

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of	)	
	)	
Policies and Rules	)	CC Docket No. 96-146
Governing Interstate Pay-Per-Call	)	
And Other Information Services	)	
Pursuant to the Telecommunications	)	
Act of 1996	)	

Before the Consumer and Governmental Affairs Bureau

**REPLY COMMENTS OF THE
FEDERAL BUREAU OF INVESTIGATION**

The Federal Bureau of Investigation (the “FBI”) hereby files reply comments in the captioned pay-per-call proceeding¹ (the “*PPC Proceeding*”), where the Commission’s Consumer and Governmental Affairs Bureau (the “Bureau”) is considering whether to modify the pay-per-call rules (“PPC Rules”)² adopted pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 (the “PPC Act”).³ The FBI is an interested party in this proceeding based on its authority to implement the Communications Assistance for Law Enforcement Act (“CALEA”).⁴

I. INTRODUCTION

The FBI joins this proceeding for a very limited purpose. The PPC Act imposes various consumer protection obligations on common carriers engaged in the provision of

¹ The Consumer & Governmental Affairs Bureau Seeks Comment to Refresh the Record on the Commission’s Rules Governing Interstate Pay-Per-Call & Other Information Services, Public Notice, DA 03-807, released March 17, 2003. This notice and comment proceeding is a continuation of the inquiry started in the Order and Notice of Proposed Rule Making in CC Docket Nos. 96-146 and 93-22, 11 FCC Rcd 14738 (1996)(the “PPC NPRM”).

² 47 C.F.R. § 64.1501 et seq.

³ 47 U.S.C. § 228.

⁴ 47 U.S.C. § 1001 et seq.

pay-per-call services (known as “900 calling services”)⁵ but provides exceptions for certain calling arrangements.⁶ One wireless commenter, AT&T Wireless Services, Inc. (“AWS”), requests a determination that its new Commercial Mobile Radio Service (“CMRS”) voice-based content services fall under the exceptions. In addition, AWS seeks a ruling that these advanced services are entirely exempt from common carrier regulation. The FBI opposes the latter request.

The FBI believes all CMRS consists of “telecommunications services” subject to common carrier regulation and that the *PPC Proceeding* is not the appropriate venue to start making exceptions from that longstanding rule. Otherwise, CMRS carriers might fail to comply with many non-pay-per-call Congressional mandates such as CALEA. In support, the following is shown.

II. CMRS VOICE CONTENT SERVICES ARE DEFINED AS TELECOMMUNICATIONS SERVICES SUBJECT TO COMMON CARRIER REGULATION

AWS describes itself as a “CMRS provider”⁷ that currently offers “CMRS voice-based content services.”⁸ One type of voice content service offered by AWS is an “enhanced directory” (“411”) service.⁹ The other is a “voice portal and voice-activated dialing” service.¹⁰ AWS wishes to offer a “broader array of content”¹¹ by delivering

⁵ 47 U.S.C. § 228(b).

⁶ 47 U.S.C. § 228(i)(2); 47 C.F.R. § 64.1501(b).

⁷ Comments of AT&T Wireless Services, Inc. (“AWS Comments”) at 1, 4, and 11.

⁸ Id. at 2-3.

⁹ Id.

¹⁰ Id.

¹¹ Id. at 3.

these services over a “broadband platform.”¹² In addition to the two voice services, AWS offers “enhanced wireless data service.”¹³

The Communications Act of 1934, as amended (the “Communications Act”) and the Commission’s rules define CMRS as a Wireless Radio Service that meets the definition of “telecommunications service”¹⁴ and is therefore subject to common carrier regulation.¹⁵ The Communications Act definition of “telecommunications” does not hinge on whether the information transmitted is voice or data.¹⁶ Moreover, the above definitions make no distinction between CMRS provided over narrowband facilities and CMRS provided over broadband facilities. On the contrary, CMRS remains classified as telecommunications service “regardless of the facilities used.”¹⁷

Accordingly, all three services described in the AWS Comments are telecommunications services subject to common carrier regulation.

¹² Id. at 9-10.

¹³ Id. at 3. AWS does not indicate whether its wireless data is offered in broadband mode.

¹⁴ 47 U.S.C. § 153(46). “The term ‘telecommunications service’ means 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.” Id.

¹⁵ 47 C.F.R. § 1.907. See 47 U.S.C. § 153(44), stating that a “telecommunications carrier” shall be treated as a common carrier to the extent that it is providing telecommunications services; See also 47 U.S.C. § 332(c)(1)(A), stating that “[a] person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier”

¹⁶ “The term ‘telecommunications’ means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153 (43).

¹⁷ See n. 14, supra.

