or other provisions of the Act that prohibits such regulation.

33/ *See* Petition at 7.

34/ *Arizona CMRS Rate Petition Order*, 10 FCC Rcd 7824, 7833 ¶ 37 (1995). *See also Second CMRS Order*, 9 FCC Rcd 1411, 1463 ¶ 124, 1474-75 ¶ 162 (1994); *AT&T/McCaw Merger Order*, 9 FCC Rcd 5836, 5858 ¶ 32 (1994), aff'd *SBC v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995).

35/ *See* Section III B.1. below.

36/ *Part 22 Order* at ¶¶ 24, 28. *See also* Section II below.

37/ Although AWS must incur costs to maintain its analog network, it is not prohibited from recouping such costs from its customers. Moreover, as Verizon Wireless has indicated, elimination of the analog cellular requirement "will not free up a significant amount of spectrum for other uses" and "will not have a significant effect on the availability of spectrum in the markets where additional spectrum is needed most." Verizon Comments at 10-11.

II. THE COMMISSION'S FIVE-YEAR TRANSITION PERIOD FOR THE ELIMINATION OF THE ANALOG CELLULAR REQUIREMENT COMPORTS WITH THE RECORD IN THIS PROCEEDING

As explained in section I above, Section 11 does not prohibit the Commission from considering purposes not envisioned when a rule was originally imposed, or looking beyond the state of competition, in determining whether the rule remains in the public interest. Instead, the Commission is free to consider currently-relevant public interest factors, which is what the Commission did in its *Part 22 Order*. Specifically, the Commission's decision establishing a five-year transition period for the elimination of the analog cellular requirement is based on a balanced and reasoned understanding of the public interest in ensuring access to wireless services by the hearing impaired and those who use wireless phones only for 911 calls.

In its *Part 22 Order*, the Commission examined the current wireless marketplace and found that persons with hearing disabilities must rely on analog technology for access to wireless services because most digital devices remain incompatible with hearing aids. The Commission addressed the technical differences between analog and digital technology, and why the former does not pose interference problems for hearing aid wearers while digital devices do. It explained that:

> Unlike analog equipment, . . . digital wireless telephones do not transmit electromagnetic energy at a steady rate, and the fluctuations can cause disruptive interference to hearing aids or cochlear implants. The hearing aid demodulates the pattern of pulsing as clicks, pings or buzzing. Currently, nearly all digital equipment can cause some interference to many types of hearing aids and cochlear implants. 38/

38/ *Part 22 Order* at ¶ 26.

The Commission also noted that even the small number digital handsets that are compatible with T-coil-equipped hearing aids require users to wear a separate neck loop device, unlike analog handsets that can function without the neck loop. 39/

Citing comments and reply comments filed in the proceeding, 40/ the Commission established a five-year transition period to ensure that its elimination of the analog cellular requirement would not be detrimental to the deaf and hard of hearing, with the expectation that digital solutions to the hearing aid compatibility problem would be developed and made widely available by the end of that period. 41/ Moreover, as an additional protective measure, the Commission reserved the right to extend the five-year transition period if sufficient progress is not made on the hearing aid compatibility issue. 42/

The Commission's decision on this point is informed by an extremely broad record on disabilities access issues that extends beyond the present docket and illustrates the extent of the Commission's expertise in this area. 43/ For example, the Commission has implemented the Hearing Aid Compatibility Act of 1988, 44/ which requires that most new

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39/ *Id.* at n.85.

40/ *See Part 22 Order* at ¶ 28-29 (citing Telecommunications for the Deaf Reply Comments at 8; NAD Reply Comments at 7-8; SHHH Reply Comments at 3-4).

41/ *See Part 22 Order* at ¶ 29 ("The progress made in developing digital TTY solutions leads us to determine that the industry will also likely be able to develop digital solutions for telephones within a five-year period.")

42/ *See id.*

43/ In addressing issues relating to the disabled, the Commission draws on the work of its Advisory Committees. The Technology Advisory Committee (TAC) has a focus group that is charged with analyses of technology and accessibility for persons with disabilities, and the Consumer Advisory Committee has as one its purposes the review of access to telecommunications products and services by individuals with disabilities.

