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

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	

SECOND REPORT AND ORDER

Adopted: February 3, 1994; **Released:** March 7, 1994

By the Commission: Commissioner Barrett issuing a statement.

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I. INTRODUCTION

1. This Report and Order revises our rules to implement Sections 3(n) and 332 of the Communications Act of 1934 (the Act), as amended by Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 (Budget Act).[1] The Budget Act was signed into law on August 10, 1993. On September 23, 1993, we adopted a Notice of Proposed Rule Making in this proceeding,[2] in which we sought comment on: (1) definitional issues raised by the Budget Act; (2) which existing mobile services and future mobile services should be classified as "commercial mobile radio services" (CMRS) under the statute and which should be classified as "private mobile radio services" (PMRS); and (3) which provisions of Title II of the Communications Act should not be applied to commercial mobile radio services. We have received 76 comments and 52 reply comments in response to the *Notice* in this proceeding.[3]

2. The Order reflects the Commission's efforts to implement the congressional intent of creating regulatory symmetry among similar mobile services. First, we interpret the statutory elements that define commercial mobile and private mobile radio service. Second, using these definitions, we determine the regulatory status of existing mobile services and of personal communications services (PCS). Third, for those services that will be classified as CMRS, we address the degree to which such services will be subject to regulation under Title II of the Act. We also address other issues raised in the *Notice,* including interconnection rights, and preemption of state regulatory authority over mobile service providers.[4] Additional issues raised by the Budget Act, such as revisions to our technical rules needed to implement the regulatory scheme discussed herein, will be addressed in a Further Notice of Proposed Rule Making to be issued shortly, and, consistent with the Budget Act, will be resolved by August 10, 1994.[5] We also anticipate that we will initiate several other proceedings to address related issues.[6]

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[1] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993).

[2] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Notice of Proposed Rule Making, 8 FCC Rcd 7988 (1993) (*Notice*).

[3] For a list of parties filing comments and reply comments, see Appendix D.

[4] In an earlier action in this docket we established filing procedures for foreign ownership waivers pursuant to the Budget Act. Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, First Report and Order, FCC 94-2 (released Jan. 5, 1994)(*First Report and Order*). See para. 12 and note 536, *infra*. We are aware that the treatment of alien ownership of CMRS and other common carrier services is of concern to many parties. We intend to examine this issue in a future proceeding.

[5] Budget Act, § 6002(d)(3).

[6] *See* Part IV.C, para. 285, *infra*.

II. BACKGROUND

A. Legislative and Commission Actions Prior to Budget Act

1. *Regulatory Classification of Mobile Services*

3. The Commission has a long history of regulating mobile radio services for the purpose of encouraging the growth of the mobile services industry so that consumers will have greater options for meeting their communications needs. The Commission has traditionally classified land mobile radio services[7] into two categories: private land mobile services and public mobile services.[8] Public mobile services are subject to common carrier regulation under Title II of the Communications Act, which, among other things, requires common carriers to provide service upon reasonable request[9] and prohibits unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication services.[10] Common carriers are generally subject to state regulation of intrastate services if a state chooses to regulate those services.[11] In addition, Section 310(b) of the Communications Act limits alien ownership of common carrier radio licensees.

4. Private land mobile services, on the other hand, developed to provide service tailored to the needs of particular user groups, such as local governments, public safety organizations, and businesses requiring specialized services that common carriers could not readily provide. Most early private radio services were established to enable specific user groups to build their own systems for internal use. As the demand for private service grew, however, the Commission also authorized licensees in some services to offer "private carrier" service, *i.e.*, service to limited groups of third-party users on a for-profit basis.[12] In either case, private radio was not subject to common carrier regulation at either the state or the federal level.

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[7] Other categories of mobile services include marine and aviation services, mobile satellite services, and certain personal radio services. These categories are addressed in our discussion of the definition of "mobile service" under Section 3(n) of the Act. See Part III.B.1, paras. 30-38, *infra*.

[8] Traditionally, the most common type of public mobile service was radio telephone service which interconnected with existing telephone systems. Private services were predominantly dispatch services such as those operated by police departments, fire departments, and taxicab companies, for their own purposes. Private services also extended to services provided to eligible users by third party providers. *See* National Ass'n of Reg. Util. Comm'ners v. FCC, 525 F.2d 630, 634 (D.C. Cir. 1976) (*NARUC I*).

[9] Communications Act, § 201, 47 U.S.C. § 201.

[10] *Id.*, § 202, 47 U.S.C. § 202.

[11] The Commission may preempt State regulations when interstate and intrastate services are inseparable and state regulations would thwart or impede federal policies. *See* Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986) (*Louisiana PSC*); Maryland Pub. Serv. Comm'n v. FCC, 909 F.2d 1510 (D.C. Cir. 1990); California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Illinois Bell Tel. Co. v. FCC, 883 F.2d 104 (D.C. Cir. 1989)(*NARUC II*); National Ass'n of Reg. Util. Comm'ners v. FCC, 880 F.2d 422 (D.C. Cir. 1989); Public Util. Comm'n of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1989)(*Texas PUC*); North Carolina Util. Comm'n v. FCC, 552 F.2d 1036 (4th Cir.)(*NCUC I*), *cert. denied*, 434 U.S. 874 (1977); North Carolina Util. Comm'n v. FCC, 537 F.2d 787 (4th Cir.)(*NCUC II*), *cert. denied*, 429 U.S. 1027 (1976).

[12] *See* Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz, Docket No. 18262, Second Report and Order, 46 FCC 2d 752 (1974), *recon.*, 51 FCC 2d 945 (1975), *aff'd*, *NARUC I*.

5. In 1982, Congress amended the Communications Act by adding Section 3(gg) and Section 332(c). The purposes of adding these provisions were: (1) to define private land mobile service; (2) to distinguish between private and common carrier land mobile services; and (3) to specify the appropriate authorities empowered to regulate these same services.[13] Section 3(gg) defined private land mobile service as "a mobile service . . . for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation."[14] In addition, Section 332(c)(3) preempted state authority to impose rate or entry regulation upon any private land mobile service.

6. The Commission interpreted Section 332(c)(1) of the Act as confirming that the commercial sale of interconnected telephone service was a common carrier offering, but also concluded that the statute allowed private land mobile services to interconnect with the public switched telephone network and retain their regulatory status so long as the licensee did not profit from the provision of interconnection.[15] In a parallel development, the Commission concluded that Section 332 allowed it to extend the range of eligible users for Specialized Mobile Radio (SMR) and Private Carrier Paging (PCP) services, enabling licensees in these services to offer service to a broad customer base with only minimal restrictions.[16]

7. The Commission's decisions, however, also created the prospect of direct competition between private land mobile services and similar common carrier services under disparate regulatory regimes. In 1991, for example, we authorized Fleet Call, Inc. (now Nextel Corp.) to develop an SMR system that Fleet Call claimed would offer wide-area, digital voice and data service comparable or superior to cellular in quality.[17] Similarly, the liberalization of the Commission's PCP rules made it difficult for consumers to distinguish private paging from common carrier paging. Because of the greater degree of regulation imposed on common carriers (federal and state regulation) than on private carriers, common carriers argued that continuing to treat wide-area SMRs and PCPs as private carriers placed competing common carrier services at a regulatory disadvantage. In 1992, this debate was given new urgency by the Commission's proposal to allocate spectrum to PCS.[18] In its PCS proposal, the Commission left open the

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[13] H.R. Rep. No. 97-765, 97th Cong., 2d Sess., at 54 (1982).

[14] Communications Act, § 3(gg), 47 U.S.C. § 153(gg)(Budget Act, § 6002(b)(2)(B)(ii)(II), struck this provision).

[15] *See* Interconnection of Private Land Mobile Systems with the Public Switched Telephone Network in the Bands 806-821 and 851-866 MHz, Docket No. 20846, Memorandum Opinion and Order, 93 FCC 2d 1111 (1983).

[16] *See* Amendment of Part 90, Subparts M and S of the Commission's Rules, PR Docket No. 86-404, Report and Order, 3 FCC Rcd 1838 (1988), *clarified,* 4 FCC Rcd 356 (1989); Amendment of the Commission's Rules To Permit Private Carrier Paging Licensees To Provide Service to Individuals, PR Docket No. 93-38, Report and Order, 8 FCC Rcd 4822 (1993)(*Private Paging Order*).

[17] *See* Fleet Call, Inc., Memorandum Opinion and Order, 6 FCC Rcd 1533, *recon. dismissed,* 6 FCC Rcd 6989 (1991) (*Fleet Call*). Although Fleet Call requested waiver of several sections of the Commission's Rules to construct its wide-area SMR system, we determined that it was necessary to waive only Section 90.631, which requires that trunked systems must be constructed within a one-year period. We granted a waiver of this section and provided Fleet Call five years to construct any stations that would be part of its digital networks. 6 FCC Rcd at 1535.

[18] 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) (*PCS Notice*).

question of whether PCS would be treated as a common carrier service, a private carrier service, or a combination of both.[19] The concern that a new generation of mobile services could be subject to inconsistent regulation caused many to argue that the existing regulatory regime should be revised.

2. *Competitive Carrier Decisions*

8. In its *Competitive Carrier* docket, the Commission classified common carriers with market power, such as the local exchange carriers (LECs) and American Telephone and Telegraph Company (AT&T), as dominant and thereby subject to full Title II regulation; carriers without market power were classified as non-dominant. Because non-dominant carriers lacked market power to control prices and were presumptively unlikely to discriminate unreasonably, the Commission adopted for them a policy of forbearance from certain regulations.[20] These carriers were not required to file tariffs under Section 203 of the Act and were not subject to certain other Commission regulations adopted pursuant to the authority of other Title II provisions. Non-dominant carriers did, however, remain subject to the general common carrier obligations of Sections 201 and 202 of the Act, and to the enforcement of these obligations pursuant to complaint procedures under Section 208.

9. Title II has been applied to paging and cellular services in somewhat different manners. The Commission has declared domestic public land mobile carriers, which are primarily providing paging services, to be non-dominant in their provision of interstate services.[21] Cellular service was designated as dominant by the Commission although without any analysis of the market power of cellular carriers.[22]

10. Last year, however, the United States Court of Appeals for the District of Columbia Circuit found the Commission's forbearance policy of permissive detariffing to be inconsistent

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[19] *Id.* at 5712-14 (paras. 94-98).

[20] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252 (*Competitive Carrier*), Notice of Inquiry and Proposed Rule Making, 77 FCC 2d 308 (1979) (*Competitive Carrier Notice*); First Report and Order, 85 FCC 2d 1 (1980) (*First Report*); Further Notice of Proposed Rule Making, 84 FCC 2d 445 (1981) (*Further Notice*); Second Further Notice of Proposed Rule Making, FCC No. 82-187, 47 Fed Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982) (*Second Report*), *recon.*, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rule Making, 48 Fed Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (*Fourth Report*), *vacated*, AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), *rehearing en banc denied*, Jan. 21, 1993; Fourth Further Notice of Proposed Rule Making, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984) (*Fifth Report*), *recon.*, 59 Rad. Reg. 2d (P&F) 543 (1985); Sixth Report and Order, 99 FCC 2d 1020 (1985) (*Sixth Report*), *rev'd*, MCI Telecomm. Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[21] *See* Preemption of State Entry Regulation in the Public Land Mobile Service, CC Docket No. 85-89, Report and Order, FCC 86-112, 59 Rad.Reg. (P&F) 1518 (1986), *remanded on other grounds*, National Ass'n of Reg. Util. Comm'ners v. FCC, No. 86-1205 (D.C. Cir. Mar. 30, 1987), *clarified*, Preemption of State Entry Regulation in the Public Land Mobile Service, CC Docket No. 85-89, Memorandum Opinion and Order, 2 FCC Rcd 6434 (1987), *citing Competitive Carrier, First Report; Competitive Carrier, Fifth Report.*

[22] *Competitive Carrier, Fifth Report*, 98 FCC 2d at 1204 n.41. *See also Competitive Carrier, Fourth Report*, 95 FCC 2d at 582.

with Section 203 of the Act.[23] As a result of this decision, mobile common carriers began to file new tariffs for their interstate services.

B. Budget Act Revisions

11. It is against this background that Congress enacted Section 6002(b) of the Budget Act 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."[24] 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."[25]

12. Second, Congress has replaced traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework and gives the Commission flexibility to establish appropriate levels of regulation for mobile radio services providers. Section 332(c) states that a person providing commercial mobile radio service will be treated as a common carrier, but grants the Commission the authority to forbear from applying the provisions of Title II, except for Sections 201, 202, and 208. Sections 332(c)(1)(A) and 332(c)(1)(C) identify the criteria for forbearance. The statute also preempt state regulation of entry and rates for both CMRS and PMRS providers. States, however, may petition the Commission for authority to regulate CMRS rates under some circumstances.[26] In addition, the Budget Act "grandfathers" the foreign ownership, as of May 24, 1993, of current private land mobile service providers that we reclassify as CMRS so that such providers are not required to divest their foreign ownership interests if they file a waiver request in a timely manner.[27] Finally, the statute requires the Commission to determine the regulatory status of PCS before February 6, 1994.[28]

III. DISCUSSION

A. Overview

1. *Congressional Objectives*

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[23] AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), *rehearing en banc denied*, Jan. 21, 1993, *cert. denied*, S. Ct. Docket No. 92-1684, 1993 Lexis 4392, 113 S. Ct. 3020, 61 U.S.L.W. 3853 (June 21, 1993). *See also* Tariff Filing Requirements for Interstate Common Carriers, CC Docket No. 92-13, Notice of Proposed Rule Making, 7 FCC Rcd 804 (1992), Report and Order, 7 FCC Rcd 8072 (1992), *rev'd*, AT&T v. FCC, No. 92-1628 (D.C. Cir. June 4, 1993), *cert. granted*, 62 U.S.L.W. 3375 (Nov. 29, 1993).

[24] Communications Act, § 332(d)(1), 47 U.S.C. § 332(d)(1).

[25] *Id.*, § 332(d)(2), 47 U.S.C. § 332(d)(2).

[26] *Id.*, § 332(c)(3), 47 U.S.C. § 332(c)(3).

[27] *See* note 4, *supra.*

[28] Communications Act, § 332(c)(1)(D), 47 U.S.C. § 332(c)(1)(D).

13. We believe Congress had two principal objectives in amending Section 332. First, Congress saw the need for a new approach to the classification of mobile services to ensure that similar services would be subject to consistent regulatory classification. The Conference Report explains that the intent of Congress is that, "consistent with the public interest, similar services are accorded similar regulatory treatment."[29] 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. By establishing a new class of commercial mobile radio services, Congress has taken a comprehensive and definitive action to achieve regulatory symmetry in the classification of mobile services.

14. The other congressional objective reflected in the statute was to ensure that an appropriate level of regulation be established and administered for CMRS providers. While the statute ensures that all CMRS providers will be subject to certain key requirements of Title II, Congress has given the Commission authority to forbear from applying other Title II provisions if such regulation is not needed to prevent unreasonably discriminatory rates or practices, or to protect consumers, and if such forbearance is consistent with the public interest (*e.g.*, the Commission action, by augmenting competition, promotes better services for consumers at reasonable prices). By taking these steps, Congress acknowledged that neither traditional state regulation, nor conventional regulation under Title II of the Communications Act, may be necessary in all cases to promote competition or protect consumers in the mobile communications marketplace.

15. The decisions we make in this Order thus are driven by these two congressional mandates. We believe the actions we take in this Order establish a symmetrical regulatory structure that will promote competition in the mobile services marketplace and will thus serve the interests of consumers while also benefiting the national economy. Moreover, in striving to adopt an appropriate level of regulation for CMRS providers, we establish, as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees who are classified as CMRS providers by this Order.

16. We have kept this objective in view in exercising the forbearance authority Congress included in the Budget Act. First, we forbear from imposing any tariff filing obligations upon CMRS providers. Second, we also forbear from establishing any market entry or market exit requirements under Section 214 of the Act. Third, although we have decided not to forbear with regard to certain other sections of Title II,[30] we also have decided not to invoke our authority under any of these provisions because we find no need to do so and we believe that the

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[29] H.R. Rep. 103-213, 103rd Cong., 1st Sess. 494 (1993) (Conference Report). *See also* H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 259-60 (House Report). Although commenters may disagree about the extent to which specific mobile services are similar, they almost unanimously agree that Congress intended these provisions of the Budget Act to create a system of regulatory symmetry. *See, e.g.*, AAR Reply Comments at 2; AMTA Comments at 4-5; American Petroleum Comments at 4; Ameritech Comments at 1-2; Arch Comments at 4; Bell Atlantic Comments at 2 (the "principle of 'regulatory parity' should serve as the polestar for this rulemaking"); CTIA Comments at 3; DC PSC Comments at 3; E.F. Johnson Comments at 3-4; LCRA Comments at 4; McCaw Comments at 1-2; Mtel Comments at 2; Nextel Comments at 5; NYNEX Reply Comments at 2; Pactel Paging Reply Comments at 9; Sprint Reply Comments at 1-2; UTC Comments at 3; Vanguard Comments at 2.

[30] We retain our authority under Section 213 (valuation of carrier property), Section 215 (transactions relating to services and equipment), Section 218 (inquiries into management), Section 219 (annual and other reports), Section 220 (accounts, records, and memoranda), and Section 221 (special provisions relating to telephone companies).

imposition of requirements under these provisions[31] could cause unwarranted burdens for carriers classified as CMRS providers. Fourth, we have vigorously implemented the preemption provisions of the Budget Act to ensure that state rate regulation of CMRS providers will be established only in the case of demonstrated market conditions in which competitive forces are not adequately protecting the interests of CMRS subscribers. Finally, although we have chosen not to forbear from specific provisions of Title II that are designed to protect consumers,[32] we do not believe that private carriers reclassified as CMRS providers will face any significant burdens as a result of becoming subject to these provisions. For example, private carriers reclassified as CMRS providers would face potential costs under Section 226 only to the extent they elect to engage in the provision of operator services.

17. We believe, based on the record before us, that private carriers who now will be regulated as CMRS providers will not find themselves confronted by a new set of burdensome regulatory requirements that might impede their provision of service or place them at a competitive disadvantage in the mobile services marketplace.[33] In deciding whether to impose regulatory obligations on service providers under Title II, we must weigh the potential burdens of those obligations against the need to protect consumers and to guard against unreasonably discriminatory rates and practices. In making this comparative assessment, we consider it appropriate to seek to avoid the imposition of unwarranted costs or other burdens upon carriers because consumers and the national economy ultimately benefit from such a course. In that regard, for example, we intend to issue a Further Notice of Proposed Rule Making in this proceeding to examine whether we should adopt further forbearance measures under Title II of the Communications Act (in addition to those taken in this Order) in the case of specified classes of CMRS providers. We conclude that our forbearance actions in this Order strike the proper balance in carrying out the congressional mandate.

2. *Impact on National Economy*

18. Before turning to our discussion of the specific issues addressed in this rule making, we present here a general economic analysis of the actions taken in the Order. We review the potential effect of our actions on the creation of jobs and the overall health of the national economy, the likelihood that our decisions will help spur investment in the nation's telecommunications infrastructure, and the effectiveness of our actions in enabling all Americans to gain access to the nation's information superhighway.

a. Fostering Economic Growth

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[31] We will, however, consider in a Further Notice requiring cellular licensees to submit information concerning their operations. *See* para. 194, *infra.*

[32] We do not forbear from Section 223 (obscene or harassing telephone calls), Section 225 (telecommunications services for hearing-impaired and speech-impaired individuals), Section 226 (Telephone Operator Consumer Services Improvement Act), Section 227 (restrictions on use of telephone equipment), and Section 228 (regulation of carrier offering of pay-per-call services).

[33] We will, however, shortly be issuing a Further Notice of Proposed Rule Making to gather a more comprehensive record regarding the impact of our decisions on certain classes of entities, and to determine whether further forbearance under Title II may be warranted. It also is significant that existing private mobile radio licensees that were licensed prior to August 10, 1993, and are subject to reclassification are further protected by the three-year transition period established in the Budget Act. In addition, any paging service utilizing frequencies allocated as of January 1, 1993, for private land mobile services is also protected by the Budget Act's three-year transition period. See Part IV.B, paras. 278-284, *infra.*

19. We believe our decisions in this Order will have a positive effect on job stimulation and economic growth because these decisions continue our efforts to foster competition in the mobile marketplace. This result will be achieved in the following ways. First, we interpret the elements of the commercial mobile radio service definition in a manner that ensures that competitors providing identical or similar services will participate in the marketplace under similar rules and regulations. Success in the marketplace thus should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs — and not by strategies in the regulatory arena. This even-handed regulation, in promoting competition, should help lower prices, generate jobs, and produce economic growth. We find support for our approach in the record of this proceeding.[34] To take one example, McCaw argues that:[35]

> Congress recognized that the implementation of original Section 332 had created a cockeyed marketplace in which enhanced specialized mobile radio licensees, but not their cellular competitors, were exempt from Title II of the Communications Act and from state regulation, and where radio common carriers were forced to compete against private carrier pagers that faced essentially no regulation at the Federal or state level. . . . It would thwart the intent of Congress . . . to define commercial mobile service in a manner that excluded *any* provider of interconnected service to the public or a substantial portion of the public. That term should be broadly construed, with exceptions only for services that cannot provide the functional equivalent of a commercial mobile service.

