LEVINE, BLASZAK, BLOCK & BOOTHBY, LLP
2001 L STREET, NW
SUITE 900
WASHINGTON, D.C. 20036
(202) 857-2550
FAX (202) 223-0833

April 26, 2004

VIA ELECTRONIC COMMENT FILING SYSTEM

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: Revision of Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, and 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 1610-1660.5 MHz Band; CC Docket No. 94-102 and IB Docket 99-67.

Dear Ms. Dortch:

Pursuant to the December 1, 2003 Report and Order and Second Further Notice of Proposed Rulemaking in the above-referenced proceeding, enclosed please find the Reply Comments of the Ad Hoc Telecommunications Users Committee ("Ad Hoc"). Ad Hoc's Comments are being transmitted to the Federal Communications Commission via the Federal Communications Commission's Electronic Comment Filing System ("ECFS").

If you have any questions or concerns, please do not hesitate to contact me at (202) 857-2550.

Respectfully submitted,

Andrew M. Brown
Counsel for
The Ad Hoc Telecommunications Users Committee

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 1610-1660.5 MHz Band	)	IB Docket No. 99-67

REPLY COMMENTS OF THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE

James S. Blaszak
Andrew M. Brown
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, NW
Suite 900
Washington, DC 20036
202-857-2550

Counsel for
The Ad Hoc Telecommunications
Users Committee

April 26, 2004

SUMMARY

In its recent *Report and Order* in this proceeding, the Commission correctly declined to adopt certain proposed regulations for MLTS, deferring instead to the legislatures and regulatory authorities of the states. In response to the *Second Further Notice of Proposed Rulemaking,* certain commenters have assailed the Commission's decision without permitting any time for state authorities to consider whether, and, if so, what regulations for MLTS are appropriate for their jurisdictions. Instead, such parties have simply repeated prior demands that the Commission immediately adopt MLTS regulations, disregarding the obvious limitations on the Commission's legal authority to do so. In these Reply Comments, Ad Hoc notes that such parties have repeatedly failed to identify valid legal bases pursuant to which the Commission could impose such regulations and dismissed the expertise and jurisdiction that the states and other federal agencies possess with respect to workplace safety regulations. Further wrangling and opposition to the Commission's decision undermines the legislative/regulatory processes that may be undertaken at the state level to determine what, if any, are the most appropriate regulations for MLTS.

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REPLY COMMENTS OF THE
AD HOC TELECOMMUNICATIONS USERS COMMITTEE

The Ad Hoc Telecommunications Users Committee ("Ad Hoc" or "the Committee") hereby replies to the comments filed in response to the Commission's *Report and Order and Second Further Notice of Proposed Rulemaking* ("*Second FNPRM")* in the above-captioned proceeding.[1] As explained in greater detail below, the record in this proceeding continues to demonstrate that the Commission lacks sufficient statutory authority to require that the owners/operators of multi-line telephone systems

[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, 18 FCC Rcd 25340 (Dec. 1, 2003) *("Second FNPRM")*.

("MLTS") implement a Commission-specified E911 program. In particular, the regulation of MLTS at places of employment, where workplace safety is the underlying justification for requiring the transmission of specific Automatic Number Information/Automatic Location Information ("ANI/ALI") to Public Safety Answering Points ("PSAPs"), falls well outside the traditional subject matter jurisdiction and expertise of the Commission. Thus, Ad Hoc has consistently urged the Commission to reject proposals for MLTS regulations that would exceed both the Commission's statutory jurisdiction and subject matter expertise.

I. THE RECORD IN THIS PROCEEDING CONTINUES TO DEMONSTRATE THAT THE COMMISSION DOES NOT HAVE ADEQUATE JURISDICTION TO IMPOSE E911 REGULATIONS ON MLTS OWNERS/OPERATORS.

