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

In the Matter of	)	
	)	
Amendments To Harmonize and Streamline Part 20	)	WT Docket No. 16-240
of the Commission's Rules Concerning	)	
Requirements for Licensees To Overcome a CMRS	)	
Presumption	)	

To: The Commission

COMMENTS
AND REQUEST FOR DECLARATORY RULING OR, IN THE ALTERNATIVE, REQUEST FOR FURTHER NOTICE OF PROPOSED RULEMAKING
OF THE
ENTERPRISE WIRELESS ALLIANCE

Respectfully submitted,

ENTERPRISE WIRELESS ALLIANCE

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EXECUTIVE SUMMARY

The Enterprise Wireless Alliance ("EWA" or "Alliance") supports the Federal Communications Commission ("FCC" or "Commission") proposal to eliminate FCC Rule Section 20.9 and make related rule changes that clarify which wireless services are presumptively classified as Commercial Mobile Radio Service ("CMRS"). Additionally, EWA urges the FCC to issue a declaratory ruling clarifying that 800 MHz and 900 MHz Specialized Mobile Radio ("SMR") systems that are not interconnected with the public switched network cannot be classified as CMRS or regulated as common carriers – or, therefore, as telecommunications carriers – in accordance with Section 332(c) of the Communications Act.

The Commission is correct that Rule Section 20.9 serves no useful regulatory or public interest purpose. The presumptions embodied in it have proven inaccurate as entities other than CMRS operators have made substantial, productive use of certain categories of spectrum identified in that rule. The FCC routinely grants waivers of the presumption upon proper showings, allowing non-CMRS entities to utilize that spectrum, but the waiver process imposes burdens both on the Commission and applicants for no useful purpose. The better approach is the one proposed in this proceeding whereby applicants will self-certify their regulatory status consistent with the definitions in Rule Section 20.3. The Alliance further recommends that the FCC retain the current common carrier, non-common carrier, and private internal categories as they allow applicants to more clearly identify how they intend to deploy the spectrum requested.

EWA also urges the FCC to issue a declaratory ruling confirming that non-interconnected 800/900 MHz SMR licensees are not common carriers. Congress has made this conclusion inescapable: (1) Section 332(c)(2) provides that "[a] person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a

common carrier for any purpose under this Act." (2) Section 332(d)(3) defines "private mobile service" to mean "any mobile service … that is not a commercial mobile service or the functional equivalent of a commercial mobile service.…" (3) Section 332(d)(1) defines "[c]ommercial mobile service" to mean "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 substantial portion of the public.…" Congress therefore has explicitly and unambiguously provided that a mobile service that is not an interconnected service cannot be treated as a common carrier service.

Such a ruling also would resolve any question about whether non-interconnected SMRs may be classified as telecommunications service providers as the FCC already has determined that the term encompasses only service provided on a common carriage basis:

> We find that the definition of "telecommunications services" in which the phrase "directly to the public" appears is intended to encompass only telecommunications provided on a common carrier basis.[1]

[1] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *First Report and Order*, 12 FCC Rcd 8776 (1997; *See also, Federal-State Joint Board on Universal Serv*., CC Docket No. 96-45, Order on Remand. 16 FCC Rcd 571 at ¶ 2 (2000) ("ICN Order") (citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourth Order on Reconsideration, 13 FCC Rcd 5318 (1997)). *See also* 47 C.F.R. § 1.907: *Wireless Telecommunications Services*. Wireless Radio Services, whether fixed or mobile, that meet the definition of "telecommunications service" as defined by 47 U.S.C. 153, as amended**, and are therefore subject to regulation on a common carrier basis** (emphasis added)**.**

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The Enterprise Wireless Alliance ("EWA" or "Alliance"), in accordance with Section 1.45 of the Federal Communications Commission ("FCC" or "Commission") rules, respectfully submits its comments regarding the Notice of Proposed Rulemaking in which the Commission has proposed to eliminate FCC Rule Section 20.9 and make related rule changes that clarify which wireless services are presumptively classified as Commercial Mobile Radio Service ("CMRS").[2] Additionally, in accordance with Section 1.4 of the Commission's rules, EWA urges the FCC to issue a declaratory ruling clarifying that 800 MHz and 900 MHz Specialized Mobile Radio ("SMR") systems[3] that are not interconnected with the public switched network cannot be classified as CMRS or regulated as common carriers – or, therefore, as

[2] In the Matter of Amendments To Harmonize and Streamline Part 20 of the Commission's Rules Concerning Requirements for Licensees to Overcome a CMRS Presumption, WT Docket No. 16-240, *Notice of Proposed Rulemaking*, 31 FCC Rcd 8470 (2015) ("NPRM").

