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

In the Matter of	)	
	)	
Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems	)	CC Docket No. 94-102
	)	
Amendment of Parts 2 and 25 to Implement the Global Mobile Personal Communications by Satellite (GMPCS) Memorandum of Understanding and Arrangements; Petition of the National Telecommunications and Information Administration to Amend Part 25 of the Commission's Rules to Establish Emissions Limits for Mobile and Portable Earth Stations Operating in the 610-1660.5 MHz Band	)	IB Docket No. 99-67

COMMENTS OF THE
AD HOC TELECOMMUNICATIONS USERS COMMITTEE

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March 29, 2004

SUMMARY

The Ad Hoc Telecommunications Users Committee supports the Commission's decision in the *Second Report and Order* not to enact E911 rules for Multi-Line Telephone Systems ("MLTS"). The states have clear jurisdiction to promulgate such regulations, including regulations that enhance the security and safety of places of employment where MLTS are frequently used. Therefore, the states are a logical place for E911 MLTS issues to be resolved, and the states' ability to exercise jurisdiction over such matters and parties is straightforward.

In contrast, the Commission does not have adequate jurisdiction to promulgate regulations for MLTS owners/operators. Such action would exceed the scope of the Commission's jurisdiction under Title II and Title III of the Communications Act; jurisdiction under Section 1 and 4(i) is insufficient to support the imposition of regulations.

Ad Hoc urges the Commission to acknowledge the limitations of its jurisdiction and permit either the states or OSHA to determine the need for E911 rules for MLTS. Both the state authorities and OSHA have: (i) the required expertise to determine whether regulation is necessary; (ii) the experience to develop appropriate regulations; and (iii) the jurisdiction to impose those regulations on MLTS owner/operators. Neither the Wireless 911 Act of 1999, pending E911 legislation in Congress, nor the ancillary

jurisdiction of the Commission, are sufficient to cure these limitations on the Commission's jurisdiction.

In the event that the Commission disagrees regarding the scope of its jurisdiction and attempts to regulate employer owner/operators of MLTS, we request that the Commission undertake a meaningful cost/benefit analysis prior to imposing any E911 regulations on MLTS operators. In particular, the Commission should consider the technical capabilities and limitations of PSAPs to ensure that costly E911 requirements are not imposed on MLTS operators that reside in jurisdictions where the PSAPs are unable to use the information transmitted from the MLTS operator's site.

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COMMENTS OF THE
AD HOC TELECOMMUNICATIONS USERS COMMITTEE

The Ad Hoc Telecommunications Users Committee ("Ad Hoc" or "the Committee") hereby submits its comments in response to the Commission's December 1, 2003 *Report and Order and Second Further Notice of Proposed Rulemaking* ("*Second FNPRM*") in the above-captioned proceeding.[1] As described in greater detail below, the Commission does not have adequate legal jurisdiction to regulate employer owners/operators of multi-line telephone systems ("MLTS") or to promulgate regulations

[1] *Revision of Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, IB Docket No. 99-67, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 03-290 (rel. December 1, 2003) *("Second FNPRM")*.

regarding issues of workplace safety. In the *Second FNPRM,* the Commission correctly refrained from promulgating such regulations, deferring to state legislative and regulatory authorities with appropriate jurisdiction over such persons and subject matter.[2] Any subsequent action by the Commission to impose E911 regulations on employer owners/operators of MLTS, absent a legislative grant of additional statutory authority, would exceed the Commission's lawful jurisdiction.

I. THE COMMISSION LACKS SUFFICIENT STATUTORY JURISDICTION TO REGULATE EMPLOYER OWNERS/OPERATORS OF MULTI-LINE TELEPHONE SYSTEMS OR TO IMPOSE REGULATIONS REGARDING WORKPLACE SAFETY.

In the *Second FNPRM,* the Commission has once again requested information regarding its authority to require compliance with E911 rules that it may adopt for MLTS.[3] Specifically, it has requested that commenters focus "on the nature of the Commission's jurisdiction over MLTS operators, in light of the Commission's earlier interpretations of Section 4(i) authority and its prior statement that 'the reliability of 911 service is integrally related to our responsibilities under Section 1 of the Act…".[4] In response to this inquiry, Ad Hoc reiterates its position that the Commission does not have sufficient jurisdiction to regulate employer owners/operators of MLTS nor does it

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[2] *Id.* at ¶ 54 & nn.189-90.