As Ad Hoc stated in its opening round comments[2] (and has stated throughout this proceeding),[3] the Commission lacks the requisite statutory jurisdiction to impose E911 regulations on employer owners/operators of MLTS. Neither the general provisions of the Communications Act nor subsequent legislation adopted by Congress to address 911 issues provides the Commission an adequate legal basis upon which to regulate employer owners/operators of MLTS.[4] Furthermore, the Commission

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[2] Comments of the Ad Hoc Telecommunications Users Committee, on *Second Further Notice of Proposed Rulemaking,* CC Docket 94-102, IB Docket 99-67 (Mar. 29, 2004), at 2-15 ("Ad Hoc Second FNPRM Comments").

[3] Comments of the Ad Hoc Telecommunications Users Committee, on *Further Notice of Proposed Rulemaking,* CC Docket 94-102, IB Docket 99-67 (Feb. 19, 2003), at 4-9 ("Ad Hoc FNPRM Comments"); Reply Comments of the Ad Hoc Telecommunications Users Committee, on *Further Notice of Proposed Rulemaking,* CC Docket 94-102, IB Docket 99-67 (Mar. 25, 2003) at 2-9 ("Ad Hoc FNPRM Reply Comments").

[4] The inadequacy of the statutory provisions cited in the record to support Commission jurisdiction over MLTS owners/operators is discussed further in Section I.A of these Comments. Other commenters have also previously questioned the adequacy of the Commission's jurisdiction over MLTS based upon existing legislation. *See* Comments of the Telecommunications Industry Association on *Further Notice of Proposed Rulemaking,* CC Docket 94-102, IB Docket 99-67 (Feb. 19, 2003) at 5-15 (FCC has no

precedent cited by the joint comments of the National Emergency Number Association ("NENA") and National Association of State 9-1-1 Administrators ("NASNA") provides no support for the sweeping expansion of Commission jurisdiction proposed by NENA/NASNA over entities and subject matter not currently regulated by the Commission.

A. Existing Legislation Does Not Provide Sufficient Legal Authority for the Commission to Regulate Employer Owners/Operators of MLTS.

Both NENA/NASNA and the Association of Public Safety Communications Officials ("APCO") urge Commission jurisdiction over MLTS (including the regulation of employer owners/operators of MLTS) based upon certain general provisions of both the Communications Act (Sections 1 and 4(i)) and the Wireless 911 Act.[5] In its comments to the *Second FNPRM,* Ad Hoc extensively addressed why neither of these statutory provisions considered alone or in conjunction with one another confer sufficient legal authority to the Commission to permit regulation of employer owners/operators of MLTS.[6] For the sake of brevity, Ad Hoc will not repeat those arguments in their entirety in these Reply Comments but, instead, offers the following summary of its previous arguments and conclusions.

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jurisdiction over equipment manufacturers or the manufacturing process); Comments of Intrado Inc. on *Further Notice of Proposed Rulemaking,* CC Docket 94-102, IB Docket 99-67 (Feb. 19, 2003) at 10-11 (without legislative action, neither 911 Act nor Communications Act provide jurisdiction over [PBX] manufacturers or the manufacturing process). *See also* Comments of the Intelligent Transportation Society of America on *Further Notice of Proposed Rulemaking,* CC Docket 94-102, IB Docket 99-67 (Feb. 19, 2003) at 12 (911 Act and Communications Act grant Commission jurisdiction only over "telecommunications" and "common carriers").

[5] Comments of NENA/NASNA at 9-10; Comments of APCO at 4.

[6] Ad Hoc Second FNPRM Comments at 4-10. Ad Hoc also extensively addressed this issue in its Comments and Reply Comments to the *FNPRM.* Ad Hoc FNPRM Comments at 4-9; Ad Hoc FNPRM Reply Comments at 3-7.

First, there are well-established limits 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 solely on Sections 1 and 4(i).[7] Indeed, NENA/NASNA and APCO fail to provide a single apposite example of prior Commission regulation of an entity that was not a Commission licensee, subject to Commission jurisdiction pursuant to authority granted under Title II and Title III of the Act, or a manufacturer of equipment that interconnects with the Public Switched Telephone Network. The Act simply does not provide the authority required for the Commission to regulate employer owners/operators of MLTS.