[3] Only 800/900 MHz commercial systems are classified as SMR in the Part 90 services. Commercial systems in lower bands are not given that designation.

telecommunications carriers – in accordance with Section 332(c) of the Communications Act,[4] an issue that is substantially related to those raised in the instant proceeding. This declaration would resolve an area that has been the subject of confusion for a number of years and, in the opinion of the Alliance, will align the Commission's rules and policies with the express and unambiguous language of the Communications Act.

I INTRODUCTION

EWA represents a broad alliance of business enterprise users, service providers, radio dealers and technology manufacturers. Many of its members hold authorizations for spectrum licensed under Parts 22, 80 and 90 of the FCC rules. Some members operate systems that are used to provide commercial dispatch service; others use this spectrum to satisfy the internal communications needs of their business enterprises. Some chose to assign portions of their spectrum holdings to other entities, including commercial, business enterprise, or, in some cases, state and local government users. The Commission is correct that the presumption of CMRS status in Rule Section 20.9 is not consistent with the FCC's current flexible regulatory approach and serves no useful purpose. EWA supports its elimination along the lines outlined in the NPRM. However, the Alliance also requests that the FCC use this opportunity to resolve the related issue of 800/900 MHz regulatory classification as described in the Declaratory Ruling request below.

II FCC RULE SECTION 20.9 SHOULD BE ELIMINATED.

The NPRM describes in detail the origins of Rule Section 20.9. It was adopted in 1994 in response to the statutory distinction between "commercial mobile services" and "private mobile services"[5] enacted by Congress in its effort to promote regulatory symmetry among mobile radio

[4] 47 U.S.C. § 332(c).
[5] The equivalent terminology in the FCC rules is CMRS and Private Mobile Radio Service ("PMRS").

services that were considered to be similar in nature. Both categories of service are defined in Section 332(d) of the Communications Act.[6]

As explained in the NPRM, Rule Section 20.9 lists a number of wireless services that, at the time the rule was adopted, were deemed presumptively to be CMRS and, therefore, treated as common carriage services. The rule subdivides the identified services into two categories and prescribes a process for overcoming the CMRS presumption for each category.

While some of the identified services, for example the cellular service, continue to meet the CMRS definition in Section 332(d) of the Communications Act,[7] the spectrum allocated to a number of the other services, over time, has proved to be useful to and needed by entities with non-CMRS operations. The FCC recognized as early as 2005 that certain spectrum authorized under Part 22 provided attractive capabilities for non-interconnected commercial service providers, business enterprise users, and public safety entities. It modified its rules to provide greater flexibility and eliminated the requirement that only common carriers could hold such authorizations.[8] However, it left in place the corollary provisions of Rule Section 20.9. Thus, while the Part 22 rules are sufficiently flexible to permit, for example, a local government entity

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[6] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b) ("1993 OBRA"), amending the Communications Act of 1934 and codified at 47 U.S.C. § 332.

[7] Section 332(d) reads as follows:

> Definitions. For purposes of this section—
> (1) the term "commercial mobile service" means any mobile service (as defined in section 153 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;
> (2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B); and
> (3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission (emphasis added).

[8] *See* Amendment of Part 22 of the Commission's Rules To Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review—Amendment of Parts 1, 22, and 90 of the Commission's Rules, WT Docket No. 03-103, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 4403 (2005).

to hold an authorization, such applicants nonetheless need to include a request for a waiver of Rule Section 20.9. As noted in the NPRM, while such waivers are granted routinely, they automatically take the application out of the Immediate Approval Processing procedures and require a minimum 14-day public notice process.[9] This delays what otherwise would be a simple licensing action, involves the expenditure of human resources with the associated costs by both the applicant and the FCC, and serves no public interest purpose.