20. Second, competition will be enhanced by the interconnection policies we establish in this Order. By making clear that interconnection obligations currently imposed upon LECs with regard to current Part 22 providers will now apply to all CMRS providers, and that PMRS providers cannot be victimized by unreasonably discriminatory practices of LECs in their provision of interconnection, we ensure that competing mobile services providers all will have a fair opportunity to obtain access to the public switched network. These even-handed interconnection policies will promote competition, job creation, and economic growth.

21. Finally, this Order helps clear the way for the licensing of PCS. In expeditiously deciding regulatory classification issues applicable to PCS, we have taken a major step toward the establishment of PCS providers as participants in the mobile services marketplace. Although estimates vary, there is wide agreement that the development of PCS holds the promise of a significant increase in competition in mobile services and stimulation to the national economy.

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[34] *See* note 29, *supra*. Bell Atlantic, in an argument that is illustrative of the position taken by several parties, states that the Commission should:

> *Adopt a broad definition of "commercial mobile service" (CMS) and its related statutory terms, in order to assure that competing mobile services are classified as CMS and are treated alike.* . . . All services which in whole or in part are offered for profit to subscribers and that offer direct or indirect access to the public switched network should be considered CMS. Conversely, only a narrow group of genuinely private services would remain as private mobile services.

Bell Atlantic Comments at 2 (footnote omitted)(emphasis in original).

[35] McCaw Comments at 1-2 (footnote omitted)(emphasis in original).

b. Promoting Infrastructure Investment

22. The continued success of the mobile telecommunications industry is significantly linked to the ongoing flow of investment capital into the industry. It thus is essential that our policies promote robust investment in mobile services. In this Order, we try to promote this goal by ensuring that regulation is perceived by the investment community as a positive factor that creates incentives for investment in the development of valuable communications services — rather than as a burden standing in the way of entrepreneurial opportunities — and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.

23. First, in implementing the preemption provisions of the new statute, we have provided that states must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers. While we recognize that states have a legitimate interest in protecting the interests of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become as a burden to the development of this competition. Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our federal mandate for regulatory parity.

24. Second, we have decided to forbear from the application of the most burdensome provisions of Title II common carriage regulation to CMRS providers. Consequently, investors will be able to make funding decisions based upon their assessment of market forces and their analysis of the strengths and weaknesses of the various telecommunications companies competing in the mobile services marketplace.

25. Third, we have engendered a stable and predictable federal regulatory environment, which is conducive to continued investment in the wireless infrastructure. Our definition of CMRS not only represents fidelity to congressional intent, but also establishes clear rules for the classification of mobile services, minimizing regulatory uncertainty and any consequent chilling of investment activity. An example of our objectives in this regard can be seen in the way we have approached the issue of functional equivalence. By refusing to tie the definition of functional equivalence to particular mobile service technologies, we have sought to avoid creating rules that cause mobile radio service providers to be reclassified because of technological changes in the way they deliver essentially the same services. This approach should result in the durability of our regulatory classifications, thus promoting the regulatory predictability that is an important prerequisite for investment.

c. Enabling Access to Information Superhighway

26. Our national economy is strengthened and the public interest is served to the extent we are successful in promoting and achieving the broadest possible access to wireless networks and services by all telecommunications users. The economy can be fortified by a ubiquitous communications web that extends access to a multiplicity of transmission capabilities to a wide community of business and residential users. Therefore, one of our objectives in this proceeding is the creation of a regulatory framework that makes access to the wireless infrastructure available to all Americans, at economically efficient prices.

27. We believe that this objective is served by our decision here. First, in heeding the congressional objective of establishing a broad class of CMRS providers, we have ensured that business customers and individual customers using mobile services are given the benefit of the core protections of Title II of the Communications Act. By classifying many mobile services as commercial, we have taken a strong step toward guaranteeing that all consumers will have non-

discriminatory access to these services. Commenters in this proceeding have recognized the advantages that our approach will have for consumers. CTIA, for example, points out that:[36]

> A broad definition of commercial mobile service, which includes services meeting the statutory definition and their functional equivalents, is necessary to prevent the threat of artificial disparities developing over time among similar services which are subject to differing regulatory regimes. Services falling within this broad classification include all current common carrier services (including cellular), all paging services, all specialized mobile radio ("SMR") services, and most PCS applications. Consistent regulatory treatment will foster the competitive process and, concomitantly, the consumer.

We believe that mobile services will play an increasingly important role in the nation's telecommunications networks, and we believe that non-discriminatory access to mobile services will give all consumers the opportunity to realize the expanding benefits of wireless technologies. For example, mobile technologies are extending the range of telecommunications services available in areas where the provision of conventional wireline services is not economically feasible. This capability is illustrated by the fact that cellular and paging carriers are increasingly serving the communications needs of businesses and residents in rural areas; in many cases these needs had not been adequately met because of the prohibitive costs associated with furnishing conventional wireline service. We believe that this opportunity will translate into consumer demand for a wide variety of mobile services, and that this demand will generate economic growth. Specifically, economic growth will be stimulated by the fact that business operations will be made more efficient and business productivity will be increased as a result of improved business access to the public switched network.

28. Second, although no one can predict with certainty the course that the development of PCS will take, we believe that the family of personal communications services holds the potential of revolutionizing the way in which Americans communicate with each other. In this Order, we establish the regulatory framework for the development of PCS principally as broadly available CMRS offerings.[37]

29. Third, in addition to playing a role in fostering competition, the decisions we make in this Order regarding interconnection obligations will promote access to the telecommunications infrastructure. Commercial mobile radio services, by definition, make use of the public switched network; the interconnection policies we establish in this Order ensure that providers of mobile services and their customers receive the benefit of the broadest possible access to the switched network.

B. Definitions

1. *Mobile Service*

a. Background and Pleadings

30. Section 332 of the Communications Act, as revised by the Budget Act, governs the regulation of all "mobile services" as defined in Section 3(n) of the Act. The *Notice* explained that the definition of "mobile service" under revised Section 3(n) is similar to the prior version

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[36] CTIA Comments at iii.

[37] We note, of course, that we also have established procedures under which carriers will have an opportunity to offer PCS on a private basis. *See* para. 119, *infra*.

of Section 3(n).[38] The Budget Act, however, amended the definition of "mobile services" under Section 3(n) to include (1) traditional private land mobile services, which were previously defined in Section 3(gg) of the Act (now deleted); and (2) personal communications services, whether licensed in our PCS docket[39] or in any future proceeding. We tentatively concluded that this revised definition was intended to bring all existing mobile services within the ambit of Section 332. Therefore, we proposed to include within the mobile services definition public mobile services (Part 22), mobile satellite services (Part 25), mobile marine and aviation services (Parts 80 and 87), private land mobile services (Part 90), personal radio services (Part 95), and all personal communications services licensed or otherwise made available under proposed Part 99.

31. The commenters generally agree with our tentative conclusion that the statute seeks to bring all existing mobile service within the ambit of Section 332. Thus, they agree with our proposal to include within this definition all services regulated under Parts 22, 25, 80, 87, 90, and 95.[40] While the parties generally agree that PCS and private land mobile services are to be included within the definition of mobile services, Bell Atlantic asserts that the Commission should define mobile services to include all auxiliary services and other mobile services provided by mobile services providers that are authorized by the respective rules of that service.[41] In this regard, MCI maintains that Section 3(n) of the Act should be interpreted broadly to recognize that PCS encompasses the full range of services described in the Commission's *Notice of Proposed Rule Making* in the PCS proceeding, including ancillary fixed services.[42]

32. Metricom argues that the statutory language in amended Section 3(n) demonstrates that Congress intended to include only licensed PCS services in the definition of mobile service. Thus, it maintains that unlicensed PCS is not a mobile service and therefore not commercial mobile radio service. Likewise, it argues that Part 15 devices are not licensed mobile services and therefore not commercial mobile radio services. It contends that because the Commission has recognized that unlicensed PCS and Part 15 devices are generically identical, Part 15 devices should be treated in a manner similar to the treatment of unlicensed PCS.[43] USTA contends that unlicensed PCS devices fall within the mobile service definition because unlicensed PCS should be classified as either commercial or private mobile radio service based on how the service is offered.

33. Rockwell maintains that the definition of mobile services should be further clarified to ensure that communications facilities provided on a transportable platform that do not move when communications services are provided are not included within the term. It believes that

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[38] "Mobile service" continues to be defined as a "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves." This definition includes "both one-way and two-way radio communications services."

[39] *See* Amendment of the Commission's Rules To Establish New Narrowband Personal Communications Services, GEN Docket No. 90-314, First Report and Order, 8 FCC Rcd 7162 (1993)(*Narrowband PCS Order*), *recon.*, FCC No. 94-30, released Mar. 4, 1994 (*Narrowband PCS Reconsideration Order*); Amendment of the Commission's Rules To Establish New Personal Communications Services, GEN Docket No. 90-314, Second Report and Order, 8 FCC Rcd 7700 (1993) (*Broadband PCS Order*), *recon. pending*.

[40] *See, e.g.*, AMTA Comments at 6-7; NYNEX Comments at 4.

[41] Bell Atlantic Comments at 3-4.

[42] MCI Comments at 3-4.

[43] Metricom Comments at 1-5.

"mobile satcom equipment packaged in a briefcase" and dual-use equipment, such as Inmarsat-M terminals, should be considered fixed communications, not mobile services.[44] In addition, New York points out that the Commission has previously determined in its decisions regarding Basic Exchange Telecommunications Radio Service (BETRS) that merely substituting a radio loop for a wire loop in the provision of basic telephone service does not constitute mobile service under Section 3(n) of the Communications Act.[45]

b. Discussion

34. We agree with the commenters that the purpose of the legislation is to include all existing mobile services within the ambit of Section 332. Thus, we agree with the commenters that all public mobile services,[46] private land mobile services, and mobile satellite services should be included within the definition. We also agree with the commenters that most marine and aviation services regulated under Parts 80 and 87 meet the statutory definition of "mobile service" to the extent that the licensees do not provide fixed point-to-point service.

35. In addition, we agree with the commenters that all of the services regulated under Part 95, except for Interactive Video and Data Service (IVDS), which is a fixed service, meet the definition of mobile service. Therefore, we adopt the approach that we proposed in the *Notice* and include the services, with the exceptions noted in this Section and in the rules we adopt by our action in this Order, governed by Parts 22, 25, 80, 87, 90, and 95 within the mobile services definition. In accordance with the statute, we will also treat all personal communications services governed by Part 24 as mobile services.

36. In view of the goal of achieving regulatory symmetry by including all existing mobile services within the ambit of Section 332, we agree with Bell Atlantic that all auxiliary services provided by mobile services licensees[47] should be included within the definition of mobile services. For the same reasons we agree with MCI that all ancillary fixed communications offered by PCS providers should fall within the definition of mobile service.[48] This is consistent with the approach we have already taken in the PCS rule making proceeding, and we conclude that giving this scope to the definition of mobile service will ensure that mobile services providers will have the flexibility necessary to meet growing consumer demand for a broad range of mobile services.

37. We agree with Metricom that unlicensed Part 15 devices and unlicensed PCS should not be included within the definition of mobile services. Specifically, the Budget Act defined "mobile service" to include "service for which a license is required in a personal communica-

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[44] Rockwell Comments at 1-2.

[45] New York Comments at 4 n.1.

[46] This finding does not apply to Rural Radio Service, including BETRS, which is a fixed service. *See* para. 38, *infra.*

[47] For example, the Commission's Rules allow cellular service licensees to provide auxiliary common carrier service. Section 22.930 of the Commission's Rules, 47 C.F.R. § 22.930.

[48] As adopted in *Broadband PCS Order,* the term "Personal Communications Services" is defined as "[r]adio communications that encompass mobile and ancillary fixed communication that provide services to individuals and businesses and can be integrated with a variety of competing networks." 8 FCC Rcd at 7713.

tions service . . . .''[49] We agree with Metricom that this language refers only to licensed services. In addition, we note that in the *Broadband PCS Order*, we allocated the 1890-1930 Mhz band for unlicensed PCS devices[50] and included these devices under Part 15. In so doing, we indicated that ''this unlicensed approach could be expected to foster the rapid introduction of new PCS technologies by permitting manufacturers to introduce new products without the delays associated with the licensing of a radio service.''[51] Thus, we reject USTA's suggestion that unlicensed PCS should be classified as a mobile service. Accordingly, unlicensed PCS and Part 15 devices will not be included under the definition of mobile services. Finally, we conclude that mobile resale service is included within the general category of mobile services as defined by Section 3(n) and for purposes of regulation under Section 332, since resale of mobile service can only exist if there is an underlying licensed service. There is no indication in the statute or the legislative history that resellers are not ''mobile service'' providers or exempt from the Section 332 regulatory classification, and we see no reason to establish such an exemption.[52]

38. We also agree with Rockwell that satellite services provided to or from a transportable platform that cannot move when the communications service is offered should not be included within the definition of mobile service. These fixed services are used to provide disaster relief, temporary communications for news reporters and expeditions, and temporary communications in remote areas and cannot be used in a mobile mode. Services provided through dual-use equipment, however, such as Inmarsat-M terminals which are capable of transmitting while the platform is moving, are included in the mobile services definition. We also agree with New York that the substitution of a radio loop for a wire loop in the provision of BETRS does not constitute mobile service for purposes of our definition. As the Commission noted in the BETRS proceeding,[53] this service was intended to be an extension of intrastate basic exchange telephone service. Thus, the radio loop merely takes the place of wire or cable, which in rural and geophysically rugged areas is often prohibitively expensive to install and maintain.

2. *Commercial Mobile Radio Service*

a. Service Provided for Profit

(1) *Background and Pleadings*

39. The first prong of the statutory definition of CMRS requires that the service must be one ''that is provided for profit.''[54] In the *Notice*, we asked commenters to address four basic issues: (1) whether Special Emergency Radio Services provided to public safety entities on a for-

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[49] Communications Act, § 3(n)(3), 47 U.S.C. § 153(n)(3), as added by Budget Act, § 6002(b)(2)(B)(ii)(I).

[50] Unlicensed PCS devices are defined in new Section 15.303(g) as ''intentional radiators operating in the frequency band 1890-1930 MHz that provide a wide array of mobile and ancillary fixed communication services to individuals and business.'' Section 15.303(g) of the Commission's Rules, 47 C.F.R. § 15.303(g).

[51] *Broadband PCS Order*, 8 FCC Rcd at 7734 (para. 79).

[52] *See* para. 260, *infra*, for a discussion of the classification of FM subcarriers.

[53] Basic Exchange Telecommunications Radio Service, Report and Order, 3 FCC Rcd 214, 217 (1988)(*BETRS Order*).

[54] Communications Act, § 332(d), 47 U.S.C. § 332(d).

profit private carriage basis should be treated as private mobile services; (2) whether a licensee that uses its service strictly for internal use should be deemed to be offering a not-for-profit service; (3) whether licensees that operate systems for internal uses but also make excess capacity available on a for-profit basis should be deemed to be providing for-profit service; and (4) whether shared-use and multiple licensing arrangements may sometimes be for-profit services.

40. Most commenters agree that the "for-profit" prong of the CMRS definition was broadly intended to distinguish licensees who provide for-profit service to customers from licensees who operate systems solely for their own internal use.[55] Commenters also echo the proposal in the *Notice* that, in determining whether a particular offering meets the statutory definition of "for profit," we must review the "service as a whole." Commenters also argue that under the "service as a whole" test, a service that meets the "for-profit" definition should be classified as for-profit even if the interconnected portion of the service is offered on a not-for-profit basis.[56] Many commenters and reply commenters favor treatment of public safety, governmental, and special emergency radio services as non-profit offerings.[57] Other commenters recommend that such licensees that offer for-profit services with their excess capacity be classified as for-profit CMRS offerings to that extent.[58]

41. Commenters express divergent views, however, on the issue of whether licensees who lease or otherwise make commercial use of excess capacity on an otherwise not-for-profit system should be considered providers of "for-profit" service. Some commenters maintain that any leasing of excess capacity should be treated as for-profit service,[59] at least to the extent of that activity, regardless of whether the licensee operates the system primarily for internal use.[60] For example, NARUC contends that sale of excess capacity converts an otherwise private internal-use licensee into a commercial mobile radio service licensee.[61] Other commenters contend that PMRS licensees whose primary operations are not-for-profit should have the flexibility to make commercial use of their excess capacity, subject to certain limitations, without being deemed "for-profit" service providers as a result.[62] UTC, for example, proposes that the Commission continue to allow non-commercial private radio licensees to lease excess

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[55] *See, e.g.*, AAR Comments at 3; Mtel Comments 5; NABER Comments at 7; Nextel Comments at 9 n.13; NYNEX Comments at 5-6; Pacific Comments at 3; PageNet Comments at 5; Rochester Comments at 3; US West Comments at 16; Vanguard Comments at 3.

[56] *See, e.g.*, Arch Comments at 4-5 n.11; DC PSC Comments at 4; GTE Comments at 5; NARUC Comments at 14; New York Comments at 4-5; Pacific Comments at 4; Southwestern Comments at 6.

[57] *See, e.g.*, APCO Comments at 2; NABER Comments at 7; Nextel Comments at 8; Pacific Comments at 3; Southwestern Comments at 5; Telocator Comments at 8; UTC Comments at 5; Vanguard Comments at 3; PA PUC Reply Comments at 5; Securicor Reply Comments at 4. We note that, since the filing of its comments in this proceeding, Telocator has changed its name to "Personal Communications Industry Association." *See, e.g.*, Inside Wireless, Feb. 2, 1994, at 10.

[58] *See, e.g.*, McCaw Comments at 15-16; TDS Comments at 3-4.

[59] *See, e.g.*, Bell Atlantic Comments at 7; DC PSC Comments at 4; GTE Comments at 5; Rochester Comments at 4-5; Sprint Comments at 5; TDS Comments at 5.

[60] *See, e.g.*, NYNEX Comments at 5-6; PageNet Comments at 5; Rockwell Comments at 2-3; Southwestern Comments at 6; Telocator Comments at 9; Vanguard Comments at 3.

[61] NARUC Comments at 15 n.5.

[62] *See, e.g.*, American Petroleum Reply Comments at 6-8.

capacity without being deemed to be a for-profit service, provided that at least 51 percent of the system is used for the licensee's internal requirements and that none of the leased capacity is used to meet the licensee's basic loading requirements.[63]

42. In relation to shared-use arrangements, many commenters assert that such arrangements should be designated as not-for-profit because shared-use systems are generally operated on a cost-shared basis by a limited user group and do not serve as a reasonable substitute for commercial mobile radio service.[64] Several other commenters and reply commenters assert that shared-use arrangements do meet the statutory definition of for-profit services on the grounds that they serve as a substitute for common carrier paging and cellular services, or are otherwise structured with the intent to receive compensation.[65] Commenters also disagree on the impact of using for-profit managers in a shared-use system. Some commenters contend that these are legitimate non-profit arrangements because the manager's fee is simply a cost shared among the systems' users,[66] while others conclude that such arrangements should be deemed for-profit to prevent managers from operating *de facto* for-profit systems that masquerade as non-profit operations.[67]

(2) *Discussion*

43. We conclude that the statutory phrase "for profit" should be interpreted to include any mobile service that is provided with the intent[68] of receiving compensation or monetary gain. We agree with commenters that this interpretation encompasses all common and private carrier services that our rules define as being offered to customers for hire.[69] We also agree with commenters that a for-profit service provider may not avoid this prong of the CMRS definition by contending that it is not reselling interconnection for profit, but merely "passing through" the interconnected portion of its service to customers on a not-for-profit basis, as was allowed under our interpretation of the prior version of Section 332. This conclusion is supported by the plain language of the statute, which defines CMRS as "any mobile service . . .

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[63] UTC Comments at 5.

[64] *See, e.g.*, American Petroleum Comments at 6-7; ARINC Comments at 4; ITA Comments at 5; Motorola Comments at 7; Nextel Comments at 9; Telocator Comments at 9; UTC Comments at 7-8.

[65] *See, e.g.*, Bell Atlantic Comments at 7; McCaw Comments at 16; Rochester Comments at 3-4; USTA Comments at 3-4; US West Comments at 15; Vanguard Comments at 4; ARINC Reply Comments at 3; McCaw Reply Comments at 19-20; USTA Reply Comments at 2.

[66] *See, e.g.*, Motorola Comments at 7; Nextel Comments at 9 n.14; UTC Comments at 7-8.

[67] *See, e.g.*, Bell Atlantic Comments at 7; California Comments at 4-5; NARUC Comments at 15; Rochester Comments at 3-4; *but see* American Petroleum Reply Comments at 7-8; Securicor Reply Comments at 4-5.

[68] We believe that Congress intended the meaning of the phrase "for profit" to comport with that which has become common usage in relation to other federal statutes interpreting the phrase to mean an intent to make a profit, rather than requiring the realization of profit in fact. *See* North Ridge Country Club v. Commissioner of Revenue, 877 F.2d 750, 756 (9th Cir. 1989).

[69] Under our current rules, private carrier services include Specialized Mobile Radio, Private Carrier Paging, and 220 MHz Commercial service. In addition, licensees in the Special Emergency Radio Service may provide service for hire to eligible third-party customers. Licensees in all other Part 90 services may provide for-profit service to eligible users and may also be licensed for internal, non-commercial systems.

that is provided for profit *and* makes interconnected service available'' to the public.[70] By separating the ''for-profit'' and ''interconnected service'' elements of the CMRS definition, Congress made clear that all licensees who provide mobile service to customers with the intent of receiving compensation are ''for-profit'' service providers, regardless of whether some element of the service is characterized as a pass-through for accounting or other purposes. In reaching this conclusion our action is consistent with the congressional intent of the new Section 332 to regulate similar mobile services under comparable requirements. We note, however, that deeming a service ''for-profit'' under our test does not make it CMRS unless it also meets the other elements of the CMRS definition or is the functional equivalent of a service that meets the definition of CMRS.