Second, NENA/NASNA and APCO have repeatedly identified the Wireless 911 Act as a statutory basis for Commission jurisdiction of MLTS.[8] In fact, the Wireless 911 Act unambiguously proscribes the Commission from imposing obligations or costs on any person.[9] Both NENA/NASNA and APCO liberally cite the general "purposes and findings provision" of the Wireless 911 Act.[10] Yet, both parties conspicuously ignore the substantive provision of the legislation which empowers the Commission only to "encourage and support" the efforts of the various states to deploy emergency communications infrastructure by "consult[ing] and cooperat[ing]" with various state and

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[7] *See* Ad Hoc Second FNPRM Comments at 5-9.

[8] NENA/NASNA Second FNPRM Comments at 10. APCO Second FNPRM Comments at 4. *See also* NENA/NASNA FNPRM Comments at 1-2; APCO FNPRM Comments at 5.

[9] 47 U.S.C. § 615 ("Nothing in this subsection shall be construed to authorize or require the Commission to impose obligations or costs on any person.").

[10] Section 2(b) of the Act states: "The purpose of this Act is to encourage and facilitate the prompt deployment throughout the United States of a seamless, ubiquitous, and reliable end-to-end infrastructure for communications, including wireless communications, to meet the Nation's public safety and other communications needs." When codified, Section 2(b) was relegated to a note to the operative provisions of the legislation. *See* 47 U.S.C. § 615, explanatory note.

local agencies and personnel.[11] Thus, the Wireless 911 Act provides no basis for the Commission to regulate MLTS owners/operators.[12] Ironically, NENA/NASNA and APCO cite the Wireless 911 Act to advocate action by the Commission that is explicitly prohibited by the Wireless 911 Act; at the same time, they oppose action by the Commission to delegate responsibility for MLTS regulation to the states and to assume the coordinative role that is explicitly required by the Wireless 911 Act. Ad Hoc commends the Commission for acting within its jurisdiction by assuming the limited role contemplated by the Wireless 911 Act.

B. Commission Precedent Cited by Certain Commenters Has Little Relevance to the Current Proceeding and Does Not Provide an Adequate Basis for the Commission to Extend its Jurisdiction over Employer Owner/Operators of MLTS.

In its most recent comments, NENA/NASNA identifies two instances of Commission precedent, each of which purportedly supports (i) the extension of Commission jurisdiction to MLTS owners/operators and (ii) the regulation by the Commission of workplace safety issues.[13] Closer examination of these decisions, however, reveals that they do not support NENA/NASNA's suggestion that the Commission has a free hand to regulate owners/operators of MLTS equipment or to impose workplace safety regulations without first basing its regulation on specific

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[11] 47 U.S.C. § 615.

[12] Admittedly, the Wireless 911 Act established "911" as the universal emergency telephone number for both wireline and wireless telephone service. 47 U.S.C. § 251(e)(3). As Ad Hoc has previously noted, however, this directive does not constitute an expansion of Commission jurisdiction given that the Commission had plenary authority over numbering resources within the United States pursuant to Section 251(e)(1) of the Communications Act. Rather, the directive simply required the Commission to take action pursuant to statutory authority it already possessed. This designation in the Wireless 911 Act cannot reasonably be interpreted as a basis for the Commission to expand its jurisdiction over MLTS owners/operators.

[13] NENA/NASNA Second FNPRM Comments at 7-8, 12.

statutory authority granted by the Act.

1. The Commission's *Broadcast Flag Order* Does Not Support Commission Jurisdiction Over Employer Owners/Operators of MLTS.

