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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Proposed amendments to Rules 25-24.505, F.A.C., Scope; 25-24.511, F.A.C., Application for Certificate; 25-24.515, F.A.C., Pay Telephone Service; 25-24.520, F.A.C., Reporting Requirements; 25-4.076, F.A.C., Wireline and Wireless Pay Telephone Service Provided by Local Exchange Companies; and 25-4.003, F.A.C., Definitions.	DOCKET NO.: [redacted]-TP FILED: 10-23-96

BELLSOUTH MOBILITY INC'S
BRIEF ON THE COMMISSION'S LACK OF JURISDICTION
OVER PROVIDERS OF WIRELESS PAY TELEPHONES SERVICE

I. INTRODUCTION

In this brief, BellSouth Mobility Inc (BMI) addresses the Florida Public Service Commission's lack of jurisdiction over a commercial mobile radio service provider (CMRSP) in its provision of wireless pay telephone service (PATS). For ease of reference, the provision of PATS by a CMRSP will be hereafter called "CMRSP/PATS."

The issue of Commission jurisdiction must be answered in the negative from two perspectives. First, from the perspective of state law, the Florida legislature has not granted the Commission jurisdiction over CMRSP/PATS. Second, from the perspective of federal law, the State of Florida has been preempted from the economic regulation of CMRSP in any of its telecommunication activities, including CMRSP/PATS.

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II. PROCEDURAL BACKGROUND

The dispute over the Commission's authority to regulate wireless PATS began with the Commission's declaratory statement

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(the "Declaratory Statement") in Docket No. 910470-TP, which was opened in response to a petition for declaratory statement by Cellular World, Inc. (Cellular World), a cellular carrier. Cellular World was considering expanding its service offerings to include pay telephone service through specialized cellular telephone equipment, and wished to determine whether such service would be subject to the Commission's jurisdiction. In part, Cellular World sought

> the Commission's declaration of the applicability and correct interpretation of Florida Statutes Section 364.02(7) (Supp. 1990) regarding the Commission's jurisdiction over Cellular World's proposed cellular telecommunications service and any Commission rules and orders related thereto. . . .

Cellular World's Petition, Par. 4, page 2.

In relevant part, Section 364.02(7), Florida Statutes (1991) provided as follows:

> (7) 'Telecommunications company' includes every corporation, partnership, and person and their lessees, trustees, or receivers appointed by any court whatsoever, and every political subdivision of the state, offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility. <u>The term "telecommunications company" does not include a cellular radio telecommunications carrier</u> . . . . (emphasis added)

On October 28, 1991, the Commission issued Order No. 25264 rendering its determination in the Cellular World matter. The Commission concluded that ". . . the cellular exemption (in Section 364.02(7)) should be construed narrowly and that the Commission has regulatory jurisdiction over the provision of pay telephone service

provided through cellular interconnection as described by Cellular World." (Order No. 25264, page 6).

In 1994, Chapter 364 was amended to foster the transition from a mostly monopoly and regulated telecommunications environment to a competitive and deregulated environment. As part of the changes to the chapter, Section 364.02(7) was renumbered as Section 364.02(12) and revised to read in pertinent part as follows:

> (12) 'Telecommunications company' includes every [entity]. . . offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility. The term 'telecommunications company' does not include . . . a commercial mobile radio service provider. . . . However, each commercial mobile radio service provider shall continue to be liable for any taxes imposed pursuant to chapters 203 and 212 and any fees assessed pursuant to s. 364.025. (emphasis added)

To avoid any confusion as to the meaning of "commercial mobile radio service provider" the Legislature added a definition in Section 364.02(3) as follows:

> (3) "Commercial mobile radio service provider" means a commercial mobile radio service provider as defined by and pursuant to 47 U.S.C. ss. 153(n) and 332(d).

