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October 21, 1996

HAND DELIVERY

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center
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Tallahassee, Florida 32399-0850

Re: Docket No. 960760-TP

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of GTE Mobilnet are the following documents:

1. Original and fifteen copies of GTE Mobilnet's Legal Brief Concerning FPSC Jurisdiction Over Providers of Wireless Pay Telephone Service; and

2. A disk in Word Perfect 6.0 containing a copy of the brief.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,

Kenneth A. Hoffman

KAH/rl

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Proposed rules relating to pay telephone service.	)	Docket No. 951560-TP
	)	Filed: October 21, 1996

GTE MOBILNET'S LEGAL BRIEF CONCERNING FPSC JURISDICTION OVER PROVIDERS OF WIRELESS PAY TELEPHONE SERVICE

GTE Mobilnet, by and through its undersigned counsel, and in response to the September 18, 1996 staff memorandum issued in this docket, hereby submits its legal brief in support of its position that the Florida Public Service Commission ("FPSC" or "Commission") lacks jurisdiction to adopt rules concerning providers of wireless pay telephone service.

I. BACKGROUND

The starting point for discussion of this issue is the declaratory statement issued by the Commission in response to a petition for a declaratory statement filed by Cellular World, Inc. ("CWI"). On April 1, 1991, CWI, a reseller of cellular services, filed a petition for declaratory statement asking the Commission to determine whether its proposed cellular pay telephone service would render it subject to Commission jurisdiction as a regulated "telecommunications company" under Section 364.02(7), Florida Statutes (1991), or whether CWI would remain unregulated under the exemption for "cellular radio telecommunications carriers" under the same statute. On a 3-2 vote, the Commission determined that

CWI's cellular pay telephone service was subject to Commission jurisdiction. Order No. 25264 issued October 28, 1991 in Docket No. 910470-TP.[1] On reconsideration, the Commission affirmed its decision but went on to direct its staff to investigate cellular pay phone regulation and provide recommendations for further action in this area. Order No. 25799 issued February 24, 1992 in Docket No. 910470-TP.[2]

Some four and one-half years later, on July 18, 1996, the Commission staff issued a Staff Memorandum in the above-captioned docket recommending the adoption of proposed rules concerning both wireless and wireline pay telephone service. Staff cited the Cellular World declarstory statement as authority for proposed wireless pay telephone rules.[3] The recommendation was addressed at the July 30, 1996 Agenda Conference where representatives of wireless telecommunications carriers expressed their objections to the Commission's adoption of rules regulating providers of wireless pay telephone service. Agreeing that the issue of the Commission's jurisdiction over wireless pay telephone service was clearly at issue, the Commission requested the staff to establish a procedural vehicle for the submission of legal briefs addressing the jurisdictional issue before any wireless pay telephone rules were

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[1] In re: Petition for Declaratory Statement regarding exemption from Public Service Commission regulation for Cellular Radio Telecommunications Carriers, by CELLULAR WORLD, INC., 91 F.P.S.C. 10:432 (1991) (hereinafter "Cellular World").

[2] 92 F.P.S.C. 2:646 (1992).

[3] July 18, 1996 Staff Recommendation in Docket No. 951560-TP, at 3.

proposed. In response thereto, the staff issued its September 18, 1996 memorandum requesting legal briefs on the issue of the Commission's jurisdiction over providers of wireless pay telephone service.

II. ARGUMENT

The Commission is a creature of statute. As such, "the Commission's power, duties and authority are those and only those that are conferred expressly or impliedly by statute of the state." Rolling Oaks Utilities v. Florida PSC, 533 So.2d 770, 773 (Fla. 1st DCA 1988). "Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, and the further exercise of the power should be arrested." City of Cape Coral v. GAL Utilities, Inc., 281 So.2d 493, 496 (Fla. 1973) (citations omitted).

It is a fundamental principle of administrative law that an agency's authority to promulgate rules is limited by the statutes conferring power to the agency. See, e.g., Board of Trustees of Internal Improvement Trust Fund of State of Florida v. Board of Professional Land Surveyors, 566 So.2d 1358, 1360 (Fla. 1st DCA 1990); Cataract Surgery Center v. Health Care Cost Containment Board, 581 So.2d 1359, 1361 (Fla. 1st DCA 1991). Proposed rules which attempt to expand the authority of a state agency beyond that established by the statutory scheme are invalid. Florida League of Cities, Inc. v. Department of Insurance and Treasurer, 540 So.2d 850 (Fla. 1st DCA 1989).