44/ 47 U.S.C. § 610(b)(1); *see* 47 C.F.R. § 68.4(a).

telephones be compatible with hearing aids, but provides an exemption for mobile phones. In 2001 the Commission initiated a proceeding to determine whether this exemption continues to be appropriate. 45/ In another proceeding, the Commission established deadlines by which carriers must ensure that text telephone (TTY) devices are able to make 911 emergency calls over digital wireless systems. 46/

The Commission also has experience implementing Section 255, 47/ which requires telecommunications equipment and services to be accessible to persons with disabilities, if readily achievable. In its comments and reply comments, AWS asserted that the existence of Section 255 made the analog cellular requirement superfluous in ensuring the accessibility of mobile services to the hearing impaired. However, the Commission considered and rejected this argument, finding that, notwithstanding carriers' obligations under Section 255, a five-year transition of the analog cellular rule was necessary "to address the particular current problem of hearing aid-compatibility with digital handsets." 48/ In its Petition, AWS merely repeats its earlier assertions without making any tangible commitment to ensuring that those with hearing impairments will have access to digital wireless services to the same degree allowed by analog

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45/ *See* In the Matter of Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, *Notice of Proposed Rulemaking*, 16 FCC Rcd 20558 (2001) ("*HAC Proceeding"*).

46/ *See* In the Matter of Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 18676, (1996).

47/ *See* Implementation of Section 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities, WT Docket No. 96-198, *Report and Order and Further Notice of Inquiry*, 16 FCC Rcd 6417 (1999).

48/ *Part 22 Order* at ¶ 30.

wireless services today. Likewise, AWS points to nothing in the record to support its assurances that such access will be available. Based on the record, therefore, the Commission was justified in relying on the continuation of the analog cellular requirement for another five years as a means of ensuring adequate access to wireless service by those with hearing disabilities.

The Commission also based its decision in the *Part 22 Order* on a finding that 20-30 million individuals relying on unsubscribed analog phones for 911-only purposes could lose access to such service without a five-year extension of the analog cellular requirement. Moreover, the Commission noted that in many areas of the country, even digital subscribers with dual-mode handsets are dependent on analog networks to make wireless 911 calls when roaming outside their home territories. 49/ Specifically, the Commission determined that a five-year transition period was required to provide sufficient time for: (1) carriers to expand digital coverage into new geographic areas; (2) emergency-only consumers to migrate to digital handsets, including those consumers that depend on donated phones; and (3) carriers to conduct customer outreach programs to educate consumers that analog services will be discontinued. 50/ AWS' only response to the Commission's record-based findings is to state, without any support, that carriers do not require five years to expand their digital networks, and that millions of donated digital phones are already available for emergency-only consumers. 51/ Notably, AWS does not even assert that a sufficient quantity of digital phones will be available for emergency-only consumers within the 30 month transition period it proposes.

49/ *Part 22 Order* at ¶ 23. *See also infra* Section III.B.1, explaining that only analog service is sufficiently ubiquitous to enable nationwide roaming.

50/ *Part 22 Order* at ¶ 24.

51/ *See* Petition at 6.

The Commission based its decision to impose a five-year transition period on an extensive record regarding the potential for disruption to the hearing impaired and 911-only wireless users of a shorter transition period. AWS has presented nothing in its Petition to undermine, or cast doubt regarding, the appropriateness of that decision.

III. THE IMPACT OF A DIGITAL TRANSITION ON TELEMATICS SERVICES NECESSITATES AT LEAST A FIVE-YEAR TRANSITION

The AWS Petition ignores an alternative and independent ground set forth by the Commission for its five-year phase-out of the analog cellular requirement. The Commission concluded based on the record evidence that "a reasonable transition period" is necessary to provide time to "develop[] multimode devices that will provide interoperability and facilitate roaming on digital networks," and to "secure service on the carriers' digital networks." 52/ It specifically found that the five-year transition period "should also mitigate any significant impacts that might affect telematics providers." 53/ The Commission's conclusion was supported by the National Telecommunications and Information Administration's ("NTIA's") analysis, which similarly concluded that "in eliminating the analog cellular requirement, the Commission should establish a transition period to allow for an orderly migration of [hearing aid and telematics] applications over to digital technology. Based upon the information in the record, a reasonable transition period would be 5 years." 54/

The record demonstrates that telematics services serve the public interest in numerous ways. And it further shows that the technical requirements of telematics operations,

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52/ *Part 22 Order* at ¶ 20.

53/ *Id*.