[3] *Id.* at ¶ 116. We note that previously in this proceeding, the Commission focused specifically on whether the Commission had adequate authority to require compliance with E911 rules by manufacturers of MLTS. *Revision of Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, IB Docket No. 99-67, Further Notice of Proposed Rulemaking, 17 FCC Rcd 25576, 25608 at ¶ 91 (rel. Dec. 20, 2002) *("FNPRM")*. In the *Second NPRM,* however, the Commission has broadened its inquiry regarding the adequacy of its authority to impose E911 requirements on other "affected parties," including carriers manufacturers, PSAPs, and MLTS operators. *Second FNPRM,* at ¶ 116.

[4] *Id.*

have sufficient expertise or authority to promulgate what—when applied to workplaces in this country—constitute regulations of workplace safety.[5]

Ad Hoc supports the Commission's decision to leave the regulation of MLTS operators' E911 responsibilities to state and local authorities.[6] The legal authority of state legislatures to regulate employer owners/operators of MLTS and workplace safety issues is far clearer than the Commission's legal authority in this area.

In the *Second FNPRM,* the Commission conditionally entrusts the states to address the issue of E911 MLTS.[7] Ad Hoc cautions the Commission, however, from inadvertently or prematurely interfering with the normal legislative or rulemaking processes of the states which may operate on a different time-table than and may yield different results from similar processes taking place at the federal level. The Commission has acknowledged that there is no evidence to indicate that federal rules would be more effective than state rules in deploying E911 for MLTS and that greater benefit may be derived from state action which can take account of unique needs and circumstances of residential and business MLTS users.[8] Ad Hoc agrees with this

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[5] The determination of whether MLTS at use in various places of employment, including office buildings and campuses, manufacturing facilities, and other non-residential areas, should transmit call back and location information to emergency service providers is fundamentally about ensuring a safe workplace. Congress has explicitly established a separate administrative regime to address work place safety issues. Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. (2004) ("OSH Act"). Employers are already subject to a well-established and thoroughly considered set of regulations for workplace safety. 29 C.F.R. Part 1910 ("Occupational Safety and Health Standards"); *see* Reply Comments of Red Sky Technologies, Inc., on *FNPRM*, CC Docket No. 94-102 (filed Feb. 28, 2003) (agreeing that there are OSHA implications associated with the implementation of E911 rules for MLTS). In contrast to any actions taken by the Commission in this area, the agencies that have considered and promulgated regulations in this area have specific statutory jurisdiction and expertise with workplace safety issues.

[6] *Second FNPRM* at ¶ 54.

[7] *Id.* ("[the Commission is] prepared to act at the federal level, should states fail to do so.").

[8] *Id.* at ¶ 55.

Commission finding and urges the Commission to be mindful of it when evaluating actions taken (or not taken) by the states with respect to E911 for MLTS.

In the *Second FNPRM,* the Commission has requested comment on the value of a "national approach" (*i.e*., action by the Commission)[9] where states have failed to act.[10] Although the Commission does not specify in the *Second FNPRM* the type of action it intends to take, Ad Hoc urges the Commission to consider carefully the limitations of its jurisdiction set forth herein and to recognize that it does not possess the same legal authority as the states either to regulate employer owners/operators of MLTS or to promulgate regulations regarding workplace safety.

A. The Communications Act does not provide the Commission with specific statutory jurisdiction sufficient to regulate employee owners/operators of MLTS or to promulgate workplace safety regulations.

In this proceeding, the Commission has premised its legal authority to regulate non-Commission licensees that do not provide common carrier or telecommunications services on the general jurisdictional provisions found in Sections 1 and 4(i) of the Communications Act.[11] Ad Hoc, along with other commenters, has questioned the Commission's reliance on these provisions to extend its jurisdiction to entities and

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[9] *Id.* at ¶ 113.

[10] *Id.* at ¶ 114. In the *Second FNPRM,* the Commission does not specifically describe the type of action it intends to take nor the timetable within which it intends to act. However, it has indicated that consideration of any such action would be made in conjunction with the issuance of a public notice one year after the date of the *FNPRM* in which the Commission will "examine the progress states have made in implementing MLTS E911 compatibility." *Id.* at ¶ 50.