III. AWS'S IMPLIED REQUEST FOR RECLASSIFICATION OF ITS CMRS VOICE CONTENT SERVICES AS "INFORMATION SERVICES" REFLECTS A MISUNDERSTANDING OF THE TERM "INFORMATION SERVICES"

AWS states that in 1992, when the PPC Act was first adopted, the market for voice content "information services" was drastically different because the Internet was still in a nascent stage.¹⁸ It adds that today CMRS carriers are developing more "content-rich" voice services that are heavily Internet-based, or "broadband" in nature.¹⁹

Next, AWS asserts that "Internet-based services are exempt from title II [common carrier] regulation," including the PPC Rules, enabling providers of wireless "data" applications to offer Internet-based voice content services.²⁰ Therefore AWS seeks "clarification" that providers of Internet-based (broadband) wireless "voice" applications should be similarly relieved of common carrier regulation.²¹ In support of this theory, AWS cites the Commission's 1998 *Federal State Joint Board on Universal Service, Report to Congress (the "Universal Service Report")*, which advised that many broadband "information service" providers should be free of common carrier constraints.²²

In sum, AWS implies that as it upgrades its pay-per-call "information services" from narrowband to broadband, it will qualify for a new, non-common carrier regulatory status. The FBI disagrees.

¹⁸ AWS Comments at 8.

¹⁹ Id. at 8-10.

²⁰ Id. at 8-9.

²¹ Id. at 9.

²² Id. citing Federal State Joint Board on Universal Service, Report to Congress in CC Docket No. 96-45, 13 FCC Rcd 11501 (1998).

Congress adopted the phrase “information services” in two very different statutes with two very different meanings. In the PPC Act, Congress used the term “information services” to describe a typical component of common carrier pay-per-call service.²³ In the Telecommunications Act of 1996, Congress used the term “information services” to denote an entirely new regulatory classification interpreted by the *Universal Service Report* as mutually exclusive to “telecommunications services” and not subject to common carrier regulation.²⁴

Applying the correct definitions, pay-per-call “information services” are classified as “telecommunications services” subject to common carrier regulation. The act of upgrading those services from narrowband to broadband facilities does nothing to alter their regulatory status because, as explained above, they remain “telecommunications services” regardless of the facilities used. As for the relationship between wireless voice and wireless data, there is no regulatory disparity because, as also shown above, these are just two different forms of “telecommunications,” not two different categories of regulatory jurisdiction. Thus, in all of AWS’s CMRS lines of business it remains a

²³ The PPC Act expressly mandates “common carrier obligations.” 47 U.S.C. §228(c). In 47 U.S.C. § 228(i), “pay-per-call” service is defined in part as any service involving “audio information or audio entertainment” [emphasis supplied]. Also, 47 U.S.C. § 228(c)(8)(A)(i) speaks of “calls made to the information service from the subscriber’s phone line” [emphasis supplied]. Finally, 47 U.S.C. § 228(c)(7) references pay-per-call services as “audio information services” and “information conveyed during the call” [emphasis supplied]. Neither the PPC Act nor the PPC Rules define the term “information services.”

²⁴ Universal Service Report at para. 13. “The term ‘information service’ means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153 (20).

telecommunications carrier subject to common carrier regulation, despite the existence of any pay-per-call “information services.”

IV. ANY RECLASSIFICATION OF AWS’S CMRS VOICE CONTENT SERVICES MUST BE ACCOMPLISHED BY SEPARATE RULE MAKING

The *Universal Service Report* favorably discussed the reclassification of broadband services from the “telecommunications services” category to the “information services” category. However, the *Universal Service Report* was a report to Congress, not a rule making.²⁵ Any reclassification of wireless broadband offerings from “telecommunications services” to “information services” would require a rule making.²⁶ In fact, the Commission has already chosen to proceed by rule making when exploring the reclassification of broadband Internet access in the context of the wireline and cable industries.²⁷

The instant PPC Proceeding is not the place to make *ad hoc* decisions on transformational issues such as wireless broadband Internet access. The narrow purpose of the PPC Proceeding is to decide whether to modify the PPC Rules. Within the scope of that common carrier inquiry, the Commission has asked whether certain calling

²⁵ Universal Service Report at para. 1.

²⁶ 47 U.S.C. § 332(c)(1) permits the Commission to “specify by regulation” that certain common carrier provisions are not applicable to a particular CMRS service or party.

²⁷ In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, Notice of Proposed Rule Making in CC Docket Nos. 02-33, 95-20 and 98-10, 17 FCC Rcd 3019 (2002); In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rule Making in GN Docket No. 00-185 and CS Docket No. 02-52, 17 FCC Rcd 4798 (2002).

arrangements should be exempt from the PPC Rules.²⁸ It did not ask whether any party should be exempt from common carrier jurisdiction altogether.

Even if the Commission were to reclassify wireless broadband Internet access, it would still need to determine the regulatory status of specific Internet-based calling services, known as “IP telephony,” that run on wireless broadband platforms. The *Universal Service Report* addressed those issues but declined to make any definitive pronouncements “in the absence of a more complete record focused on individual service offerings.”²⁹

The FBI is especially concerned about the treatment of those wireless broadband applications under CALEA. CALEA requires “telecommunications carriers” to upgrade their networks so law enforcement agencies can conduct lawful electronic surveillance on whatever services those carriers employ to allow a customer to originate, terminate, or direct communications.³⁰

CALEA solutions have already been devised for wireless voice content services such as those currently offered by AWS.³¹ However, if the Commission redesignates the broadband versions of those services as “information services,” carriers may decide not to bring them into compliance with CALEA, thus fracturing the implementation of this important public safety mandate. For example, a non-compliant network element may be

²⁸ PPC NPRM at paras. 47-48.