54/ Letter of Nancy J. Victory, Assistant Secretary of Commerce for Communications and Information, at 3 ("NTIA Letter").

the durable nature of cars, and industry conditions in general require a transition period of at least five years. The Commission's decision is well-supported and there is, accordingly, no basis for granting AWS' Petition.

A. Telematics Offers Valuable Public Safety and Other Services

Telematics providers offer a variety of services that enhance automotive safety and security, such as remote door unlock, stolen vehicle location, remote diagnostics and roadside assistance. In an emergency, a telematics subscriber can, with the push of a "mayday" button, immediately contact an operator who will notify the appropriate emergency responders. Moreover, after a collision, a telematics unit automatically places an emergency call, an invaluable service when a car's occupants are unconscious or otherwise incapacitated.

The record developed in this proceeding leaves no question that the existence and widespread deployment of telematics serves the public interest. The National Association of EMS Physicians opined that "the current deployment of over two million ACN-equipped vehicles is already saving lives and reducing the morbidity from injuries in vehicle crashes." 55/ Similarly, the Assistant Secretary of NTIA stated that the "publicly beneficial uses" of analog cellular technology include the fact that "approximately two and a half million automobiles on the road as well as many in development rely on analog cellular technology as the means of transmitting their potentially life-saving road safety communication." 56/ Because telematics is

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55/ Letter from the from Richard C. Hunt, MD, FACEP, President, National Association of EMS Physicians dated January 16, 2002, at 1. Dr. Hunt noted "Automobile crashes are one of the leading causes of death and injury in the United States. The delivery of timely and appropriate emergency medical care is critical to reducing the severity of an injury as well as the probability of death. In fact, the first hour after an accident is often referred to as the "golden hour" because of its importance to the medical outcome of a crash victim."

56/ Letter from Nancy J. Victory at 2.

"too important to be marginalized to rapidly disappearing first generation technology," NTIA urged that in transitioning the analog cellular requirement, the Commission should set a reasonable transition period to ensure the orderly migration of these applications." 57/

In addition, the ComCARE Alliance, a broad-based national coalition of physicians, health care workers, public safety officials, emergency responders, and others, has stated in another Commission proceeding that telematics "offers unique capabilities to assist response agencies in identifying and responding to emergencies." 58/ An OnStar study of automatic crash/airbag deployment notification ("ACN") calls that resulted in assistance requests to public safety answering points ("PSAPs") indicated that the telematics service providers' call was the first notice received by the PSAP in approximately 60% of the incidents. 59/ Today, telematics services are receiving and requesting emergency assistance for more than 900 airbag deployments per month and more than 6,000 other emergency situations. 60/ Moreover, call center-based telematics enables the provision of precise location information to PSAPs regardless of whether they are able to receive E911 Phase II location data. 61/ Without a bit of hyperbole, one can state that people are alive today because of telematics: accident victims for whom help would have arrived too late, or not at all, but for the instant and automatic response provided by embedded telematics units.

57/ *Id.*

58/ Comments of the ComCARE Alliance, CC Dkt No. 94-102 (filed Feb. 18, 2003) ("ComCARE Comments") at 7.

59/ *See* OnStar Ex Parte, March 28, 2002 at 2.

60/ Represents combined current data for OnStar and ATX. For earlier OnStar data, *see* OnStar Comments at 3 and OnStar Ex Parte, March 28, 2002 at 2.

61/ *See* American Honda Ex Parte, June 24, 2002 at 3.

Telematics also offers features such as stolen vehicle tracking, the ability to perform remote diagnostics on various of the automobile's systems, and various other features that may not be life-or-death, but nonetheless contribute to driver security and convenience. By the end of the 2001, OnStar – just one of the two major telematics service providers – reported that every month it was averaging over 375 stolen vehicle location requests, 15,000 door unlock requests and 15,000 roadside assistance and remote diagnostics requests. 62/ Today, ATX and OnStar together report over 425 stolen vehicle location requests, 27,000 remote door unlocks and 30,000 roadside and remote diagnostic requests. Abundant evidence before the Commission demonstrates that telematics services save and improve lives. There is no question that telematics is in the public interest, and that the Commission should ensure, through the institution of a reasonable transition period, their continued viability and utility.