NENA/NASNA posits that the Commission's recent *Broadcast Flag Order*[14] permits the Commission to regulate manufacturers of MLTS equipment through the doctrine of ancillary jurisdiction. In its Second FNPRM Comments, Ad Hoc extensively addressed NENA/NASNA's ancillary jurisdiction argument which was first made by APCO in an identically worded ex parte filing.[15] Essentially, NENA/NASNA, (and, previously, APCO) argues that the *Broadcast Flag Order* provides precedent upon which the Commission can regulate manufacturers of MLTS equipment.[16] NENA/NASNA then opines that "there is nothing in the concept of ancillary jurisdiction that necessarily limits the Commission's authority to makers of equipment."[17] In trying to bootstrap the Commission's potential ancillary jurisdiction over manufacturers of MLTS equipment to jurisdiction over any entity affected by E911 rules for MLTS, NENA/NASNA, as APCO before it, glosses over several important limiting features of the *Broadcast Flag Order* that are relevant to the Commission's inquiry into its jurisdiction over MLTS owners/operators.

As Ad Hoc noted in greater detail in its *Second FNPRM Comments*, in the *Broadcast Flag Order* the Commission (i) stated that its exercise of ancillary jurisdiction

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[14] *In the Matter of Digital Broadcast Content Protection,* MB Docket No. 02-230, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 23550 (Nov. 4, 2003) ("*Broadcast Flag Order*").

[15] Ad Hoc Second FNPRM Comments at 12-13, commenting on Letter from Robert M. Gurss, Association of Public Safety Communications Personnel, to Secretary Marlene Dortch, WT Docket 94-102, (Nov. 7, 2003) ("APCO Ex Parte").

[16] NENA/NASNA Second FNPRM Comments at 7-8.

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

was *necessary* to fulfill its obligations under the Communications Act and that 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;[18] and (ii) limited its exercise of such jurisdiction under the ancillary jurisdiction doctrine to manufacturers which fall directly within the Commission's statutory authority over the "instrumentalities, facilities, apparatus and services incidental to [wire] transmission."[19]

Application of either those restrictions to the instant case would effectively proscribe Commission jurisdiction over employer owners/operators of MLTS. The Commission is neither required by the Act to impose regulations on such entities nor is it the only federal or state agency with the authority to ensure workplace safety. Furthermore, even if the Commission determined that the exercise of ancillary jurisdiction over MLTS manufacturers were appropriate, such jurisdiction cannot be reasonably construed, based upon applicable law including the *Broadcast Flag Order,* to extend to non-regulated users of such equipment. Thus, NENA/NASNA's invocation of the *Broadcast Flag Order* does not provide a meaningful basis for the Commission to promulgate E911 regulations for employer owners/operators of MLTS.

2. In the RF Radiation Exposure Limit Proceedings, the Commission Has Explicitly Stated that it Does Not Have Jurisdiction or Expertise over Health and Safety Issues or Workplace Practices and Procedures.

NENA/NASNA asserts that the Occupational Safety and Health Administration ("OSHA") does not have *exclusive* jurisdiction over workplace safety issues, citing the

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18 *Broadcast Flag Order* at ¶ 33.

19 *Id.* at ¶¶ 29-30.

FCC's promulgation of "special RF radiation exposure limits for 'occupational/controlled' environments" as "but one example" of the Commission entering the field of workplace safety regulation.[20] While OSHA may not hold exclusive jurisdiction over workplace safety issues, that fact does nothing to cure the Commission's *lack* of jurisdiction over the regulation of such issues. Indeed, the Commission's RF radiation exposure regulations and related rulemakings support Ad Hoc's position that OSHA has, at the very least, *primary* jurisdiction and expertise over workplace safety and that the Commission has previously acknowledged that it has neither the legal jurisdiction nor the expertise to promulgate specific workplace safety regulations.

By way of background, the Commission's promulgation of radiofrequency ("RF") radiation exposure limits resulted from an explicit statutory directive in the National Environmental Policy Act of 1969 ("NEPA") which required federal agencies to evaluate the effects of their actions on the quality of the human environment.[21] To meet its responsibilities under NEPA, the Commission adopted requirements for evaluating the environmental impact of its actions, including human exposure to RF energy emitted by *FCC-regulated transmitters and facilities.*[22] The jurisdiction to issue RF radiation exposure regulations was not based solely on the Commission's Section 1 responsibilities to promote safety of life and property through the use of wire and radio communications. Rather, the RF radiation exposure limit regulations respond to a

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20 NENA/NASNA Second FNPRM Comments at 12.