On January 4, 1996 (revised on July 18, 1996), Commission staff filed its recommendation that the Commission adopt certain proposed pay telephone rules and in these rules continue to assert jurisdiction over providers of CMRSP/PATS. The rationale for the staff's recommendation is as follows:

> By Order No. 25264, 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), the Commission declared that it has jurisdiction over the pay telephone service provided through wireless interconnection. Since this decision,

> the Commission has received consumer complaints about price gouging by wireless providers as well as inadequate notice that a pay telephone station is cellular. Regulation of wireless pay telephone providers is in the public interest because many wireless pay telephone stations resemble traditional, wireline stations. If wireless providers were not required to post adequate notice and were not subject to the pay telephone rate caps, the public may be misled into paying much higher rates for pay telephone calls. Since the Commission's pay telephone rules do not specifically address wireless pay telephone providers, staff recommends [the following] . . . rules be amended to codify standards concerning wireless providers . . .

The Commission approved the staff recommendation and issued notice of proposed rules relating to pay telephone service on July 31, 1996.

On September 18, 1996, Commission staff issued a notice proposing, inter alia, that CMRSP/PATS rules be considered separately from wireline PATS rules, and inviting interested persons to file briefs with respect to the Commission's authority to adopt rules intended to regulate the activities of CMRSP/PATS. This Brief is filed in response to the staff notice.

III. ARGUMENT

THE COMMISSION DOES NOT HAVE JURISDICTION OVER CMRSP/PATS BECAUSE (1) THE LEGISLATURE HAS DEFINED THE COMMISSION'S JURISDICTION TO EXCLUDE CMRSPs AND (2) THE CONGRESS HAS PREEMPTED ALL STATES FROM THE ECONOMIC REGULATION OF SUCH CMRSPs.

A. IN SECTION 364.02(12), THE LEGISLATURE HAS DEFINED THE COMMISSION'S JURISDICTION TO EXCLUDE CMRSPS.

1. The Commission may assert jurisdiction only if the legislative delegation of that authority is clear.

The narrow question addressed here is whether the Commission

has jurisdiction over CMRSP/PATS. The applicable legal standard for this issue is well established: the Commission may assert jurisdiction only if the delegated authority is clear, i.e., if there is no reasonable doubt as to the delegation of authority.

The rationale for and case law supporting this proposition is well known to the Commission. It is axiomatic that the Commission is a creature of statute and thus " . . . its powers and duties are only those conferred expressly or impliedly by statute." The State of Florida Department of Transportation v. Mayo, 354 So.2d 359, 361 (Fla. 1977); Daltona Corp. v. Mayo, 342 So.2d 510 (Fla. 1977). Moreover, it is equally well established that ". . . any reasonable doubt as to the existence of a particular power of the Public Service Commission must be resolved against it." Dept. of Transportation v. Mayo, 354 So.2d at 359 (Fla. 1977). Thus, under well-established case law, the Commission may assert jurisdiction over CMRSP/PATS only if the legislative delegation of that authority is clear. If there is any reasonable doubt, the question of jurisdiction must be resolved against the Commission.

2. Under Florida Statutes, Commission jurisdiction over CMRSPs is expressly excluded; therefore, any claim of jurisdiction over CMRSP/PATS is by inference and subject to reasonable doubt.

The scope of the Commission's jurisdiction is defined at the beginning of Chapter 364. For example, the first two provisions of Chapter 364 read as follows:

364.01 Powers of commission, legislative intent.

> (1) The Florida Public Service Commission shall exercise over and in relation to telecommunications companies the powers

conferred by this chapter.

> (2) It is the legislative intent to give exclusive jurisdiction in all matters set forth in this chapter to the Florida Public Service Commission in regulating telecommunications companies, and such preemption shall supersede any local or special act or municipal charter where any conflict of authority may exist. . . . (emphasis added)

In other words, Chapter 364 grants the Commission jurisdiction over "telecommunications companies," which Section 364.02(12), defines as follows:

> (12) 'Telecommunications company' includes every (entity). . . offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility. The term 'telecommunications company' does not include . . . a commercial mobile radio service provider. . . . (emphasis added)

Thus, the Commission is initially given jurisdiction over all entities that provide telecommunications services for hire within the state. However, there are subsets of such entities over which the Legislature has declared that the Commission does not have jurisdiction. One of these subsets is CMRSPs. To reiterate: "The term 'telecommunications company' does not include . . . a commercial mobile radio service provider." The Legislature could not have been more clear.