B. Elimination of the Analog Requirement Threatens the Elimination of Telematics

The accelerated transition date that AWS proposes would threaten the continued existence of telematics services. All telematics units currently in existence rely on analog cellular service, and any transition will be technically difficult and will depend on conditions – including the continued buildout of digital networks – that do not now exist. Moreover, telematics units are embedded in durable vehicles that last for many years on the road, and have an extended design and product life cycle.

1. Analog Service is the Only Service With the Geographic Coverage to Support Telematics

Although statistics show that the nation's mobile phone users are increasingly shifting to digital phones, there is, in fact, no nationwide wireless system without analog.

62/ *See* OnStar Ex Parte, March 28, 202 at 2.

Analog is the "glue" that holds the system together by enabling nationwide roaming. It also provides the Congressionally-mandated "seamless, ubiquitous and reliable wireless telecommunications system" and "promote[s] public safety and provide[s] immediate and critical communications links among members of the public." 63/ Today, there is no true nationwide digital network. According to the Commission's own statistics, CDMA networks are built out in only 50 percent of the United States; the combination of TDMA and GSM cover approximately 53 percent; and iDEN covers only 35 percent. 64/ There are, in other words, enormous swaths of territory in which a particular digital standard would yield no coverage. Likewise, there are large areas in which there is no digital coverage at all – a situation whose remedy requires the time provided by a gradual phase-out of the analog cellular requirement.

Telematics service requires ubiquitous coverage. Unlike an ordinary mobile phone user, a driver who breaks down or suffers a crash in a coverage gap cannot simply drive on and attempt the call later. Without analog coverage today, automatic crash notification calls would go unanswered, stolen vehicles could not be tracked, and emergency services could not be summoned in fifty percent of the United States. Only by using the wireless "lingua franca" of AMPS can telematics providers ensure that their customers receive the coverage they need.

2. Analog Service is Currently the State of the Art for Transmitting Voice and Data on the Same Call As Required to Support Telematics Life Saving Services

The cornerstone applications of telematics, as described above, are location-based services such as ACN, "mayday" calling, driver assist and other applications. The ability to transmit data and voice on the same call is integral to each of these functions, and only AMPS

63/ Wireless Communications & Public Safety Act of 1999, Pub. L. No. 106-81, §2(a)(6) ("911 Act").

64/ *See Seventh CMRS Report*, App. C Table 7.

currently offers that capability. 65/ Once a voice channel connection is established by a telematics device, frequency-modulated data (such as vehicle identification and location) is transmitted on that channel to the call center. The call is then switched to a voice mode and conversation between the call center and vehicle occupants takes place.

As set forth in the record and recognized by the Commission, the telematics industry is moving to invent, engineer and deploy a robust digital solution. 66/ But even after a solution has been developed, it will take several years for manufacturers to be able to integrate a digital solution into all vehicle lines, given automotive lead times and validation requirements. Thus, as NTIA has stated, "given current timelines, it would take a minimum of five years for new digital telematics systems to be widely introduced." 67/

C. The Long Product Cycles of Automobiles and Automotive Industry Requires a Transition Period of At Least Five Years

The extremely long product life cycles of cars (and therefore telematics units) provides a further reason for a five-year transition of the current analog requirement. Because automobiles are so highly engineered and require such extensive testing prior to consumer release, it takes far longer for automobile manufacturers to change designs than it does the manufacturers of other products. Three distinct cycles dictate the speed at which an automobile manufacturer can respond to changes in product requirements: the design cycle, the product cycle, and the vehicle life cycle.

65/ *See* OnStar Comments at 5-6; ATX Reply Comments at 12; Audi Ex Parte, May 2, 2002 at 2.

66/ *See Part 22 Order* at ¶ 20 (citing MBUSA March 12, 2002 Ex Parte).

67/ NTIA Letter at 3.