[11] 47 U.S.C. §§ 151 and 154 (i). *See Second FNPRM,* at ¶ 116 & n.352; *FNPRM*, at ¶ 91. The Commission's prior actions to amend its regulations were based primarily on the jurisdiction conferred by Title I and II of the Communications Act. *See Second FNPRM* at ¶ 122; *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, IB Docket No. 99-67, Report and Order, 11 FCC Rcd 18676, 18752, ¶ 164 (1996). Accordingly, those amendments to the regulations applied only to wireless common carriers and equipment manufacturers.

subject matter generally beyond the Commission's Title II and Title III jurisdiction.[12] In the *Second Report and Order,* the Commission refrained from addressing this jurisdictional question, noting that its decision to defer regulation of MLTS to state legislative and regulatory authorities made a determination of the Commission's jurisdiction unnecessary.[13] Now, the Commission seeks "updated comment" on its ability to promulgate regulations affecting MLTS operators pursuant to Section 1 and 4(i).[14]

As Ad Hoc has noted throughout this proceeding, there are well-established limitations on the Commission's ability to regulate entities or subject matter outside its Title II and Title III authority, particularly when the sole basis for extending such authority is premised on Sections 1 and 4(i).[15] For example, in *GTE Service Corp. v. FCC*,[16] the Second Circuit held that the Commission's Section 1 and 4(i) jurisdiction did not permit it to regulate the conduct of a common carrier's data processing subsidiary. The Second Circuit determined that while the Commission was empowered to regulate

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[12] *See* Comments of the Telecommunications Industry Association, on *FNPRM*, CC Docket No. 94-102 (Feb. 19, 2003) ("TIA FNPRM Comments"), at 5-15 (FCC has no jurisdiction over equipment manufacturers or the manufacturing process); Comments of Intrado Inc., on *FNPRM,* CC Docket No. 94-102 (Feb. 19, 2003) ("Intrado FNPRM Comments"), at 10-11 (without legislative action, neither Wireless 911 Act nor Communications Act provide jurisdiction over [PBX] manufacturers or the manufacturing process); Comments of ATX Technologies, Inc., on *FNPRM,* CC Docket No. 94-102 (Feb. 19, 2003) ("ATX FNPRM Comments"), at 19-26 (no jurisdiction over telematics); Comments of the Intelligent Transportation Society of America, on *FNPRM,* CC Docket No. 94-102 (Feb. 19, 2003) ("ITS America FNPRM Comments"), at 12 (Wireless 911 Act and Communications Act grant Commission jurisdiction only over "telecommunications" and "common carriers").

[13] *Second FNPRM* at ¶ 63 & n.216.

[14] *Id.* at ¶ 116.

[15] Comments of Ad Hoc Telecommunications Committee, on *FNPRM,* CC Docket No. 94-102 (filed Feb. 19, 2003) ("Ad Hoc FNPRM Comments"), at 4-8; Reply Comments of Ad Hoc Telecommunications Committee, on *FNPRM,* CC Docket No. 94-102 (filed Mar. 25, 2003) ("Ad Hoc FNPRM Reply Comments"), at 3-6.

[16] 474 F.2d 724 (2d Cir. 1973).

the anticompetitive activities of common carriers, it was not permitted to regulate the activities of their affiliated data processing entities.[17] More recently, the United States Court of Appeals for the District of Columbia Circuit rejected certain FCC rules that were based upon, *inter alia,* Sections 1, 2(a), and 4(i) of the Communications Act, holding that the FCC's authority under Title I is "broad but not without limits."[18] In the instant case, the Commission has no independent grant of jurisdiction under the Communications Act to regulate employer owners/operators of MLTS or to regulate workplace safety issues.

Absent an explicit statutory command in the Communications Act to regulate owners of MLTS, the Commission has suggested that its jurisdiction over MLTS owners might be appropriate because action pursuant to such jurisdiction would, according to the Commission, promote safety of life and property through the use of radio or wire transmissions.[19] In particular, the Commission seeks comment "on the nature of the Commission's jurisdiction over MLTS operators, in light of … its prior statement that 'the reliability of 911 service is integrally related to our responsibilities under Section 1 of the Act …'."[20] Ad Hoc notes that the "prior statement" identified by the Commission is largely irrelevant to the instant legal question regarding the Commission's legal authority to regulate employer owners/operators of MLTS who are otherwise not subject to regulation under Title II or Title III.

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[17] *Id.* at 734.

