

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Amendment of Part 22 of the Commission’s	)	WT Docket No. 03-103
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	)	

**REPLY COMMENTS**

The Washington, D.C. telecommunications law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast (“BloostonLaw”), on behalf of its clients that are licensees under Part 22 of the Commission’s Rules, hereby submits these reply comments in the above captioned matter.<sup>1</sup>

The Commission proposes to revise or eliminate the Part 22 Public Mobile Services (“PMS”) rules that have become obsolete as the result of technological change, Commercial Mobile Radio Services (“CMRS”) competition, and supervening changes to related Commission rules.

BloostonLaw supports the Commission’s decision to eliminate unnecessary restrictions on Part 22 license holders and, in this regard, recommends that the Commission make it clear that Part 22 licensees may operate as either “common carriers” or “private users.”

The record in this proceeding reflects that the overwhelming majority of commenters agree that the Commission should liberalize its spectrum policy and modify Part 22 of its rules by eliminating any requirement that Part 22 licensees operate as “common carriers.” Clarifying that licensees have a choice as to their regulatory status will widen the potential use of PMS

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<sup>1</sup> See 68 FR 44003. The Commission’s *Notice* was released April 28, 2003.

spectrum so that these licensees will have the flexibility to provide more varied and innovative communications services.

The Joint Commenters oppose the deletion of the term “common carrier” from Part 22 of the Commission’s rules.<sup>2</sup> The Joint Commenters appear to be concerned that the proposed modification would eliminate common carrier status as a possibility, and thereby eliminate important regulatory protections that accompany this status. BloostonLaw agrees that the Commission should not deprive Part 22 licensees of the *opportunity* to elect common carrier status, and to thereby garner the benefits (and responsibilities) of being a common carrier with regard to important issues such as interconnection rights and the Health Insurance Portability and Accountability Act of 1996 (“HIPPA”), consistent with the Communications Act of 1934, as amended. However, the Part 22 rules should be clear that such licensees are not *required* to be common carriers. The Commission has already implemented its flexible spectrum use policy in an across-the-board fashion, and investments have been made by Part 22 licensees in reliance on this flexibility. Moreover, the ability of Part 22 licensees to choose their regulatory status furthers the public interest, and the Congressional mandate that there be regulatory parity between Part 22 and Part 90 licensees that operate in a similar fashion.

**I. The Commission Should Permit Part 22 Licensees To Elect Operation As Non-Common Carriers**

BloostonLaw and other commenters agree that the Commission should eliminate any notion that PMS licensees must operate as “common carriers.”<sup>3</sup> Instead, the Commission should

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<sup>2</sup> Joint Commenters Comments at 1. The Joint Commenters comprise Arch Wireless Operating Company, Inc., the Allied National Paging Assn., the American Association of Paging Carriers, Metrocall Holdings, Inc.

<sup>3</sup> See, e.g., Comments of Cingular Wireless at 17-18, Joint Comments of Emergency Radio Service Inc., Saia Communications, Inc., KTI, Inc., and Texas License Consultants at 2-4, Comments of the American Mobile Telecommunications Association, Inc., at 6.

reword its rules to clarify that Part 22 licensees may operate on a CMRS or *Private Mobile Radio Service (PMRS)* basis, and that such licensees will be subject to the rights and obligations of the regulatory regime that they have elected. Instead of replacing the term “common carrier” in Part 22.7 with the term “licensee,” BloostonLaw suggests that the Commission perhaps consider replacing the term “licensee” with the phrase “CMRS providers and PMRS users.” In this way, confusion as to the type of entities eligible to hold authorizations under Part 22 will be minimized.

BloostonLaw respectfully disagrees with the Joint Commenter’s assertion that the replacement of the term “common carrier” with “licensee” would mean that a PMRS provider could no longer operate or be recognized as a “common carrier” because of the descriptive nature of that very term.<sup>4</sup> The term “licensee” does not restrict whether a Part 22 licensee could operate as a common carrier, a non-common carrier, or a private user. As BloostonLaw described in its comments, if a PMS licensee wants to elect common carrier status, the licensee will still be entitled to the full rights of that regulatory status guaranteed by the Communications Act of 1934, as amended. To the extent that this is not clear in the wording of the proposed rule changes, it should be made clear.