Given the above, any assertion of Commission jurisdiction over CMRSP/PATS must be grounded in an explicit statutory grant of authority that acknowledges the jurisdictional limits of Section 364.02(12) and that states with at least equal force the Legislature's intention to grant the claimed jurisdiction. Without

such a clear statement of legislative intent, there is, "a reasonable doubt as to the lawful existence to the particular power that would be proposed to be exercised, and thus further exercises of that power must be arrested." City of Cape Coral v. GAC Utilities, Inc., 281 So.2d 493, 496 (Fla. 1973). In short, the Commission has no valid legislative basis for asserting jurisdiction.

3. The Cellular World Declaratory Statement attempts to establish the Commission's jurisdiction over CMRSP/PATS without reference to and in contravention of Florida case law providing standards for resolving questions of agency authority.

As noted, the Commission's 1991 Declaratory Statement interpreted the substantially identical statutory precursor to Chapter 364 as conveying a grant of jurisdiction over CMRSP/PATs. The Declaratory Statement asserted the existence of a reasonable doubt as to the restriction on the Commission's jurisdiction, and then proceeded to resolve that announced doubt in favor of the Commission's jurisdiction.

The analysis supporting the assertion of jurisdiction is flawed in several ways. Perhaps the most glaring flaw, however, is the Declaratory Statement's failure to acknowledge and apply the proper legal standard for determining jurisdiction. In approaching the task of interpretation, the Declaratory Statement provides as follows:

> The prime directive in statutory interpretation is to give effect to what the legislature intended. Divining the intent of the legislature in this case requires that we reconcile potentially conflicting statutory provisions. To further complicate the issue, the provisions of Sections 364.02(7) and 364.3375, Section

> 364.02(6), state that 'Service is to be construed in its broadest and most inclusive since.' [sic] We interpret Section 364.02(6) to refer to regulated services and not to the exception.

Declaratory Statement, at page 5.

At the outset, if the Commission's jurisdiction must be "divined," then at the very least, there is reasonable doubt as to that jurisdiction and under case law "further exercise of that power must be arrested." Radio Telephone Communications, Inc. v. Southeastern Telephone Company, 117 So.2d 577, (Fla. 1965). Moreover, the declaratory statement acknowledges that there are "potentially conflicting" statutory provisions and the issue of the Commission's jurisdiction is "compl[i]cate(d)." The Declaratory Statement announces that the conundrum of the Commission's jurisdiction will be resolved by construing the grant of its authority over "service" expansively, while narrowly interpreting the "exception" to its jurisdiction. In short, it is asserted that there is a "reasonable doubt" as to the breadth of the "exception" which must be resolved against the "exception" and in favor of the expansive reach of the term "service."

The reasoning set forth in the Declaratory Statement fails to consider the well-established case law in this area. If the Declaratory Statement had included consideration of applicable case law it not only would have addressed the general principles that reasonable doubt must be resolved against Commission jurisdiction, but would have included a Supreme Court case on point.

In Radio Telephone Communications, Inc. v. Southeastern Telephone Company, 177 So.2d 577 (Fla. 1965), the issue before the

Supreme Court of Florida was whether Radio Telephone Communications, Inc. (RTC) was a "telephone company" within the meaning of the then existing version of Chapter 364. In reviewing the Commission's assertion of jurisdiction the Court acknowledged that RTC met the definition of "telephone company" as defined in Section 364.02, Florida Statutes (1964); nevertheless, the Court concluded that the 1913 Florida Legislature could not have intended to regulate radio communication services when it had established the regulatory scheme because such service had not yet been developed. The Court also rejected the argument that reenactment of Chapter 364 throughout the years brought a radio communication company within the definition of the telephone company. The Court saw that argument as an invitation to "judicial legislation of the kind frequently condemned . . ." Id. at 581.

