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October 21, 1996

BY HAND DELIVERY

Ms. Blanca Bayo, Director
Division of Records and Reporting
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. ~~96000-TP~~

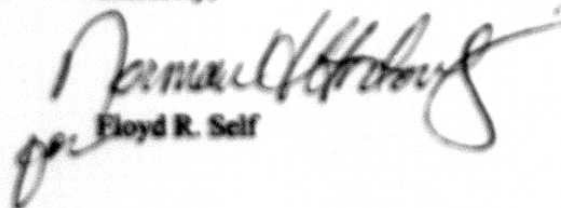
Dear Ms. Bayo:

Enclosed are an original and fifteen copies of the Legal Brief of AT&T Wireless Services of Florida, Inc. in the above-referenced docket. Also enclosed is a 3 1/2" diskette with the document on it in WordPerfect 6.0/6.1 format.

Please indicate receipt of this document by stamping the enclosed extra copy of this letter.

Thank you for your assistance in this matter.

Sincerely,


Floyd R. Self

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Enclosures
cc: William H. Higgins, Esq.
Parties of Record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In re: Proposed Rules Relating)
to Pay Telephone Service)
_____)

Docket No. 951560-TP
Filed: October 21, 1996

LEGAL BRIEF OF AT&T WIRELESS

Pursuant to the Commission's Notice issued September 18, 1996, AT&T Wireless Services of Florida, Inc. ("AWS") submits this brief on the issue of the Commission's jurisdiction over wireless pay telephones.

BACKGROUND

On April 1, 1991, Cellular World, Inc. ("Cellular World") filed a Petition for Declaratory Statement regarding the applicability and scope of the statutory exemption embodied in Florida Statutes section 364.02(7) (Supp. 1990) for "cellular radio telecommunications carriers" and the meaning of telecommunications service "to the public" as applied to Cellular World's proposed cellular car phone service.

In addition, Cellular World was considering the offering of cellular telephone service on a per call payment basis through specialized cellular telephone equipment that would be placed at locations not readily or economically susceptible to traditional landline pay telephone service. These locations included rental cars, shipboards, offshore islands, short-term events, and disaster recovery sites.

Based upon these facts, Cellular World requested that the Commission find its proposed cellular pay phone operations exempt from Commission regulation pursuant to section 364.02(7),

Florida Statutes. In Order No. 25264, issued October 28, 1991, the Commission found it had no jurisdiction over cellular service to persons renting a cellular instrument in conjunction with an automobile. However, as for the remaining service situations, the Commission found that it did have jurisdiction over such situations.

Subsequently, several cellular providers petitioned for intervention and reconsideration of Order No. 25264. The Commission denied such petitions. However, in light of the concerns expressed by the cellular providers about the nature and effect of the Commission's assertion of jurisdiction over cellular payphone services, the Commission directed its Staff to conduct an investigation into cellular payphone regulation. Order No. 25799, issued February 24, 1992, in Docket No. 910470-TP.

Over the next several years, the Staff held several workshops to examine the technical aspects of providing pay telephone service through a cellular telephone. The Staff concluded its investigation and recommended that the docket be closed, as any further action would occur in a new docket established for rulemaking. Order No. PSC-94-1494-FOF-TP, issued December 5, 1994 in Docket No. 930407-TP. However, while the investigation docket was open for several years, the cellular carriers never had the opportunity to address with the Commission the jurisdictional issues raised by the Motion for Reconsideration in the Cellular World case.

At the July 30, 1996, Agenda Conference, the Staff presented in this docket proposed payphone rule amendments, including rules regulating wireless pay telephone. After comments by various carriers, the Commission voted to defer Staff's proposed amendments to address both technical issues and the Commission's jurisdiction with respect to wireless providers. Pursuant to the schedule set forth, AWS hereby submits this legal brief. As is further discussed below, based

upon applicable state and federal law, the Commission should find that it has no legal authority to regulate wireless equipment that may be used as pay telephones.

I. The Florida Public Service Commission Has No Legal Authority to Regulate Wireless Pay Telephones Under Florida Law.

Based on current statutes and case law, the Commission has no jurisdiction over any entity providing pay telephone services through a wireless instrument. To the extent there may have been doubt at the time of the Cellular World Order regarding the meaning of the statutory exemption of cellular providers from Commission jurisdiction, recent amendments and additions to chapter 364, Florida Statutes, resolve that doubt.