[18] *Motion Picture Ass'n of Am., Inc v. FCC,* 309 F.3d 796, 804 (D.C. Cir. 2002) ("MPAA"). *See also* TIA FNPRM Comments at 11-12 (citing *MPAA* in favor of its position that Sections 1 and 4(i) of the Communications Act do not confer jurisdiction on the Commission to regulate manufacturers of MLTS).

[19] *Second FNPRM* at ¶ 116.

[20] *Id.*

Indeed, the Commission must acknowledge that it made this facially broad statement regarding its responsibility for 911 services in the context of a rulemaking in which its jurisdiction to promulgate the regulations in question was not in doubt.[21] The Commission simply asserted its "interest" in 911 services prior to imposing requirements on common carriers – over which there is *no question* the Commission has jurisdiction pursuant to Title II – to report outages of 911 services.[22] Therefore, this previous Commission statement provides no insight into the Commission's jurisdiction over MLTS owners nor can it reasonably be promoted as a legal basis on which to expand the Commission's jurisdiction to entities otherwise outside the Commission's Title II and Title III jurisdiction.

As Ad Hoc noted in response to the *FNPRM* in this proceeding, the Supreme Court in *FDA v. Brown & Williamson Tobacco Corporation* unambiguously held that "no matter how 'important, conspicuous, and controversial' the issue … an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."[23] Thus, the Commission cannot regulate entities and subject matter not within its jurisdiction, and Section 1 and 4(i) of the Act are insufficient, without something more, to confer to the Commission jurisdiction over employer owners/operators of MLTS and workplace safety issues. In considering the scope of the jurisdiction granted to the Food and Drug Administration by Congress in the Food,

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[21] *Amendment of Part 63 of the Commission's rules to Provide for Notification of Common Carriers of Service Disruptions,* CC Docket No. 91-273, Second Report and Order, 9 FCC Rcd 3911, 3925, at ¶ 35 (Aug. 1, 1994).

[22] *Id.*

[23] 529 U.S. 120, 161 (2000). *See also* Ad Hoc FNPRM Comments (analyzing the decision and its application to instant regulations) at 6-9; Ad Hoc FNPRM Reply Comments at 5-6 & n.10 (same).

Drug and Cosmetics Act, the Court held, *inter alia,* that the grant of jurisdiction provided in one statute may be affected by other acts of Congress, particularly where Congress has spoken subsequently and more specifically to the topic at hand.[24]

The Court's holding in *Brown & Williamson* is directly relevant to the jurisdictional issue currently before the Commission. By enacting the OSH Act in 1970, Congress demonstrated its unambiguous intent to create a unique administrative structure with the mission of regulating workplace safety.[25] The OSH Act specifically grants power to the Department of Labor to promulgate regulations[26] while carefully balancing federal and state obligations and areas of responsibility in the area of workplace safety.[27] If the Commission were to attempt to regulate the operators of MLTS used in places of employment, it would encroach on subject matter jurisdiction and authority that Congress specifically granted to the Department of Labor.

In the instant case, a court would also likely to conclude that while the Commission can regulate common carriers and, perhaps, telecommunications equipment manufacturers to promote "safety of life and property through the use of wire

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[24] 529 U.S. at 133 (citing *United States v. Romani,* 523 U.S. 517, 530-31 (1998)).

[25] *See* 29 U.S.C. § 651(b) ("The Congress declares it to be its purpose and policy…. to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources … (3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards… [and] (9) by providing for the development and promulgation of occupational safety and health standards"). *See also Brown & Williamson,* 529 U.S. at 144 (holding that Congress's passage of several tobacco-related pieces of legislation subsequent to the original passage of the FDCA indicated its intent to create a separate regulatory regime for tobacco products, effectively excluding the FDA from exercising jurisdiction over such products).

[26] 29 U.S.C. § 651(b)(3).

[27] 29 U.S.C. §§ 651(b)(11) and 667.

and radio communication,"[28] it cannot regulate the nation's employers toward the same end.

B. The Wireless 911 Act and legislation pending in Congress provide no additional jurisdiction to the Commission sufficient to allow regulation of employer owners/operators of MLTS or workplace safety issues.