21 42 U.S.C. § 4331 *et seq.*

22 47 C.F.R. § 1.1310. *See Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation,* ET Docket No. 93-62, Report and Order, 11 FCC Rcd 15123, 15125, at ¶ 5 (Aug. 1, 1996) (emphasis added) ("*RF Radiation R&O*"), *recon.,* Second Memorandum Opinion and Order, 12 FCC Rcd 13494 (1997), *aff'd, Cellular Phone Taskforce v. FCC,* 205 F.3d 82 (2d Cir. 2000), *cert. denied,* 531 U.S. 1070 (2001).

specific Congressional directive in NEPA to evaluate environmental hazards resulting from the Commission's lawful regulation of certain types of transmitters and facilities. The jurisdictional nexus between the Commission and the entities/subject matter regulated is established through those provisions of the Act, notably Title III, that specifically permit Commission regulation of radio services, including transmitters and facilities. This is precisely the type of jurisdictional nexus that has not been established between the Commission and employer owners/operators of MLTS.

Indeed, NENA/NASNA's reliance on the Commission's RF radiation exposure regulations undermines its own position that the Commission has the requisite jurisdiction and expertise to regulate workplace safety. When considering specific amendments to its RF radiation exposure standards, the Commission relied heavily on the input of other federal agencies with expertise in matters of public health and safety.[23] Specifically, the Commission declined to adopt certain proposed workplace standards, finding that a certain workplace safety proposal "is beyond the scope of our jurisdiction,"[24] and further stating that "Our NEPA responsibilities do not appear to encompass the issuance of specific rules on workplace practices and procedures. If such a policy were to be instituted by the Federal Government, *it would seem more appropriate for OSHA itself to promulgate this type of rule.*"[25] Thus, when faced with a request by OSHA to promulgate a specific rule regulating workplace safety, the Commission deferred regulation back to OSHA based on that agency's jurisdiction and

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[23] *RF Radiation R&O,* FCC Rcd at 15135, ¶ 28; *see also In the Matter of the Effects of Communications Towers on Migratory Birds,* WT Docket No. 03-187, Notice of Inquiry, 18 FCC Rcd 16938, 16947 n.51 (Aug. 20, 2003).

[24] *Id.* at 15136, ¶ 33.

[25] *Id.* (emphasis added).

expertise over workplace safety issues. Similarly, the Commission noted "[t]he Commission . . . is not a health and safety agency and would defer to the judgment of [those] expert agencies with respect to determining the appropriate levels of safe exposure to RF energy."[26]

Contrary to NENA/NASNA's suggestion that the Commission's RF radiation exposure limit regulations support action by the Commission to regulate workplace safety through the promulgation of MLTS E911 regulations, the Commission's heavy reliance on the expertise of federal health and safety agencies to determine appropriate standards for RF radiation exposure urges similar deference to outside entities with appropriate jurisdiction and expertise in the area of workplace safety. Notably, and of particular relevance to this proceeding, the Commission identified specific workplace proposals as more appropriate for evaluation and adoption by OSHA. The Commission's decision to defer regulation of MLTS to state authorities is fully consistent with its decision in the RF Radiation Order to refrain from regulating specific issues of workplace health and safety over which it has acknowledged it lacks clear jurisdiction and expertise.

II. THE COMMISSION DOES NOT HAVE ADEQUATE EXPERTISE OR RESOURCES TO DETERMINE APPROPRIATE WORKPLACE SAFETY STANDARDS THAT WOULD SUPPORT E911 REGULATIONS FOR MLTS.

