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Writer's E-mail
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February 19, 2013

VIA ELECTRONIC FILING

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

**Re: CG Docket No. 10-213
WT Docket No. 96-198
CG Docket No. 10-145**

Ex Parte Presentation

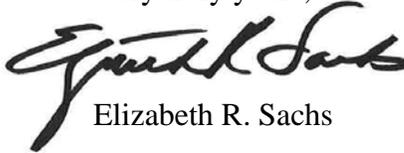
Dear Ms. Dortch:

On February 8, on behalf of the Enterprise Wireless Alliance (“EWA”), undersigned counsel sent the attached email to Roger Noel of the Wireless Telecommunications Bureau requesting a meeting to discuss the definition of “telecommunications carrier.” As noted in the email, the issue did not relate specifically to any particular rulemaking proceeding, including those identified above, and did not address any issues raised in any proceeding. On February 14, Mark E. Crosby, President and CEO of EWA, and undersigned counsel for EWA, met with the staff of the Wireless Telecommunications Bureau (“WTB”) listed below other than David Hu. The parties discussed the definition of a telecommunications carrier or service provider as it relates to licensees in the VHF and UHF Part 90 services. On February 15, again on behalf of EWA, undersigned counsel sent the attached email and memo to the WTB staff listed below, as well as to David Hu of the WTB at the request of the meeting attendees. Out of an abundance of caution, these materials are being filed as ex parte presentations in the above-identified proceedings.

This letter is being filed electronically, in accordance with Section 1.1206(b) of the Commission’s Rules, 47 C.F.R. § 1.1206(b), for inclusion in the record in these proceedings.

Kindly refer any questions or correspondence regarding this matter to the undersigned.

Very truly yours,



Elizabeth R. Sachs

Attachments

cc: Roger Noel, Chief, Mobility Division, WTB (participated telephonically) (via email)
Scot Stone, Deputy Chief, Mobility Division, WTB (via email)
Lloyd Coward, Deputy Chief, Mobility Division, WTB (via email)
Allen Barna, Senior Attorney, Mobility Division, WTB (via email)
Brian Regan, Policy Advisor to the Bureau Chief, WTB (via email)
David Hu, Associate Chief, Broadband Division, WTB (via email)
Genevieve Ross, Attorney, Broadband Division, WTB
(participated telephonically) (via email)

From: Liz Sachs [LSachs@fcclaw.com]
Sent: Friday, February 08, 2013 9:53 AM
To: Roger Noel
Cc: Mark Crosby
Subject: Meeting

Roger:

Are you available for a meeting with Mark and me on 2/14 anytime other than 1-2? No, it's not a Valentine's Day surprise, but we'd like to discuss with WTB the definition of a "telecommunications service provider" on Part 90 spectrum below 512 MHz. The issue arises in the context of the upcoming accessibility reporting requirement and its applicability – or not – to what I'll call private carriers operating in the bands below 800 MHz, but hinges on Part 90 eligibility and not on the accessibility requirements themselves.

If that date doesn't work, what other times would you be available?

Thanks.

Liz Sachs

**LUKAS, NACE, GUTIERREZ &
SACHS LLP**

From: Liz Sachs
Sent: Friday, February 15, 2013 12:41 PM
To: 'Allen Barna'
Cc: Mark Crosby (mark.crosby@enterprisewireless.org); Roger Noel; Scot Stone; Lloyd Coward; Genevieve Ross; Brian Regan; David Hu
Subject: RE: Accessibility Act Reporting Requirements

Attached please find a memo summarizing EWA's position that we discussed yesterday regarding the telecommunications service provider definition as it relates to different categories of Part 90 commercial operators. We look forward to your comments. If you believe that an *ex parte* filing is required, please let me know at your earliest convenience.

Thank you and enjoy your long weekend.

Liz Sachs

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From: Allen Barna [<mailto:Allen.Barna@fcc.gov>]
Sent: Thursday, February 14, 2013 4:38 PM
To: Liz Sachs
Cc: Mark Crosby (mark.crosby@enterprisewireless.org); Roger Noel; Scot Stone; Lloyd Coward; Genevieve Ross; Brian Regan; David Hu; Allen Barna
Subject: Accessibility Act Reporting Requirements

Thanks to you and Mark for meeting with us today to explain and expand upon the issues raised in your Feb 8 email below.

Also, in light of precedents mentioned and other additional info provided at that meeting, thanks for planning to supplement earlier email so that we can understand better specific questions raised, what you believe to be the answers to those questions, and the basis for your beliefs.

In addition, please let me know if you are aware of any proceeding(s) for which our meeting today might trigger an obligation to make an *ex parte* filing. If you are aware of any, please confirm you will make necessary filing(s) or alert me that we should consider such filings. To assist you in making any such filings and in supplementing earlier email, I am copying those who participated in meeting plus David Hu in our Broadband Division.

On our way back to the 12th Street entrance, I mentioned to Mark our recent PN seeking comments on possible improvements to our rules. As I could not recall release date or relevant

comment/reply periods, I have attached first page of that PN which I suspect that you have seen already.

Allen (Al) Barna
Senior Attorney, Mobility Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
(202) 418-1536

From: Liz Sachs [LSachs@fccclaw.com]
Sent: Friday, February 08, 2013 9:53 AM
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Cc: Mark Crosby
Subject: Meeting

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Thanks.