Although the Commission has not requested in the *Second FNPRM* comment on the Wireless Communications and Public Safety Act of 1999 ("Wireless 911 Act") [29] as a source of jurisdiction for the Commission to regulate MLTS owners, several commenters have attempted to use various provisions of that legislation to suggest Congressional intent with respect to MLTS.[30] In its *FNPRM* filings, Ad Hoc incorrect assertions that the Wireless 911 Act could reasonably provide the Commission a jurisdictional basis to regulate owners of MLTS.[31] For the sake of brevity, we will not repeat our arguments here but urge the Commission to review our prior filings and the arguments presented therein.

Suffice it to say that *nothing* in the 911 Act supports the proposition that Congress explicitly or implicitly authorized the FCC to impose E911 regulations of any kind on wireline services or equipment, let alone to impose them upon MLTS operators or to regulate issues of workplace safety. Indeed, with the exception of the advisory

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[28] 47 U.S.C. § 151.

[29] 47 U.S.C. § 615. *See also Implementation of 911 Act; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, WT Docket No. 00-110, CC Docket No. 92-105, Fourth Report and Order and Third Notice of Proposed Rulemaking, 15 FCC Rcd 17079 (2000). Notably, the Commission's role to "encourage and support" efforts by States to deploy end to end emergency communications infrastructure was limited to consultation with States and affected groups and encouragement of development and implementation of statewide deployment plans.

[30] NENA and NASNA FNPRM Comments at 1-2; APCO FNPRM Comments at 5.

[31] Ad Hoc FNPRM Reply Comments at 6-8; Ad Hoc FNPRM Comments at 8-9.

role described in Section 3(b),[32] the Act specifically states "nothing in this subsection [3(b)] shall be construed to authorize or require the Commission to impose obligations or costs on any person."[33] Some of the proposals being considered by the Commission, which would cause operators of MLTS at places of employment to manage and update databases for the transmission of specific call-back or location information and to invest in new services or equipment, would be inconsistent with this statutory command.

Simply put, as its title suggests, the Wireless 911 Act applies only to wireless services[34] and does not provide the Commission with any additional jurisdiction sufficient to support regulation of MLTS owners/operators.[35] Had Congress intended to expand the Commission's jurisdiction to MLTS operators and workplace safety issues, it would have expressly granted the FCC such authority when it passed the 911 Act. It did not do so.

Interestingly, pending Congressional legislation regarding E911 also does not contemplate expanded Commission jurisdiction.[36] Both Senate and House bills, as currently drafted, authorize the coordination of emergency communications systems by

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[32] 47 U.S.C. § 615.

[33] *Id.* *See* Letter from FCC Chairman Michael K. Powell to Sen. Ernest F. Hollings (Mar. 4, 2003) at 2 n.1 (stating that Section 3(b) prohibits the Commission from imposing obligations or costs on any person).

[34] One incidental exception is the statutory directive establishing "9-1-1" as the universal emergency telephone number in the United States. 47 U.S.C. § 251(e)(3). As Ad Hoc noted in its FNPRM Comments at 7 n.14, it is doubtful that this directive constitutes an expansion of Commission jurisdiction given the Commission's plenary authority over numbering resources within the United States pursuant to Section 251(e)(1) of the Communications Act. Thus, the suggestion of some commenters that this directive constitutes a "statutory command and policy framework," *see* NENA and NASNA FNPRM Comments at 2, or provides a basis for Commission jurisdiction over MLTS operators is without merit.

[35] *See* TIA FNPRM Comments at 7.

[36] E-911 Implementation Act of 2003, H.R. 2898 RFS, 108th Cong. (2003); Enhanced 911 Emergency Communications Act of 2003; S.1250 RS, 108th Cong. (2003).

federal, state and local governments, fund the deployment of certain E911 services to PSAPs, and require that funds ostensibly collected for E911 not be used for other purposes. Neither bill, however, expands the Commission's jurisdiction in a manner that could be construed to permit the regulation of entities beyond the Commission's Title II and Title III jurisdiction. Again, given the opportunity to provide the Commission with jurisdiction sufficient to regulate MLTS operators, Congress did not do so.

C. The Commission's ancillary jurisdiction does not extend to operators of MLTS equipment even if such jurisdiction would permit the Commission to regulate manufacturers of such equipment.

In the *FNPRM,* the Commission solicited comment on whether it could require compliance with its E911 rules by manufacturers of MLTS.[37] The Commission suggested that such authority might be plausible based upon the theory of ancillary jurisdiction.[38] Although the Commission did not resolve the issue of whether it had authority to compel manufacturers to take steps to ensure MLTS E911 compatibility (because it did not revise its Part 64 or Part 68 rules in the Second Report and Order),[39] the Association of Public Safety Communications Officials ("APCO") submitted an ex parte filing with the Commission outlining the legal basis on which the Commission could attempt to exercise such ancillary jurisdiction.[40]

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[37] *FNPRM* at ¶ 91.