Even if the Commission were able to establish some sort of jurisdictional basis upon which it could lawfully regulate employer owners/operators of MLTS, sensible public policy urges the Commission to acknowledge the limits of its expertise and resources in establishing workplace safety standards. As Ad Hoc has previously noted

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[26] *Id.* at 15135, ¶ 28.

in its FNPRM Comments[27] and its Second FNPRM Comments,[28] it would be exceedingly difficult – if not impossible – to articulate a general "one size fits all" regulation about the location and call back information, if any, that each employer should develop, maintain, and transmit in the event of an emergency without first considering: (i) the workplace safety regulations already imposed upon such workplaces; (ii) existing emergency signaling and response plans in place at a given workplace; (iii) the type of workplace from which the 911 call originates; (iv) the capabilities of individual PSAPs to receive and process ANI/ALI, and to arrive at emergency locations within a fixed period of time, accounting for the variations in distances to travel and possible congestion in different localities. These inquiries are likely to be local in nature, detailed and time-consuming.

Strangely, certain commenters appear determined to exclude the federal and state agencies, most notably OSHA (and their relevant state counterparts), that have unrivaled expertise and jurisdiction over workplace safety issues.[29] In fact, NENA/NASNA goes so far as to propose that the Commission and OSHA enter into a memorandum of understanding through which OSHA "would accede to FCC expertise…."[30] NENA/NASNA provides no explanation or rationale, however, for how complete exclusion of the one federal agency with the most complete knowledge and experience over workplace safety issues promotes the development of reasonable,

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27 Ad Hoc FNPRM Comments at 4.

28 Ad Hoc Second FNPRM Comments at 18.

29 NENA/NASNA Second FNPRM Comments, at 11 ("We cannot accept … that the issue of 9-1-1 access through MLTS on business premises belongs with the federal Occupational Safety and Health Administration or its state counterparts rather than the FCC.").

30 *Id.* at 12.

effective and sensible emergency workplace safety regulations. Indeed, such exclusion is inconsistent with the Commission's prior practices in the RF radiation exposure rulemaking wherein the Commission actively involved federal health and safety agencies, including OSHA, the National Institute for Occupational Safety and Health ("NIOSH") and the Food and Drug Administration ("FDA"), in its rulemaking process and willingly deferred to such agencies when their expertise and jurisdiction exceeded that of the Commission.

While NENA/NASNA complains that "existing OHSA rules are simply not detailed or comprehensive enough to provide the help public safety responders need,"[31] it is urging the Commission to adopt comprehensive workplace safety regulations, when the Commission has no experience in evaluating workplace safety conditions, determining appropriate and cost-effective solutions to address workplace safety issues, or drafting workplace safety regulations in a manner that will survive judicial scrutiny. Existing OSHA regulations already address the subject matter of emergencies at places of employment.[32] Simple logic dictates that incremental changes to existing regulations that address the concerns of NENA/NASNA by the agency with appropriate expertise to evaluate the changes proposed is far preferable to the Commission creating regulations from scratch in an area where it has no subject matter expertise and serious questions surrounding the validity of its jurisdiction.

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[31] *Id.* at 12.

[32] *See* 29 C.F.R. Part 1910 ("Occupational Safety and Health Standards"), Subpart E ("Exit Routes, Emergency Action Plans, and Fire Protection Plans").

III. CONCLUSION

In its *Report and Order,* the Commission correctly decided not to adopt E911 rules for MLTS owners/operators, instead allowing state and local authorities with clear jurisdiction and expertise to consider what, if any, MLTS regulations are appropriate for their jurisdictions. Having deferred to the states on the issue of MLTS regulation, the Commission should not now undermine those efforts by re-inserting itself into the process of developing MLTS regulations, particularly given the serious questions associated with the Commission's jurisdiction and expertise over workplace safety. In the event the states fail to act, the Commission should follow its own precedent by allowing the federal agency with expertise in regulating workplace safety, OSHA, to determine whether E911 obligations are appropriate for MLTS owners/operators and, if so, the regulations that should apply.

Respectfully submitted,

James S. Blaszak
Andrew M. Brown
Levine, Blaszak, Block and Boothby, LLP
2001 L Street, NW
Suite 900
Washington, DC 20036
202-857-2550

Counsel for
The Ad Hoc Telecommunications Users Committee

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