The Court further reasoned that the Legislature had never conferred upon the Commission "any general authority to regulate 'public utilities.'" Id. (emphasis added) Historically, where the Legislature intended for the Commission to regulate an entity as a public utility, it provided a specific grant for that purpose. Thus, even though RTC met the statutory definition of a "telephone company," the Legislature had not explicitly stated its intention that companies such as RTC be subject to the Commission's jurisdiction. The Court disagreed with the Commission's argument that the statutory scheme and the public interest required a conclusion of Commission jurisdiction:

> We are always reluctant to disagree with an administrative body in its interpretation of the statute

> which it has the duty to administer; and, of course, the orders of the Florida Commission come to this court with a presumption of regularity, ... But we cannot apply such presumption to support the exercise of jurisdiction where none has been granted by the Legislature. If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested.

Id.

In light of the clear guidance of Radio Telephone, the Commission must conclude that it does not have jurisdiction over CMRSP/PATS. In Radio Telephone, the Legislature could not have intended jurisdiction because radio communication companies were not in operation; in this case, the Legislature clearly stated that the Commission does not have jurisdiction over CMRSPs. In Radio Telephone, the Commission attempted to assert jurisdiction because RTC's activities met the expansive and general definition of "telephone company" and because "service" was to be interpreted broadly; in the instant case, the Commission would assert jurisdiction over CMRSPs where their activities meet the expansive and general definition of "pay telephone service." In Radio Telephone, the Court held that the Commission may not expansively interpret its jurisdiction to assert authority where the Legislature could not have contemplated such jurisdiction; in the instant case, the Commission may not expansively interpret its jurisdiction to assert authority where the Legislature specifically said it did not contemplate such jurisdiction.

B. THE CONGRESS HAS PREEMPTED ALL STATES FROM THE ECONOMIC REGULATION OF CMRSPs.

The Commission's purpose in proposing PATS rules for wireless

providers is to engage in economic regulation of these carriers in certain aspects of their business. For example, as noted above, the staff recommendation argues that economic regulation is in the public interest,

> because many wireless pay telephone stations resemble traditional, wireline stations. If wireless providers were not required to post adequate notice and were not subject to the pay telephone rate caps, the public may be misled into paying much higher rates for pay telephone calls.

The Commission may not engage in such economic regulation, however, because the states have been preempted in this field by the Congress. Specifically, in its 1993 amendments to the Federal Communications Act ("FCA"), 47 U.S.C. § 151 et seq., Congress expressly prevented states from regulating the rates charged by any commercial mobile service. Under the legislative heading "State preemption," Congress provided that "[n]otwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . . ." 47 U.S.C. § 332(c)(3)(A) (West 1991 & Supp. 1995). The preemptive intent of this provision is made particularly clear by its rejection of the dual interstate/intrastate regulatory regime embodied in sections 152(b) and 221(b). See 47 U.S.C. §§ 152(b) and 221(b). Thus, Congress has completely preempted any state regulation, whether interstate or even intrastate, of rates connected with commercial mobile

services.[1]

This view of the preemptive effect of the federal legislation has been embraced by the FCC. In May of 1995, the FCC relied on the new Section 332 to prevent states from regulating rates for cellular and other mobile radio services. The FCC stated:

> In 1993, Congress passed legislation prohibiting state and local governments from regulating the rates for commercial mobile radio services, including cellular service. States with rate regulation in place on June 1, 1993 were given the opportunity to petition the Commission for continuation of such authority. The statute requires such states to demonstrate that market conditions fail to protect consumers from unjust and unreasonable rates, or unjustly and unreasonably discriminatory rates.
>
> In denying the states' petitions, the Commission noted the legislative intent to prefer competitive entry over rate regulation of commercial mobile radio services. The Commission distinguished the rapidly growing and technically evolving cellular market from more mature industries closed to competitive entry and subject to traditional rate regulation.

FCC's Release dated May 11, 1995 (A copy is attached as Exhibit A hereto).

Thus the Commission may not attempt to impose rate regulation on CMRSP/PATs because federal preemption has precluded the Florida Legislature from delegating such authority to the Commission.