44. We also conclude that Congress intended the phrase ''for profit'' to exclude services where the licensee does not seek to receive compensation from operation of a mobile radio system. Under this test, public safety and governmental services, other than private carrier licensees in the Special Emergency Radio Service, are plainly not-for-profit.[71] Similarly, businesses and other private entities who operate mobile systems exclusively for internal use will also be treated as not-for-profit under this test. Part 90 of our Rules currently defines an ''internal system'' as a system in which ''all messages are transmitted between the fixed operating positions located on the premises controlled by the licensee and the associated mobile stations or other transmitting or receiving devices of the licensee.''[72] Such systems are typically operated by licensees who require highly customized mobile radio facilities for their personnel to use in the conduct of the licensee's underlying business. Because such licensees have found their direct operation and control of internal systems to be an advantageous way to meet their internal communications needs, and because internal systems do not create a need for regulation to protect consumers under Title II, we conclude that businesses should continue to have the option to construct and operate internal systems on a private basis. Therefore, where a system is used only to serve the licensee's internal communications requirements rather than offered with the intent of receiving compensation, we conclude that the licensee is not providing service ''for profit'' within the meaning of the statute.

(a) Excess Capacity Activities

45. One of the main issues that arises in applying the for-profit element of the CMRS test is how to treat services in which one portion of the service is offered on a for-profit excess capacity basis while the other portion is not-for-profit. We conclude that any licensee that employs spectrum for not-for-profit service, such as an internal operation, but also uses its

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[70] Communications Act, § 332(d), 47 U.S.C. § 332(d) (emphasis added). We note that the approach taken by Congress in the statutory language precludes us from exploring the question whether Title II regulation should apply in the case of any company utilizing mobile service spectrum in connection with any profit-making venture, regardless of whether the venture involves the provision of mobile services on a for-profit basis. For example, the provisions of Title II would not extend to the operations of a delivery service company using its own mobile network for vehicle communications. Section 332 specifies that Title II regulation extends *only* to those cases in which spectrum is used to provide *a mobile service* on a for-profit basis.

[71] *See* 47 C.F.R. Part 90, Subparts B and C. As discussed below, private carrier SERS licensees will also be classified as PMRS notwithstanding their for-profit status, because we have concluded that the Special Emergency Radio Service is not ''available to a substantial portion of the public'' within the meaning of the statute. Paras. 67, 82, *infra.*

[72] Section 90.7 of the Commission's Rules, 47 C.F.R. § 90.7. An internal system shall be construed to include the premises (and associated mobile stations and devices) of the licensee and any other corporate or other business entity that controls, or is controlled by, the licensee.

excess capacity to make available a service that is intended to receive compensation, will be deemed to be offering a "for-profit" service to the extent of such excess capacity activities. For example, if a PMRS licensee makes a for-profit service available with its excess capacity, it would be for-profit to the extent of such activity. Furthermore, if the for-profit portion of the service meets the other elements of the CMRS definition, or is the functional equivalent of services meeting the CMRS definition, it is CMRS to the extent of such service. We agree with those commenters who argue that this rule applies whenever CMRS service is offered as a "hybrid" service, whether it is offered on an excess capacity basis, or as an "ancillary" service.[73]

46. We conclude that this approach is preferable to the "principal use" approach supported by some commenters, which would allow non-commercial licensees to offer for-profit services with their excess capacity without effect to their not-for-profit status so long as the principal use of the license was not-for-profit internal use. For example, we disagree with UTC's proposal that PMRS licensees should be able to remain private even if they lease up to 49 percent of their "reserve capacity" to other parties. In our view, UTC's approach could defeat the Budget Act's goal of regulatory symmetry by causing similar for-profit services to be classified differently because one happens to be paired with a not-for-profit service, while the other is not. Articulating a definition of what constitutes the "principal use" of a frequency would also be difficult because the nature of a licensee's use may change over time. Finally, adopting a principal use test might invite licensees to circumvent the for-profit test by structuring their services to be "principally" not-for-profit where they nevertheless intended to offer a for-profit service to the public.[74]

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[73] We believe that Congress contemplated allowing hybrid CMRS-PMRS services. For example, the statute directs the Commission to treat as a common carrier any "person engaged in the provision of service that is a commercial mobile service . . . *insofar as such person is so engaged* . . . ." Communications Act, § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A) (emphasis added). *See also id.*, § 332(c)(2). The plain meaning of the phrase "insofar as such person is so engaged" in these provisions contemplates partial or hybrid CMRS offerings.

[74] Our decision not to adopt a "principal use" test here is limited to our interpretation of the "for-profit" prong of the CMRS definition. In the Notice in our competitive bidding proceeding we propose to apply a "principal use" test to implement the requirement in Section 309(j)(2)(A) of the Act that, in order to be "auctionable," a particular service must be one that involves the licensee's receiving "compensation from subscribers." Implementation of Section 309(j) of the Communications Act, Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rule Making, FCC 93-455, 8 FCC Rcd 7635, 7639-40 (paras. 30-33) (1993) (*Auction Notice*). Under the proposed "principal use" test, a service is defined as auctionable if its "principal use" is to receive "compensation from subscribers" even if a portion of the service is used for non-compensatory communications. We specifically stated in the *Auction Notice*, however, that:

> [t]he distinction between "private mobile service" and "Commercial Mobile Service" in [amended] Section 332 turns on several criteria that are not relevant to Section 309(j), *e.g.*, whether the service is interconnected to the public switched network and provided to a substantial portion of the public . . . . Thus, it appears that a service could be classified as a private mobile service for purposes of Section 332 but not be deemed "private" for purposes of Section 309(j).

Id., 8 FCC Rcd at 7638-39 (paras. 25-26). Therefore, our decision not to adopt a "principal use" test here has no effect on our proposals in the auction proceeding.

(b) Shared-Use Systems

47. While we regard any leasing of excess capacity as for-profit service, we conclude that licensees should be able to enter into shared-use arrangements on a not-for-profit basis and not be deemed CMRS, provided that they meet certain requirements. We believe that Congress recognized the benefits of allowing private radio users to enter into legitimate cost-sharing arrangements and did not intend such arrangements to be classified as "for-profit" service.[75] As commenters note, such arrangements are beneficial because they allow radio users to combine resources to meet compatible needs for specialized internal communications facilities. At the same time, it was not Congress's intent, nor is it ours, to allow licensees to enter into sham "not-for-profit" arrangements in an effort to disguise essentially for-profit activity. To ensure that only legitimate cost-sharing arrangements are treated as not-for-profit, we will continue to require that all parties to cost-sharing arrangements be identified and disclosed in the licensee's records, and that all cost-sharing arrangements be fully documented by a written agreement maintained as part of the licensee's records, as is currently required under Section 90.179 of our Rules.[76] Licensees who meet these requirements will be deemed to be not-for-profit and presumptively classified as PMRS. We believe these safeguards are sufficient to prevent PMRS licensees from providing *de facto* for-profit service in competition with CMRS providers.[77] If it is demonstrated that, notwithstanding these safeguards, a licensee is operating a shared system authorized for not-for-profit or cost-shared use to offer a for-profit service, it will be in violation of Section 90.179 of the Commission's Rules,[78] and subject to enforcement actions. Ultimately, the licensee could be reclassified as CMRS, assuming it meets the other prongs of the test.

48. Because we are imposing these limitations on licensees who wish to enter into cost-sharing arrangements on a not-for-profit or cooperative basis, we consider it unnecessary to take the further step, suggested by some commenters, of prohibiting use of third-party managers to assist in the operation of such systems. Multiple-licensed systems ("community repeaters") that use managers are typically small systems in which all system users are individually licensed. In our view, Congress's concern in adopting the "for-profit" test was whether a radio service is being provided to customers for profit, not whether small groups of licensed users seek the assistance of a manager to operate their shared system. As several commenters note, managers play a beneficial role in the operation of many not-for-profit systems and typically receive compensation for their services. From the licensee's point of view, however, the manager's fee is no different from other shared costs of operation, *e.g.*, purchase of equipment and site rental. We see no indication in the statute or the legislative history that Congress intended to restrict the types of costs that licensees could share, so long as the cost-sharing arrangement among the licensees is *bona fide*. To do so, in our view, could inadvertently inhibit the ability of legitimate private licensees to obtain required technical and operational assistance so as to operate more efficiently.

49. Although we conclude that the hiring of a manager by multiple licensees does not fall within the definition of "for-profit" service, we intend to monitor closely the use of multiple-licensing arrangements to ensure that unlicensed managers do not attempt to provide for-profit service as *de facto* licensees. Our rules clearly state that the ultimate responsibility for operation

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[75] The definition of "mobile service" in Section 3(n) refers to "private" communications systems that may be licensed on an "individual, *cooperative, or multiple* basis." 47 U.S.C. § 153(n)(2) (emphasis added).

[76] 47 C.F.R. § 90.179.

[77] In addition to these safeguards, a violation of our rules could result in the imposition of other sanctions, including license revocation and forfeitures.

[78] 47 C.F.R. § 90.179.

of the system resides with the licensee and cannot be assumed by an unlicensed third party. Thus, a not-for-profit system structured to give an unlicensed manager sufficient operational control to provide for-profit service to customers would be a violation of Section 310(d) of the Communications Act[79] and our rules, for which the system license could be revoked. In addition, as noted above,[80] our decision to allow private shared-use systems to contract with system managers does not preclude our determining, based on an appropriate showing, that the system is a *de facto* for-profit service, and subject to the appropriate enforcement actions. In addition, the licensee may be subject to reclassification because it will meet the definition of CMRS, assuming it meets the other prongs of the test, or because it is the functional equivalent of CMRS.

b. Interconnected Service

(1) *Background and Pleadings*

50. In order for a mobile service to be defined as a commercial mobile radio service, it must make interconnected service available. The statute defines interconnected service as "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)."[81] The *Notice* requested comment on the significance of the phrase "interconnected service," rather than "interconnected," which was used in the original House version of the legislation. We suggested two alternative explanations for this distinction: (1) that in order for a particular service offering to be considered "interconnected service," the service must be offered on an interconnected basis at the end user level, *i.e.*, the service must provide an end user with the ability to directly control access[82] to the public switched network (PSN) for purposes of sending or receiving messages to or from points on the network; or (2) that Congress crafted the language in order to avoid including private line service within the definition of "interconnected service." The *Notice* also sought comment on how to define the terms "interconnected" and "public switched network." In regard to the definition of "public switched network," commenters were asked to discuss whether the Commission should limit this term to local exchange and interexchange common carrier switched networks, or whether we should interpret this element more expansively.

51. Commenters generally agree that Congress intended by use of the term "interconnected service" to distinguish between those communications systems that are physically interconnected with the network and those systems that are not only interconnected but that also make interconnected service available.[83] Therefore, many commenters stress that interconnected

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[79] 47 U.S.C. § 310(d).

[80] Para. 47, *supra.*

[81] Communications Act, § 332(d)(2), 47 U.S.C. § 332(d)(2).

[82] In referencing the notion of direct end user control in the *Notice* we had in mind services in which the user is able to initiate direct, real time interaction with the network, as opposed to services (such as those using store-and-forward technologies) in which the user does not have such a capability.

[83] AAR Reply Comments at 4; Bell Atlantic Comments at 8; GTE Comments at 5; NYNEX Reply Comments at 7; Pagemart Reply Comments at 3; Radiofone Reply Comments at 3; Securicor Reply Comments at 5; TRW Comments at 20 n.41; USTA Comments at 4; UTC Comments at 8; *see also* Geotek Comments at 7-8 (arguing that this distinction allows the Commission to adopt a threshold for determining when the traffic of the interconnected portion of a service reaches sufficient levels to be classified as interconnected service); *but see* Motorola Comments at 7 (arguing that interconnected service should be defined as physical interconnection with the public switched network because it might be

service should not include a service that uses the facilities of the public switched network for internal transmitter control purposes.[84] Some commenters believe that an interconnected service must provide an end user with the ability to control directly access to the public switched network for purposes of sending or receiving messages to or from points on the network.[85] The majority of commenters, however, interpret interconnected service as a service that will merely allow the subscriber to send or receive messages over the public switched network.[86] Several parties emphasize that the Commission should look to the subscriber's perception of whether the subscriber can send or receive messages over the public switched network.[87] According to TDS, the example of private line type services does not appear to be a useful basis for defining interconnected service. TDS contends that existing and emerging combinations of subscriber controlled switching and terminal devices permit the subscriber to make a coordinated use of multiple networks. These increasingly prevalent arrangements mean that there is realistically no effective limit on the number of points where any particular subscriber communication might ultimately be sent or received.[88] UTC, on the other hand, notes that utilities and pipeline companies often employ dedicated private lines that use and allow access to only a portion of the public switched telephone network.[89]

52. Many commenters agree that the Commission should follow the precedent of the *International Satellite Systems*[90] decision for determining whether a mobile service is

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difficult to apply the distinction between those systems that are physically interconnected to the public switched network and those that also make interconnected service available).

[84] DC PSC Comments at 5; NABER Comments at 8; PageNet Comments at 9; PRSG Comments at 2; Roamer Comments at 7; Securicor Reply Comments at 5; Southwestern Comments at 7; TDS Comments at 6; UTC Comments at 9.

[85] AmP Reply Comments at 3; NYNEX Comments at 7; Pactel Comments at 9; Pagemart Reply Comments at 6; TDS Comments at 6; TRW Reply Comments at 17; UTC Reply Comments at 10.

[86] Bell Atlantic Comments at 8; CTIA Comments at 8-9; GTE Comments at 5-6; E.F. Johnson Comments at 6; McCaw Comments at 17; NABER Comments at 8; Pacific Comments at 6; PageNet Comments at 6; PA PUC Reply Comments at 6-7; Rochester Comments at 4; Sprint Comments at 5-6; Southwestern Comments at 6-7; Telocator Comments at 9-10; US West Comments at 16-17; USTA Comments at 4; Vanguard Comments at 5; *see also* AMTA Comments at 9 & n.5 (supporting this definition in the context of two-way services, but expressing no opinion on the interpretation of those terms in the context of one-way paging operations).

[87] Bell Atlantic Comments at 9; NYNEX Comments at 7; Roamer Comments at 6-7; Sprint Comments at 6; US West Comments at 16-17.

[88] TDS Comments at 6; *but see* Radiofone Reply Comments at 4-5 (arguing that private line service typically may be originated and terminated only within the subscribing company's buildings, even though those buildings may be located in different states).

[89] UTC Comments at 10.

[90] Establishment of Satellite Systems Providing International Communications, CC Docket No. 84-1299, Report and Order, 101 FCC 2d 1046 (1985) (*International Satellite Systems*), *recon.*, Memorandum Opinion and Order, 61 Rad. Reg. 2d (P&F) 649 (1986), *further recon.*, Memorandum Opinion and Order, 1 FCC Rcd 439 (1986). In *International Satellite Systems*, the Commission concluded that interconnecting through a data circuit terminating in a computer that can store and process the data and subsequently retransmit it over that network constitutes interconnection to a public switched messaging network. *Id.* at 1101.

interconnected with the public switched network.[91] Several parties caution that making distinctions based on technologies could encourage mobile service providers to design their systems to avoid commercial mobile radio service regulation.[92] Other commenters encourage the Commission to adopt an approach that interconnection requires real-time access to the public switched network.[93] Consequently, commenters disagree about the implications of the definition of interconnection for store and forward services.[94] Several commenters also mention that Congress specifically contemplated reclassifying private carrier paging to commercial mobile radio service regulation by "grandfathering" private carrier paging services under private regulation for three years.[95] The parties that responded to our question regarding whether a mobile provider offers interconnected service if it offers service that is interconnected through an intermediary that is interconnected to the public switched network, generally agree that this would constitute interconnected service.[96]

53. Many commenters believe that the Commission should continue to use its traditional definition of public switched telephone network to include only local exchange carriers and interexchange carrier switched networks.[97] Some parties argue that there is no indication that

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[91] Arch Comments at 8; MCI Comments at 6; Mtel Comments at 6; NARUC Comments at 16; PageNet Comments at 7-8; USTA Comments at 5; Vanguard Comments at 5. *But see* Pagemart Reply Comments at 4 (arguing that this precedent bears no relationship to Congress's goal in amending Section 332); TRW Reply Comments at 17 n.37.

[92] BellSouth Comments at 8; MCI Comments at 6; Mtel Comments at 7; US West Comments at 17-18.

[93] Grand Comments at 3-5; Pagemart Comments at 5; RMD Comments at 3-4; TRW Reply Comments at 17.

[94] Those parties who consider store and forward technology to constitute interconnection include: Arch Comments at 7-8; Bell Atlantic Comments at 9-10; CTIA Comments at 9; DC PSC Comments at 5; E.F. Johnson Comments at 6 & n.7; GTE Reply Comments at 2-3; McCaw Comments at 29-30; MCI Comments at 6; Mtel Comments at 6-7; NABER Comments at 9-10; NARUC Comments at 16-17; New York Comments at 6; PA PUC Reply Comments at 7; Pacific Comments at 6; Pactel Paging Comments at 6; PageNet Comments at 5; Radiofone Reply Comments at 4; Roamer Comments at 7; Rochester Comments at 4; Sprint Comments at 5-6; Southwestern Comments at 7; Telocator Comments at 10 n.11; US West Comments at 17; USTA Comments at 5; Vanguard Comments at 5-6. Those parties who consider store and forward technology not to constitute interconnected service include: AmP Reply Comments at 2-4; Grand Comments at 3-5; NYNEX Comments at 8 n.10; Pagemart Comments at 5; Rockwell Comments at 3; TDS Comments at 7-8.

[95] *See* Budget Act, § 6002(c)(2)(B). NARUC Comments at 17; Nextel Comments at 16; PageNet Comments at 12-13; US West Reply Comments at 4 n.12. *But see* Pagemart Reply Comments at 7-8.

[96] GTE Comments at 6; NARUC Comments at 16; NYNEX Comments at 8; PA PUC Reply Comments at 6-7; USTA Comments at 4; US West Comments at 17-18; Vanguard Comments at 5. *But see* Geotek Comments at 8 (contending that indirectly connected services should not be deemed to be providing an interconnected service); Roamer Comments at 7 (claiming that it depends whether the service is interconnected as an integral part of the service offering or for the licensee's own internal purposes).

[97] BellSouth Comments at 9-10; GTE Comments at 6; McCaw Comments at 17; Motorola Comments at 7-8; NABER Comments at 8; PageNet Comments at 10; Roamer Comments at 6; Southwestern Comments at 7 n.4; Telocator Comments at 10; TRW Comments at 20 n.41; UTC Comments at 10.

Congress intended to broaden the scope of the term "public switched network."[98] Others, however, urge the Commission to adopt a more forward looking definition that acknowledges that the future of telecommunications will encompass many service providers using various technologies to create a "network of networks."[99] New York, for example, suggests that the definition of public switched network should include all networks — regardless of technology — that are now or in the future will be associated with the provision of switched services to the general public.[100] Nextel proposes a definition that encompasses service that can reach any subscriber or equipment addressable through the North American Numbering Plan.[101]

(2) *Discussion*

54. 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.[102] 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). Neither the statute nor the legislative history uses the term "end user control." We believe that it would be infeasible for end users, in any literal sense, to control directly access to the public switched network for sending or receiving messages to or from points on the network. The comments explain that subscribers are concerned only with the ability to transmit and receive messages to and from the public switched network.

55. We believe that Congress used the phrase interconnected service to further the goal of creating regulatory symmetry for similar mobile services. Thus, even a mobile service that is not yet interconnected, but has requested interconnection, is considered an interconnected service.[103] If Congress was concerned about end user or subscriber control of access to the network, it would not have included in the definition of interconnected service those services awaiting Commission response to interconnection requests. Therefore, we believe it is reasonable to conclude that an interconnected service is any mobile service that is interconnected with the public switched network, or service for which a request for interconnection is pending, that allows subscribers to send or receive messages to or from anywhere on the public switched network.[104] In addition, we will consider a mobile service to be offering interconnected service

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[98] McCaw Comments at 17; BellSouth Comments at 9-10; Southwestern Comments at 7 n.4; Telocator Reply Comments at 5.

[99] Bell Atlantic Comments at 9 n.9; New York Comments at 6; Nextel Comments at 10-11; NYNEX Comments 8-9; PA PUC Reply Comments at 7-8; Pacific Comments at 5; Sprint Comments at 7.

[100] New York Comments at 6.

[101] Nextel Comments at 11 n.18; *see also* NYNEX Reply Comments at 8 n.16; Pacific Comments at 5.

[102] *See* Conference Report at 496 (explaining that the Senate Amendment, adopted by the Conferees, requires an interconnected service to be broadly available).

[103] Communications Act, § 332(d)(2), 47 U.S.C. § 332(d)(2).