The law is well settled that the Commission has no general grant of authority to regulate public utilities in Florida. Radio Tel. Communications, Inc. v. Southeastern Tel. Co., 170 So.2d 577 (Fla. 1964). The jurisdiction of the Public Service Commission is derived solely from the grant of legislative authority. United Telephone Co. of Florida v. Public Service Com'n. 496 So.2d 116 (Fla. 1986). Furthermore, any doubt concerning the existence of regulatory authority over a particular activity must be resolved against the exercise of that authority. Florida Bridge Co. v. Bevis, 363 So.2d 799 (Fla. 1978).

All jurisdiction over telephone service is derived from section 364.01(1), Florida Statutes (1995). This statute provides: "The Florida Public Service Commission shall exercise over and in relation to telecommunications companies the powers conferred by this chapter." Consequently, if an entity does not meet the definition of a "telecommunications company" as defined by statute, the Commission is without jurisdiction to regulate that entity.

At the heart of the Cellular World Declaratory Statement was the meaning of the "cellular"

exemption. In 1991, section 364.02(7), Florida Statutes (Supp. 1990), specifically exempted a "radio telecommunications carrier" from the definition of a telecommunications company. However, at that time "radio telecommunications carrier" was not defined in the Florida Statutes, the federal statutes or federal or state regulations. Lacking legislative guidance, the Commission declined to find that Cellular World met the definition of a "radio telecommunications carrier." In the Cellular World Order, other than carphones, which were not "to the public" and thus exempt from jurisdiction, the Commission concluded that its regulatory authority is not dependent on the nature of the technology utilized to provide the service. Notwithstanding the fact that a cellular telephone was being used, the Commission determined that it could regulate wireless payphones since it had jurisdiction over landline payphones.

While AWS has always disagreed with the Cellular World Order's interpretation of the 1991 Statute, more recent legislative enactments resolve any doubt about this Commission's jurisdiction. As part of its 1995 rewrite of chapter 364 to introduce local competition, the Florida Legislature amended the definition of "telecommunications company." Today, the revised definition of "telecommunications company" includes:

every corporation, partnership, and person and their lessees, trustees or receivers appointed by any court whatsoever, and every political subdivision in the state, 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 an entity which provides a telecommunications facility exclusively to a certificated telecommunications company, a commercial mobile radio service provider, a facsimile transmission service, a private computer data network company not offering service to the public for hire, or a cable television company providing cable service as defined in 47 U.S.C. s. 522. 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).

Thus, the new statute drops the former "radio telecommunications carrier" language and utilizes the term "a commercial mobile radio service provider." In introducing this new terminology, the Legislature further provided in section 364.02(2), Florida Statutes (1995), that the term "commercial mobile radio service provider" shall have the same meaning as is defined by 47 U.S.C. sections 153(n) and 332(d). There are two important consequences of this legislative change.

First, all of the relevant terms are now unambiguously defined in law. Beginning with 47 U.S.C. 332(d)(1), this statute provides:

the term "commercial mobile service" means any mobile service (as defined in section 153(n) of this title) 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.

The term "mobile service" is further defined as "a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes both one-way and two-way radio communication service." 47 U.S.C. 153(n).

A cellular pay telephone is by definition a mobile station: it utilizes radio pathways and not landline wires to effect communications. In this context, mobile does not mean movable, rather that the instrument is not physically linked to the landline network. Thus, any entity using a "wireless" instrument to provide telephone service on a per call compensation basis would be a commercial mobile radio service provider and exempt from this Commission's jurisdiction. The federal law underlying the Florida statutory exemption looks solely to the end user equipment involved without any recognition or consideration for the type of service ultimately being offered.

The second consequence of the legislative change to the 1995 amendments to Chapter 364

is the use of the word "provider" in lieu of the former "carrier" term. The new legislative definitions should resolve any doubts as to jurisdiction. However, the Cellular World Declaratory Statement relies in part on the conclusion that use of the term carrier applied to those engaged in making cellular facilities service available to the public, as opposed to the pay telephone service there at issue. Whatever limitations may have been inherent in the use of the term carrier should now be removed -- a provider can include all variety of facilities and reseller entities.