The NPRM proposes to update the Part 20 rules by, among other actions, eliminating Rule Section 20.9, thereby eliminating the CMRS presumption for the services listed. Instead, applicants and licensees would notify the Commission of their regulatory status when filing an application for an initial, modified, or assigned license, basing their selection on the definitions of CMRS and PMRS in Rule Section 20.3. Those definitions essentially track the language in Section 332(d) of the Communications Act, including the criterion that a system claiming CMRS status is "an interconnected service."[10]

The Alliance supports this proposal.[11] As explained in the NPRM, there has been increasing PMRS demand for certain spectrum currently classified presumptively as CMRS. The uses to which these entities put this spectrum unquestionably provide substantial benefits to the American public by supporting emergency responders, by increasing the efficiency of American industry, or by providing local, dispatch, commercial service that focuses on business and local government entities with group call needs that are met efficiently, both from a spectrum and cost perspective, on this type of non-cellularized system. The fact that the FCC's

[9] NPRM at ¶ 8.
[10] 47 C.F.R. § 20.3
[11] As a member of the Land Mobile Communications Council ("LMCC"), EWA already is on record in support of eliminating the need for waivers to overcome the Rule Section 20.9 CMRS presumption, a requirement the LMCC described as "an unnecessary burden on applicants and the FCC staff." Comments of the LMCC, WT Docket No. 14-180 at 4 (filed Dec. 17, 2014).

records are essentially devoid of proceedings in which the claimed CMRS or PMRS status of an applicant or licensee has been challenged, based on "functional equivalency" or any other argument, confirms that the rules do not need to specify services with a CMRS presumption or define the means of overcoming it.

The NPRM notes that current terminology would allow parties to specify their regulatory status as common carrier (and thus subject to CMRS obligations), non-common carrier (not subject to CMRS obligations) or private (also not subject to CMRS obligations).[12] It queries whether these categories should be replaced with CMRS and PMRS.[13]

EWA recommends that the Commission retain the three alternatives currently used on the Form 601. The Part 90 spectrum below 512 MHz is available for both private internal and commercial systems. When these systems qualify under Rule Section 90.187 for centralized trunked status, their station class is identified as FB8 whether the spectrum is being used for internal or commercial service.[14] There also are private internal systems and non-interconnected commercial systems using Part 22 and Part 80 spectrum today; commercial systems identify their systems as non-common carrier, while internal users select the private category. Those selections appear on the Main page of each license in the ULS database, so interested parties can determine easily whether a system is commercial or private. If these alternatives are not maintained, both types of applicants would be identified as PMRS. Determining the actual use of the spectrum would require pulling up the application itself to examine the response to Item #2 on Schedule H, where applicants are required to describe the activity for which they will use the requested spectrum. This additional, sometimes time-consuming step will be avoided by

[12] NPRM at n. 27.
[13] NPRM at ¶ 26.
[14] As discussed below, the same issue will arise in the 800/900 MHz bands if the Declaratory Ruling is granted, since non-interconnected SMRs and private internal licensees both would be identified as PMRS with stations classes of FB2.

retention of the three categories identified above. At least with respect to Part 90 services, this will be less, not more confusing, than classifying all entities as CMRS or PMRS.

While the Alliance supports the proposed deletion of Rule Section 20.9, that support is conditioned on the FCC addressing the issue raised in the Declaratory Ruling request below. EWA urges the Commission to resolve an inconsistency between the FCC's regulatory classifications and the Communications Act by modifying the Section 20.3 PMRS definition to specifically identify non-interconnected 800/900 MHz SMR systems as PMRS and affirming, consistent with Section 332(c) of the Communications Act, that PMRS systems may not be classified or treated as common carriers for any purpose. Absent such a ruling, deleting Rule Section 20.9 would result in greater inconsistency in the rules than exists today. Rule Section 20.9(a)(4) explicitly classifies only interconnected SMRs as CMRS. (As discussed below, the Commission nonetheless and inexplicably rejects applications from non-interconnected SMR applicants that identify themselves as non-common carrier, and thus PMRS, entities.) By contrast, although the CMRS definition in Rule Section 20.3 includes interconnection as an essential element, the contrasting definition of a PMRS system lists a number of service and system types, but does not identify non-interconnected SMR systems as one of those services.