[104] In defining interconnected service in terms of transmissions to or from "anywhere" on the PSN, we note that it is necessary to qualify the scope of the term "anywhere"; if a service that provides general access to points on the PSN also restricts calling in certain limited ways (*e.g.*, calls attempted to

even if the service allows subscribers to send or receive messages to or from anywhere on the public switched network, but only during specified hours of the day. We adopt this position because we do not wish to provide any incentive for a mobile service provider to limit access to the public switched network as a means of avoiding regulation as a CMRS provider. We agree, however, with those commenters who argue that our interpretation of interconnected service should not include interconnection with the public switched network for a licensee's internal control purposes.

56. The statute requires us to define the terms "interconnected" and "public switched network." The Commission has a long history of deciding issues regarding interconnection with the public switched network.[105] For example, concerning cellular service providers, the Commission has explained the term "physical interconnection."[106] Part 90 of our Rules uses similar language to define interconnection.[107] In the CMRS context, we define "interconnected" as a direct or indirect connection through automatic or manual means (either by wire, microwave, or other technologies) to permit the transmission of messages or signals between points in the public switched network and a commercial mobile radio service provider.

57. Although we adopt language similar to that used in Part 90 of our Rules, we intend for this language to encompass mobile service providers using store and forward technology.[108] This approach to interconnection with the public switched network is analogous to the one that we used in determining what restrictions should apply to international communications satellite systems separate from INTELSAT. In *International Satellite Systems,* the Commission addressed whether it should authorize international communications satellites that would compete with INTELSAT. An Executive Branch letter to the Commission stated that certain restrictions must be imposed on these competing international satellite systems prior to final authorization by the Commission. The Commission was directed to prohibit these separate satellite systems from

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be made by the subscriber to "900" telephone numbers are blocked), then it is our intention still to include such a service within the definition of "interconnected service" for purposes of our Part 20 rules.

[105] *E.g.*, Use of the Carterfone Device in Message Toll Telephone Service, Decision, 13 FCC 2d 420 (1968).

[106] The term "physical interconnection" refers to the facilities connection (by wire, microwave or other technologies) between the end office of a landline network and the mobile telephone switching office (MTSO of a cellular network or the hardware or software, located within a carrier's central office, which is necessary to provide interconnection.

Need To Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling, 2 FCC Rcd 2910, 2918 n.27 (1987) (*Interconnection Order*).

[107] Connection through automatic or manual means of private land mobile radio stations with the facilities of the public switched telephone network to permit the transmission of messages or signals between points in the wireline or radio network of a public telephone company and persons served by private land mobile radio stations.

47 C.F.R. § 90.7.

[108] We note that the Private Radio Bureau interpreted prior Section 332 of the Act to find that store and forward technology did not constitute interconnection. In light of the amendments to Section 332 contained in the Budget Act, as implemented in this Order, the Private Radio Bureau's prior policy is no longer applicable.

providing communications interconnected with public switched message networks.[109] In clarifying which services were barred,[110] the Commission specifically prohibited competing satellite systems from interconnecting through a data circuit "terminat[ing] in a computer that can store and process the data and subsequently retransmit it over that network."[111]

58. We disagree with those commenters who argue that the *Data Com* and *Millicom* cases should guide us to a different result. In *Data Com,* the Commission found that no interconnection was involved in a communications system where callers wishing to page subscribers placed a call through the PSN to an answering service which then relayed the message to the intended recipient by activating the Data Com transmitter through a private radio link. We held that the Data Com system was not providing interconnected service because there was no direct connection between the Data Com transmitter and the PSN.[112] While the *Millicom* case involved a system that used store and forward technology, this fact was not pertinent to our decision there because that decision turned on whether the licensee was operating a shared-use system that would subject it to the interconnection prohibition contained in the prior version of Section 332.[113]

59. The statute also requires the Commission to define the term "public switched network." The Commission has frequently used the term "public switched telephone network" (PSTN) to refer to the local exchange and interexchange common carrier switched network, whether by wire or radio.[114] Many parties urge the Commission to continue this approach to defining the public switched network. We agree with commenters who argue that the network should not be defined in a static way. We believe that this interpretation is also more consistent with the use of the term "public switched network," rather than the more technologically based term "public switched telephone network." The network is continuously growing and changing because of new technology and increasing demand. The purpose of the public switched network is to allow the public to send or receive messages to or from anywhere in the nation. Therefore, any switched common carrier service that is interconnected with the traditional local exchange

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[109] *International Satellite Systems,* 101 FCC 2d at 1054. An exception was made for emergency restoration service.

[110] *Id.* at 1100.

[111] *Id.* at 1101.

[112] Data Com, Inc., Declaratory Ruling, 104 FCC 2d 1311, 1315 & n.7 (1986). In the *Data Com* case, we found that no aspect of the service provided by Data Com was dependent upon any direct or indirect physical connection to the public switched network. In contrast, there can be services in which some transmitters used in providing the service are not physically connected to the network but the service is treated as interconnected because its overall configuration includes physical links with the PSN.

[113] Applications of Millicom Corporate Digital Communications, Memorandum Opinion and Order, 65 Rad. Reg (P&F) 235, 237-39 (1983), *aff'd sub nom.* Telocator Network of America v. FCC, 761 F.2d 763 (D.C. Cir. 1985).

[114] For example, in establishing the Basic Exchange Telecommunications Radio Service (BETRS) we held that it was "intended to be an extension of intrastate basic exchange service." *BETRS Order*, 3 FCC Rcd at 217. In particular, we explained that "BETRS is provided so that radio loops can take the place of (expensive) wire or cable to remote areas." *Id.*

or interexchange switched network will be defined as part of that network for purposes of our definition of "commercial mobile radio services."[115]

60. A mobile service that offers service indirectly interconnected to the PSN through an interconnected commercial mobile radio service, such as a cellular carrier, will be deemed to offer interconnected service because messages could be sent to or received from the public switched network via the cellular carrier. We agree with Nextel and Pacific that use of the North American Numbering Plan[116] by carriers providing or obtaining access to the public switched network is a key element in defining the network because participation in the North American Numbering Plan provides the participant with ubiquitous access to all other participants in the Plan. We find that another important element is switching capability, which the term "public *switched* network" implies. This includes any common carrier switching capability, not only a local exchange carrier's switching capability. Thus, we believe that this approach to the public switched network is consistent with creating a system of universal service where all people in the United States can use the network to communicate with each other.

c. Service Available to the Public

(1) *Background and Pleadings*

61. The last element of the commercial mobile radio service definition is that the service must be made available to the public. Specifically, the statute provides that, if a licensee offers a for-profit service 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," then it is a commercial mobile radio service.[117] In the *Notice*, we interpreted the language "to the public" as contemplating "any interconnected service that is offered to the public without restriction, as existing common carrier services are offered."[118] The *Notice* also sought comment regarding (1) what types of services are "offered to such classes of eligible users as to be effectively available to a substantial portion of the public"; (2) whether such services that are "effectively available" include those offerings that are "available to a substantial portion

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[115] It is important to note, however, that defining a carrier as part of the public switched network does not impose any interconnection obligations upon that carrier. Interconnection obligations flow from a common carrier's Section 201 obligations if the Commission finds that such connections are in the public interest. The question of whether we will require CMRS providers to offer interconnection to their facilities to other CMRS providers or other parties requesting interconnection will be examined in a separate proceeding. *See* para. 285, *infra.* Moreover, our defining a carrier as part of the PSN for purposes of our definition of "commercial mobile radio service" is not intended to alter or modify the extent to which any such carrier may be subject to any obligations or requirements (*e.g.*, network reliability reporting, open network architecture) other than those contained in Section 332 of the Act or in regulations promulgated by the Commission pursuant to Section 332.

[116] The Plan provides a method of identifying telephone lines in the public network of North America. The Plan has three ways of identifying phone numbers: a three digit area code, a three digit exchange or central office code, and a four digit subscriber code. Currently, Bell Communications Research (Bellcore) administers this plan. The Commission has initiated a proceeding related to the North American Numbering Plan, and, in particular, the impending shortage of telephone numbers. *See* Administration of the North American Numbering Plan, CC Docket No. 92-237, Notice of Inquiry, 7 FCC Rcd 6837 (1992).

[117] Communications Act, § 332(d)(1), 47 U.S.C. § 332(d)(1).

[118] The statute directs the Commission to "specify by regulation" such classes of eligible users as to be "effectively available to a substantial portion of the public." *Id.*

of the public'' despite limitations on end user eligibility; (3) whether system capacity should be a factor in determining whether a service is ''effectively available'' to the public; and (4) whether service area size or ''location-specificity'' in service offerings ought to be a consideration in finding that a service is not ''effectively available'' to the public.

62. The majority of commenters discuss two basic issues in relation to the ''to the public'' prong of the commercial mobile radio service definition, namely: (1) how should the phrase ''to the public'' be interpreted; and (2) what should be the appropriate test for determining which services are ''effectively available to a substantial portion of the public.'' Many commenters agree that a particular mobile service should be considered available ''to the public'' only if it is available to the public either without restriction or without distinction.[119] BellSouth, however, asserts a service could be considered publicly available even if the Commission's Rules place some minimal restrictions on end user eligibility.[120] Similarly, Sprint states that the ''public'' need not encompass the entire universe of potential users.[121] US West urges the Commission to limit the number and type of factors that the Commission considers in determining public availability in order to avoid case-by-case analysis.[122] Lastly, MPX maintains that services that limit their customer base by means of elected negotiations, such as SMRs, should not be deemed to be available to the public.[123]

63. The second ''public availability'' element requires inquiry into whether the interconnected mobile service is made available ''to such classes of eligible users as to be effectively available to a substantial portion of the public.'' Many commenters and reply commenters assert that this element should be interpreted to exclude services that are available only to classes of eligibles comprised of only specific industries, businesses, or other narrow eligibility classes.[124] Several other commenters and reply commenters, however, favor applying a test for the ''effectively available'' element requiring that, if service is available or intended to be available, to a large sector of the public, irrespective of any eligibility restrictions, it should be deemed to be effectively available to a substantial portion of the public.[125]

64. Commenters also address the issues whether limited capacity on a system restricts whether it is effectively available to a substantial portion of the public, and whether a location-

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[119] *See, e.g.*, E.F. Johnson Comments at 7; GTE Comments at 6; McCaw Comments at 18; Motorola Comments at 8; NABER Comments at 10; New York Comments at 7; Nextel Comments at 11; PageNet Comments at 11-12.

[120] BellSouth Comments at 11.

[121] Sprint Comments at 7.

[122] US West Comments at 19.

[123] MPX Comments at 4.

[124] *See, e.g.*, AAR Comments at 4; Arch Comments at 5 n.13; ARINC Comments at 5-6; GTE Comments at 7; Motorola Comments at 8; NABER Comments at 10; Reed Smith Comments at 3; Roamer Comments at 9; TDS Comments at 8; UTC Comments at 11; AAR Reply Comments at 4; Securicor Reply Comments at 6; Telocator Reply Comments at 4.

[125] *See, e.g.*, Bell Atlantic Comments at 11; CTIA Comments at 10; Mtel Comments at 8 ; New York Comments at 7; NARUC Comments at 17; Pacific Comments at 7-8; PacTel Comments at 12-13; Rochester Comments at 5; Southwestern Comments at 9; Sprint Comments at 8; Telocator Comments at 11; USTA Comments at 6; US West Comments at 19-21; Vanguard Comments at 6-7; McCaw Reply Comments at 23-24; PA PUC Reply Comments at 8; USTA Reply Comments at 3-4; US West Reply Comments at 5-6.

specific service or one offered only in a limited geographic area would not be effectively available to the public. As to the first issue, many commenters and reply commenters agree that low capacity has no effect on the public availability of a service.[126] E.F. Johnson, however, maintains that low capacity is a valid factor in restricting the public availability of a service.[127] Several commenters further agree that location-specificity and limited geographic area are irrelevant to a determination of public availability.[128] GTE and Roamer, however, maintain that location-specificity and limited geographic area do significantly restrict the public availability of a service.[129]

(2) *Discussion*

65. We agree with commenters who contend that a service is available "to the public" if it is offered to the public without restriction on who may receive it. For example, PageNet asserts that private carrier paging (PCP) is available to the public without restriction because the "last significant eligibility" limitation was removed when PCPs were authorized to serve individuals, in addition to Part 90 eligibles. We agree. Nor do we find compelling MPX's assertion that services that limit their customer base by means of elected negotiations should be deemed to be unavailable to the public. In addition, we believe that similarly situated customers should have the opportunity to obtain service on the same terms as negotiated by other customers, unless, of course, the carrier is able to demonstrate that any distinctions in terms do not constitute unreasonable discrimination under Section 202(a) of the Act.[130]

66. In parsing the language "to such classes of eligible users as to be effectively available to a substantial portion of the public" in Section 332(d)(1)(B) of the Act, we believe that the key words are "effectively available." In drafting this language, Congress eschewed the House definition's use of the word "broad" to modify the phrase "classes of eligible users" and

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[126] *See, e.g.*, Arch Comments at 5-6; Bell Atlantic Comments at 12; BellSouth Comments at 13; CTIA Comments at 10; DC PSC Comments at 6; GTE Comments at 7; Mtel Comments at 8; Motorola Comments at 8-9; NYNEX Comments at 11; Pacific Comments at 8-9; PageNet Comments at 11; Rochester Comments at 5 n.9; Southwestern Comments at 10-11; Sprint Comments at 8; TDS Comments at 9; Telocator Comments at 12; US West Comments at 20; UTC Comments at 11-12; Vanguard Comments at 7; McCaw Reply Comments at 24; Telocator Reply Comments at 4; Arch Reply Comments at 5; *but see* GTE Reply Comments at 4; Securicor Reply Comments at 6.

[127] E.F. Johnson Comments at 7.

[128] *See, e.g.*, Bell Atlantic Comments at 12; CTIA Comments at 10; DC PSC Comments at 6; McCaw Comments at 18; Motorola Comments at 8-9; Mtel Comments at 8; Pacific Comments at 9; PageNet Comments at 11; Rochester Comments at 5; Southwestern Comments at 10-11; Sprint Comments at 8 n.11; TDS Comments at 10; US West Comments at 20; UTC Comments at 11-12; Vanguard Comments at 7.

[129] GTE Comments at 7; Roamer Comments at 10.

[130] The terms and conditions for different classes of customers may, of course, vary. Whether such differences are lawful would be a question of whether there is unreasonable discrimination under Section 202(a) of the Act. In the case of individualized or customized service offerings made by CMRS providers to individual customers, it is our intent to classify and regulate such offerings as CMRS, regardless of whether such offerings would be treated as common carriage under existing case law, if the service falls within the definition of CMRS.

adopted instead the Senate's version which deleted the word "broad," indicating legislative intent to:[131]

> ensure that the definition of "commercial mobile services" encompasses all providers who offer their services to broad or narrow classes of users so as to be effectively available to a substantial portion of the public.

Thus, Congress intended both broad and narrow classes of eligible users that meet the statutory definition to be included within this element. The statute directs the Commission to specify those classes in its regulations.

67. In applying the statutory language, we look to several relevant factors, such as the type, nature, and scope of users for whom the service is intended.[132] Thus, in the case of existing eligibility classifications under our Rules,[133] service is *not* "effectively available to a substantial portion of the public" if it is provided exclusively for internal use or is offered only to a significantly restricted class of eligible users, as in the following services: (1) Public Safety Radio Services;[134] (2) Special Emergency Radio Service;[135] (3) Industrial Radio Services (except for Section 90.75, Business Radio Service);[136] (4) Land Transportation Radio Services;[137] (5) Radiolocation Services;[138] (6) Maritime Service Stations;[139] and (7) Aviation Service Stations.[140] Service among these Part 90 eligibility groups, or to internal users, is made available on only a limited basis to insubstantial portions of the public. We conclude that it was Congress's intent that making service available to, or among, the eligible users in the above-stated private mobile radio services does not constitute service that is "effectively available to a substantial portion of the public." Finally, 220-222 MHz band and private paging systems that serve only the licensee's internal needs will not be deemed "effectively available

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[131] Conference Report at 496.

[132] The statutory language warrants looking at several factors where the word "substantial" modifying "portion of the public" could mean either "considerable; ample; large" or "of considerable worth or value; important." Webster's New World Dictionary, Third College Edition, 1336 (1988).

[133] Our description here applies the test to existing classes of eligible users. We recognize, of course, that other classes could be established under our Rules in the future that would not be "effectively available to a substantial portion of the public" depending on the type, nature, and scope of users for whom the service is intended.

[134] 47 C.F.R. §§ 90.15-90.25.

[135] 47 C.F.R. §§ 90.33-90.55.

[136] 47 C.F.R. §§ 90.59-90.73, 90.79, 90.81.

[137] 47 C.F.R. §§ 90.85-90.95.

[138] 47 C.F.R. §§ 90.101, 90.103.

[139] 47 C.F.R. § 80.15.

[140] 47 C.F.R. § 87.19.

to a substantial portion of the public," because our rules restrict use of those services to internal applications.[141]

68. In contrast, if a licensee operates a system not dedicated exclusively to internal use, or provides service to users other than eligible user groups under our rules like those in the services listed in the preceding paragraph, it *is* offering service that is "effectively available to a substantial portion of the public." Thus, the eligibility provisions for the Business Radio Service (BRS), PCPs (other than internal use), commercial 220-222 MHz land mobile systems, and SMRs would permit service offerings effectively to a "substantial portion" of the public. The Part 90 eligibility rules for all types of SMRs, commercial 220-222 MHz land mobile systems, and PCPs, for example, include individuals as a category of eligible customers. Furthermore, eligible users in the BRS generally include any persons engaged in the operation of commercial activities, educational, philanthropic, or ecclesiastical institutions, clergy activities, and hospitals, clinics, or medical associations.[142] We believe that end user eligibility is virtually unrestricted in the Business Radio Service and offerings in that Service are therefore made effectively available to a substantial portion of the public. Our classification of BRS illustrates the fact that a service may be classified as "effectively available to a substantial portion of the public" regardless of whether individuals are eligible to receive the service. In addition, Automatic Vehicle Monitoring services that are offered to third party users will be deemed "effectively available to a substantial portion of the public," because our interim rules authorize service to persons eligible in the radio services of Part 90.[143]

69. Under the "system capacity" exception proposed in the *Notice*, any licensee whose system has limited capacity, such as an SMR with the capacity of no more than 70 to 100 users per channel, would be deemed to be offering a service that was not effectively available to a substantial portion of the public. We agree with those commenters who argue that adopting the "system capacity" approach would undermine the plain meaning of the statute, and Congress's intent in passing it. Although a service has low system capacity, it may nonetheless be available

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[141] *See generally* Sections 90.703(b), 90.717, 90.721, 90.723(a), 90.733(a)(2), 90.733(a)(3), and 90.733(b) of the Commission's Rules, 47 C.F.R. §§ 90.703(b), 90.717, 90.721, 90.723(a), 90.733(a)(2), 90.733(a)(3), 90.733(b); Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Memorandum Opinion and Order, 7 FCC Rcd 4484, 4490-91 (1992)(220 MHz local channels in commercial or non-commercial status; non-commercial nationwide licenses are for primary purpose of satisfying internal communications requirements, but licensee may elect to provide commercial service on limited basis at end of five-year period following grant of license). *See also, e.g.*, Section 90.494(a) of the Commission's Rules, 47 C.F.R. § 90.494(a) (900 MHz paging frequencies available to all Part 90 eligibles for commercial or non-commercial use). Licensees in these services that have elected to operate not-for-profit internal systems are barred by the terms of their licenses from offering a for-profit commercial service. Such internal systems also are treated as not-for-profit for purposes of the CMRS definition. *See* para. 44, *supra*.

[142] Section 90.75 of the Commission's Rules, 47 C.F.R. § 90.75; *see also* Amendment of Part 90 of the Commission's Rules To Expand Eligibility and Shared-Use Criteria for Private Land Mobile Frequencies, PR Docket No. 89-45, Report and Order, 6 FCC Rcd 542 (1991).

[143] Section 90.239 of the Commission's Rules, 47 C.F.R. § 90.239. In addition, we have granted a waiver to Teletrac to allow it to offer service to individuals. *See* Amendment of Part 90 of the Commission's Rules To Adopt Regulations for Automatic Vehicle Monitoring Systems, PR Docket No. 93-61, Notice of Proposed Rule Making, 8 FCC Rcd 2502, 2502-03 (1993). This Notice also proposes expanding the eligibility of this service to include individuals and the Federal Government. *Id.* at 2503.

"to the public."[144] Even if system capacity were relevant to a determination of a given mobile service's public nature, setting a standard for what constitutes a low capacity system would involve guesswork in a rapidly changing area where system-efficient technologies are constantly squeezing more capacity from smaller volumes of spectrum, and might provide incentives for inefficient spectrum use. In addition, therefore, we conclude that low system capacity should not be a factor in determining whether a class of eligible users makes the service "effectively available to a substantial portion of the public."

70. Lastly, we address the issue raised in the *Notice* whether a limitation in the geographic size of a service area ought to be a factor in deciding that a service is not "available to the public" or "effectively available to a substantial portion of the public." We agree with commenters who contend that geographic area or location specificity should not be a factor in our determination. We conclude that irrespective of the service area in which a given licensee is operating, if that licensee is serving such classes of eligible users as to be in effect making its service usable by a substantial portion of the public in that area, it is a service available to the public. This conclusion is consistent with the statute and congressional intent. Classifying the mobile service as a commercial mobile radio service, even though its offering is restricted to a limited geographic area will best serve the congressional objective of ensuring that telecommunications providers that compete with one another in any geographic area are subject to the same regulatory requirements and standards. Furthermore, we believe that finding a location-specific service not to be publicly available would be spectrally inefficient because it may produce disincentives to licensees to build out their systems into wide-area networks. At the same time, as wireless technologies move toward microcell and picocell environments, we believe that it would not serve the public interest to allow such state-of-the-art technology, albeit reserved to small areas, to be restricted from the general public.