[38] *Id.* & n.221.

[39] *Second FNPRM* at ¶ 62.

[40] Letter from Robert M. Gurss, Association of Public Safety Communications Personnel, to Secretary Marlene Dortch, WT [sic] Docket 94-102, (Nov. 7, 2003) ("APCO Ex Parte").

APCO argues that the Commission's recent decision in the *Broadcast Flag Order,*[41] in which the Commission exercised its ancillary jurisdiction over consumer equipment manufacturers to require that their products include features to recognize and respond to content redistribution restrictions, provides precedent upon which the Commission could regulate manufacturers of MLTS equipment.[42] Then, in a gigantic leap of logic unsupported by the Commission's decision in the *Broadcast Flag Order* or relevant authority relating to the doctrine of ancillary jurisdiction, APCO opines that "there is nothing in the concept of ancillary jurisdiction that necessarily limits the Commission's authority to makers of equipment."[43] In trying to bootstrap the Commission's potential ancillary jurisdiction over manufacturers to jurisdiction over any entity affected by E911 rules for MLTS, APCO impermissibly glosses over several important limiting elements of the *Broadcast Flag Order* that are relevant to the Commission's inquiry into its jurisdiction over MLTS operators.

First, the Commission in the *Broadcast Flag Order* noted that exercise of its ancillary jurisdiction was *necessary* to fulfill its responsibilities under the Communications Act.[44] Notably, no other regulatory entity had the legal authority or delegated responsibility to assure the prompt and successful transition of the nation's broadcasting system to a digital transmission standard.[45] The *Second FNPRM* declares that states and localities have not only a vested interest and responsibility in ensuring

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[41] *In the Matter of Digital Broadcast Content Protection,* MB Docket No. 02-230, Report and Order and Further Notice of Proposed Rulemaking, FCC 03-273, (Nov. 4, 2003) ("*Broadcast Flag Order*").

[42] APCO Ex Parte at 1-2.

[43] *Id.* at 4-5.

[44] *Broadcast Flag Order* at ¶ 33.

[45] *Id.* at 30.

the effective delivery of 911 services but also legal authority to regulate 911 services in their jurisdictions.[46] Thus, unlike in the *Broadcast Flag Order,* the Commission's involvement is not necessary to achieve a clearly stated public goal, the achievement of which has been delegated to the Commission.

Second, in the *Broadcast Flag Order,* the Commission extended its ancillary jurisdiction extended *only* to the manufacturers of digital receiving equipment; it did not extend its jurisdiction to owners or operators of such equipment. To the extent that the *Broadcast Flag Order* expands traditional interpretations of the doctrine of ancillary jurisdiction and supports the exercise of Commission jurisdiction over MLTS manufacturers,[47] the Commission in the *Broadcast Flag Order* stays well within traditional limits of the doctrine's scope, restricting its jurisdiction to the regulation of "instrumentalities, facilities, apparatus and services incidental to [wire] transmission."[48] The Commission did not extend its jurisdiction to the owners and operators of such equipment used in the transmission of such "wire communications."

APCO ignores these important distinctions and urges the Commission to adopt a view that places no limits on its ancillary jurisdiction.[49] As noted in Section I.A, *supra,* such an expansive view of the Commission's jurisdiction is not consistent with applicable legal precedent.

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[46] *Second FNPRM* at ¶¶ 53-54.

[47] *But see* TIA FNPRM Comments at 8-16 (arguing that ancillary jurisdiction over MLTS manufacturers is not legally supportable because it does not arise from an explicit statutory grant of jurisdiction).

[48] 47 U.S.C. § 153(52); *Computer and Communications Industry Association v. FCC,* 461 U.S. 938 (1983), *cert. denied, Louisiana Pub. Serv. Comm. v. FCC,* 461 U.S. 938 (1983).

[49] APCO Ex Parte at 4-5.

D. Expectations of access to 911 and E911 do not support Commission regulation of MLTS operators or workplace safety issues in the absence of appropriately established jurisdiction.