III REQUEST FOR DECLARATORY RULING

The Alliance has sought FCC clarification regarding the classification and treatment of mobile systems that are not interconnected with the public switched network on more than one occasion. It did so in the August 14, 2013 Supplement to Petition for Partial Reconsideration filed by EWA and the USMSS, Inc. in CC Docket No. 96-115. The FCC has never acted on that Petition. The Alliance's January 31, 2011 request for guidance regarding compliance with CPNI requirements turned on this same issue and the FCC's response, in the Alliance's opinion, did

not resolve the question raised in reference to the unambiguous language of the Communications Act.[15]

The requested Declaratory Ruling requires resolution of two questions:

1) May a non-interconnected mobile system be classified and regulated as a common carrier service despite Section 332(c) of the Communications Act that (a) classifies all mobile systems as either CMRS or PMRS; (b) includes as an essential element of CMRS classification that the system be interconnected with the public switched network; and (c) states that a person engaged in providing PMRS "shall not…be treated as a common carrier for any purpose under this Act?"[16]
2) Does the term "telecommunications service" apply only to service provided on a common carrier basis?

A. The Communications Act's Definition of CMRS/PMRS is Determinative with Respect to Whether a Non-Interconnected System May be Classified and Regulated as a Common Carrier by the FCC.

Despite the express language of the Communications Act, the Commission staff has taken the position that 800/900 MHz SMRs, whether or not interconnected, are common carriers with a CMRS regulatory status because they are permitted to serve "the public." Applications for 800/900 MHz SMR systems are routinely rejected if they assert non-interconnected, non-common carrier status.[17] Rule Section 90.603 does allow all SMR licensees to serve individuals, federal government agencies, and other Part 90 eligible entities. However, SMRs, other than those that qualify as an Enhanced Specialized Mobile Radio System ("ESMR") pursuant to Rule Section 90.7, which, by definition, are interconnected, are highly limited in their spectrum

[15] See Letter from Austin C. Schlick, General Counsel to Mark E. Crosby, President/CEO dated Feb. 28, 2011.
[16] 47 U.S.C. § 332(c).
[17] See, *e.g.*, FCC File No. 0007409589.

capacity and geographic coverage. Their ability to hold themselves out indifferently to the public is circumscribed by the practical limitations of their systems.

But even if these SMR licensees could be characterized as serving the public, Congress has already determined that – unless interconnected – they "shall not…be treated as a common carrier for any purpose under this [Communications] Act."[18] This language could not be clearer or have been more purposefully drafted. Section 332(c) was enacted in response to concerns that Nextel Communications, Inc. operated an interconnected, cellular-like 800/900 MHz SMR system effectively on a nationwide basis, but was subject to distinctly different regulatory obligations than competitive cellular systems licensed under Part 22 of the FCC rules.[19] Interconnection, the ability to establish communications paths between radio devices on the mobile network and telephones on what was then the landline network, was and remains a fundamental capability of cellular-like systems and distinguishes them from other commercial mobile systems.

The FCC itself recognized this distinction in Rule Section 20.9, which included only "**Specialized Mobile Radio services that provide interconnected service** (part 90 of this chapter)" (emphasis added) as "mobile services [that] **shall be treated as common carriage services and regulated as commercial mobile radio services**."[20] This rule faithfully tracks the Congressional directive in Sections 332(c) and (d) of the Communications Act. The Commission staff is free to believe that Congress was wrong (and that its own Rule Section 20.9 was wrong) and that all systems capable of serving the public meet the historical definition of

[18] *See* n. 13 *supra*.
[19] The FCC subsequently adopted Part 90 definitions of and rules for "800 MHz Cellular System," "800 MHz High Density Cellular Systems," and "Enhanced Specialized Mobile Radio" systems that maintain the distinction between cellularized and dispatch SMR systems. See 47 C.F.R. § 90.7.
[20] 47 C.F.R. § 20.9(a)(4).

common carriage and should be classified as such, but that opinion cannot override the contrary Congressional decision with respect to mobile systems.