3. *Private Mobile Radio Service*

a. Background and Pleadings

71. The statute defines private mobile service as "any mobile service (as defined in section 3(n)) that is not a commercial mobile service or the functional equivalent of a

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[144] Apart from situations involving carriers of last resort, *see, e.g.*, United Fuel Gas. Co. v. Railroad Comm'n, 278 U.S. 300, 309 (1929)("The primary duty of a public utility is to serve on reasonable terms all those who desire the services it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give."); *see also* American Tel. & Tel., Memorandum Opinion and Order, 73 FCC 2d 248, 263 (1979), the common carriage obligation extends only to the provision of "adequate or reasonable" facilities in response to demand:

> The term "adequate or reasonable" is not in its nature capable of exact definition. It is a relative expression, and has to be considered as calling for such facilities as might be fairly demanded, regard being had, among other things, to the size of the place, the extent of the demand for [service], the cost of furnishing the additional accommodations asked for, and to all other facts which would have a bearing upon the question of convenience and cost.

Atlantic Coast Line R.R. v. Wharton, 207 U.S. 328, 335 (1907); *see* New York ex rel. Woodhaven Gas Light Co. v. Pub.Serv.Comm'n, 269 U.S. 244, 248 (1925). Thus, under longstanding principles of common carriage regulation, the carrier's costs in "furnishing the additional accommodations" are a relevant factor in determining the nature and extent of the carrier's obligation to provide service.

commercial mobile service, as specified by regulation by the Commission.''[145] The *Notice* described two alternative interpretations of this definition. Under one approach, a mobile service would be classified as private if (1) it fails to meet the statutory definition of a commercial mobile radio service *or* (2) it is not the functional equivalent of a commercial mobile radio service, even if it meets the literal definition of a commercial mobile radio service. Under another reading of the legislation, a mobile service would be classified as private if (1) it fails to meet the statutory definition of a commercial mobile radio service; *and* (2) it is not the functional equivalent of a commercial mobile radio service. In addition, we requested comment on what specific standards the Commission should use to determine whether a given service is the functional equivalent of a commercial mobile radio service.

72. Commenters disagree about the correct interpretation of the definition of private mobile radio service. Some commenters urge the Commission to adopt a broad definition of PMRS, so that the term would include any service that is not a commercial mobile radio service as well as a mobile service which may meet the literal definition of a CMRS, but is not the functional equivalent of a service that is deemed to be CMRS.[146] These parties generally refer to the example in the Conference Report, of a service that the Commission might classify as private, to support their position.[147] Commenters advocating a broad definition of private mobile radio service contend that their interpretation is consistent with the congressional intent to create regulatory symmetry for similar services.[148] In general, these commenters argue that Congress was concerned about regulatory symmetry between wide-area SMRs and cellular carriers and, therefore, Congress did not intend to apply Title II regulation to mobile services that are not the functional equivalent of commercial mobile radio services even if the services fall within the technical definition of CMRS.[149] Reed Smith also argues that the language of the statute is not ambiguous and compels a broad interpretation of private mobile radio service.[150] In addition, UTC asserts that, in adding the functional equivalence test, Congress did not change the definition of commercial mobile radio service. Rather, Congress added an

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[145] Communications Act, § 332(d)(3), 47 U.S.C. § 332(d)(3).

[146] AMT/DSST Comments at 7-8; AMTA Comments at 12-13; E.F. Johnson Comments at 7-8; Geotek Comments at 5; ITA Comments at 2-4; LCRA Comments at 8-9; Motorola Comments at 9; NABER Comments at 11; Pagemart Comments at 8; Reed Smith Comments at 6; Roamer Comments at 11-12; RMD Comments at 5-6; Securicor Reply Comments at 7; Time Warner Comments at 5-6; TRW Comments at 16 n.33; UTC Comments at 12-13.

[147] AMT/DSST Comments at 7-8; AMTA Comments at 13; E.F. Johnson Comments at 7-8; Geotek Comments at 6-7; Motorola Comments at 9-10; NABER Comments at 11; Pagemart Comments at 9; Reed Smith Comments 7-9; Roamer Comments at 12; RMD Comments at 5-6; Securicor Reply Comments at 7-8; TRW Reply Comments at 19; UTC Comments at 14. *See* Conference Report at 496.

[148] AMT/DSST Comments at 7-8; E.F. Johnson Comments at 8; ITA Comments at 3-5; Motorola Comments at 10; Pagemart Comments at 9; Roamer Comments at 11-12; RMD Comments at 5-6; Securicor Reply Comments at 8; Time Warner Comments at 6; UTC Comments at 13.

[149] AMT/DSST Comments at 7; ITA Comments at 3-5; Motorola Comments at 10; RMD Comments at 5-6; UTC Comments at 13. *See also* AMTA Comments at 12 (claiming that Congress was also concerned that PCS services that provided a cellular or local loop-type service would be classified as common carriage); Roamer Comments at 11-12 (including wide-area private carrier paging systems as services that prompted the legislation).

[150] Reed Smith Comments at 6; *accord* UTC Reply Comments at 13.

escape valve for classifying services as private even if they meet the literal definition of CMRS.[151]

73. Many other parties argue that the Commission should adopt a narrow interpretation of private mobile radio service, which would include any mobile service that is not a commercial mobile radio service and is not the functional equivalent of a CMRS.[152] In support of this interpretation, these commenters generally refer to the language in the Conference Report that the term private mobile service includes "*neither* a commercial mobile service *nor* the functional equivalent of a commercial mobile service."[153] Commenters advocating a narrow interpretation of the definition of private mobile radio service agree with parties advocating a broad interpretation that Congress intended to create regulatory symmetry for similar services.[154] They conclude, however, that Congress would not have created a technological distinction, like the example in the Conference Report, to allow similar services to be subject to differing regulatory schemes. After all, argue many of these commenters, Congress was attempting to remove regulatory disparities based on technical distinctions.[155]

74. Some commenters also suggest that the clear language of the statute goes against the broad definition of private mobile radio service. BellSouth notes that it is difficult to imagine how a service could meet the statutory definition of commercial mobile radio service and not be the functional equivalent of CMRS. Any service meeting the statutory criteria and Commission definitions for CMRS is, by definition, the functional equivalent of itself. It is therefore not only a commercial mobile radio service, but also the functional equivalent of a commercial mobile radio service.[156] According to US West, the sole support for the broad interpretation of private mobile radio service is the language from the Conference Report which does not support the proposition for which it is cited. The example could not refer to a service falling within the literal definition of CMRS, argues US West, because it does not describe a for-profit service.

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[151] UTC Comments at 14.

[152] Arch Comments at 6; Bell Atlantic Comments at 13; BellSouth Comments at 20; CTIA Comments at 11-13; DC PSC Comments at 7; GCI Comments at 2; GTE Comments at 8; McCaw Comments at 19-20; MCI Comments at 6; Mtel Comments at 9; NARUC Comments at 18-19; NTCA Comments at 2-3; New Par Comments at 7-8; New York Comments at 8; NYNEX Comments at 12; PA PUC Reply Comments at 9; Pacific Comments at 7; Pactel Comments at 7-8; Rochester Reply Comments at 3; Southwestern Comments at 11-12; Sprint Comments at 9; TDS Comments at 10; USTA Comments at 6; US West Comments at 7-8; Vanguard Comments at 8-9.

[153] Conference Report at 496 (emphasis added). Bell Atlantic Comments at 13; DC PSC Comments at 7; Mtel Comments at 9; NARUC Comments at 19; PA PUC Reply Comments at 9 & n.21; Pacific Comments at 7 n.15; Southwestern Comments at 12; US West Comments at 8-9; USTA Reply Comments at 4-5; Vanguard Comments at 8.

[154] Bell Atlantic Comments at 13; CTIA Comments at 11; GTE Comments at 8; McCaw Comments at 19-20; NARUC Comments at 19; New Par Comments at 7; NYNEX Comments at 12; TDS Comments at 10-11; Vanguard Comments at 8.

[155] *See* Bell Atlantic Comments at 13-14; CTIA Comments at 13-14; GTE Comments at 8; McCaw Comments at 20 & n.55.

[156] BellSouth Comments at 22 n.67. *See also* Southwestern Comments as 13 (arguing that a broad definition of "private" assumes that a commercial service is not defined by its own definition); US West Comments at 8-9 (claiming that a broad interpretation of private mobile radio service implausibly presupposes that there are commercial mobile radio services which would not be the functional equivalent of commercial mobile radio service).

Importantly, according to some commenters, this statement in the Conference Report follows the "neither/nor" language[157] that makes indisputable that the functional equivalence analysis applies only to those services which do not meet the commercial mobile radio service definition.[158] Nextel, on the other hand, submits that both interpretations of private mobile radio service are correct and effectuate Congress's directive that functionally equivalent or substitutable services must be subject to similar regulation.[159]

75. Some commenters and reply commenters support the proposal in the *Notice* to adopt the functional equivalence test used to determine whether a common carrier unreasonably discriminates in its charges for like communications services.[160] CTIA urges the Commission to also apply precedent from the relevant market analysis used in antitrust law.[161] Commenters criticize adopting a technological test like that described in the Conference Report, because different technologies are capable of providing comparable services.[162] NYNEX urges the Commission to adopt general rules regarding the functional equivalence test.[163] McCaw, on the other hand, believes that the Commission should determine functional equivalence on a case-by-case basis when a service is authorized.[164] A few commenters and reply commenters disagree with the proposal in the *Notice* to adopt the functional equivalence test used by the Commission in discrimination cases.[165] For example, Geotek argues that the functional equivalence test should focus on whether the interconnected portion of the service is the primary service offered or only secondary or incidental to the primary service.[166]

b. Discussion

(1) *Scope of Definition*

76. We agree with commenters who argue that Congress intended to narrow the scope of the definition for private mobile radio service by adding language stating that a mobile service would be considered to be private if it is not the functional equivalent of a commercial mobile radio service. Given this congressional intent, we conclude that a mobile service may be

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[157] *See* para. 73, *supra.*

[158] US West Comments at 8; *accord* CTIA Reply Comments at 13.

[159] Nextel Comments at 13-14.

[160] CTIA Comments at 11-13; DC PSC Comments at 7-8; GTE Comments at 8; Mtel Comments at 10; NABER Comments at 11; NARUC Comments at 19-20; Nextel Reply Comments at 5-7; NYNEX Comments at 13; PA PUC Reply Comments at 9-10; Pacific Comments at 8; TDS Comments at 11; Telocator Reply Comments at 6; USTA Comments at 6; Vanguard Comments at 9.

[161] CTIA Comments at 11-13.

[162] McCaw Comments at 20 n.55; NYNEX Comments at 12-13; PRSG Comments at 2; Southwestern Comments at 14; Telocator Comments at 13 n.18; US West Reply Comments at 8; Vanguard Comments at 9.

[163] NYNEX Comments at 13-14; *see also* Time Warner Comments at 6-7.

[164] McCaw Comments at 21-22; *see also* PA PUC Reply Comments at 10; TRW Comments at 26 n.51; UTC Comments at 14-15.

[165] *See, e.g.*, E.F. Johnson Comments at 8; Motorola Comments at 10-11; Southwestern Comments at 13-14; TRW Reply Comments at 20 n.42.

[166] Geotek Comments at 7-8.

classified as private only if it is neither a CMRS nor the functional equivalent of a CMRS. The factors that have led us to this conclusion are: the plain language of the statute, statements in the legislative history, and the overall purpose of the statute. First, we believe that our conclusion draws its strongest support from the plain words of the statute. As we have noted, Section 332(d)(3) of the Act provides that a mobile service may be classified as a PMRS only if it is *not* a commercial mobile radio service *or* the functional equivalent of a CMRS. We believe that the most logical method of applying this statutory test is as follows: If we conclude that a mobile service is offered to the public (or a substantial portion of the public), is offered for profit, and is an interconnected service, then we must conclude that the mobile service is a commercial mobile radio service because the nature of the service brings it within the statutory definition of commercial mobile radio services. Once we have concluded that a mobile service falls within the literal statutory definition of a CMRS, it is logically impossible, under the statute, to conclude that the service could be classified as a private mobile radio service. The statute unequivocally states that a private mobile radio service is not a commercial mobile radio service. It would be inconsistent with the statute to say that the term "commercial mobile radio service" is not defined by the elements stated in Section 332(d)(1), but by some benchmark CMRS that Congress did not specify (such as one that employs frequency reuse or covers a particular geographic area, as suggested by some commenters). As BellSouth notes, if a service meets the definition of CMRS it is difficult to conceive how it could not be the functional equivalent of CMRS, *i.e.*, of itself. On the other hand, if we conclude that a mobile service does *not* meet the literal definition of a commercial mobile radio service, we will presume that the service is private and it will be regulated as PMRS unless there is a showing in a specific case that it is the functional equivalent of a service that is classified as CMRS. Thus, the language of the statute clearly provides that if a mobile service meets the literal definition of a CMRS or it is found to be the functional equivalent of a service that does meet the literal definition of CMRS, it cannot be classified as a PMRS.

77. Second, the Conference Report supports this interpretation. The Report states that the Conference Committee amended the definition of private mobile radio service to "make clear that the term includes *neither* a commercial mobile service *nor* the functional equivalent of a commercial mobile service, as specified by regulation by the Commission."[167] Thus, the Conference Report specifies that any mobile service that falls within the literal definition of a CMRS *cannot* be classified as a private service. We recognize, as some commenters have pointed out, that the Conference Report provides a specific example where the Commission *may* determine that a service is not the functional equivalent of a CMRS because it does not employ frequency or channel reuse or make service available to a wide geographical area.[168] This example, however, does not necessarily represent a mobile service that fits the literal definition of a commercial mobile radio service because the example does not indicate whether the service is for profit. Also, the Conference Report cannot be read to *require* the Commission to find that such a service is not the functional equivalent of a CMRS. Congress intended to leave this issue to the Commission's expertise. Further, the language of a statute "is not to be regarded as modified by examples set forth in the legislative history."[169] Thus, the specific example in the Conference Report cannot drive us away from the conclusion compelled by the plain words of Section 332(d)(3). We believe that our interpretations of the individual elements of CMRS ensure that services that do not compete with commercial mobile radio services will be classified as private. For example, a for-profit service will be presumptively private only if it is not an interconnected service or it is not offered to the public or a substantial portion of the public.

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[167] Conference Report at 496 (emphasis added).

[168] *Id.*; *see also* CTIA Reply Comments at 13.

[169] Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 649 (1990).

78. The third factor supporting our interpretation of the term "private mobile radio service" is the fact that the interpretation comports with the statute's overriding purpose to ensure that similar services are subject to the same regulatory classification and requirements.[170] Although the language referring to the functional equivalent of a CMRS was added by the conferees, the House Report expresses concern about the functional equivalent of a common carriage offering being regulated as a private service. The House Report states:[171]

> Under current law, private carriers are permitted to offer what are essentially common carrier services, interconnected with the public switched telephone network, while retaining private carrier status. Functionally, these "private" carriers have become indistinguishable from common carriers . . . .

The House illustrated its concern over the disparate regulatory treatment that has emerged under current law by specifically referring to the expanded definition of eligible user for specialized mobile radio service and private carrier paging licensees, to include individuals on an indiscriminate basis and Federal Government entities. The discussion also refers to enhanced specialized mobile radio services. Thus, under the approach taken in the House Report, even if a mobile service does not fit within the strict definition of a commercial mobile radio service, if the service amounts to the "functional equivalent" of a service that is classified as CMRS, it should be regulated as a CMRS. We do not find any clear intent that in adopting the final language Congress intended to depart from this purpose of the statute.

(2) *Functional Equivalence Test*

79. As explained in the preceding section, the definition of private mobile radio service includes any service that does not meet the definition of CMRS. The statute further provides, as explained above, that PMRS also does not include a service that is the functional equivalent of a CMRS. The statute grants the Commission authority to specify the functional equivalent of CMRS. We have broadly interpreted the definitional elements of CMRS because Congress intended this definition to ensure that the Commission regulate similar mobile services in a similar manner. Thus, we anticipate that very few mobile services that do not meet the definition of CMRS will be a close substitute for a commercial mobile radio service. Therefore, we will presume that a mobile service that does not meet the definition of CMRS is a private mobile radio service. This presumption may be overcome only upon a showing by a petitioner challenging the PMRS classification that the mobile service in question is the functional equivalent of a commercial mobile radio service.[172]

80. Based on such a showing and any other relevant evidence or matters that the Commission may officially notice, the Commission will evaluate a variety of factors in deciding whether the service under review is the functional equivalent of a commercial mobile radio service. Our principal inquiry will involve evaluating consumer demand for the service in order

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[170] *See* Part II.A, paras. 3-10; Part III.A.1, paras. 13-17, *supra.*

[171] House Report at 259-60 (footnotes omitted).

[172] We note that the presumption that we adopt here is not to be confused with the presumption we establish for PCS. *See* Part III.D, paras. 116-123, *infra.* In relation to PCS we decide that all PCS is presumptively CMRS. The significance of the presumption in the PCS context is that licensees receiving PCS spectrum *must* use the spectrum to provide CMRS, unless they make a sufficient showing that they should be permitted to use some or all of their allocated PCS spectrum on a private basis. Here we have established generic definitions of CMRS and PMRS. Our presumption in the PCS context, in applying these generic definitions, is based on our expectation that CMRS classification will fit these new services and will most adequately meet the goals we have established for PCS.

to determine whether the service is a close substitute for CMRS. For example, we will evaluate whether changes in price for the service under examination, or for the comparable commercial service, would prompt customers to change from one service to the other. Market research information identifying the targeted market for the service under review also will be relevant. Of course, we will refine this examination in the context of the individual cases that may arise based on a showing by any interested party.[173]

C. Regulatory Classification of Existing Services

81. In the *Notice* we explained that the Budget Act requires us to examine the regulatory status of all existing mobile services under the statutory definitions discussed in the preceding sections. We therefore sought comment on whether existing mobile services should be classified as CMRS or PMRS. The following sections explain our classification, based on the definitions of CMRS and PMRS, of existing services as they are currently provided. We recognize, however, that the manner in which these services are provided may change over time, and that these changes may require reclassification.

1. *Existing Private Services*

a. Government, Public Safety, and Special Emergency Radio Services

82. We proposed in the *Notice* to classify all existing government and public safety mobile services as private mobile services under Section 332(d)(3) of the Act. The commenters uniformly support this tentative conclusion.[174] Because our rules restrict use of these services to local governments and public safety organizations, they are not available "to the public" or a "substantial portion of the public" within the meaning of Section 332(d). In addition, with the exception of the Special Emergency Radio Service, these service categories are limited to not-for-profit use. We therefore conclude that, as proposed, all government, public safety, and Special Emergency services regulated under Part 90, Subparts B and C, will be classified as PMRS and will continue to be regulated as they have been.

b. Aviation, Marine, and Personal Radio Services

83. The *Notice* proposed to classify all mobile service licensees in the Part 80 marine services and Part 87 aviation services (with the exception of Public Coast Station licensees, who are currently regulated as common carriers) as PMRS on the grounds that these are not-for-profit systems. We also proposed to classify personal mobile radio services under Part 95 as PMRS on the same basis. The comments generally support this approach.[175] Therefore, we conclude that all mobile services under Parts 80, 87, and 95 will be classified as PMRS, except for Public Coast Station service (Part 80, Subpart J), which will be classified as CMRS. We also note that this action does not apply to *fixed* services under these rule parts, which are beyond the purview of Sections 3(n) and 332 of the Act. Thus, Operational Fixed Station licensees under Part 80, Subpart L, and Part 87, Subpart P, and Interactive Video and Data Service, which we have also determined to be a fixed service, are not affected by this Order.

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[173] The procedures for overcoming the presumption that a mobile service provider should be regulated as PMRS are specified in Section 20.9(a) of the Commission's Rules, as adopted in this Order. *See* Appendix A.

[174] *See, e.g.*, AAR Comments at 4-5; AAR Reply Comments at 2-3; American Petroleum Comments at 6; DC PSC Comments at 8; PRSG Comments at 2.

[175] *See, e.g.*, ARINC Comments at 4-6; PRSG Comments at 2; Grand Comments at 2.

c. Industrial and Land Transportation Services

84. In lieu of a specific proposal for classification of the Industrial and Land Transportation Services (regulated under Part 90, Subparts D and E of our Rules),[176] we sought general comment on how the statutory definitions should apply to licensees in these service categories. The *Notice* tentatively concluded that licensees operating systems for internal use should be deemed not-for-profit within the meaning of the statute and therefore classified as PMRS. In addition, we noted that because many of these private land mobile services are specifically targeted to specific businesses, industries, or user groups, they are arguably not intended for the public or even a substantial portion of the public. We therefore sought comment on whether for-profit service in these categories should be classified as PMRS as well.

