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

In the Matter of		
	)	
Regulatory Classification of 800/900 MHz Specialized Mobile Radio ("SMR") Service Systems	) WT Docket No. _____	

PETITION FOR DECLARATORY RULING

Pursuant to Section 1.2 of the Federal Communications Commission's ("FCC") rules, the Enterprise Wireless Alliance ("EWA") requests the FCC to confirm that 800/900 MHz Specialized Mobile Radio ("SMR") service systems[1] that are not interconnected with the public switched telephone network are private mobile systems in accordance with 47 U.S.C. § 332(d) and, in accordance with 47 U.S.C. § 332(c)(2), may not be classified or regulated as common carriers for any purpose under the Communications Act of 1934 ("Act"). Such a ruling would be consistent with the January 2, 2025, Opinion of the United States Court of Appeals for the Sixth Circuit in its so-called "net neutrality" decision.[2]

In that Opinion, the Court determined that 47 U.S.C. § 332(d), enacted by Congress in 1993,[3] classified all mobile systems as either private or commercial, with the two categories being mutually exclusive. The statutory definitions are determinative:

> (1) the term "commercial mobile service" means 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;

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[1] *See* 47 C.F.R. § 90.7: *Specialized Mobile Radio system.* A radio system in which licensees provide land mobile communications services (other than radiolocation services) in the 800 MHz and 900 MHz bands on a commercial basis to entities eligible to be licensed under this part, Federal Government entities, and individuals.

[2] *Ohio Telecom Ass'n v. FCC*, Nos. 24-7000/3449/3450/3497/3504/3507/3508/3510/3511/3519/3538 (6th Cir., Jan. 2, 2025) ("6th Cir. or "Court").

[3] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 1033-66, Title VI, § 6002(b)(2)(A), 107 Stat. 312, 392 (1993) ("Budget Act").

(2) ….
(3) the term "private mobile service" means any mobile service…that is not a commercial mobile service or the functional equivalent of a commercial mobile service….[4]

Section 332(c)(2) states:

> 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.[5]

The Court concluded, in accordance with these statutory definitions, that because mobile broadband service is not interconnected with the public switched telephone network and therefore is not a commercial mobile service it must be classified as a private mobile service.

Background

Section 332(c) of the Act was enacted in response to concerns that Nextel Communications, Inc. (then FleetCall, Inc.) operated a nationwide, interconnected, cellular-like 800/900 MHz SMR system, but was subject to distinctly different regulatory obligations than competitive cellular systems licensed under Part 22 of the FCC's rules. The FCC also anticipated allocating spectrum to the Personal Communications Service, another competitive, cellular-like mobile service whose regulatory classification needed to be determined.[6] This amendment to the Act reflected a Congressional determination that interconnection, the ability to establish communications paths between and among wireless devices on a variety of mobile networks and telephones operating on what then was the landline network, was a fundamental feature of cellular-like systems.

[4] 47 U.S.C. § 332(d) (emphasis added).
[5] 47 U.S.C. § 332(c). This section is entitled "Regulatory Treatment of Mobile Services." It provides for only two categories of mobile services: Commercial Mobile Services (CMRS in the FCC rules) and Private Mobile Services (PMRS in the FCC rules).
[6] *Amendment of the Commission's Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314 ET Docket No. 92-100, Notice of Proposed Rule Making and Tentative Decision, 7 FCC Rcd 5676 (1992).

Under Section 332(c) of the Act, CMRS systems, by definition, are interconnected, provide telecommunication service for a fee to the public, and are to be regulated as common carriers. PMRS licensees are defined, among other elements, by what they are not – they are not interconnected – and "shall not…be treated as a common carrier for any purpose."[7]

The Commission confirmed these definitions the following year:

> It is against this background that Congress enacted Section 6002(b) of the 1993 Budget Act[8] to revise Section 332 of the Communications Act. The amended statute changes the prior regulatory regime in two significant respects. First, **Congress has replaced the common carrier and private radio definitions that evolved under the prior version of Section 332 with two newly defined categories of mobile services**: commercial mobile radio service (CMRS) and private mobile radio service (PMRS). CMRS is defined as "any mobile service (as defined in section 3(n)) 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." PMRS means "any mobile service (as defined in section 3(n)) that is not a commercial mobile service or the functional equivalent of a commercial mobile service.[9]

It stated further:

> The Conference Report explains that the intent of Congress is that "consistent with the public interest, similar services are accorded similar regulatory treatment. This objective was accomplished by **replacing the common carrier and private carrier classifications that had evolved under the prior statute with the new categories of CMRS and PMRS**.[10]

It explained the regulatory classification of SMRs in this way:

> [M]ost SMR licensees automatically meet two of the elements of the CMRS definition. First, because all our rules define SMR licensees as "commercial" service providers, they are by definition providing for-profit service.… Second, we have concluded that the SMR end user eligibility criteria set forth in our rules allow licensees to make service available to the public. With respect to the "interconnection" element of the definition, however, our rules allow but do not require SMRs to provide interconnected service to subscribers. We therefore conclude that

[7] 47 U.S.C. § 332(c).
[8] Budget Act.
[9] Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 at ¶ 11 (1994) ("CMRS 2nd R&O") (footnotes omitted) (emphasis added).
[10] *Id*. at ¶ 13 (emphasis added).