The touchstone of commercial mobile radio service is a wireless instrument on at least one end of the call. Based upon these legislative changes, there is no basis for this Commission to now conclude that it has jurisdiction over any type of wireless pay telephone service.

II. Federal Law Preempts Most, if not all, State Jurisdiction Over Wireless Services

A second, independent basis for the Commission's lack of authority to regulate cellular pay telephones is the Congress' preemption of certain forms of state regulation over commercial mobile radio service providers.

It is well established that the Supremacy Clause of the United States Constitution vests Congress with the power to preempt state law. Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987). Congress, in drafting a statute, may use language that dictates the extent to which the statute preempts state law. 3M Health Care, Ltd. v. Grant, 908 F.2d 918 (11th Cir. 1990). Moreover, "Congressional enactment of a provision defining the preemptive scope of a statute implies that it intended to limit the preemptive scope of the statute to the express terms of the preemption provision." Lohr v. Medtronic, Inc., 56 F.3d 1335 (11th Cir. 1995).

The preemption language of 47 U.S.C. §332 establishes Congress' intent to preempt state

and local governments from exercising jurisdiction over wireless pay telephones. It provides in pertinent part:

(3) State preemption

(A) Notwithstanding 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 or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

A commercial mobile service provider, by definition, includes "mobile services which provide a regularly interacting group of base, mobile, portable, and associated control and relay stations . . . for private one-way and two-way land mobile radio communications." See 47 U.S.C. §§ 153(n) and 332(d).

Wireless pay telephones are commercial mobile radio service providers pursuant to the statutory definition. By virtue of the fact that cellular providers use mobile stations or receivers, Florida is preempted from regulating the "entry of or the rates charged" by wireless pay telephone providers. This means, at a minimum, that this Commission may not impose any entry requirements on those wanting to offer this service nor may this Commission regulate the rates such providers charge the public.

Given the nature of this service and the unique circumstances that are usually associated with its offering to the public, AWS believes that if the complete Florida statutory exemption did not exist, it would still be unnecessary for this Commission to impose any type of regulation on wireless payphone providers in those limited matters that may still be reserved to the states under section 332 of the Federal Statute. There has been no determination that the offering of wireless pay telephone service has generated any type of material consumer problem, let alone some widespread crisis

meriting regulatory action. Indeed, the most likely area for consumer confusion, price, has been completely preempted. As for the other aspects of Florida's pay telephone regulations that might arguably apply in the absence of the Florida statutory exemption, for example, handicapped access, signage, and dialing requirements, such regulations are generally unworkable or inappropriate in the situations in which these instruments are being deployed (e.g., on trailers at sporting events).

Thus, in the absence of the Florida statutory exemption, to the extent this Commission retains any jurisdiction over wireless pay telephones, the Commission should carefully review the application of each of its existing landline rules. In this review, it should thoughtfully determine what types of regulatory oversight are meaningfully necessary in this very specialized niche market, work which really has not yet been done. Since the scope of state authority remaining after the federal preemption is quite narrow, any exercise of such jurisdiction, consistent with state law, should be directed to meeting specific, definable regulatory objectives.

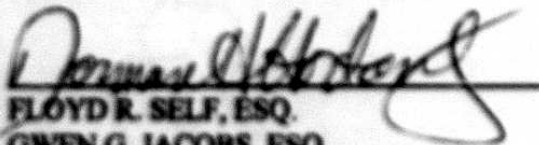
CONCLUSION

Based on current state law, the Commission is without legal authority to regulate cellular pay telephones. In addition, the Congress has preempted both state entry barriers and price regulation, leaving a very narrow field of state authority provided there is any state jurisdiction in the first place, which there is not under chapter 364. Therefore, AT&T Wireless Services of Florida, Inc. requests the Commission find it is without jurisdiction to regulate cellular pay telephones.

Respectfully submitted this 21st day of October, 1996.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Legal Brief of AT&T Wireless Services of Florida, Inc. in Docket No. 951560-TP has been sent by Hand Delivery (*) and/or U.S. Mail on this 21st day of October, 1996 to the following parties of record:

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