85. Virtually all commenters agree that PMRS classification is appropriate for licensees in any of the Industrial or Land Transportation Services who operate systems solely for their own internal use.[177] As discussed in Part III.B.2.a, paras. 39-49, *supra*, however, commenters are divided on the issue of whether a private non-commercial licensee should be classified differently if it leases excess capacity or enters into a shared-use arrangement with other users.[178] Commenters also express differing views on whether private carriers in the Industrial and Land Transportation Services make service available to a "substantial portion of the public" within the meaning of Section 332(d). Many commenters argue that the eligibility restrictions for these services limit their use to such specialized user groups that they should be uniformly classified as private services.[179] Other commenters contend that even existing private services designated for specific user groups should be deemed "available to a substantial portion of the public" on the grounds that they compete with common carrier services.[180]

86. We conclude that, with the exception of the Business Radio Service, all Industrial and Land Transportation Services should be classified as private mobile radio services under Section 332(d)(3) of the Act. We agree with the view expressed by many commenters that because these services are limited under our rules to highly specialized uses for restricted classes of eligible users, they should be treated as not available to a substantial portion of the public for purposes of Section 332(d)(1). In addition, many of the licensees in these services operate systems solely for internal use and therefore do not meet the "for-profit" element of the CMRS definition.[181]

87. In the case of the Business Radio Service (BRS), we have determined that our eligibility rules are sufficiently broad to render this service effectively available to a substantial

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[176] The Industrial Radio Services consist of the Power, Petroleum, Forest Products, Video Production, Relay Press, Special Industrial, Business, Manufacturers, and Telephone Maintenance radio services. The Land Transportation Services are the Motor Carrier, Railroad, Taxicab, and Automobile Emergency radio services.

[177] *See, e.g.*, AAR Comments at 4-5; American Petroleum Comments at 4.

[178] *See, e.g.*, CTIA Comments at 7-8; McCaw Comments at 16; TDS Comments at 3-4.

[179] *See* ARINC Reply Comments at 2; American Petroleum Comments at 3-6; AAR Reply Comments at 4.

[180] USTA Comments at 5-6.

[181] Consistent with our decision concerning sale of excess capacity activities, however, we emphasize that Industrial and Land Transportation Services licensees will be treated as for-profit to the extent of any for-profit activity. Paras. 45-46, *supra*.

portion of the public.[182] Therefore, classification of BRS licensees will depend on whether they meet the other elements of the CMRS definition discussed in this Order. BRS licensees who offer for-profit interconnected service, as we have defined these terms, will be classified as CMRS providers. On the other hand, BRS licensees who operate internal use systems or do not offer interconnected service to system users will be classified as PMRS unless it is demonstrated that they are providing service that is functionally equivalent to CMRS.

d. Specialized Mobile Radio

88. In the *Notice*, we requested comment on how the elements of the CMRS definition should be applied to Specialized Mobile Radio (SMR) service. We stated our tentative belief that wide-area SMR service should be considered available to a "substantial portion of the public" and therefore classified as CMRS if the other elements of the definition are met. We pointed out that if we treat wide-area SMRs as available to a substantial portion of the public, under this approach, both existing wide-area SMR service and pending proposals for wide-area SMR service could be affected. We requested comment, however, on whether we should classify as private SMRs that do not offer wide-area service or do not employ frequency reuse on the grounds that such services are either not available to a "substantial portion of the public" or that they are not the "functional equivalent" of commercial mobile radio service. In addition, we sought comment on how we should classify wide-area licensees who provide non-interconnected service, do not serve a substantial portion of the public, or devote the majority of their system capacity to traditional dispatch service.

89. Many of the commenters believe that any wide-area SMR systems that provide interconnected service should be classified as CMRS.[183] Some commenters, such as E.F. Johnson, believe that only those wide-area systems employing frequency reuse should be classified as CMRS.[184] Commenters are also divided as to how we should classify small or traditional SMR systems. For example, CTIA and others contend that all SMR providers should be classified as CMRS in light of Congress's directives and economic analysis concerning their substitutability.[185] Other commenters, such as ITA, believe that the Commission should continue to classify as private smaller SMR systems that are licensed for a limited number of frequencies and offer service to a specialized class of customers.[186]

90. Under our interpretation of the statute, most SMR licensees automatically meet two of the elements of the CMRS definition. First, because all our rules define SMR licensees as "commercial" service providers,[187] they are by definition providing for-profit service under our interpretation of the CMRS definition. Second, we have concluded that the SMR end user eligibility criteria set forth in our rules[188] 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

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[182] *See* para. 68, *supra.*

[183] *See, e.g.*, AMTA Comments at 14-15; DC PSC Comments at 8; NYNEX Comments at 14-15 & n.18.

[184] E.F. Johnson Comments at 9.

[185] *E.g.*, CTIA Comments at 15; Pacific Comments at 10; Mtel Comments at 10-11; Arch Comments at 8.

[186] ITA Comments at 5.

[187] Section 90.7 of the Commission's Rules, 47 C.F.R. § 90.7.

[188] Section 90.603(c) of the Commission's Rules, 47 C.F.R. § 90.603(c).

conclude that 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.[189]

91. This approach will result in CMRS classification for any wide-area SMR that intends to offer for-profit interconnected service, as we expect most such systems will do. This is consistent with Congress's goal and the views of most commenters that SMRs providing interconnected service on a competitive basis with cellular carriers should be regulated similarly to cellular carriers. At the same time, this approach will allow traditional SMR dispatch services to be classified as private to the extent that these systems are not offering interconnected service or do not have an interconnection request pending with the Commission. In this respect, we agree with those parties who argue that an individual dispatch-only SMR system does not fit within the definition of CMRS.

92. We emphasize, however, that any offering of interconnected service by a traditional SMR licensee will result in CMRS classification. Thus, our decision whether to classify SMRs as PMRS or CMRS will not turn on system capacity, frequency reuse, or other technology-dependent aspects of system operations. We agree with Telocator that "the agency has never relied on system capacity to ascertain regulatory status" and "to do so now could create disincentives to employ new capacity-enhancing technologies . . . ."[190] In addition, as concluded in an earlier section, our decision how to classify a service will not turn on the size of the geographic area served.[191]

93. Finally, we note that under our interpretation of "functional equivalence" discussed in paras. 79-80, *supra,* the possibility exists that an SMR system that does not fall within the CMRS definition could nevertheless be classified as CMRS based on a finding that it is functionally equivalent to CMRS. Because we are presuming all such SMR systems to be private, however, we conclude that there is no reason to reach this issue at this juncture. Should there be instances where parties contend that a presumptively private SMR licensee is providing the functional equivalent of CMRS, we believe that development of a record is required to overcome this presumption, and that such instances should be addressed on a case-by-case basis.

e. 220-222 MHz Private Land Mobile

94. In the 220-222 MHz band, we license systems with local or nationwide channels that can be used for commercial or non-commercial operations.[192] In the *Notice*, we requested comment addressing whether for-profit interconnected private land mobile services at 220 MHz should be classified as CMRS and non-commercial 220 MHz services classified as PMRS. Roamer asserts that technical limitations make the 220 MHz services unattractive for interconnected two-way voice communications, so they are not competitive with wide-area SMR offerings, cellular, or PCS. Roamer contends that 220 MHz services should therefore remain private except to the extent that we determine, on a case-by-case basis, that they compete with

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[189] As discussed in para. 55, *supra,* SMR licensees who do not offer interconnected service to their customers may use interconnected facilities for internal control purposes without affecting their regulatory status.

[190] Telocator Comments at 12.

[191] Para. 70, *supra.*

[192] *See* Part 90 of the Commission's Rules, Subpart T, 47 C.F.R. §§ 90.701-90.741.

wide-area SMR services.[193] Other commenters address 220 MHz systems indirectly; for example, AMTA argues that we should classify as private all two-way private carriers and all purely internal systems (this would include the non-commercial 220 MHz systems).[194]

95. Despite the arguments presented by Roamer, the key issue at 220 MHz is not whether the technology is attractive for voice messaging, but rather whether interconnected, for-profit service is in fact made available to the public. Eligibility for this service is extremely broad,[195] so we find that 220 MHz services are effectively made available to a substantial portion of the public. The technology permits licensees to offer interconnected services. Regulatory status therefore depends upon whether the licensee in fact makes available for-profit, interconnected service. Local 220 MHz channels may be used for commercial or non-commercial operations. If a local system licensee offers interconnected service that is for-profit, as we have interpreted that element of the statutory CMRS definition, then the service will be classified as CMRS. Services that are not interconnected or that are used for only non-commercial purposes, however, will be presumptively classified as PMRS, unless affirmative showings demonstrate that they are in fact the functional equivalent of CMRS. Nationwide 220 MHz channels are expressly designated for commercial or non-commercial use. The Rules provide for-profit use of the commercial channels, so the question in each case is whether interconnected service is offered. Offerings of interconnected service will be classified as CMRS, therefore, and non-interconnected services will be presumptively classified as PMRS unless contrary showings are made. The non-commercial nationwide channels are assigned for internal use of the licensee, which we have determined is not a for-profit use. Services on such channels therefore will be presumptively classified as PMRS unless a contrary showing is made. To the extent that these channels are used for any for-profit operations, however, and to the extent that interconnected service is offered, these channels will be reclassified as CMRS.

f. Private Paging

96. We requested comment on the regulatory treatment of private paging services under the statute. In so doing, we explained that private carrier paging (PCP) services are provided for profit and without any significant restriction regarding classes of customers; therefore, whether PCPs are classified as commercial mobile radio services would depend on whether they are providing interconnected service. In contrast, we conclude that paging services operated exclusively for the licensee's internal communications are not-for-profit.[196]

97. Commenters' views on the classification of PCPs are divided primarily based on whether they believe that "store-and-forward" service is a form of interconnected service within the meaning of the statute.[197] As discussed above, we have concluded that end user transmission or receipt of messages to or from the public switched network on a store-and-forward basis does constitute interconnected service.[198] Therefore, we conclude that PCPs should be classified as commercial mobile radio services. PCP services are generally provided for profit

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[193] Roamer Comments at 3-5.

[194] AMTA Comments at 14-16. *See* Section 90.771 of the Commission's Rules, 47 C.F.R. § 90.771 (non-commercial 220 MHz systems are designated for licensee's internal use).

[195] *See* Section 90.703 of the Commission's Rules, 47 C.F.R. § 90.703.

[196] *See* para. 44, *supra.*

[197] *See, e.g.*, Bell Atlantic Comments at 15; CTIA Comments at 15; McCaw Comments at 29-30; Motorola Comments at App. A; Nextel Comments at 16-17; NYNEX Comments at 15; Pagemart Comments at 8-10.

[198] *See* paras. 57-58, *supra.*

and without significant restrictions on eligibility. Also, given our determination regarding the types of arrangements that constitute interconnected service for purposes of Section 332(d)(1) of the Act, PCPs satisfy the criteria for classification as commercial mobile radio services. We believe that this classification is justified in part by the fact that there are no longer any real differences between private carrier and common carrier paging systems. As Nextel points out, "[b]oth offer interconnected service to enable subscribers to be reached by any user of the public switched network."[199] We do not extend CMRS classification, however, to private internal paging systems. Because these systems are not-for-profit and serve the internal communications needs of licensees rather than being publicly available, they will be presumptively classified as PMRS.

g. Automatic Vehicle Monitoring

98. Currently, Automatic Vehicle Monitoring (AVM) systems operate under interim rule provisions.[200] We sought comment in the *Notice* regarding the Commission's pending proposal to permit licensees of Automatic Vehicle Monitoring (AVM) systems, which operate by means of radio transmission to and from central control points, to provide location and monitoring service to Part 90 eligibles, individuals, and the Federal Government.[201] Metricom argues that Location and Monitoring Service (LMS) systems should be classified as CMRS because if the system operators make their service available to individuals then the services will be available to a substantial portion of the public.[202] Southwestern, an active AVM participant, states that AVM services should be classified as CMRS because they are likely to evolve into interconnected service over time.[203]

99. Under our interim rules, AVM service is licensed on a not-for-profit basis.[204] If this service is offered to third party users, the service is effectively available to a substantial portion of the public.[205] Under our proposal in the *LMS Notice,* AVM may be licensed on a for-profit basis and we propose to expand the eligibility to include individuals and the Federal Government.[206] At present, however, these systems do not offer interconnected service, nor are they likely to do so in the foreseeable future. Therefore, we will presumptively classify AVM systems as PMRS. Of course, should AVM systems develop interconnected service capability in the future, as Southwestern predicts, they will be subject to reclassification. Other AVM services, *i.e.*, those that are not wide-band offerings, include a broad range of services such as tag readers that may track trains and highway vehicles, automatically debit tolls from drivers' accounts, and perform numerous other intelligent location and monitoring services. Although these advanced services are provided for the benefit of the public, we anticipate that

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[199] Nextel Comments at 16.

[200] Section 90.239 of the Commission's Rules, 47 C.F.R. § 90.239.

[201] *See* Amendment of Part 90 of the Commission's Rules To Adopt Regulations for Automatic Vehicle Monitoring Systems, PR Docket No. 93-61, Notice of Proposed Rule Making, 8 FCC Rcd 2502 (1993) (*LMS Notice*).

[202] Metricom Comments at 5-6.

[203] Southwestern Comments at 8, 17.

[204] *LMS Notice,* 8 FCC Rcd at 2503. In 1992, however, the Private Radio Bureau granted Teletrac a waiver of the Commission's Rules to allow it to provide service on a private carrier basis, to serve individuals, and to locate objects other than vehicles. *Id.* at 2502-03.

[205] *See* para. 68, *supra.*

[206] *LMS Notice,* 8 FCC Rcd at 2503.

they generally will be offered through state and local government and other non-profit entities on a non-commercial basis, or used by licensees such as railroads for internal use, and therefore are not for-profit offerings. Accordingly, these services will be classified presumptively as PMRS.

2. *Existing Common Carrier Services*

a. Cellular and Other Services

(1) *Background and Pleadings*

100. The *Notice* requested comment on how existing common carrier services should be classified under revised Section 332 of the Act. We stated our view that existing common carrier services that provide interconnected radiotelephone service to the public will be classified as commercial mobile radio services. We emphasized that, depending on our decision as to whether store-and-forward paging constitutes interconnected service, however, common carrier systems that use store-and-forward could be subject to reclassification. In addition, we requested comment on whether some of the smaller common carrier systems in the Public Mobile Service could be reclassified as private if we conclude that low capacity systems do not serve the public, or a substantial portion of the public, for purposes of the CMRS definition in Section 332(d)(1).

101. The commenters generally agree that existing common carrier services, including cellular and paging, should be classified as commercial mobile radio services.[207] These parties agree that those common carrier services are for-profit, are interconnected services, and are made available to the public without restrictions. Some of the commenters believe, however, that there may be certain common carriers that may be more appropriately reclassified as private because they are not functionally equivalent in terms of market power and presence.[208]

(2) *Discussion*

102. We agree with the commenters who argue that most of the existing common carrier services satisfy the statutory requirement for classification as a commercial mobile radio service because they meet the three prongs of the statutory test. We agree with these parties that cellular service (Part 22, Subpart K) and the 800 MHz air-ground service (Part 22, Subpart M) are services that that fit within the three-pronged definition because they are provided for profit, are interconnected to the public switched network, and make interconnected service available to the public. The Public Land Mobile Service (Part 22, Subpart G) comprises several types of mobile and fixed operations, of which paging services, mobile telephone service (MTS), improved mobile telephone service (IMTS), trunked mobile service, and 454 MHz air-ground service meet the definition of commercial mobile radio service.[209] With respect to paging services that may use store-and-forward technology, we have determined that such technology should not prevent a service from being considered an interconnected service.[210] We also find that Offshore Radio

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[207] *See, e.g.*, CTIA Comments at 15; GTE Comments at 9; Motorola Comments at App. A; NYNEX Comments at 16.

[208] *See* AMTA Comments at 15; E.F. Johnson Comments at 9-10.

[209] The Public Land Mobile Service also contains provisions for authorization of 72-76 MHz fixed and point to multipoint stations which are fixed operations that operate in conjunction with mobile services.

[210] *See* paras. 57-58, *supra.*

Service (Part 22, Subpart L) satisfies the criteria for classification as CMRS.[211] This service is provided for profit, offers interconnected service, and contains no restriction on who may use the service. Moreover, Part 22 offshore radio service in not purely a fixed service as defined by our Rules. Accordingly, we classify these existing common carrier mobile services as commercial mobile radio services. Finally, we find that the Rural Radio Service, including BETRS, is a fixed service and is not affected by this proceeding.

b. Dispatch

(1) *Background and Pleadings*

103. We requested comment on whether we should amend our rules to allow existing common carriers who are classified as commercial mobile radio services to provide dispatch service. Under Section 332(c)(2) of the Act, Congress has given the Commission discretion to terminate the current dispatch prohibition in whole or in part. Thus, we sought comments on (1) whether there are any technical justifications for continuing the prohibition; (2) whether eliminating the dispatch prohibition would provide carriers with greater flexibility to meet their customer needs; and (3) whether eliminating the prohibition would promote increased competition in the dispatch marketplace and lower costs to subscribers.

104. While most commenters favor eliminating the current prohibition on dispatch,[212] a number of commenters raise competitive concerns with such a proposal.[213] Those who favor elimination of the dispatch prohibition argue that there are no technical justifications for the prohibition and that allowing CMRS providers to offer dispatch service will provide consumers with expanded choices.[214] Parties on the other side of this issue argue that while eventual repeal of the dispatch ban may be justified, immediate repeal could enable CMRS providers to exert market power against traditional SMR systems that now offer dispatch.[215] In addition, AMSC requests that the Commission clarify that mobile satellite service (MSS) systems are permitted to provide dispatch service.[216]

(2) *Discussion*

105. We have concluded that the record established in this proceeding has not provided us with sufficient data to sustain an informed judgment regarding the effects that removal of the dispatch service ban may have in the dispatch marketplace. Therefore, we have decided to seek further comment on this matter in the context of an upcoming proceeding in which we plan to examine our prohibition against the licensing of wireline telephone carriers in the SMR service. This will enable us to establish a more definitive record so we can better evaluate this issue. We note, however, the following points. First, in examining the dispatch service issue, we will continue to be guided by our objective to promote and protect competition, not specific competitors. Second, AMSC MSS has been authorized to provide "a two-way voice dispatch

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[211] Offshore Radio Service Stations are authorized to offer and provide common carrier radio telecommunications services for hire to subscribers on structures (also, airborne stations not exceeding 1000 feet above ground and boats) in the offshore coastal waters of the Gulf of Mexico. *See* Sections 22.1000-22.1008 of the Commission's Rules, 47 C.F.R. §§ 22.1000-22.1008.

[212] *See, e.g.*, MCI Comments at 6-7; NYNEX Comments at 16; Telocator Comments at 16-17.

[213] *See, e.g.*, E.F. Johnson Comments at 10.

[214] *See, e.g.*, Bell Atlantic Comments at 17-19; Telocator Comments at 16-17.

[215] *See, e.g.*, AMTA Comments at 21-22.

[216] AMSC Comments at 6-7; AMSC Reply Comments at 1-2.

service between a user terminal and a base station."[217] This Order does not alter AMSC's current authorization to provide service.

c. Satellite Services

(1) *Background and Pleadings*

106. We explained in the *Notice* that mobile services using the system capacity of a satellite licensee fall within Section 3(n) of the Communications Act. Citing *Martin Marietta,*[218] we indicated that the Commission may authorize a domestic satellite licensee to offer system capacity for the provision of mobile service on a non-common carriage basis absent a showing that it would not be in the public interest. Because Section 332(c)(5) did not prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to CMRS providers shall be treated as common carriage, we tentatively concluded that we should continue our existing procedures for making this determination.[219] Furthermore, we stated that if the satellite system licensee opts to provide commercial mobile radio service directly to end users, it shall be treated as a common carrier. Similarly, provision of commercial mobile radio service to end users by earth station licensees or providers who resell space segment capacity would be treated as common carrier service. We sought comments on this analysis.

107. Starsys, Motorola, and NYNEX agree with our proposal to continue to authorize domestic mobile satellite service licensees to provide service on a non-common carrier basis if the public interest is served.[220] In addition, AMSC agrees with our proposal to require this service to be classified as CMRS to the extent that the services are provided to end users.[221] AMSC requests, however, that if the Commission decides to regulate some mobile satellite licensees as non-common carriers in the provision of space segment, all licensees of similar services, such as AMSC, should be regulated the same.[222] TRW and Reed Smith argue that resellers of satellite capacity should not be regulated as CMRS unless they provide service directly to end users, regardless of the regulatory status of the licensee of the underlying satellite

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[217] Amendment of Parts 2, 22 and 25 of the Commission's Rules To Allocate Spectrum for and To Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, GEN Docket No. 84-1234, Memorandum Opinion, Order and Authorization, 4 FCC Rcd 6041, 6046-48 (1989)(*AMSC Authorization Order*).

[218] Martin Marietta Communications Systems, Memorandum Opinion and Order, 60 Rad.Reg. (P&F) 2d 779 (1986)(*Martin Marietta*).

[219] The Commission must make this determination by looking at an array of public interest considerations (*e.g.*, the types of services being offered and the number of licensees being authorized). *See, e.g.*, Amendment of Parts 2, 22 and 25 of the Commission's Rules To Allocate Spectrum for, and To Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, GEN Docket No. 84-1234, Second Report and Order, 2 FCC Rcd 485, 490 (1987); Amendment to the Commission's Rules To Allocate Spectrum for, and To Establish Other Rules and Policies Pertaining to, a Radiodetermination Satellite Service, GEN Docket No. 84-689, Second Report and Order, 104 FCC 2d 650, 665-66 (1986)(*RDSS Order*).