The regulatory treatment of PMRS and CMRS systems is governed by Section 332(c) of the Communications Act. Under the statute, mobile systems that are not interconnected with the public switched network are classified as PMRS and may not be treated as a common carrier for any purpose under the Communications Act.

Congress has made this conclusion inescapable. As discussed above, and to reiterate: (1) Section 332(c)(2) provides that "[a] person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this Act." (2) Section 332(d)(3) defines "private mobile service" to mean "any mobile service … that is not a commercial mobile service or the functional equivalent of a commercial mobile service.…" (3) Section 332(d)(1) defines "[c]ommercial mobile service" to mean "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 substantial portion of the public.…" Congress therefore has explicitly and unambiguously provided that a mobile service that is not an interconnected service cannot be treated as a common carrier service.

B. The Term Telecommunications Service Encompasses Only Telecommunications Provided on a Common Carrier Basis.

The term telecommunications service is defined in the Communications Act as 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."[21] It is,

[21] *See* n. 5 *supra*.

effectively, a restatement of the traditional common carrier definition. The FCC has stated repeatedly that the term encompasses only service provided on a common carriage basis:

> We find that the definition of "telecommunications services" in which the phrase "directly to the public" appears is intended to encompass only telecommunications provided on a common carrier basis.[22]

Non-interconnected SMR do offer service for a fee, and the FCC generally has interpreted the term "the public" broadly, despite regulatory and practical limitations on the class of users that can be served.[23] However, the Commission's view regarding this facial conformance with the telecommunications service definition, in EWA's opinion, is not determinative. Section 332(c) defines the permissible regulatory treatment of all mobile services. It establishes a bright line demarcation between those that may be treated as common carriers – and, therefore, as telecommunications service providers – for regulatory purposes under Title II or any other provision of the Act, and those that may not.

Specifically, Congress determined that only persons engaged in the provision of a CMRS service (which Congress defined as an interconnected service[24]) may be treated as common carriers.[25] Thus, it expanded the traditional definition of common carriage to add a criterion for mobile operations that the service also must be interconnected. Conversely, the Act states that a

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[22] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *First Report and Order*, 12 FCC Rcd 8776 (1997; *See also, Federal-State Joint Board on Universal Serv*., CC Docket No. 96-45, Order on Remand. 16 FCC Rcd 571 at ¶ 2 (2000) ("ICN Order") (citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourth Order on Reconsideration, 13 FCC Rcd 5318 (1997)). *See also* 47 C.F.R. § 1.907: *Wireless Telecommunications Services*. Wireless Radio Services, whether fixed or mobile, that meet the definition of "telecommunications service" as defined by 47 U.S.C. 153, as amended**, and are therefore subject to regulation on a common carrier basis** (emphasis added)**.**

[23] *See, e.g*., ICN Order. EWA urges the Commission to revisit this interpretation. As discussed above, in EWA's view non-interconnected 800/900 MHz SMRs should not be treated as telecommunications service providers because they do not offer "telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.…" 47 U.S.C. § 153(46). Instead of being available to the public, their offerings are more limited because of their limited spectrum capacity and geographic coverage. The fact that they may be "permitted" by the FCC's rules to offer their service on a common carrier basis is not determinative. The statutory test is whether these carriers choose to offer their services as common carriers. As EWA has explained, 800/900 MHz SMRs are constrained from making this choice because of the practical limitations of their networks.

[24] *See* 47 U.S.C. § 332(d)(1).

[25] *Id*., § 332(c)(1)(A).

person engaged in providing PMRS "shall not…be treated as a common carrier **for any purpose** under this Act."[26] Because the Act prohibits the FCC from regulating PMRS as a common carrier offering, and because the FCC has determined that the provision of telecommunications service constitutes common carriage, the Act exempts PMRS providers, those providing non-interconnected, for-profit mobile service, from obligations associated with their provision of telecommunications service.