Liz Sachs

**LUKAS, NACE, GUTIERREZ &
SACHS LLP**

MEMORANDUM

To: Wireless Telecommunications Bureau

From: Enterprise Wireless Alliance

Re: Telecommunications Service Provider Definition

Date: February 15, 2013

The Enterprise Wireless Alliance (“EWA”) includes as members a number of licensees that provide for-profit, non-interconnected service using Industrial/Business (“I/B”) Part 90 spectrum. Because these systems are not interconnected with the telephone network, they are not classified as Commercial Mobile Radio Service (“CMRS”),¹ a term that includes interconnection as part of its definition.

In addition to the regulatory obligations associated with CMRS status, other obligations rooted in statutory requirements are applicable to “telecommunications carriers” and providers of “telecommunications services.” For these purposes, “telecommunications service” is defined in the Communications Act as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”² Thus, unlike CMRS, classification as providing a telecommunications service is not dependent on whether the system is interconnected with the telephone network.

Part 90 commercial service providers fall into two categories depending on the frequency band in which they operate. Those operating at 800/900 MHz are labeled Specialized Mobile Radio (“SMR”) Service operators and are governed by the eligibility rule set out in Section 90.603(c):

Any person eligible under this part and proposing to provide on a commercial basis base station and ancillary facilities as a Specialized Mobile Radio Service System operator, **for the use of individuals, federal government agencies and persons eligible for licensing under subparts B or C of this part.**³

¹ 47 C.F.R. § 20.3.

² 47 U.S.C. § 153.

³ 47 C.F.R. § 90.603(c) (emphasis added). Subparts B and C of Part 90 describe the Public Safety and Industrial/Business entities that qualify, respectively, to hold licenses under those subparts.

Commercial I/B licensees operating in the Part 90 bands below 800 MHz (primarily 150-174 MHz, 450-470 MHz, and 470-512 MHz) are not identified as SMR, but are called private carriers, which term is defined as follows: “An entity licensed in the private services and authorized to provide communications service to other private services on a commercial basis.”⁴ These licensees are permitted to share the use of their facilities on a for-profit basis in accordance with Rule Section 90.179:

Licensees of radio stations authorized under this rule part may share the use of their facilities. A station is shared when persons not licensed for the station control the station for their own purposes pursuant to the licensee's authorization. Shared use of a radio station may be either on a non-profit cost shared basis or on a for-profit private carrier basis. Shared use of an authorized station is subject to the following conditions and limitations:

- (a) **Persons may share a radio station only on frequencies for which they would be eligible for a separate authorization.**⁵

Thus, an I/B private carrier is only permitted to share its station on a for-profit basis with entities that would qualify independently to hold a Part 90 I/B license in accordance with Rule Section 90.35:

Persons primarily engaged in any of the following activities are eligible to hold authorizations in the Industrial/Business Pool to provide commercial mobile radio service as defined in Part 20 of this chapter or to operate stations for transmission of communications necessary to such activities of the licensee:

- (a)(1) The operation of a commercial activity;
- (a)(2) The operation of educational, philanthropic, or ecclesiastical institutions;
- (a)(3) Clergy activities; or
- (a)(4) The operation of hospitals, clinics, or medical associations.
- (a)(5) Public Safety Pool eligibles are eligible for Industrial/ Business Pool spectrum only to the extent that they are engaged in activities listed in paragraphs (a)(1) through (4) of this section.⁶

It is EWA’s opinion that this distinction between the above-800 MHz SMR and the below 512 MHz private carrier is directly relevant to the question of whether each class of licensee meets the definition of providing a telecommunications service to the public, or to such classes of users as to be effectively available directly to the public. SMRs are legally permitted to serve anyone: individuals, state, local, and Federal government entities, all categories of

⁴ 47 C.F.R. § 90.7.

⁵ 47 C.F.R. § 90.179(a).

⁶ 47 C.F.R. § 90.35. I/B private carriers are permitted to provide service to public safety entities only if they are engaged in a Section 90.35 permissible activity or pursuant to a waiver granted by the FCC. I/B licensees may share the use of their systems on a not-for-profit, cost-shared basis with public safety and Federal Government entities pursuant to Section 90.179(h).

business users, and anyone in between. By contrast, I/B private carriers are limited to serving entities that themselves would qualify to hold licenses under Rule Section 90.35. They are not permitted to provide telecommunications service to the general, consumer public or even to governmental users except in the limited circumstances set out in the rules.

The Commission addressed this issue with regard to SMRs in its “regulatory parity” proceeding in the early 1990s and concluded that SMR service was available “to a substantial portion of the public....”⁷ It stated that “...we have concluded that the **SMR end user eligibility criteria set forth in our rules allow licensees to make service available to the public.**”⁸ The eligibility criteria of Rule Section 90.35 restrict I/B private carriers to serving specific, limited categories of potential customers. The rule prohibits them from serving the “public,” the universe of individual consumers, or such a broad range of users as effectively to be available to the public. Because I/B private carriers fail that element of the definition, they cannot be considered telecommunications carriers or providers of telecommunications service and, therefore, are not subject to the regulatory obligations applicable to such entities.

⁷ *Second Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 1411 at ¶ 88.

⁸ *Id.* at ¶ 90 (emphasis added).