[220] Motorola Comments at 13-15; NYNEX Comments at 17; Starsys Comments at 2.

[221] AMSC Comments at 5.

[222] AMSC Reply Comments at 3-4.

system.[223] TRW also argues that some mobile satellite services — *e.g.*, radiolocation services for truck fleets or data service networks for a company's employees — may not be CMRS because they may be offered on a non-interconnected basis to a limited population.[224]

(2) *Discussion*

108. The Commission will continue to use its existing procedures to determine whether "the provision of space segment capacity by satellite systems to providers of commercial mobile service shall be treated as common carriage."[225] We will extend this treatment to any entity that sells or leases space segment capacity, to the extent that they are not providing CMRS directly to end users. Consistent with Section 332(c)(1)(A) of the statute, however, the provision of both space and earth segment capacity either by mobile satellite system licensees providing service through, for example, their own licensed earth stations, or by earth station licensee resellers, directly to users of CMRS shall be treated as common carriage.[226] Thus, each mobile satellite service must be evaluated, consistent with the approach outlined in this decision, to determine whether the service offering is CMRS or PMRS.

109. At present, there are three mobile satellite services authorized by this Commission: geostationary mobile satellite service (MSS);[227] non-voice, non-geostationary mobile satellite service (NVNG MSS),[228] and radiodetermination satellite service (RDSS).[229] MSS is regulated as a common carrier service, RDSS is regulated as a private service, and NVNG MSS space station licensees are not required to be common carriers in providing system access to CMRS providers. Thus, under our existing procedures, we have already provided a regulatory framework under which RDSS and NVNG system licensees and other entities may provide system access to CMRS providers on a non-common carrier basis. We believe that each of these services may be offered to end users as CMRS. For example, these services probably will be offered for-profit and to the public; however, they may not be interconnected to the public switched network in all cases (*e.g.*, the back-haul to the customer may be through a private fixed-satellite network). Thus, to the extent a space station licensee or other entity provides to end users a service that meets the elements of the CMRS definition discussed in this Order or is the functional equivalent of CMRS, we will regulate the provision of that service by the licensee or other entity as common carriage. We decline on this record, however, to change the regulatory classification of AMSC, the sole domestic MSS space station licensee. AMSC is authorized as a provider of space segment capacity directly to end users through its own earth

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[223] Reed Smith Comments at 5; TRW Reply Comments at 13.

[224] TRW Comments at 16-21.

[225] Comsat has been authorized to offer system capacity on Inmarsat satellites for the provision of mobile satellite service. It has also been authorized to offer Inmarsat-based mobile satellite service directly to end users. Comsat has been treated as a common carrier in both instances. 47 U.S.C. § 741. The new Section 332(c)(4) of the Communications Act provides that Section 332(c) does not alter or affect this treatment.

[226] *See* Conference Report at 494.

[227] *AMSC Authorization Order.*

[228] Amendment of the Commission's Rules To Establish Rules and Policies Pertaining to a Non-Voice, Non-Geostationary Mobile Satellite Service, CC Docket No. 92-76, Report and Order, 8 FCC Rcd 8450 (1993).

[229] *See RDSS Order.*

stations.[230] AMSC has not demonstrated why, under our existing procedures, it should not continue to be regulated as a common carrier.[231] In another rule making proceeding, the Commission has proposed that low-Earth orbiting satellites be used to provide MSS in the 1.6 and 2.4 GHz bands.[232] We will determine in that proceeding the regulatory status of the provision of space segment capacity in the 1.6 and 2.4 GHz bands to CMRS providers.[233] In addition, based on the Section 332 criteria outlined in this decision, we will determine whether a satellite licensee's provision of space segment capacity to end users shall be treated as CMRS or PMRS. Regardless of the nature of this determination, however, it is important to note that we have sought comment in the *MSS Above 1 GHz Notice* regarding whether there are "public interest reasons to impose a legal compulsion upon MSS Above 1 GHz space station operators to serve the public indifferently, even if an MSS Above 1 GHz offering does not fall within the definition of CMRS."[234]

3. *Commercial and Private Service on Common Frequencies*

a. Background and Pleadings

110. Based on the assumption that some existing private land mobile services are reclassified as commercial mobile radio services, we stated in the *Notice* that it would be necessary to address how commercial and private mobile radio services would co-exist on common frequencies. We stated our belief that any attempt to separate our existing private land mobile bands into separate allocations for commercial and private services would be impractical and unnecessary. Instead, we indicated that we prefer to allow licensees on existing land mobile frequencies the flexibility to provide either commercial or private service as defined by our rules.

111. One approach we proposed would allow licensees the option to provide both commercial and private service under a single license. Under this alternative, we would impose the appropriate classification and regulations on each type of service provided. Another approach we proposed would be to classify licensees as commercial or private mobile radio service providers based on their primary use of the spectrum. We sought comments on the implications of each of these proposals as well as other alternatives to resolve this issue.

112. AMTA warns that any bifurcated regulatory approach we adopt may have to be revisited if it impedes industry growth or uniquely disadvantages certain classes of users.[235]

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[230] American Mobile Satellite Corp., File No. 420-DSE-P/L-90, Order and Authorization, 7 FCC Rcd 942 (1992).

[231] The Commission has also authorized IDB to provide Inmarsat-based mobile satellite service directly to end users. IDB requested, and was granted, common carrier status. We find no basis on this record to modify IDB's common carrier status.

[232] Amendment of the Commission's Rules To Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5 / 2483.5-2500 MHz Frequency Bands, CC Docket No. 92-166, Notice of Proposed Rule Making, FCC 94-11 (adopted Jan. 19, 1994) (*MSS Above 1 GHz Notice*).

[233] Using our existing procedures, the Commission will make its determination based on the criteria of the *NARUC I* test discussed in the *MSS Above 1 GHz Notice*. *Id.* at para. 80.

[234] *Id.* at para. 81.

[235] AMTA Comments at 16.

E.F. Johnson asserts that the Commission need only establish compatible co-channel protection criteria between the services to ensure co-existence.[236]

b. Discussion

113. As a result of our other decisions in this Order, some, but not all, licensees operating on frequency bands currently allocated to Part 90 services will be reclassified as CMRS providers. We will not be able to determine the regulatory status of licensees by the assigned frequency bands as in the past. Rather, it appears inevitable that both commercial and private mobile radio services will coexist on the same frequency bands. Thus, we agree with E.F. Johnson that it is not practical to establish a regulatory structure that is frequency specific.

114. Based on our objective of ensuring that like mobile services are regulated similarly as a means of ensuring regulatory symmetry, we will be amending our rules in a future rule making in this proceeding to reconcile significantly disparate technical, operational and procedural regulations. Our decision to bring similar offerings under the same regulatory classification and rules should allow all mobile service providers the flexibility to offer competitive service.

115. Finally, we favor issuing a single license to mobile service providers offering both commercial and private services on the same frequency. In particular, we will adopt the same licensing scheme for existing mobile services as we are establishing for PCS.[237] As we discuss in Part III.D, paras. 116-123, *infra*, PCS licensees that offer both commercial and private services will be issued a single CMRS license, but may seek authority to dedicate a portion of their assigned spectrum to PMRS.

D. Regulatory Classification of Personal Communications Services

1. *Background and Pleadings*

116. In the *Notice* we sought comment on what regulatory approach ought to be taken with respect to personal communications services (PCS). In particular, we asked commenters to address whether all PCS should be deemed to be commercial mobile radio service, or whether some PCS offerings might be identified as private mobile radio services. We also proposed that, if PCS is defined to include both commercial and private applications, then PCS licensees should be allowed to choose the type of service they would provide. In relation to this "self-designation" option, the *Notice* also sought comment on whether the option should require that licensees offer one type of service on a primary basis, limiting their offering of the other type on a secondary basis, or in the alternative, whether we ought to allow licensees to offer both commercial and private mobile radio services on a "co-primary" basis. Finally, we asked commenters to evaluate the practical licensing consequences that would flow from adoption of the "self-designation" option.

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[236] E.F. Johnson Comments at 9.

[237] We plan to issue a Notice of Proposed Rule Making in the near future to address a range of licensing issues related to the actions we take in this Order. Procedural and technical rules relating to the provision of commercial and private services by carriers on the same frequency will be considered in that proceeding. *See* Part IV.C, para. 285, *infra*.

117. Many commenters and reply commenters favor treatment of all PCS services as exclusively, or at least "presumptively," commercial mobile radio service offerings.[238] Several other commenters maintain, however, that all PCS licensees should be allowed to "self-designate," by means of licensee choice, whether they are to provide commercial or private mobile radio service offerings.[239] A few commenters and reply commenters contend that some portion of PCS spectrum should be reserved for private mobile radio service use.[240] Mtel argues, however, that "it is the nature of the services provided, and not any regulatory compulsion or self-designation, that should dictate PCS classification."[241] Lastly, Time Warner maintains that all PCS should be regulated as private mobile radio service.[242]

2. *Discussion*

118. In deciding what regulatory approach to adopt for PCS we believe that it is imperative first to emphasize the goals for this service that were established in our PCS proceeding and by Congress in adopting the Budget Act. In the *PCS Notice* we proposed to achieve four basic goals in establishing PCS, namely: (1) universality; (2) speed of deployment; (3) diversity of services; and (4) competitive delivery.[243] Consequently, in our final decisions in both the broadband and narrowband contexts, we decided to define PCS broadly, as:[244]

> [r]adio communications that encompass mobile and ancillary fixed communication services that provide services to individuals and businesses and can be integrated with a variety of competing networks.

In adopting this definition for broadband and narrowband PCS, our goal was to ensure that PCS would include the widest possible variety of services for individuals and businesses, and that PCS providers would be able to employ the "maximum degree of flexibility" in meeting the communications requirements of various users.[245] We also believe that Congress's intent in adopting the Budget Act was to maximize the competitiveness and public availability of PCS

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[238] *See, e.g.*, AMTA Comments at 18; Bell Atlantic Comments at 16; CTIA Comments at 17; DC PSC Comments at 10; NARUC Comments at 9-10; Nextel Comments at 17; Pacific Comments at 13-14; Southwestern Comments at 17-18; USTA Comments at 9-10; Vanguard Comments at 13-14; Pacific Reply Comments at 4-5; PA PUC Reply Comments at 10-11.

[239] *See, e.g.*, AMT/DSST Comments at 5; Ameritech Comments at 2-4; California Comments at 2-4; CTIA Comments at 17-18; CTP Comments at 3; GTE Comments at 12-13; Motorola Comments at 11-12; NABER Comments at 13-14; NTCA Comments at 4; Pagemart Comments at 17-18; Rochester Comments at 6 n.11; TDS Comments at 17-18; Telocator Comments at 17-18; TRW Comments at 26-27; *but see* MCI Reply Comments at 6; Rural Cellular Reply Comments at 5-8.

[240] *See, e.g.*, New York Comments at 9; Southwestern Comments at 18; UTC Comments at 17-18; UTC Reply Comments at 19-20.

[241] Mtel Comments at 11.

[242] Time Warner Comments at 4.

[243] *PCS Notice*, 7 FCC Rcd at 5679 (para. 6).

[244] *Broadband PCS Order*, 8 FCC Rcd 7700, 7710-13 (paras. 19-24). *See Narrowband PCS Order*, 8 FCC Rcd 7162, 7163-64 (paras. 9-14).

[245] *Broadband PCS Order*, 8 FCC Rcd at 7712 (para. 23); *Narrowband PCS Order*, 8 FCC Rcd at 7164 (para. 13).

spectrum.[246] We conclude that, for the reasons discussed in the following paragraphs, designating broadband and narrowband PCS as presumptively CMRS will advance all of our goals and Congress's intent in enacting the Budget Act.

119. We agree with Bell Atlantic's suggestion that we establish a "presumption" that PCS will be classified as CMRS, allowing each PCS provider to make a showing that one or more of its services are private. We believe that the presumption approach is warranted because we have defined PCS to be broadly available to "individuals and businesses" and capable of interoperability so that it "can be integrated with a variety of competing networks."[247] PMRS services do not meet these criteria because they are not available to the public (or a substantial portion of the public) or are not interconnected to the public switched network. Therefore, a presumption that PCS should be CMRS fits our general definition of the service. All PCS spectrum will be presumed to be licensed as CMRS. An applicant or licensee proposing to use any PCS spectrum to offer service on a PMRS basis may overcome the CMRS presumption. To do so, the applicant or licensee must make a showing that must include a certification indicating that the licensee plans to offer PCS on a private basis. The certification must include a description of the proposed service sufficient to demonstrate that it is *not* within the CMRS definition. As in other licensing activities, we intend to rely on applicants' representations, and any interested party seeking to show that a licensee's request to offer PCS on a private basis does not defeat the CMRS presumption must present specific allegations of fact supported by an affidavit of a person or persons with personal knowledge.[248] If a PCS applicant who is authorized to provide only PMRS service actually provides CMRS service under that license, it will be subject to appropriate enforcement action.[249]

120. We agree with commenters that treating PCS as presumptively CMRS will advance the public interest and the underlying intent of the Budget Act. First, CMRS status for PCS will advance our goal of universality for PCS. Certain Title II obligations ensuring non-discriminatory access and fair pricing, and procedures for filing complaints against practices violating these obligations, will contribute to the universal availability of PCS because such regulations place an obligation on PCS licensees to make their service available to the public at fair prices, and the complaint process under Section 208 is available to ensure that these obligations are met.[250] No similar Title II obligations would apply if we were to designate PCS as private carriage. We also conclude that commercial mobile radio service status is consistent with our goal of achieving

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[246] *See* Communications Act, § 8(g), 47 U.S.C. § 158(g). Furthermore, our authority to issue licenses by auction under the Budget Act was conditioned on the completion of this rule making proceeding with respect to classification of PCS. *See* Communications Act, §§ 309(j)(10)(A)(iv), 332(c)(1)(D), 47 U.S.C. §§ 309(j)(10)(A)(iv), 332(c)(1)(D); *see also Auction Notice*, 8 FCC Rcd at 7655 n.110 (para. 116) (principal use of PCS spectrum is expected to involve service offerings rendered in exchange for compensation).

[247] *Broadband PCS Order*, 8 FCC Rcd at 7712 (para. 23).

[248] *See* Communications Act, § 309(d)(1), 47 U.S.C. § 309(d)(1). Because of the CMRS presumption, all PCS applications and modifications will be placed on public notice for 30 days. *See id.*, § 309(b). *See* Section 20.9(b) of the Commission's Rules, as adopted in this Order, for the procedures an applicant or licensee must follow to offer PCS as a PMRS.

[249] *See, e.g.*, Communications Act, §§ 312(a), 503(b), 47 U.S.C. §§ 312(a), 503(b).

[250] *See, e.g.*, Communications Act, §§ 201, 202, 208, 47 U.S.C. §§ 201, 202, 208 (providing for, respectively: service and interconnection upon reasonable request and terms; no unjust or unreasonable discrimination; complaint procedures to exact forfeitures for violation of these obligations); *see also Notice*, 8 FCC Rcd at 7999-8001 (paras. 56-68).

speedy deployment of PCS. We have set certain construction requirements for PCS licensees in order to ensure such quick deployment of PCS. Within their ten-year license terms, broadband PCS licensees must serve one-third of the population within their market areas within five years, two-thirds within seven years, and 90 percent within ten years after being licensed.[251] In the case of narrowband PCS, licensees will be required to cover 37.5 percent of the population of the applicable service area within five years, and 75 percent of the population within ten years.[252]

121. We believe that designation of PCS as presumptively CMRS is consistent with the strict build-out requirements we have established to ensure quick deployment of the service. The plain meaning of the words "offer service to . . . the population" in the broadband PCS build-out requirements is that broadband PCS licensees must be in a position to serve the stated percentages of population, upon reasonable request, in their service areas within the specified time. We agree with commenters who also maintain that it would be difficult for broadband PCS licensees to meet these build-out requirements on a private basis, since the requirements call for service of large percentages of population. Because we have concluded that Section 332 requires PMRS to be limited to service available to only a limited group of users in any given service area, or restricted to non-interconnected service, it would be extremely difficult for licensees to meet our PCS build-out requirements on a private basis.

122. CMRS status for PCS will not hinder our goal of promoting diverse services. The statute allows us to adopt a flexible regulatory scheme to treat certain CMRS in a streamlined fashion, thereby cultivating diversity among services.[253] Nor will regulating all PCS as presumptively CMRS necessarily deter diverse service offerings because, in the past, we have allocated spectrum for common carriage use without requiring that it be operated only under any one particular technical set of parameters.[254]

123. Also, common carriage regulation of PCS will foster competitive delivery. Congress has given us the mandate to examine the competitive aspects of commercial mobile radio service markets on an ongoing basis so that we can assure competitive conditions exist among PCS

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[251] *Broadband PCS Order*, 8 FCC Rcd at 7753-54 (paras. 132-134).

[252] *Narrowband PCS Reconsideration Order* at para. 32.

[253] In explaining the provisions of Section 332(c)(1)(A) allowing forbearance for some commercial mobile service providers, the Conference Report explains that:

> the purpose of this provision is to recognize that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services. While this provision does not alter the treatment of all commercial mobile services as common carriers, this provision permits the Commission some degree of flexibility to determine which specific regulations should be applied to each carrier.

Conference Report at 491.

[254] *See, e.g.*, Amendment of Parts 2 and 22 of the Commission's Rules To Allocate Spectrum in the 928-941 MHz Band and To Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service, First Report and Order, 89 FCC 2d 1337, 1343 (1982) (deciding "not to earmark common carrier frequencies for any specific use").

licensees and in relation to rival services.[255] CMRS status for PCS will further accomplish Congress's intent in enacting the Budget Act by establishing regulatory symmetry among mobile service providers. In addition, statutory forbearance from many aspects of Title II common carriage regulation will enhance the efficiency and public value of PCS spectrum, advancing the nation's network infrastructure into the forefront of state-of-the-art wireless telecommunications technologies. Moreover, our rules will allow PCS providers to provide private PCS service if they demonstrate a reasonable basis for overcoming the CMRS presumption.[256] We therefore conclude that presumptive commercial mobile radio service status for PCS will advance the public interest.

E. Forbearance from Title II Regulation

1. *Statutory Test*

124. Section 332(c)(1)(A) provides that the Commission may determine that any provision of Title II may be specified as "inapplicable to [any] service or person" otherwise treated as a common carrier.[257] The Conference Report states that "[d]ifferential regulation of providers of commercial mobile services is permissible but is not required in order to fulfill the intent of this section."[258]

125. Section 332(c)(1)(A) also requires that before forbearing from applying any section of Title II the Commission must find that each of the following conditions applies:[259]

(1) Enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory.

(2) Enforcement of such provision is not necessary for the protection of consumers.

(3) Specifying such provision is consistent with the public interest.

As we discussed in the Notice, as part of evaluating the "public interest" described in Section 332(c)(1)(A)(iii), Section 332(c)(1)(C) mandates that the Commission consider "whether the proposed regulation . . . will promote competitive market conditions, including the extent to which such regulation . . . will enhance competition among providers of commercial mobile service. . . ."[260] For PCS, Section 332(c)(1)(D) specifically requires the Commission to make these determinations within 180 days of enactment. While the public interest evaluation requires the Commission to look at market conditions, the statute permits us to consider other factors in deciding whether to forbear from regulating under any provision of Title II. In the Notice we

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[255] Under the Communications Act, §§ 332(c)(1)(A)-332(c)(1)(C), 47 U.S.C. §§ 332(c)(1)(A)-332(c)(1)(C), the Commission may review competitive market conditions and adopt a flexible regulatory scheme forbearing from certain regulations in order to foster competition. *See Notice*, 8 FCC Rcd at 7998-99 (paras. 53-59); *see also* Part III.E, paras. 124-219, *infra.*

[256] See para. 119, *supra.*

[257] Communications Act, § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A).

[258] Conference Report at 491.

[259] Communications Act, § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A).

[260] *Id.*, § 332(c)(1)(C), 47 U.S.C. § 332(c)(1)(C).

sought comment on what factors the Commission should consider when performing the analyses pursuant to this test.

2. *Competition in the Commercial Mobile Radio Services Marketplace*

a. Background and Pleadings

126. In the *Notice*, we tentatively concluded that the mobile services marketplace was sufficiently competitive to justify forbearance from many sections of Title II.[261] Since the third prong requires the Commission to determine the effect of forbearance on competition in the CMRS marketplace, we focus on the competitive nature of the CMRS marketplace first.

127. CTIA, Motorola, and other commenters contend that the CMRS marketplace is competitive, and becoming increasingly more so, with as many as seven PCS licensees and SMR and enhanced SMR providers joining the two cellular licensees and resellers currently operating in each market.[262] Bell Atlantic and McCaw argue that in the cellular market, the presence of two facilities-based providers, in addition to resellers, assures competitive conditions that prevent any one competitor from possessing the ability and incentive to engage in anti-competitive practices.[263] McCaw also asserts that cellular carriers lack market power.[264] Bell Atlantic and GTE contend that the Commission has long recognized that the cellular marketplace is subject to vigorous competition on both a facilities and resale basis.[265] Motorola and Mtel further argue that the paging industry is even more competitive, with 80 private and common carrier channels available in the 900 MHz band alone, supporting several thousand systems across the nation.[266]

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[261] The *Notice* did not propose to address the question of forbearance for international CMRS and we do not propose such action here. *See* note 369, *infra*.

