96-115, 10-145, & 10-213

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AUG 12 2013

Federal Communications Commission
Office of the Secretary

March 15, 2013

Sean Lev, Esq.
General Counsel
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

RE: Regulatory Obligations of Private Mobile Service Providers

Dear Mr. Lev:

The Enterprise Wireless Alliance (EWA) is a national association representing, among other entities, several hundred Part 90 licensees that provide local and regional push-to-talk, non-interconnected, for-profit, private mobile service (PMS) to business enterprise and public safety entities. EWA provides regulatory updates to its members to clarify FCC rules and decisions and thereby promote compliance with applicable FCC requirements.

Several recent statutory and regulatory actions impose obligations on "telecommunications service providers," and have caused confusion in the PMS community. These obligations include certification of compliance with Customer Proprietary Network Information[1] requirements and, more recently, with the FCC's Accessibility Recordkeeping Compliance requirements.[2] As detailed below, because the regulatory treatment of these mobile systems is governed by Section 332(c) of the Communications Act,[3] and because these PMS systems are not interconnected with the public switched network, it is EWA's opinion that they are not subject to the requirements described above or to any other obligation imposed on entities that provide "telecommunications service."

The term "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."[4] The FCC has stated repeatedly that the term encompasses <u>only</u> service provided on a common carriage basis.[5]

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[1] 47 C.F.R Part 64, Subpart U (§§ 64.2001-64.2011).
[2] 47 C.F.R. Part 6 (§§ 6.1-6.23), Part 7 (§§ 7.1-7.23), Part 14 (§§ 14.1-14.52).
[3] 47 U.S.C. § 332(c).
[4] 47 U.S.C. §153(53).
[5] *See, e.g., Federal-State Joint Board on Universal Serv.*, CC Docket No. 96-45, Order on Remand. 16 FCC Rcd 571 at ¶ 2 (2000) ("ICN Order") (citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourth Order on Reconsideration, 13 FCC Rcd 5318 (1997)).

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Although the non-interconnected PMS carriers represented by EWA do offer service for a fee, and the FCC generally has interpreted the term "the public" broadly despite regulatory and practical limitations on the class of users they can be served,[6] Section 332(c) of the Communications Act[7] defines the permissible regulatory treatment of all mobile services. It establishes a bright line demarcation between those that may be treated as common carriers – and, therefore, as telecommunications service providers – for regulatory purposes under Title II of the Act and those that may not.

Specifically, Congress determined that only persons engaged in the provision of a commercial mobile service (CMS) may be treated as common carriers.[8] CMS is defined as any mobile service "that is provided for profit **and makes interconnected service available** (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission."[9] Thus, it expands the traditional definition of common carriage to add a criterion for mobile operations that the service also must be interconnected. The Act goes on to define the term "interconnected service" as that which "is interconnected with the public switched network...."[10]

Conversely, the Act states that a person engaged in providing PMS "shall not...be treated as a common carrier **for any purpose** under this Act."[11] PMS is defined as service that "is not a commercial mobile service or the functional equivalent of a commercial mobile service...."[12] Because the Act prohibits the FCC from regulating PMS as a common carrier offering, and because the FCC has determined that the provision of telecommunications service constitutes common carriage, the Act exempts PMS providers, those providing non-interconnected, for-profit mobile service, from obligations associated with the provision of telecommunications service.

To take an example, an FCC requirement that a PMS provider must certify, as a "telecommunications service provider," that it complies with recordkeeping obligations established in Section 14.31 of the FCC's Rules would necessarily treat the PMS provider as a common carrier. Such a requirement therefore would be impermissible, because Section 332(c)(2) of the Act prohibits any such treatment of PMS providers.

This interpretation creates no inconsistency with prior FCC decisions in this area. Thus, the FCC concluded that the Iowa Communications Network (ICN), which operated a state-owned fiber optic telecommunications network, was a telecommunications carrier, despite legal restrictions limiting the entities eligible to be served on the network, a characteristic shared with most PMS licensees because of FCC eligibility rules.[13] The FCC concluded that, "...restrictions on eligibility to use a carrier's services do not necessarily preclude common carrier status."[14]

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[6] *See, e.g.*, ICN Order.
[7] 47 U.S.C. § 332(c).
[8] *Id.* § 332(c)(1)(A).
[9] *Id.* § 332(d)(1) (emphasis added).
[10] *Id.* § 332(d)(2).
[11] *Id.* § 332(c)(2) (emphasis added).
[12] *Id.* § 332(d)(3).
[13] ICN Order at ¶ 8; *see, e.g.*, 47 C.F.R. § 90.179(a).
[14] ICN Order at ¶ 8.

However, because ICN was not providing a mobile service, its regulatory treatment was not governed by Section 332(c) of the Act, and the FCC was not required to consider whether the system was interconnected with the telephone network.

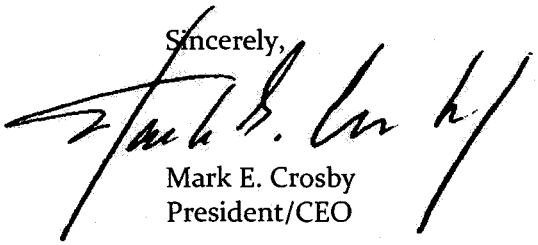
By contrast, interconnection was the determinative criterion in the FCC's denial of a request from Maritime Communications/Land Mobile, LLC (Maritime) on behalf of Waterway Communication System, LLC and Mobex Network Services, LLC in which Maritime argued that it was not required to make Universal Service Fund (USF) contributions.[15] The FCC disagreed with Maritime's claim that it was not a mandatory contributor to USF and, specifically, that the limited universe of users to which it was permitted to provide mobile service dictated that it did not serve "the public" and should not be classified as a telecommunications carrier.[16] In denying the request, the FCC relied on the fact that the Automated Maritime Telecommunications Service (AMTS) that Maritime was authorized to provide was required to be interconnected with the public switched network. Because it was an interconnected mobile service, it had been classified by the FCC as Commercial Mobile Radio Service (CMRS) – or CMS as it is identified in the Communications Act – and properly could be categorized as a telecommunications service and regulated as a common carrier offering.[17]

The FCC's decision in the Maritime case thus serves as precedent for the proposition that, in the case of mobile service providers, the issue of whether they are subject to requirements imposed on telecommunications service providers (common carriers) is driven by whether the mobile service involved is interconnected. If it is not, then the service provider cannot be treated as a common carrier/telecommunications service provider and cannot be made subject to requirements applicable to common carriers/telecommunications service providers.

For the reasons described herein, and pursuant to Section 332(c)(2), EWA intends to advise its members that if they are providing non-interconnected PMS, the Communications Act prohibits their regulation as common carriers and, therefore, as providers of telecommunications service, which the FCC has stated is common carriage.

Please feel free to contact the undersigned if you have any questions or comments regarding this analysis.

Sincerely,



Mark E. Crosby
President/CEO

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[15] *Universal Service Contribution Methodology Request for Review by Waterway Communications System, LLC and Mobex Network Services, LLC*, WC Docket No. 06-122, Order, 23 FCC Rcd 12836 (2008).
[16] *Id.* at ¶ 10.
[17] *Id.*