The product cycle of an automobile – that is, the time during which a particular vehicle is manufactured and offered for sale without substantial re-design – is typically five years or longer, depending on its sales volume and market conditions. Changes to electronic devices such as telematics, which involve redesigns of a vehicle's electronic architecture and wiring harnesses, are difficult to make within the vehicle product cycle. Furthermore, substantial product development lead-time is necessary even before the product life cycle begins. Because of the extensive safety and reliability testing that must precede release of a new vehicle, it typically takes three years or more for a vehicle redesign to go from the drawing board to the show room. Therefore, a model that has been in the showroom for five years actually would be based on eight-year-old designs – the product of the combination of the vehicle design cycle and the vehicle product cycle. A five-year transition period is the minimum that would permit an orderly transition from analog to digital. 68/

Moreover, the Commission should take into account the durability of automobiles. The average life of a car on the road today is 8-9 years and 7-8 years for a truck, and vehicles are designed for a life of double that time. 69/ Indeed, as of July 1999, nearly 40 percent of the vehicles on the road were over 10 years old. 70/ The installed base of analog telematics is significant and is "approaching 3 million units." 71/ As NTIA has stated, "analog systems are

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68/ *See also, e.g.*, Comments of Toyota Motor North America, Inc., CC Dkt No. 94-102 (filed Feb. 18, 2003) at 22.

69/ *See* OnStar Comments at 6; *Ward's Motor Vehicle Facts & Figures 2000* at 44-45.

70/ *Id*.

71/ Senators' Letter to Chairman Powell (May 22, 2002) at 2 ("Senators' Letter").

now installed in millions of automobiles and there is a public interest in ensuring that they be able to operate nationwide." 72/

Nor would it be a simple solution to retrofit existing analog units with digital capabilities. Telematics units are finely integrated into a car's electrical and physical environment, and any retrofit would be very expensive and technically challenging. 73/ In a letter to the Commission, a bipartisan coalition of eleven Senators wrote that a "measured and rational transition" is necessary to avoid "undermining existing investments by consumers and businesses in legacy equipment." 74/ A five-year transition period recognizes that telematics are embedded in automobiles which last for many years and cannot be easily redesigned. A shorter period would not sufficiently protect the interests of "owners of vehicles with automatic crash/airbag deployment notification systems who may no longer be able to rely on those systems." 75/

D. A Gradual AMPS Phase-out Is Consistent with Congressional Intent

The findings underlying the Wireless Communications and Public Safety Act of 1999 ("911 Act") and its express language support the Commission's decision to require a five-

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72/ NTIA letter at 3.

73/ *See* Letter from Gary L. Cowger, President, GM North America, to Chairman Powell (July 31, 2002) at 2 ("We are exploring retrofit solutions for future and most current vehicles. However, the cost and practicability of retrofitting is uncertain given the physical placement of telematics units in a vehicle and, critically, the fact that digital telematics technology is still being developed. For older vehicles and some current models, retrofitting appears impractical due to incompatibility of those vehicles' older electrical architectures with the digital telematics solution.").

74/ Senators' Letter at 1.

75/ *Id.* at 2. *See also* American Honda Ex Parte, June 24, 2002 at 3 (urging the Commission to recognize and protect existing consumer and subsequent owner investment).

year transition of its analog cellular requirement. 76/ In their letter to Chairman Powell the Senators observed:

> In its passage of the Wireless Communications And Public Safety Act of 1999, Congress voiced its belief that "emergency care systems, particularly in rural areas of the Nation, will improve with the enabling of prompt notification of emergency services when motor vehicle crashes occur" and that the "operation of seamless, ubiquitous and reliable wireless telecommunications systems promote public safety and provide immediate and critical communications links among members of the public." Today, AMPS is the only technology that comes close to meeting that vision. 77/

The 911 Act explicitly recognizes the importance of telematics in general – and of ACN in particular – in its direction to the Commission to consult with the motor vehicle industry and in provisions related to the use of automatic crash notification information. 78/ A gradual phase-out of the analog cellular requirement is essential to preserving the life-saving and other benefits of telematics systems. The impact of the digital transition on telematics services provides an adequate and independent basis for the Commission's decision to implement a five year transition period, and, accordingly, for its rejection of AWS' Petition.

IV. CONCLUSION

For the foregoing reasons, the Joint Commenters urge the Commission to deny AWS' request in its Petition to reduce the five-year transition period established for the elimination of the analog cellular requirement. As the Commission recognized in its *Part 22 Order*, many groups of consumers would be at risk of losing access to mobile services without the five-year transition period. AWS has presented no valid legal or factual basis for challenging the Commission's well-founded decision.

76/ 911 Act at § 2.

77/ Senators Letter at 1-2.

78/ 911 Act §§ 3(b), 5(2).

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CERTIFICATE OF SERVICE

I, Jean Claire Meikle, do hereby certify that the foregoing Opposition of the Joint Commenters was served this 1st day of April, 2003, by first-class U.S. mail on:

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