²⁹ Universal Service Report at para. 83.

³⁰ In the Matter of Communications Assistance for Law Enforcement, Second Report and Order in CC Docket No. 97-213, 15 FCC Rcd 7105 (1999) at para. 2 (citing 47 U.S.C. § 1002(a)).

³¹ It is the FBI’s understanding that AWS has already installed and deployed the industry-adopted “J-Standard” CALEA solution for this purpose.

unable to intercept certain required call identifying information, which in turn may foil a criminal investigation.

A reclassification of wireless broadband might also raise doubts about the applicability of other important Congressional mandates such as the enhanced location (“E911”) requirement governing CMRS carriers.³² All the more reason why the Bureau should leave the wireless reclassification issue for another day.

V. THE FCC CAN READILY RESOLVE AWS’S PPC CONCERNS WITHOUT TRIGGERING THE COMPLEX ISSUES OF REGULATORY RECLASSIFICATION

The Bureau can readily resolve the PPC concerns of AWS without addressing AWS’s more ambitious reclassification proposal. As long as the Bureau finds that AWS’s broadband CMRS voice content services do not implicate the PPC Act or the PPC Rules, the Bureau already has the authority to exempt AWS from those rules. A limited PPC Rule exemption would meet AWS’s goals of “resolving the ambiguities in the pay-per-call rules” and “encouraging the development of broadband services”³³ without treading on dangerous jurisdictional ground.

VI. CONCLUSION

The Bureau is confronted with an unfortunate confusion over the term “information services.” To resolve this confusion, The FBI respectfully requests the Bureau to: (1) clarify that the Communications Act employs two very different uses of the term “information services;” (2) clarify that AWS’s CMRS voice content services are

³² See Universal Service Report at para. 91.

³³ AWS Comments at 9-10.

“telecommunications services;” and (3) deny AWS’s implied request to exempt those services from common carrier jurisdiction.

Respectfully submitted,

THE FEDERAL BUREAU OF INVESTIGATION

By: /s/ Patrick W. Kelley

Patrick W. Kelley
Deputy General Counsel
Office of the General Counsel
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535
(202) 324-3000

Dated: May 27, 2003

CERTIFICATE OF SERVICE

I, Christine C. White, Executive Assistant with the Electronic Surveillance Technology Section of the Federal Bureau of Investigation, hereby certify that on this 27th day of May, 2003, the foregoing Reply Comments of the Federal Bureau of Investigation were filed electronically on the FCC's Electronic Comments Filing System and paper or electronic copies were served via U.S. Mail or electronic mail, as indicated, to the following:

K. Dane Snowden, Chief
Consumer & Governmental
Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
ksnowden@fcc.gov

Calvin Osborne
Attorney Advisor
Consumer & Governmental
Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
cosborne@fcc.gov

John Muleta, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
jmuleta@fcc.gov

Edmond J. Thomas, Chief
Office of Engineering and Technology
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
ethomas@fcc.gov

Julius P. Knapp, Deputy Chief
Office of Engineering and Technology
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
jknapp@fcc.gov

J. Scott Marcus
Senior Advisor for Internet Technology
Office of Strategic Planning and
Policy Analysis
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
jmarcus@fcc.gov

Qualex International
Portals II
445 12th Street, S.W.
Room CY-B402
Washington, DC 20554
qualexint@aol.com

James E. Fox*
PO Box 367
Mendham, NJ 07945

Joseph G. Dicks
Law Offices of Joseph G. Dicks, APC
750 B Street, Suite 2720
San Diego, CA 92101
jdicks@jgdlaw.com

Howard J. Symons
Mintz, Levin, Cohn, Ferris, Glovsky and
Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, DC 20004
hjsymons@mintz.com

Adelle Simpson*
20096 Hwy 139
Brierfield, AL 35035

Walter Steimel, Jr.
Greenberg Traurig, LLP
800 Connecticut Avenue, N.W.
Suite 500
Washington, DC 20006
steimelw@gtlaw.com

Richard A. Rocchini*
AT&T Corporation
Room 3A227
One AT&T Way
Bedminster, NJ 07921

Ian D. Volner*
Venable, Baetjer, Howard &
Civiletti, L.L.P.
1201 New York Avenue, N.W.
Suite 1000
Washington, DC 20005

Joel R. Dichter
Klein, Zelman, Rothermel &
Dichter, L.L.P.
485 Madison Avenue
15th Floor
New York, NY 10022-5803
jdichter@legal.org

Marilyn Fox*
5114 E. Karen Drive
Scottsdale, AZ 85254

Michael James*
MicroVoice Applications, Inc.
5100 Gamble Drive
Minneapolis, MN 55416

John P. Lawless*
2910 Mill Street
Reno, NV 89502-2176

/s/ Christine C. White
Christine C. White

*via U.S. Mail