This interpretation is consistent with prior FCC decisions in this area. Thus, the FCC concluded that the Iowa Communications Network ("ICN"), which operated a state-owned fiber optic telecommunications network, was a telecommunications carrier, despite ICN's argument that legal restrictions limited the entities eligible to be served on the network, a characteristic shared with most PMRS licensees because of FCC eligibility rules.[27] The FCC concluded that, "…restrictions on eligibility to use a carrier's services do not necessarily preclude common carrier status."[28] However, because ICN was not providing a mobile service, its regulatory treatment was not governed by Section 332(c) of the Act, and the FCC was not required to consider whether the system was interconnected with the telephone network.

By contrast, interconnection was the determinative criterion in the FCC's denial of a request from Maritime Communications/Land Mobile, LLC ("Maritime") on behalf of Waterway Communication System, LLC and Mobex Network Services, LLC, in which Maritime argued that it was not required to make Universal Service Fund ("USF") contributions.[29] The FCC disagreed with Maritime's claim that it was not a mandatory contributor to USF and, specifically, that the limited universe of users to which it was permitted to provide mobile service dictated

[26] *Id*. § 332(c)(2) (emphasis added).
[27] ICN Order at ¶ 8; *see, e.g.*, 47 C.F.R. § 90.179(a).
[28] ICN Order at ¶ 8.
[29] *Universal Service Contribution Methodology Request for Review by Waterway Communications System, LLC and Mobex Network Services, LLC*, WC Docket No. 06-122, *Order*, 23 FCC Rcd 12836 (2008).

that it did not serve "the public" and should not be classified as a telecommunications carrier.[30] In denying the request, the FCC relied on the fact that the Automated Maritime Telecommunications Service that Maritime was authorized to provide was required to be interconnected with the public switched network. Because it was an interconnected mobile service, it was required by the Communications Act to be classified by the FCC as CMRS and properly could be categorized as a telecommunications service and regulated as a common carrier offering.[31]

The FCC's decision in the Maritime case stands for the proposition, in the case of mobile service providers, that the issue of whether they are subject to requirements imposed on common carriers/telecommunications service providers is determined by whether the mobile service involved is interconnected. If it is not, then Section 332(c) of the Act requires that the service provider not be treated as a common carrier/telecommunications service provider and may not be made subject to requirements applicable to them.

To reach a different conclusion would deprive Section 332(c) of its intended and explicitly described purpose: establishing different regulatory structures for commercial mobile systems that are and are not interconnected.[32] A different label does not alter the outcome. There is no practical distinction for mobile service providers between being classified and regulated as a common carrier versus a telecommunications service provider.[33] Both involve the

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[30] *Id*. at ¶ 10.
[31] *Id*.
[32] PMRS systems used for private internal purposes by business enterprise and governmental entities clearly were not the focus of this regulatory distinction, as they do not provide a service to third parties at all.
[33] *See* Peter K. Pitch & Arthur W. Bresnahan, *Common Carrier Regulation of Telecommunications Contracts and the Private Carrier Alternative*, 48 FED. COMM. L.J. 447, 451-52 (1996):

> The Telecommunications Act of 1996 neither disturbs the common carrier classification nor provides any additional guidance as to its meaning. In addition, many of the new provisions of the Act apply to "telecommunications carriers" which are defined to include … any provider of "telecommunications services." A "telecommunications service," in turn, is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be

types of obligations that Congress expressly determined, in Section 332, would apply only to interconnected mobile systems.

In light of the unambiguous language of the Communications Act, and subsequent FCC decisions consistent with that Congressional directive, EWA believes that the issue is ripe for resolution through a Declaratory Ruling: 800/900 MHz SMRs that are not interconnected are properly classified as non-common carrier PMRS licensees and may not be treated as common carriers for any purpose under the Act, regardless of whether their activities involve the provision of "telecommunications service," as that term is defined by the Act.

EWA acknowledges that the statutory definition of "telecommunications service" and the provisions of Section 332 of the Act may be construed as being in conflict in the case of 800/900 MHz SMRs, if the Commission were to treat these carriers as telecommunications service providers whose services are provided on a common carrier basis. The conflict would arise because Section 332(c)(2) specifically provides that private mobile service providers such as 800/900 MHz SMRs shall not be treated as common carriers for any purpose under the Act.