BMI respectfully suggests, however, that is not necessary to

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[1] In addition to rates, Congress has also completely preempted the "entry" into the entire business of commercial mobile services. 47 U.S.C. § 332(c)(3)(A) As has been well-publicized, the FCC has, through a licensing policy, carefully and completely regulated the entry into the various types of commercial mobile services.

view this as a case of preemption. On the contrary, the exclusion of CMRSPs from the Commission's jurisdiction by Section 364.02(12), Florida Statutes, is perfectly compatible with the stated Congressional intent - there is harmony between state and federal authority. Only an interpretation of Chapter 364 that ignores both the plain meaning of Section 364.02(12) and well-established case law could bring the Commission and the FCC into conflict on this issue.

CONCLUSION

Because it contravenes the clear intent of both the Florida legislature and the United States Congress, as well as well-recognized Florida case law, the Commission's attempt to assert jurisdiction over CMRSPs is beyond the scope of its authority. Accordingly, this Commission must abandon its attempt to impose pay telephone regulations upon CMRSPs.

Respectfully submitted this 23rd day of October, 1996.

Patrick K. Wiggins
Wiggins & Villacorta, P.A.
501 East Tennessee Street
Suite B
Post Office Drawer 1657
Tallahassee, Florida 32302
(904) 222-1534

Counsel for BellSouth Mobility Inc

FCC NEWS
FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET, N.W.
WASHINGTON, DC 20554

Report No. WT 95-8 WIRELESS TELECOM ACTION May 11, 1995

FCC DENIES STATE PETITIONS TO REGULATE RATES FOR COMMERCIAL MOBILE RADIO SERVICES

The FCC has denied petitions from seven states seeking authority to continue regulating intrastate rates for cellular and other commercial mobile radio services. The Commission found in its decisions today that the petitions filed by Arizona, California, Connecticut, Hawaii, Louisiana, New York, and Ohio did not meet the statutory standard established by Congress, viz., failed to demonstrate that market conditions fail to protect consumers from unjust and unreasonable rates or unjustly and unreasonably discriminatory rates.

In 1993, Congress passed legislation prohibiting state and local governments from regulating the rates for commercial mobile radio services, including cellular service. States with rate regulation in place on June 1, 1993 were given the opportunity to petition the Commission for continuation of such authority. The statute requires such states to demonstrate that market conditions fail to protect consumers from unjust and unreasonable rates, or unjustly and unreasonably discriminatory rates.

In denying the states' petitions, the Commission noted the legislative intent to prefer competitive entry over rate regulation of commercial mobile radio services. The Commission distinguished the rapidly growing and technically evolving cellular market from more mature industries closed to competitive entry and subject to traditional rate regulation.

In addition, the Commission found that competition from new wireless services, known as personal communications services (PCS), is imminent. On March 13, the FCC concluded its biggest auction to date of licenses for PCS. The auction, which lasted more than three months and offered 99 licenses covering the United States and its territories, raised more than $7 billion for the U.S. Treasury.

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EXHIBIT
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Over the next few years, the FCC is planning a number of additional PCS license auctions, which are expected to bring competition to cellular and other commercial mobile radio services. Eventually, each market in the United States will have a total of five to eight companies that offer wireless communications services to consumers.

"The Commission has demonstrated time and again its commitment to competition as a way to increase consumer services and decrease prices," said Regina Keeney, Chief of the FCC's Wireless Telecommunications Bureau. She added, "These decisions will promote entrepreneurial investment and economic growth and foster wider access to wireless services."

Actions by the Commission May 4, 1995 by Reports & Orders (FCC 95-190-194); May 5 by Report & Order (FCC 95-195); and May 8, 1995 by Report & Order (FCC 95-199). Chairman Hundt, Commissioners Quello, Barrett, Nuss and Chong.

-FCC-

News Media Contact: Stacey Reuben Moss at (202) 418-0654
Wireless Telecommunications Bureau Contact: Dan Phythyon at (202) 418-0600 or Stan Wiggins (202) 418-1310.