The Commission adopted four criteria to analyze whether a particular communications service should be subject to E911 Rules.[50] Among the criteria adopted was whether a customer using a particular service or device has a "reasonable expectation" of access to 911 and E911 services.[51] As Ad Hoc noted in its FNPRM Reply Comments in light of the positions taken by several commenters,[52] the four criteria listed—including that regarding users' reasonable expectations—are not legal standards for establishing the Commission's jurisdiction over particular services, persons, or subject matter.[53] Rather, they are criteria promulgated by the Commission to determine the desirability of exercising jurisdiction, but only *after* such jurisdiction has been properly established. It is odd, then, that the Commission began its analysis by applying the four criteria to MLTS without first determining whether it even had adequate jurisdiction to promulgate regulations over employer owner/operators of MLTS.[54] Ad Hoc reiterates its concern that the Commission has put the cart before the horse, developing a policy outcome before establishing the jurisdiction to enact it.

The Commission arrives at a hasty and unsupported conclusion regarding users' reasonable expectations about access to E911 through MLTS. First, the Commission states that "it is not entirely apparent from the record whether end-users of telephones

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50 *Second FNPRM* at ¶ 18.

51 *Id.*

52 *See* NENA and NASNA FNPRM Comments at 2; APCO FNPRM Comments at 10.

53 Ad Hoc FNPRM Reply Comments at 8.

54 *Second FNPRM* at ¶ 51.

served by MLTS always have a clear expectation of access to 911 and E911."[55] Then in an apparent reversal of its observation that consumer expectations are ambiguous, the Commission states that "consumers generally expect that 911 or E911 would work from the telephone at a particular location, and that a consumer using MLTS would have the same expectation…".[56] Ad Hoc is concerned that the Commission's generalization of consumer expectations is based solely on the conclusory statements of three interested commenters.[57]

Particularly in the context of MLTS used at places of employment, the Commission should be cognizant of the MTLS operator's ability to manage its users' expectations regarding access to 911 services. Employers in particular are able to use various forms of notification and training to alert their employees that access to 911 may be obtained through different methods than it is obtained on non-MLTS telephone instruments or that E911 is not available from a particular location. Often, places of employment have alternative emergency call, notification, and rescue procedures that are well publicized among the employee population. There is simply no information in the record to support the Commission's statement that MLTS callers "generally expect to have access to E911."[58] As a general matter, the Commission has provided no indication that consumers have an expectation of any kind with respect to E911. Indeed, the Commission appears to blur consumers' expectation that they will be able to access some form of 911 emergency response service through MLTS with the

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55 *Id.* at ¶ 51.

56 *Id.*

57 *Id.* at ¶ 51 & n.182.

58 *Id.*

expectation that such access would also include the transmission of specific location and call-back information. Because the Commission has determined that consumer expectation will play a role in determining whether E911 rules should apply to particular services, it must provide a more complete record of support for its conclusions that consumers do indeed have specific expectations.

II. THE COMMISSION MUST SUPPLEMENT THE RECORD IN THIS PROCEEDING WITH AN APPROPRIATE COST/BENEFIT ANALYSIS OF ANY PROPOSED REGULATIONS.

In the event that the Commission determines that it has adequate jurisdiction to impose regulations upon operators of MLTS, it should undertake a cost/benefit analysis to determine whether the costs associated with complying with any Commission regulations are reasonable. At this juncture, the current record does not contain adequate information about the actual costs that the Commission's initial list of capability requirements[59] and those of many commenters would impose upon the purchasers/operators of MLTS, and, ultimately, on the economy as a whole.[60]

Prior to promulgating any regulations, or adopting any equipment or network standards, the Commission should fully develop the record in this proceeding by seeking comments on the actual costs that any proposed regulations or standards would impose. The Commission should then conduct an appropriate analysis to

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[59] *FNPRM* at ¶ 83.

[60] Several commenters have urged the Commission to impose regulations without any apparent regard for or explanation of the cost of such regulations to manufacturers or end-users. *See* Colorado 9-1-1 Task Force FNPRM Comments at 6; Boulder Regional Emergency Telephone Service Authority ("BRETSA") FNPRM Comments at 8; Washington E911 Program FNPRM Comments at 7; APCO Comments at 4.

determine whether the imposition of such costs would confer a commensurate benefit of increased access to E911 and overall enhancement of public safety.