These limitations are reflected in Florida's Administrative Procedure Act, Chapter 120, Florida Statutes. Section 120.52(8)(c), Florida Statutes (Supp. 1996) provides that a rule is an invalid exercise of delegated legislative authority if it "enlarges, modifies or contravenes the specific provisions of law implemented ...." Florida's recently Revised Administrative Procedure Act[4] places further restraints on agencies in the rulemaking process. Under the 1996 law, a general statutory grant of rulemaking authority is no longer sufficient to adopt a rule -- "a specific law to be implemented is also required."[5]

Here, there is no specific Florida statute authorizing Commission regulation over wireless pay telephone service. To the contrary, Chapter 364, Florida Statutes (1995) and federal legislation enacted in 1993 confirm that state regulatory authority over the entry and rates of wireless pay telephone service providers has been preempted by federal law.

GTE Mobilnet respectfully submits that the Cellular World decision was erroneous when made and that any doubt as to the proposition that the Commission lacks jurisdiction over wireless pay telephone service has been clarified and confirmed by subsequently enacted Federal and Florida statutes, as well as a recent Commission order.

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[4]Ch. 96-159, Laws of Florida.

[5]Ch. 96-159, §3, Laws of Florida; §120.52(8), Fla. Stat. (Supp. 1996).

A. THE CELLULAR WORLD DECISION UNLAWFULLY ASSERTED PSOC JURISDICTION OVER A PROPOSED WIRELESS PAY TELEPHONE SERVICE PROVIDER.

In the Cellular World proceeding, the Commission was faced with two apparently conflicting statutory provisions. On the one hand, Section 364.02(7), Florida Statutes (1991) provided that the term "telecommunications company" did not include a "cellular radio telecommunications carrier." Because the Commission's statutory authority is limited to the regulation of "telecommunications companies,"[4] CWI and others[5] maintained that CWI's proposed pay telephone service was exempt from Commission jurisdiction. On the other hand, Section 364.02(6), Florida Statutes (1991), provided that the term "service" was "... to be construed in its broadest and most inclusive sense." Relying on its authority to regulate pay telephone service pursuant to Section 364.3375, Florida Statutes (1991), the Commission concluded that it could assert jurisdiction over CWI's wireless pay telephone service notwithstanding the statutory exemption provided to cellular radio telecommunications carriers.

The Cellular World decision conflicts with the prior decision of the Florida Supreme Court in Radio Telephone Communications, Inc. v. Southeastern Telephone Company, 170 So.2d 577 (Fla. 1964)

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[4]See Section 364.01(1) and (2), Florida Statutes (1991).

[5]Following the issuance of Order No. 25264 on October 28, 1991, McCaw Cellular Telecommunications, Inc. filed a petition for intervention and motion for reconsideration or clarification of Order No. 25264. BellSouth Mobility, Inc. filed an amicus memorandum in support of McCaw's motion for reconsideration or clarification. These motions were denied by Order No. 25799 issued February 24, 1992.

(hereinafter "Radio Telephone"). Radio Telephone involved a dispute between Radio Telephone Communications, Inc. ("RTC"), a Federal Communications Commission ("FCC") licensed wireless common carrier and Southeastern Telephone Company ("Southeastern"), a landline local exchange company. Southeastern objected to RTC's interconnection with Southeastern's landline facilities contending, inter alia, that RTC was a " telephone company" as defined by statute[1] and, therefore, was required to obtain a certificate from the Commission as a prerequisite to providing service. The Commission agreed issuing an order determining that RTC was a "telephone company" as defined by Florida law, requiring RTC to obtain a certificate of public convenience and necessity, and authorizing Southeastern to discontinue the connection of its landline service with RTC's mobile radio service. RTC appealed the Commission order.

The Florida Supreme Court reversed. The Court noted that the Commission lacks general statutory authority to regulate various types of public utilities and the services they provide. The Court further stated that each decision by the Legislature to grant the Commission authority to regulate a type of public utility company and service was predicated by passage of a comprehensive plan of

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[1]Section 364.02, Florida Statutes (1963) defined the term "telephone company" to include "every corporation ... owning, operating or managing any telephone line or part of telephone line used in the conduct of the business of affording telephonic communication service for hire within this state."

regulation." Radio Telephone, 170 So.2d at 581.

Turning to the "the radio communications services with which we are here concerned," the Court held that the Florida Legislature had not granted authority to the Commission to regulate such services. 170 So.2d at 581-2 (emphasis supplied). Emphasizing that "[i]f there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of that power should be arrested," the court concluded that "if and when the Florida Legislature decides to enter the field (radio communications services) ... it will do so in no uncertain terms and in language appropriate to ... this new type of communications service." 170 So.2d at 582.

