

## BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory )	DOCKET NO. 910470-TP
Statement regarding exemption from )	
Public Service Commission regulation )	ORDER NO. 25264
for Cellular Radio Telecommunications) )	
Carriers, by CELLULAR WORLD, INC. )	ISSUED: 10/28/91
)	

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman  
 SUSAN F. CLARK  
 J. TERRY DEASON  
 BETTY EASLEY  
 MICHAEL MCK. WILSON

ORDER GRANTING REQUEST FOR DECLARATORY STATEMENT  
FINDING THAT PROPOSED CELLULAR PAY TELEPHONE SERVICE IS  
SUBJECT TO COMMISSION JURISDICTION

BY THE COMMISSION:

I. BACKGROUND

On April 1, 1991, Cellular World, Inc. (Cellular World) filed a Petition for Declaratory Statement. Cellular World has asked the Commission to determine whether its proposed cellular pay phone operations would render it a regulated "telecommunications company" within the meaning of section 364.02(7), Florida Statutes, or whether it would remain unregulated under the exemption for "cellular radio telecommunications carriers" contained in that statute. As stated in 25-22.021, a declaratory statement provides a "means for resolving a controversy or answering questions or doubts concerning the applicability of any statutory provision, rule, or order as it does, or may, apply to petitioner in his or her particular circumstances only." Cellular World has asked for an opinion as it relates only to the particular circumstances of its proposed business venture. Cellular World's Petition is, therefore, consistent with the proper use of a declaratory statement and should be granted.

II. CELLULAR WORLD PETITION

According to the Petition, Cellular World is a reseller of cellular services. It does not provide cellular service through its own facilities but contracts with a facilities-based carrier for the underlying cellular service. Cellular World's business is to sell or lease cellular phones and resell the cellular service obtained from the facilities-based cellular carrier.

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The company is considering expanding its business to include cellular pay phone service both on a cash and credit card basis. Cellular World states that the equipment will be placed at locations not readily or economically susceptible to traditional pay phone service. Examples cited include placement of the phones in rental cars, on ship board or off-shore islands, and at short term locations such as sporting events, parades, or disaster recovery sites. Cellular World thus contemplates that it would only be in the business of placing its equipment in mobile locations, such as rental cars, or at locations, such as a sporting event, where a trailer of phones would be located for a short period of time. The rental car phones would be magnetic strip reader cellular telephones affixed in the rental car and made available only to the rental car patron. The phones used at other locations would be similar to traditional landline pay phone service accessible to any walk-up customer. Payment for this service would be both by coin or currency and by credit card.

Dialing and routing of calls from Cellular World's pay phones would be handled by cellular facilities carriers. All calls would be transmitted to the cellular carrier's mobile telephone switching office (MTSO). Calls would then be switched to Cellular World's designated interexchange carrier which would then route the calls back to the originating local exchange company for local calls, with interLATA calls going to the appropriate IXC.

According to Cellular World, it proposes to have a rate structure based on a uniform charge for local and toll calls. Although final plans have not been completed, Cellular World contemplates that it will use a set-up charge and a per-minute-of-use charge which would apply to all minutes of use, local and toll and which would include the necessary air time charge for use of the cellular network. The petition states that this rate structure is necessitated by Cellular World's networking configuration and the fact that all cellular telephone originated calls must be handled over the cellular network.

Cellular World states that all equipment would be labelled regarding rates and services provided or that this information would be separately made available. The cellular phones would allow emergency access such as 911, without charge.

Based on the facts stated, Cellular World asks the Commission to find that the exclusion of cellular carriers from the definition of "telecommunications company" in Section 364.02(7), Florida Statutes, exempts its proposed cellular pay phone operations from Commission regulation. That section states inter alia:

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...The term "telecommunications company" does not include an entity which provides a telecommunications facility exclusively to a certificated telecommunications company, or a specialized mobile radio service operator, a private radio carrier, a radio common carrier, a cellular radio telecommunications carrier, or a cable television company providing cable services as defined in 47 U.S.C. 522.

The company argues that the Commission only has authority to regulate those entities which meet the definition of telecommunications company. It is from that statutory grant that the Commission is able to exercise jurisdiction over the various entities such as LEC's, IXC's, shared tenant providers, operator service providers, alternative access vendors and pay telephone providers. Cellular World thus argues that cellular carriers have been excluded from the definition of telephone company and that no jurisdiction of the Commission may attach, even though the Company may engage in some activities which are similar to those of telephone companies which the Commission may regulate.

Cellular World claims that it meets the statutory exemption in 364.02(7) based on the plain meaning of the statute. It argues that being a cellular carrier necessarily involves a communication over the cellular radio network that originates or terminates on a cellular phone. It further states that the statutory exclusion would be meaningless if construed to exclude the cellular telephone equipment and that, without it, the use of the cellular network would serve no purpose. Cellular World claims that the Commission recognized this necessary integration of cellular facilities and cellular phones when it stated in Order No. 20475 that cellular carriers could not be allowed to use their equipment for termination of landline-to-landline calls. Cellular World further argues that the exclusion for cellular carriers is without any limitations or specific designations. It is not just for cellular car phones or for all types of cellular service except the use of cellular phones as pay phones.

Cellular World states that the legislative history makes it clear that the Legislature intended to delete all Commission authority over cellular carriers. It also notes that the Commission has not exercised any jurisdiction over Airphone services although that type of cellular pay phone has been around for several years.