> classification of all SMR systems turns on whether they do, in fact, provide interconnected service as defined by the statute. Licensees who provide interconnected service will be classified as CMRS providers, while those who do not will be classified as PMRS providers.[11]

Finally, the Commission also stated the following:

> We believe that by using the phrase "interconnected service," Congress intended that mobile services should be classified as commercial services if they make interconnected service broadly available through their use of the public switched network. The purpose underlying the congressional approach, we conclude, is to ensure that **a mobile service that gives its customers the capability to communicate to or receive communication from other users of the public switched network should be treated as a common carriage offering** (if the other elements of the definition of commercial mobile radio service are also present, or if the service can be deemed the functional equivalent of CMRS).[12]

Current Status

Some of the earliest non-interconnected SMR licenses were granted with a non-common carrier regulatory status. However, while the origins and timing of this change are not clear, at some point staff within the Wireless Telecommunications Bureau ("WTB") adopted a different position. The electronically generated licenses of non-interconnected SMR systems can show a PMRS regulatory status, however applicants are required to self-identify as seeking common carrier regulatory status on the FCC Form 601. Selecting the non-common carrier classification results in the return and ultimately the dismissal of the application.

This position was explained as follows in a Return Notice sent to one SMR applicant:

> "Common carrier" is the correct regulatory status for any SMR license, regardless of interconnection, because SMR operators are telecommunications carriers under the Communications Act.… The Commission has stated that Section 332 of the Communications Act does not bar imposing common carrier regulation on PMRS providers.…. SMRs offer telecommunications for a fee to the public, so they are common carriers, despite the fact that non-interconnected SMR stations are PMRS rather than CMRS.[13]

[11] *Id*. at ¶ 90.
[12] *Id*. at ¶ 54 (footnotes omitted) (emphasis added).
[13] Notice of Return, FCC File No. 0007655162, Reference No. 6260298 (May 20, 2017).

In support of this conclusion, WTB cited the following statement from a 1996 Commission rule-making proceeding:

> [T]o the extent a PMRS provider uses capacity to provide domestic or international telecommunications for a fee directly to the public, it will fall within the definition of "telecommunications carrier" under the Act.[14]

That interpretation takes out of context a single sentence from a single paragraph in a document, the text of which runs 658 pages and 1,441 paragraphs. A reading of the *Interconnection Order* in its entirety confirms that the FCC did not intend to, and did not, disturb the Section 332(c) definitional distinction between CMRS and PMRS licensees. Moreover, the FCC lacked authority to alter the statutory definitional distinction.

The *Interconnection Order* was adopted by the FCC in response to the restructuring of the local, interexchange, and international telephone markets mandated by the Telecommunications Act of 1996.[15] A fundamental element of this restructuring was requiring incumbent local exchange carriers ("LECs") "to **provide interconnection** to any requesting telecommunications carrier at any technically feasible point."[16]

The sentence cited in the Return Notice is in Section IX of the *Interconnection Order*, which is entitled "Duties Imposed on 'Telecommunications Carriers' by Section 251(a)." In that Section, the FCC stated:

> Parties generally agree with our tentative conclusion that, to the extent a carrier is engaged in providing for a fee **local, interexchange, or international services,** directly to the public or to such classes of users as to be effectively available to the public, that carrier falls within the definition of "telecommunications carrier."[17]

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[14] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499 at ¶ 993 (1996) ("*Interconnection Order*").
[15] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et. seq.*
[16] *Interconnection Order* at ¶ 26 (emphasis added).
[17] *Id.* at ¶ 987 (emphasis added).

As with the rest of the *Interconnection Order*, it is clear that the Commission is talking about carriers that offer interconnected telephone-type service, not two-way dispatch service that has no interconnection capability. It is instructive to read the entire paragraph from which that sentence has been quoted:

> We believe, as a general policy matter, that all telecommunications carriers that compete with each other should be treated alike regardless of the technology used unless there is a compelling reason to do otherwise. We agree with those parties that argue that **all CMRS providers are telecommunications carriers and are thus obligated to comply with section 251(a)**. **These carriers meet the definition of "telecommunications carrier" because they are providers of telecommunications services as defined in the 1996 Act and are thus entitled to the benefits of section 251(c), which include the right to request interconnection and obtain access to unbundled elements at any technically feasible point in an incumbent LEC's network**. PMRS is defined as any mobile service that is not a commercial service or the functional equivalent of a commercial mobile service. We conclude that **to the extent a PMRS provider uses capacity to provide domestic or international telecommunications for a fee directly to the public**, it will fall within the definition of "telecommunications carrier" under the Act and will be subject to the duties listed in section 251(a).[18]

The most reasonable interpretation of this statement is that a PMRS licensee that devotes some portion of its capacity to the provision of an interconnected for-profit domestic or international service to the public does not shield itself from the attendant common carriage obligations by virtue of its parallel PMRS status.