Although the Radio Telephone decision held that the Commission lacked jurisdiction over radio communications services, the decision was not cited nor discussed in the Cellular World declaratory statement. In Radio Telephone, Justice Roberts forecasted that when the Legislature was ready to put the Commission in the business of regulating radio communications services, it would do so in "no uncertain terms." 170 So.2d at 582. When Cellular World was decided, the Legislature had been very express and clear in its decision that the Commission would

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"As examples, the Court referred to "Ch. 350, Fla. Stat., F.S.A. (Ch. 4700, Laws of 1899), regulating railroads and common carriers as therein defined; Ch. 366, Fla. Stat., F.S.A. (Ch. 26545, Laws of 1951) regulating gas and electric companies; Ch. 367, Fla. Stat., F.S.A. (Ch. 59-372, Laws of 1959), regulating water and sewer systems; and, of course, Ch. 364, Fla. Stat., F.S.A. (Ch. 6525, Laws of 1913), regulating telegraph and telephone companies." 170 So.2d at 581.

not regulate radio communications services by virtue of the exclusion of "a cellular radio telecommunications carrier" from the definition of a regulated "telecommunications company."

In sum, the Commission ignored the controlling precedent of the Radio Telephone decision in Cellular World. Radio Telephone held that a provider of "radio communications service" is not subject to Commission jurisdiction. At the time Cellular World was decided, the Radio Telephone holding had been adopted by the Legislature in excluding "a cellular radio telecommunications carrier" from regulation as a telecommunications company. Any doubt as to the incorrectness of the Cellular World decision and the relevancy of the Radio Telephone precedent was recently laid to rest by the Commission itself. In In Re: Petition to rescind and dismiss GTE Florida Incorporated's tariff A117 by Thomas Morgan, Docket No. 960875-TL, the Commission addressed a petition filed by a customer of GTE Florida Incorporated's ("GTEFL") challenging GTEFL's proposed discontinuance of its Imposed Mobile Telephone Service ("IMTS", a form of wireless mobile service) due to the current availability and use of more technologically advanced cellular wireless services. Citing Radio Telephone, the Commission dismissed the petition for lack of jurisdiction:

> Upon careful consideration we have determined that we do not have the authority to address Mr. Morgan's petition. IMTS is wireless service, over which we have no jurisdiction. See Radio Telephone Communications, Inc. v. Southeastern Telephone Company, 170 So.2d 577, 582 (Fla. 1964), where the Supreme Court said: "[T]he Legislature did not intend ... to regulate any type of radio service, including the 'radiotelephone' service provided by

Southeastern and RTC to their subscribers." The fact that IMTS service has been a tariffed offering in Florida does not change our lack of jurisdiction. IMTS service is within the jurisdiction of the Federal Communications Commission.[10]

B. THE COMMISSION HAS BEEN EXPRESSLY PREEMPTED FROM EXERCISING JURISDICTION OVER WIRELESS PAY TELEPHONE PROVIDERS BY PASSAGE OF THE OMNIBUS BUDGET AND RECONCILIATION ACT OF 1993.

In Cellular World, the Commission rationalized its decision to assert jurisdiction over CWI's wireless pay telephone service by noting that neither Florida law nor the FCC defined a "cellular radio telecommunications carrier" or "cellular service."[11] This alleged justification for asserting jurisdiction over wireless pay telephone service no longer exists due to the passage of the Omnibus Budget and Reconciliation Act of 1993 ("OBRA") by Congress.[12] Section 6002(b) of OBRA amended Sections 3(n) and 332 of the Communications Act of 1934 and, in so doing, defined "commercial mobile service" and clarified and confirmed federal preemption over the entry and rates of commercial mobile service providers.

"Commercial mobile service" is defined under OBRA 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

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[10]Order No. PSC-96-1261-FOF-TL issued October 8, 1996, at 3.

[11]91 F.P.S.C. 10:432 at 435-6 (1991).

[12]Pub. L. No. 103-66, Title VI, §6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993).

substantial portion of the public, as specified by regulation by the Commission (FCC) ...."[13] Pursuant to the authority granted under OBRA, the FCC has adopted a similar definition of a "commercial mobile radio service."[14]

With respect to federal preemption, OBRA provides, in pertinent part:

> ... no state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service ...."[15]

The passage of OBRA in 1993 clearly forbids state regulation of the entry or rates of commercial mobile radio service providers. Wireless pay telephone service is a commercial mobile service. Any purported authority to regulate such service pursuant to Cellular World has been expressly preempted by federal law.

C. THE 1995 COMPREHENSIVE REWRITE OF CHAPTER 364, F.S., CONFIRMS THE LACK OF FPSC JURISDICTION OVER WIRELESS PAY TELEPHONE SERVICE.

Any gasp of life remaining in the Cellular World decision after OBRA was clearly laid to rest by the Florida Legislature's

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[13] 47 U.S.C. §332(d)(1).