To the extent the Commission perceives these provisions to be in conflict, EWA suggests that the Commission should consider the relevance of a rule of statutory construction providing that, if two provisions of a statute apply, and one of the provisions is general while the other is specific, then the specific provision controls.[34] Application of this rule of construction would result in a conclusion that 800/900 MHz SMRs may not be made subject to common carrier

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> effectively available directly to the public, regardless of the facilities used." … [A]n essential element of common carriage is the holding out of a service to the public. Thus, it appears from the definitions of "telecommunications service" and "telecommunications carrier" in the Telecommunications Act of 1996 that Congress has extended the common carrier classification and, therefore, the private carrier distinction, to assist in the identification of entities and services to be subject to the requirements of the new law.

[34] *See* 3 Norman J. Singer & J.D. Shambie Singer, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:05, at 177 (7th Ed. 2008) (emphasis added) (stating that, "[w]here there is inescapable conflict between general and specific terms or provisions of a statute, the specific will prevail").

regulation because, notwithstanding the fact that their operations fall within the general definition of "telecommunications service" in Section 3(46) of the Act,[35] the provisions of Section 332(c)(2) specifically and unambiguously provide that private mobile service providers shall not be treated as common carriers.

EWA notes, however, that this canon of statutory construction applies only "where the conflict between the statutory provisions is inescapable, that is, where there is no plausible construction of either provision that allows the conflict to be reconciled."[36] EWA suggests a possible reconciliation of Sections 3(46) and 332(c)(2).

Specifically, the sole purpose of the former section is to define "telecommunications service" for purposes of the Act, and the definition makes clear that a principal component of a telecommunications service is that it is offered on a common carrier basis. Section 3(46) does not itself create any obligations or requirements applicable to telecommunications service providers. One must look to other provisions of the Act to ascertain these obligations and requirements.

Section 332(c)(2), in turn, specifies that providers of private mobile service—even if they may be classified as "telecommunications service" providers under the Section 3(46) definition—are not to be treated as common carriers for purposes of applying any of the obligations, requirements, or other provisions of the Act. Under this reading, there is no inherent or inescapable conflict between the definitional section and Section 332(c)(2). The latter section does not impinge upon the definitional section, but instead provides a substantive rule that

[35] 47 U.S.C. § 153(46).

[36] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, Second Order on Reconsideration, 12 FCC Rcd 8653, 8674 (¶ 40) (1997) ("Second Reconsideration Order") (emphasis in original).

private mobile service providers are not subject to common carrier regulation even if their operations are treated as "telecommunications services."

Further, the Section 332(c)(2) provision exempting private mobile service providers from any common carrier regulation under the Act is not inescapably in conflict with provisions of the Act that do impose common carrier regulation on telecommunications service providers. For example, Section 251(a)(1) of the Act imposes an interconnection obligation on "telecommunications carriers," which are defined in Section 3(44)[37] to mean providers of telecommunications services.

Section 332(c)(2) has, in effect, created an exception to the application of Section 251(a)(1), by providing that its common carrier obligations will not apply to private mobile service providers, regardless of whether these providers may be classified as "telecommunications service" providers. The substantive requirements of Section 251(a)(1) are not limited or otherwise altered, but the scope of their application is narrowed to account for the specific exception Congress enacted in Section 332. This "plausible construction of [the two sections] allows [the Commission] to reconcile the apparent conflict, making sense of both provisions and serving the purposes of the statute to the greatest extent possible."[38]

If the FCC disagrees, then the Alliance requests that the FCC issue a Further Notice of Proposed Rulemaking or a Public Notice seeking comment on the Alliance's position on this issue.

[37] 47 U.S.C. 153(44).
[38] Second Reconsideration Order, 12 FCC Rcd at 8674 (¶ 40).

IV CONCLUSION

For the reasons discussed herein, EWA recommends deletion of Rule Section 20.9 conditioned on the modification of Rule Section 20.3 as described above and conditioned on adoption of a Declaratory Ruling or a Further Notice or Proposed Rulemaking as addressed herein.

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