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Cellular World goes on to argue that, as a cellular service reseller, it is entitled to the same regulatory status and treatment as a facilities-based carrier under the statute. It points out that the Commission's legal analysis of interexchange service resellers has been no different than that employed for evaluating facilities-based carriers and that regulatory treatment has essentially been the same.

Finally, the company argues that even if the Commission had some jurisdiction to regulate its pay phone operations, its proposed rental car phone service would not be utility service "to the public" under the statute. It argues that to the public means available to the public generally or indiscriminately, and to those with whom there is no prior contractual relationship. Cellular World's customers would first have to rent a car and then exercise the option of taking a cellular phone. Such phones would not be maintained for the use of the transient public and should not be considered offered to the public under this scenario.

### III. ANALYSIS

After reviewing the language of the current statute as well as past statutes, legislative history, relevant case law and Commission Orders, we find that the provision of cellular pay telephone service proposed by Cellular World is subject to this Commission's jurisdiction.

Cellular World is correct that the Commission's jurisdiction under Chapter 364 is limited to the regulation of entities which meet the statutory definition of a telecommunications company. Section 364.01(1) states:

"The Florida Public Service Commission shall exercise over and in relation to telecommunications companies the powers conferred by this chapter."

Section 364.02(7) specifically exempts a "cellular radio telecommunications carrier" from the definition of telephone company; however, nowhere in Chapter 364 is there a specific explanation of what is meant by the former term.

The Federal Communications Commission Regulations offer no definitional aid. Cellular service is defined by the FCC in terms of a license to use a specifically allocated portion of radio transmission frequency spectrum, limitations on transmission power, and geographic boundaries. The FCC's regulations are silent as to

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the types of services that may be provided through the use of cellular technology. Moreover, resellers of cellular service have been around almost as long as the facilities-based carriers, and have been sanctioned by the Federal Communications Commission as an important element in the development of competitive cellular service. CC Docket No. 79-318, Report and Order, 86 F.C.C. 2d 469 (May 4, 1981) Thus, cellular radio telecommunications carriers are properly characterized as cellular service providers. As noted previously, the Florida legislature did not define cellular service.

Chapter 364 was structured by the legislature to regulate the provision of telecommunications services. The regulatory scheme is not dependent on the nature of the technology utilized to provide the service.

Cellular service is generally thought to be the provision of telecommunications service to a specific individual through the use of an instrument that uses cellular radio technology to access the public switched network. Generally this means that a person obtains a cellular telephone instrument and contracts directly or indirectly with an FCC licensed cellular carrier. Typical cellular service is a direct substitute for the typical residential or business line and carries the added benefit of geographic mobility.

In contrast to cellular service, in Section 364.3375, Florida Statutes, the legislature enacted a comprehensive regulatory scheme for the provision of pay telephone service. Pay telephone service is not specifically defined but is described as including "telephone service using telephones that are capable of accepting payment by specie, paper money, or credit cards." Pay telephone service is generally considered to be the sale of the use of an instrument to the casual transient public where the instrument is not dedicated to the exclusive use of a specific individual. The provision of pay telephone service is severable from and not dependent on the technological nature of the instrument or the technological nature of the instrument's interconnection with the public switched network.

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), states that "Service is to be construed in its broadest and most inclusive since." We interpret Section 364.02(6) to refer to regulated services and not to the exceptions.

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In reconciling the cellular exemption with the other provisions of Chapter 364, it would not be logical to construe cellular service so broadly as to immunize from jurisdiction any telecommunications service that utilizes cellular transmission technology anywhere in the communications path. To do so is to give the provider of any telecommunication service the option of determining if it will be subject to regulation. In the context of this case, Cellular World's argument creates an inevitable anomaly: two pay telephone instruments sitting side by side, identical in every respect except that service from one is not be subject to jurisdiction because the service provider chose to utilize cellular technology for interconnection to the public switched network. As a result, the statutory structures imposed by the legislature in Section 364.3375 for the protection of the public could be nullified at the option of the PATS service provider. The legislature could not have intended such an illogical result.

With respect to the provision of cellular service to rental cars, we conclude that, consistent with the above analysis, such service is in the nature of cellular service and not in the nature of public pay telephone service. In the rental car scenario cellular service is being provided for the exclusive use of the individual person renting the car.

#### IV. CONCLUSION

Based on the foregoing, we conclude that the cellular exemption 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. We further conclude that the provision of cellular service to persons renting a cellular instrument in conjunction with an automobile as proposed by Cellular World is not subject to Commission jurisdiction. Our conclusions are based on the facts as stated in Cellular World's petition. Any variation in these facts could lead the Commission to reach different conclusions than those embodied in the declaratory statement.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the provisions of pay telephone service through the use of cellular interconnection technology as proposed in Cellular World, Inc.'s Petition For Declaratory Statement is subject to Commission jurisdiction as set forth in the body of this Order. It is further

ORDERED that this docket be closed.

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By ORDER of the Florida Public Service Commission, this 28th  
day of OCTOBER, 1991.

  
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STEVE TRIBBLE Director  
Division of Records and Reporting

( S E A L )

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Commissioner Easley and Beard dissent from the Commission's decision above that the provision of private pay telephone service through the use of cellular technology is subject to the Commission's jurisdiction.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer

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utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.