A significant component of this cost/benefit analysis should include an assessment of the actual E911 capabilities of the PSAPs and emergency response agencies (*i.e.,* police, fire, rescue) in numerous local jurisdictions that would receive calls requesting emergency assistance. If an insufficient number of PSAPs are able to receive and process ANI/ALI from MLTS, or there are reasons unrelated to E911 why police, fire, and rescue personnel cannot react to a distress call in a timely fashion, for example, due to a lack of personnel or equipment, a nationwide standard imposing a requirement that equipment be capable of transmitting such information would not be justified.[61]

III. THE COMMISSION SHOULD REFRAIN FROM IMPOSING REGULATIONS ON EMPLOYER OWNER/OPERATORS OF MLTS BECAUSE IT LACKS THE NECESSARY EXPERTISE TO REGULATE WORKPLACE SAFETY EFFECTIVELY.

Even if the Commission were to find that it has jurisdiction to regulate employer operators of MLTS, the Commission lacks the expertise necessary to prescribe the type of information that MLTS used in places of employment should transmit to PSAPs and the steps that employers must take to update and maintain this information. As Ad Hoc noted in its FNPRM Comments, it would be exceedingly difficult – if not impossible – to articulate a general "one size fits all" regulation about the location and call back

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[61] Recent reports indicate that only 19% of PSAPs have Phase II wireless E911 service and that by the end of 2005, that number is likely to increase to only 50%. *Telecommunications Reports,* "Bigger State Role Needed in E911 Effort," No. 4 (Feb. 15, 2004), at 27. The Commission should investigate whether PSAPs have sufficient technical capabilities to receive or process ANI/ALI transmissions that MLTS operators would be required to transmit if the Commission were to impose E911/MLTS obligations on private and public employers.

information, if any, that each employer should develop, maintain, and transmit in the event of an emergency without first considering: (a) the workplace safety regulations already imposed upon such workplaces; (b) existing emergency signaling and response plans in place at a given workplace; and (c) the type of workplace from which the 911 call originates.[62]

All of these inquiries exceed the scope of the Commission's expertise and jurisdiction. Ad Hoc agrees with the Commission that states are in a far better position to evaluate the local issues associated with the provision of 911 Services.[63] Any action to regulate employer owners/operators of MLTS should be taken by state or federal agencies with specific jurisdiction over, and expertise in, workplace safety issues. As Ad Hoc noted in some detail in its FNPRM Comments, OSHA has the specialized expertise necessary to promulgate regulations that most effectively protect American workers and has set forth detailed regulations to achieve the purposes for which the agency was created.[64]

NENA and NASNA objected to the suggestion that E911 regulations affecting MLTS operators should be promulgated by OSHA, rather than the Commission.[65] Notably, their objection is not based on legal grounds that OSHA does not have jurisdiction over employer operators of MLTS, or on policy grounds that OSHA does not have the requisite expertise to regulate effectively workplace safety issues. Rather NENA and NASNA object to the involvement of OSHA based solely on the

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62 Ad Hoc FNPRM Comments at 4.

63 *Second FNPRM* at ¶ 53.

64 Ad Hoc FNPRM Comments at 9-12.

65 NENA and NASNA FNPRM Reply Comments at 12.

determination that *existing* OSHA regulations are not detailed or comprehensive enough to ensure effective deployment of emergency response personnel.[66] Yet NENA and NASNA are asking the Commission – which has little or no expertise in formulating workplace safety regulations – to write detailed and comprehensive workplace safety regulations from scratch.

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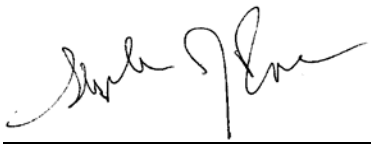
[66] *Id.*

IV. CONCLUSION

The Commission correctly decided not to adopt E911 rules for MLTS operators, instead allowing state and local authorities to consider the appropriate scope of MLTS regulations in their jurisdictions. Unlike the states, the Commission does not have adequate jurisdiction, nor does it have sufficient expertise in issues of workplace safety to devise and impose E911 regulations on MLTS operators. In the event the states fail to act, the Commission should allow the federal agency with expertise in regulating workplace safety, OSHA, to determine whether E911 obligations are appropriate and, if so, the regulations that should apply. In the event that the Commission does attempt to assert jurisdiction over MLTS operators and promulgate regulations affecting them, it should conduct a meaningful cost/benefit analysis of such regulations prior to instituting them.

Respectfully submitted,



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March 29, 2004