The Joint Commenters also express concern that by deleting references to “common carrier” in Part 22, the regulatory 1993 OBRA benchmark would be improvidently blurred. The Commission has both the authority and the directive to change the PMS licensee eligibility characteristic by allowing licensees to choose between CMRS and PMRS status. Part 90 paging licensees (who can configure their systems to provide the same services as Part 22 paging operations) have been given the choice between CMRS and PMRS status, pursuant to Congress’

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<sup>4</sup> Joint Commenters at 5-6.

regulatory parity mandate.<sup>5</sup> If Section 22.7 is interpreted to require common carrier status for Part 22 licensees, it would be contrary to the regulatory parity that the Commission has already been implementing through its policies and practices.

The Commission's decision to implement a flexible use policy, with relaxed service and use restrictions, dictate that Part 22 licensees have the option to operate on a PMRS basis. For example, as BloostonLaw explained, Rule Sections 24.12 and 27.12 governing Personal Communications Services and Miscellaneous Wireless Services, respectively, do not limit license holders to entities that already are or plan to become common carriers.<sup>6</sup> Retaining the "common carrier" requirement suggested by the Joint Commenters would contravene the Commission's flexibility policy and create an anomaly to the scheme set in place for PCS and other services where private user status may be elected. Moreover, it would impair the ability of paging carriers and other licensees to enter into innovative arrangements with hospitals, state and local governments and large corporations, to establish specialized, exclusive use systems on a cost-effective basis. At a time when paging services are suffering in the marketplace, these arrangements will become an increasingly important way for Part 22 licensees to remain viable and make full use of their spectrum.

The Joint Commenters are also concerned that the exemption from privacy provisions of HIPPA would be lost if the common carrier language eliminated.<sup>7</sup> The exemption applies to business associates of covered entities acting as a conduit for transmitting protected information.

This assertion again brings home the point that the Joint Commenters may wrongly believe that

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<sup>5</sup> See, *Public Notice, Information for Part 90 Licensees Subject to Reclassification as CMRS Providers on August 10, 1996*, 11 FCC Rcd. 9267 (rel. August 6, 1996)(stating that Part 90 paging licensees can elect PMRS status by providing non-interconnected or private use service; can switch from CMRS to PMRS status after their initial election; and can choose dual CMRS/PMRS status).

<sup>6</sup> 47 C.F.R. §§ 24.12, 27.12.

<sup>7</sup> Joint Commenters at 7-8. Able Communications Comments at 4.

replacing the term “common carrier” with the term “licensee” would mean that a Part 22 licensee could no longer operate or be recognized as a common carrier. While it is important to clarify that Part 22 licensees continue to have the option to operate on a common carriage basis, and retain their rights as “common carriers,” it is equally important, as demonstrated by the comments submitted in this proceeding, to permit those licensees choosing to operate on a non-common carrier basis to do so.<sup>8</sup>

## II. Conclusion

As the Comments filed in this proceeding demonstrate, modifying the common carriage language allows and encourages Part 22 licensees to more fully utilize their assigned frequencies. It also allows further development of secondary markets as licensees will be able to offer any underutilized frequencies to a larger class of entities as both common carriers and non-common carriers will be able to utilize the PMS frequencies. However, the Commission should clarify that the planned revisions to Part 22 will permit common carriers and non-common carriers alike to have the same opportunity to utilize PMS spectrum; and that Part 22 licensees who elect CMRS status will have the same rights and obligations as other CMRS carriers.

Respectfully submitted,

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<sup>8</sup> Regarding air-ground station operators, Able Communications questions the legality of removing the common carrier status of such operators and suggest consumers may be harmed from a transition from common carrier to private carrier licensing. Because of the unusual nature of air-ground operations, BloostonLaw does not oppose this position.

## CERTIFICATE OF SERVICE

I, Douglas W. Everette do hereby certify that I have on this 23<sup>rd</sup> day of October, 2003, had copies of the foregoing REPLY COMMENTS delivered to the following via U.S. mail:

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