In amending Section 332(c) of the Act, Congress replaced the traditional common carrier definition (a definition indistinguishable from the definition of telecommunications service) for purposes of mobile telecommunications service providers. That provision of the statute adds interconnection as an essential element of classification as CMRS and specifies that persons providing the only other category of mobile service – PMRS – may not be treated as common carriers

[18] *Id*. at 993 (emphasis added).

(or, thus, telecommunications service providers) for any purpose.[19] To reach a different conclusion would deprive Section 332(c) of its intended and explicitly described purpose of establishing different regulatory structures for commercial mobile systems providing service to the public that are and are not interconnected.

As the 6th Circuit concluded: "In sum, mobile broadband does not qualify as 'commercial mobile service' under § 332(d)(1) [because it is not interconnected with the public switched telephone network] and therefore may not be regulated as a common carrier."[20]

Classification as Common Carrier/Telecommunications Carrier Subjects Non-Interconnected SMR Systems to Unnecessary, Even Impossible Regulatory Obligations

Allowing non-interconnected SMR systems to carry a PMRS label on the face of the license has no legal or practical significance if the applicant is required to identify itself as a common carrier in its application. The only regulatory difference between a non-interconnected mobile system, a PMRS license, and an interconnected mobile system, a CMRS license, is the statutory exclusion from being regulated as a common carrier if classified as PMRS. That distinction is eliminated if the applicant must designate common carrier status.

The FCC rules governing common carriers do not carve out an exemption for common carriers holding PMRS licenses, nor should they since the Act states that PMRS licensees may not be regulated as common carriers for any purpose. The designation of non-interconnected SMR systems as common carriers because they appear to conform to the definition of

[19] The FCC has stated repeatedly that the term telecommunications service 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." *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 at ¶ 10 (2008).

[20] 6th Cir. at p. 26.

"telecommunications providers" is a nomenclatorial upending of the explicit directive of the Act that must be corrected.

The illogic of the current interpretation was further highlighted in 2017 when the FCC adopted rule changes recognizing the public interest and legal appropriateness in allowing wireless mobile licensees to designate their regulatory status consistent with their operations and with the rules governing the service.[21] Those changes were intended to harmonize regulatory requirements across services and eliminate unnecessary regulatory burdens. For example, applicants for Part 22 Paging and Radiotelephone Service authorizations that allow the provision of commercial service to the public generally, service that had been classified presumptively as common carrier/CMRS,[22] are now permitted to identify themselves as non-common carriers if their services are not interconnected. In all but one instance the Commission's goals have been achieved. Applicants may now designate their regulatory status as common carrier, non-common carrier, or private in all mobile bands – except 800/900 MHz SMR applicants.

The legally unsupportable exclusion of the 800/900 MHz SMR service from those rule changes has significant implications for licensees in the SMR service. Labelling non-interconnected SMR systems as common carriers/telecommunications carriers imposes a number of regulatory obligations, most of which assume customers have devices used to connect with other devices equipped with telephone numbers or to access the internet, not two-way radios used to communicate with similarly equipped users. The following list of common carrier regulations is illustrative, not exhaustive, of obligations to which SMR service providers could be subject:[23]

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[21] *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, Report and Order, 32 FCC Rcd 10731 (2017).

[22] 47 C.F.R. §§ 22.501 *et seq.*

[23] The list does not include CMRS obligations that perhaps are avoidable with the PMRS designation on the SMR license itself.

Part 1: Subpart CC: Foreign Ownership Rules

Part 6: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities

Part 9: 911 Requirements

Part 32: Uniform System of Accounts for Telecommunications Companies

Part 36: Jurisdictional Separations Procedures; Standard Procedures for Separating Telecommunications Property Costs, Revenues, Expenses, Taxes and Reserves for Telecommunications Companies

Part 42: Preservation of Records of Communication Common Carrier

Part 43: Reports of Communication Common Carriers, Providers of International Services and Certain Affiliates

Part 51: Interconnection

Part 52: Numbering

Part 54: Universal Service

Part 59: Infrastructure Sharing

Part 64: Miscellaneous Rules Relating to Common Carriers (including, but not limited to, Communications Assistance for Law Enforcement Act and Customer Proprietary Network Information)

Form 499

Requested Ruling

The staff decision to classify non-interconnected SMR systems as common carriers was due to a misinterpretation of the FCC decisions discussed in this Petition. That interpretation is contrary to the express language of the Act, as affirmed by the Court in the recent 6th Cir. decision. EWA requests the FCC to (1) correct WTB's erroneous interpretation; and (2) establish a process for misclassified licensees to correct the regulatory status on their authorizations with no FCC processing fee and no frequency coordination or other filing requirement.

Respectfully submitted,

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May 28, 2025