[14] 47 C.F.R. Sec. 20.3 defines a "Commercial mobile radio service" as "[a] mobile service that is: (1)(A) provided for profit, i.e., with the intent of receiving compensation or monetary gain; (b) an interconnected service; and (C) available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (2) the functional equivalent of such a mobile service described in paragraph (1)."

[15] 47 U.S.C. §332(c)(3)(A).

comprehensive re-write of Chapter 364, Florida Statutes in 1995.[14] These amendments are material from the standpoint of both what the Legislature did and did not do.

First, with respect to the statutory exclusions from the definition of a "telecommunications company," the Legislature struck the terms "a specialized mobile radio service operator, private radio carrier, a radio common carrier, (and) a cellular radio telecommunications carrier," replacing them with the FCC's "commercial mobile radio service" ("CMRS") provider, the service defined by the FCC pursuant to OBRA.[15]

Second, in addition to retaining provisions subjecting wireless telecommunications carriers (now referred to as CMRS providers) to state sales and gross receipts taxes, the Legislature added language subjecting CMRS providers to universal service fees assessed pursuant to Section 364.025, Florida Statutes (1995).[16]

Third, and finally, the only amendment to the statutory scheme for regulation of pay telephone service was an amendment providing that each pay telephone station shall "be eligible to subscribe to flat-rate, single-line business local exchange service."[17]

Recalling the Radio Telephone decision, the Court observed that had the Florida Legislature intended the Commission to

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[14]Ch. 95-403, Laws of Florida.

[15]Ch. 95-403, §7, Laws of Florida; §364.02(12), Fla. Stat. (1995).

[16]Id.

[17]Ch. 95-403, §24, Laws of Florida; §364.3375(2)(e), Fla. Stat. (1995).

regulate "radio communications service," it would have been a simple matter to insert such language in the statutory definition of a "telephone company." 170 So.2d at 581.[20] Had the Legislature intended the Commission to have regulatory authority over wireless pay telephone service, it would have been a simple matter to insert appropriate language into the comprehensive re-write of chapter 364, F.S. But the Legislature chose not to do so. CMRS providers were subjected to universal service fees but not pay telephone regulation under the revisions to Section 364.02(12), Florida Statutes (1995). Similarly, the provisions concerning the regulation of pay telephone service were amended only to include the option of a flat rate B1 line -- not the regulation of CMRS providers who provide pay telephone service. Thus, the Legislature's failure to include appropriate amendments in the 1995 rewrite of Chapter 364 expressly granting the Commission authority to regulate wireless pay telephone service supports the conclusion that the Commission lacks such authority.

Moreover, by amending Section 364.02(12) to incorporate the OBRA/FCC term "commercial mobile radio service provider," the Legislature expressed its intent to clarify Florida law to ensure consistency with federal statutes, rules and orders defining and applying the terms "commercial mobile service" and "commercial

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[20] See also Sumner v. Board of Psychological Examiners, 555 So.2d 919, 921 (Fla. 1st DCA 1990) ("If the legislature had intended [section 120.60(2), F.S.] to specifically require written notice within ninety days, it would have been a simple matter to have inserted the limitation in the statute)."

mobile radio service."[21] Those statutes[22] and FCC orders[23] confirm Congress' intent to preempt state government from regulating the entry or rates of commercial mobile radio service which includes wireless pay telephone service.

III. CONCLUSION

The 1996 revisions to Florida's Administrative Procedure Act require a proposed rule to implement a specific law. In this case, Chapter 364, Florida Statutes, does not authorize the Commission to assert jurisdiction over CMRS providers who provide wireless pay telephone service. To the contrary, Chapter 364 excludes CMRS providers from Commission regulation except for the limited purpose of potential universal service assessments. Florida law complements federal law which expressly preempts state regulation over the entry and rates of CMRS providers. GTE Mobilnet maintains that the Commission acted outside of its jurisdiction in the Cellular World proceeding. Any dispute on that point surely has been resolved by the subsequent amendments to both federal and Florida law discussed in this brief.

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[21] See U.S. Fire Ins. Co. v. Roberts, 541 So.2d 1297, 1299 (Fla. 1st DCA 1989) ("A long existing rule of statutory construction is that mere statutory change of language does not necessarily indicate an intent to change the law, for the intent may be to clarify what was doubtful and to safeguard against misapprehension as to existing law (citations omitted).").

[22] See 47 U.S.C. §332(c)(3)(A) and 332(d)(1).

[23] See, e.g., Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Notice of Proposed Rule Making, 8 FCC Rcd. 7988 (1993).

To conclude, the Commission lacks statutory authority to adopt rules concerning providers of wireless pay telephone service.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U. S. Mail to the following this 21st day of October, 1996:

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wireless.brief