[262] CTIA Comments at 33; Motorola Comments at 17-18. *See also* AMSC Comments at 1; Arch Comments at 11; BellSouth Comments at 26; Century Comments at 5-6; Comcast Comments at 12; GTE Comments at 15; Cox Comments at 7; McCaw Comments at 8; Nextel Comments at 21; Sprint Comments at 12; Telocator Comments at 19-20, *citing* CTIA, "The U.S. Cellular Telecommunications Industry: An Overview Analysis of Competition and Operating Economics" at 12-16 (Aug. 26, 1992).

[263] Bell Atlantic Comments at 21-24; McCaw Comments at 7-8. *See also* Southwestern Comments at 27.

[264] McCaw Comments at 9.

[265] Bell Atlantic Comments at 23-24, *citing* Bundling of Cellular Customer Premises Equipment and Cellular Service, CC Docket No. 91-34, Notice of Proposed Rule Making, 6 FCC Rcd 1732, 1733 (1991); Bundling of Cellular Customer Premises Equipment and Cellular Service, CC Docket No. 91-34, Report and Order, 7 FCC Rcd 4028, 4029 (1992) *(Cellular CPE Bundling Order)*; GTE Comments at 14-15, *citing Cellular CPE Bundling Order*.

[266] Motorola Comments at 18; Mtel Comments at 15 (asserting that paging is competitive, arguing that the Commission established three common carrier network paging carriers based upon a determination that such licensing was sufficient both to serve existing demand and to provide genuine competition), *citing* Amendments of Parts 2 and 22 of the Commission's Rules To Allocate Spectrum in the 928-941 MHz Band and To Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service, General Docket No. 80-183, Memorandum Opinion and Order on Reconsideration (Part 2), 93 FCC 2d 908 (1983). *See also* Telocator Comments at 19.

128. New Par, citing a recent economic study, notes that cellular rates have declined in real terms since cellular's inception.[267] Pagenet contends that the number of paging subscribers has increased, and the price of pagers and paging services has declined, and that these are clear indications of the competition present in the paging market.[268] CTIA asserts that the CMRS marketplace is competitive and argues that it is well-documented that CMRS providers lack market power, *i.e.*, the ability to raise price by restricting output.[269]

129. Bell Atlantic cites to another Commission rule making in which the Commission concluded that "[i]t appears that facilities-based carriers are competing on the basis of market share, technology, service offering, and service price."[270] Mtel, Pagenet, and Telocator note that the Commission has already found other common carrier mobile licensees, which are primarily engaged in the provision of paging service, to be non-dominant in their provision of interstate services.[271] In-Flight notes that the Commission found, in establishing rules for 800 MHz air-ground service, that each air-ground service provider would face substantial competition from other air-ground service providers.[272]

130. Bell Atlantic argues that the cellular industry has experienced rapid growth, nationwide expansion of coverage, declining prices, and introduction of new technologies and services, all while cellular carriers did not file tariffs.[273] Bell Atlantic points out that the vast majority of states have decided not to regulate cellular service and many states which at one time imposed rate regulation have abandoned it based on the competitiveness of the cellular markets in their states. This, asserts Bell Atlantic, supports the Commission's tentative finding that the tariffing requirement is "not necessary."[274]

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[267] New Par Comments at 9, *citing* Cellular Competition: The Charles River Study (1992). This report found a 19 percent decline (adjusted for inflation) in rates since 1983 and a 44 percent decline in accounting and operating a cellular telephone over the same period.

[268] Pagenet Comments at 20-21, *citing* EMCI, The State of the US Paging Industry — Subscriber Growth, End-User and Carrier Trends: 1990, at 33; EMCI, The State of the US Paging Industry — Subscriber Growth, End-User and Carrier Trends: 1993, at 1, 9.

[269] CTIA Comments at 34, *citing* J. Haring & C. Jackson, Strategic Policy Research, "Errors in Hazlett's Analysis of Cellular Rents," at 1 (Sept. 10, 1993) (Haring & Jackson) ("rents in cellular telephony can only reflect scarcity of spectrum rather than market power"); Metro Mobile v. New Vector, 892 F.2d 62 (9th Cir. 1989) (cellular market is competitive).

[270] Bell Atlantic Comments at 23, *quoting Cellular CPE Bundling Order*, 7 FCC Rcd at 4029.

[271] Mtel Comments at 14; Pagenet Comments at 18-20 (paging industry is vigorously competitive, *citing* R. Ridley, 1993 Survey of Mobile Radio Paging Operators, Communications, Sept. 1993 (Ridley Survey), at 20); Telocator Comments at 19; Telocator Reply Comments at 11. *See also* Bell Atlantic Comments at 22; Motorola Comments at 18; PacTel Paging Comments at 11.

[272] In-Flight Comments at 3, *citing* Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 Bands, GEN Docket No. 88-96, Report and Order, 5 FCC Rcd 3861, 3865 (1990), *recon. denied*, 6 FCC Rcd 4582 (1991).

[273] Bell Atlantic Comments at 23.

[274] *Id.* at 24-25.

131. NCRA argues that the public does not have access to a competitive cellular market.[275] The PA PUC contends that it cannot support the Commission's finding that there is sufficient competition in the commercial mobile services marketplace.[276] NCRA contends that the Commission has not changed its classification of facilities-based cellular providers as dominant carriers. NCRA claims that cellular's dominant status, coupled with the Commission's obligation to perform a detailed review of competitive market conditions, make any conclusions about the cellular market without collecting the necessary data premature.[277] New York and PA PUC also believe that a decision to support forbearance, in consideration of the current market conditions, would be premature.[278]

132. California contends that it and consumer groups have determined that competition does not exist in the California market.[279] California further asserts that in the California cellular market many cellular operators have an ownership interest in the other competitor in the same market, and that in many cases, cellular licensees that compete in one market may be business partners in another, contributing to the market problems. California argues that there is not adequate competition in the cellular marketplace in California to ensure just, reasonable, and non-discriminatory rates. California contends that it would be premature for the Commission to forbear from regulating the rates of CMRS.[280]

133. Bell Atlantic, CTIA, and Southwestern assert that NCRA's comments repeat the same claims it presented to the Commission in the cellular resale proceeding, which the Commission rejected.[281] PacTel contends that NCRA's claims regarding competition in the cellular market are incorrect.[282] Bell Atlantic argues that wholesale rate regulation has in fact increased rates.[283] Finally, Bell Atlantic and CTIA contend that NCRA, at best, provides flawed economic support for its claims.[284]

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[275] NCRA Comments at 15-16.

[276] PA PUC Reply Comments at 14.

[277] NCRA Comments at 15-16.

[278] New York Comments at 10-11; PA PUC Reply Comments at 15.

[279] California Comments at 6.

[280] California Comments at 6-8 (at a recent legislative hearing the Public Utilities Commission of the State of California presented evidence showing that rates that were set nearly nine years ago have not fallen). *See also* MMR Reply Comments at 6 (urging the Commission not to forbear from tariff regulation for commercial mobile service providers affiliated with dominant carriers).

[281] Bell Atlantic Reply Comments at 7; CTIA Reply Comments at 8; Southwestern Reply Comments at 5-7. *See also* GTE Reply Comments at 10; Pacific Reply Comments at 8; Rochester Reply Comments at 5. Bell Atlantic asserts that the Commission's action was affirmed in sweeping language by the D.C. Circuit, which held that NCRA's "evidence [of lack of competition] falls far short" and was "thin." Bell Atlantic Reply Comments at 7, *citing* Cellnet Communication, Inc. v. FCC, 965 F.2d 1106 (D.C. Cir. 1992).

[282] PacTel Reply Comments at 2-3. *See also* Telocator Reply Comments at 11-12.

[283] Bell Atlantic Reply Comments at 8.

[284] *Id.* at 8-9; CTIA Reply Comments at 7-8. *See also* McCaw Reply Comments at 12-13. CTIA claims that NCRA selectively quotes from a recent Government Accounting Office report that states that the GAO is unable to determine whether the cellular market is competitive. CTIA also notes that NCRA's

134. CTIA, NYNEX, and Bell Atlantic dispute the claims of California, which they argue are based only on the California market.[285] Moreover, argues CTIA, economic studies show that cellular rates are approximately 5 percent to 16 percent higher in those states that regulate cellular prices. Therefore, claims CTIA, regulation and not the lack of competition may explain the higher rates that are being complained of.[286] PacTel contends that in fact cellular rates are now lower than in the past, both in absolute terms and as adjusted for inflation.[287]

b. Discussion

135. We reached the tentative conclusion in the *Notice* that the level of competition in the CMRS marketplace is sufficient to support a decision to exercise our forbearance authority as established by Congress in the Budget Act. Based upon our review of the comments and our further examination of the issues presented, we now have made the following principal findings.

136. First, we conclude that the most prudent approach for us to follow in reaching decisions regarding forbearance in this Order must involve an examination of the prevailing climate of competition with respect to each of the various mobile services comprising the CMRS marketplace. A threshold question is whether we should treat CMRS as a single market for purposes of exercising our forbearance authority. There is disagreement in the record regarding whether commercial mobile radio services are distinct or whether they can be blended together into a single CMRS market. We conclude that, for purposes of evaluating the level of competition in the CMRS marketplace, the record does not support a finding that all services should be treated as a single market. Thus, we will proceed with an analysis that focuses on each of the various commercial mobile radio services currently offered, and about to be offered, keeping in mind that our doing so is not intended to prejudge the issue of whether, and to what extent, there is competition among these various services.

137. Second, we conclude that the record supports a finding that all CMRS service providers, other than cellular service licensees, currently lack market power. This finding, which is presented in greater detail with respect to each of the services in succeeding paragraphs, supports our conclusion that consumer interests will not be adversely affected, that economic growth will be stimulated and the general economy will benefit, and that the public interest thus will be served, by our forbearing from certain requirements in Title II of the Act that otherwise would be placed upon CMRS providers.

138. Third, in the case of cellular service, the Commission has previously acknowledged that, while competition in the provision of cellular services exists, the record does not support a conclusion that cellular services are fully competitive. We conclude here, however, that the current state of competition regarding cellular services does not preclude our exercise of forbearance authority. Although we discuss the basis for this conclusion in greater detail in our subsequent discussion of cellular service, we stress here that an important aspect of this

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reliance upon a study concerning cellular rents is also unfounded considering the report's recent refutation. CTIA Reply Comments at 8 n.15, *citing* Haring & Jackson at 1.

[285] CTIA Reply Comments at 3-5; NYNEX Reply Comments at 15-18; Bell Atlantic Reply Comments at 10. *See also* GTE Reply Comments at 10-11; Telocator Reply Comments at 11; US West Reply Comments at 14-15 (the views of California and New York concerning the state of competition are not shared by regulatory commissions in most other states).

[286] CTIA Reply Comments at 4-5. *See also* Bell Atlantic Reply Comments at 10; NYNEX Reply Comments at 16-17 (studies confirm that prices are 10 percent to 15 percent higher in markets where cellular rates are regulated, so regulation hurts consumers).

[287] PacTel Reply Comments at 4-5.

conclusion is that we have decided to initiate a further proceeding in which we will propose to establish extensive and ongoing monitoring of the cellular marketplace as a means of ensuring the forbearance action we take in this Order does not adversely affect the public interest.[288] We have noted California's concerns about regional partnerships involving cellular licensees which are competitors in some markets. These arrangements might result in the sharing of pricing information in joint marketing efforts or they might blunt incentives to compete. These arrangements will be monitored by the Commission and are subject to scrutiny under federal antitrust laws.

139. By our actions here today we have identified that CMRS providers include all cellular licensees, common carrier paging licensees and private carrier paging licensees (except those providing internal service), all wide-area SMR providers, and most SMR providers.[289] Although the cellular service market is not fully competitive,[290] these other services are competitive.

140. First, the paging industry is highly competitive.[291] A recent study found that, on average, a paging carrier faces five other paging carriers competing with it in a given market, and some face as many as nineteen.[292] The combination of high capacity, large numbers of service providers, ease of market entry, and ease of changing service providers results in paging being a very competitive segment of the mobile communications market. In the 900 MHz band alone, there are forty private paging channels, of which roughly two-thirds are licensed to private carriers, and forty common carrier channels. Additionally, there are over thirty common and private carrier paging channels in the 150 MHz and 450 MHz bands.[293] There are three nationwide common carrier paging channels. Current technology permits literally tens of thousands of pagers per market to be served by a single channel, and recent advances are increasing paging channel capacity dramatically. As a result, there is a huge capacity for paging, and relatively easy entry into this market, especially for private carrier paging providers. Paging systems are relatively inexpensive to build. The price of paging equipment and service to end users is falling. Further, the technical similarity of paging equipment, particularly within a given frequency band, along with the low prices of pagers and the ready availability of leasing arrangements, enables paging customers to move easily to the service provider of their choice.

141. Second, consider SMR licensees. Most SMR licensees provide dispatch service and many also provide mobile telephone service. Non-interconnected dispatch services are PMRS. Thus, for purposes of analyzing whether forbearance is in the public interest, the appropriate focus is on the examination of market power in the provision of CMRS, such as mobile telephony.

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[288] *See* para. 194, *infra*.

[289] One recent report estimates that by sometime in the 1990s, there will be over 7,000 800 MHz and 900 MHz SMRs using over 50,000 channels. *See* D. Fertig, Private Radio Bureau, FCC, *Specialized Mobile Radio*, at 24 (Feb. 1991).

[290] *See Cellular CPE Bundling Order*, 7 FCC Rcd at 4028.

[291] *See* EMCI, "The State of the US Paging Industry" (1990); EMCI, "The State of the US Paging Industry" (1993).

[292] *See* Ridley Survey at 20.

[293] Additional paging capacity is available on FM subcarriers that are being used both for private and common carrier paging services under Section 73.295 of the Commission's Rules, 47 C.F.R. § 73.295.

142. The SMR service's current share of the mobile telephone market is small, particularly in comparison with cellular providers.[294] Thus, to the extent that cellular rates are reasonable and would continue to be so under a forbearance regime, one should reach the same conclusion for the provision of mobile telephony by SMR licensees.

143. Some SMRs are installing advanced digital technology and have accumulated enough spectrum under SMR licenses to compete more effectively in the mobile telephony market by offering wide-area services.[295] At least initially, however, SMR licensees face significant competitive disadvantages. First, substantially less spectrum is allocated for SMR than for cellular or PCS.[296] Second, SMR subscriber equipment costs more than cellular subscriber equipment.[297] Third, initial marketing costs for digital SMR may be greater than marketing costs for cellular operators.[298] These barriers are reflected in the significantly lower market valuations of SMR companies as compared to cellular companies.[299] Thus, we conclude that SMRs providing mobile telephone service at present do not appear to have market power in the provision of mobile telephony. Although we anticipate that PCS entry will increase competition in this area, we will continue to monitor this situation as part of our annual review of the CMRS marketplace. [300]

144. The Commission has determined that no air-to-ground service provider is dominant.[301] The Commission found that selection of an open entry plan, coupled with the

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[294] Total SMR units, which are primarily dispatch, are estimated at 1.5 million as of December 1993. Total interconnected units are estimated at 425,000 units, as compared with 13 million cellular telephones. *See* Economic and Management Consultants International, Inc., "The State of SMR & Digital Mobile Radio: 1993-1994," at 1, 105 (Dec. 1993) (EMCI SMR Report).

[295] *See* note 17, *supra*.

[296] The SMR service is allocated 14 MHz in the 800 MHz band and 5 MHz in the 900 MHz band, as compared to a total of 50 megahertz for the two cellular carriers. *See* Part 22 and Part 90 of the Commission's Rules, 47 C.F.R. Parts 22, 90. The spectrum allocated for SMR is not contiguous: it is interspersed with channels designated for Public Safety and other private radio services. This inhibits use of technologies needing wider channel bandwidths. The technical standards for the 800 and 900 MHz bands are substantially different, precluding economic use of both bands in one radio unit.

[297] EMCI SMR Report at 146; M. Carter-Lome, "An Answer to Cellular," Communications, at 29 (Sept. 1993).

[298] Merrill Lynch, "SMR in the United States: A Window of Opportunity," at 28 (Oct. 1993).

[299] For example, the price AT&T agreed to pay for McCaw shares implies a value of approximately $282 per "pop" (*i.e.*, per each member of the resident population in the geographical area involved), whereas the price MCI agreed to pay for Nextel shares implies a value of approximately $43 per pop. *See* S. Malgieri, "SMRs Becoming Hot Investment in 1990's Wireless Technology," Radio Communications Report, Sept. 13, 1993, at 21; E. Andrews, "MCI Plans Big Nextel Stake as a Move into Wireless," N.Y. Times, Mar. 1, 1994, at D1.

[300] Congress has required the Commission to "review competitive market conditions with respect to commercial mobile services and [to] include in its annual report an analysis of those conditions." Communications Act, § 332(c)(1)(C), 47 U.S.C. § 332(c)(1)(C).

[301] *See* Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 Bands, GEN Docket No. 88-96, Report and Order, 5 FCC Rcd 3861, 3865 (1990), *recon. denied*, 6 FCC Rcd 4582 (1991).

competitive pressure created by multiple airlines seeking quality service at low prices, supported streamlined regulation of air-to-ground service providers.[302]

145. Finally, the record on the degree of competition is less clear for cellular service than for the other services in the CMRS marketplace. As indicated earlier, the Commission classified cellular carriers as dominant in a previous proceeding, although it did not engage in a market analysis at that time. The Commission has in the past found, however, that cellular providers face sufficient competition and that it therefore is in the public interest to relax some Commission policies traditionally applied to non-competitive markets.[303]

146. There are two facilities-based providers of cellular service in each geographic market segment. The fact that there are only two carriers raises the question of the extent to which these duopoly providers are able to reach an implicit or explicit agreement not to compete vigorously with one another and thus to elevate rates above their competitive levels. Standard principles of economics indicate that duopolists may be able to sustain what is in effect a shared monopoly — with the attendant elevated prices — either by tacitly agreeing not to price aggressively or by restricting the amount or rate of investment in new capacity. On the other hand, there are reasons that it may be difficult or unprofitable for cellular providers to coordinate their actions in this manner.

147. One limit on the profitability of collusion is provided by competing services. Hence, a key issue is the extent to which other services, such as paging and landline telephone service, compete with cellular. While an increase in the price of cellular services surely will induce some consumers to switch to the use of pagers or a landline service, the degree of cross-price elasticity has not been established in this record.

148. In addition to actual competition today, the threat of potential competition in the future may also affect current cellular pricing and investment. In the near future, there will be up to seven broadband PCS providers in each geographic area. Moreover, narrowband PCS services may compete with cellular to some extent. Since this additional competition will not be a reality for some time, it imposes no direct constraint on current pricing behavior. Nevertheless, impending competition can make any collusive pricing or capacity constraints more difficult to sustain today. The approaching increase in competition may limit the ability, and profitability, of attempts to restrict cellular investment today because today's investments can have significant impacts on the profits that will be earned in the face of PCS competition. A cellular provider may invest in additional capacity now in anticipation of gaining advantage in the coming competitive environment,[304] rather than to restrict output through tacit or explicit collusion with a fellow duopolist.

149. Other factors may also limit a cellular carrier's ability to reach tacit agreements. Rapid changes in the nature of the product can make collusion difficult. For example, one report has determined that quality competition is high, with cellular licensees working to develop techniques that reduce interference and decrease the number of blocked or dropped calls. Price competition has led to equipment discounts to customers of amounts between $100 and $450

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[302] *See id.*

[303] *See Cellular CPE Bundling Order*, 7 FCC Rcd at 4028-29. The Commission found that the cellular market was sufficiently competitive to permit cellular service providers to bundle cellular CPE as long as they did not specifically tie the provision of service with CPE. The Commission recognized that other market characteristics made this bundling in the public interest.

[304] This result may be particularly likely for a service such as cellular telephony, where system ubiquity and capacity (and the resulting blockage rates) are an element of service quality.

when new customers initiate cellular service.[305] Complex pricing structures, such as are used in the cellular industry, make it difficult for a carrier to sustain collusive pricing.[306]

150. As discussed above, commenters offer a variety of arguments and pieces of data that they believe demonstrate the extent of competition. We found none of these analyses to be determinative. CTIA and New Par, citing the same study, point to declines in the real price of cellular services as indicative of competition. This argument is, however, incomplete. It is critical to understand the reason why prices have been falling. For example, even a monopolist may lower its prices as it lowers costs or increases its capacity. Moreover, if prices are continuing to fall, does this logic imply that the markets are not fully competitive? Before reaching a conclusion about the state of competition, one must explain why cellular prices have been falling. Those who allege that prices are falling mainly because of competition do not support that claim with adequate evidence.[307] Similarly, some commenters point to improvements in service quality as evidence of competition. Again, however, one must understand the forces underlying the quality improvements before concluding that vigorous competition is the driver.

151. Some might argue that capacity constraints (rather than the exercise of market power) are what drives quantities, and thus market power has not been a problem. But to be complete explanations, these analyses must account for the fact that capacity is the result of investment choices made by the carriers themselves. As already discussed,[308] a possible theory of collusion in these markets is that firms restrict their capacity levels below competitive levels but then fully utilize that capacity that they have put in place.

152. Cellular systems in some markets have reached their current capacities. Since there is no more spectrum available to allocate for cellular systems, many of the systems have reduced cell size and improved antenna design in order to maximize frequency reuse. Consequently, the only way capacity can be further increased is by converting to digital technology. The two competing digital technologies that are being implemented are time division multiple access (TDMA) and code division multiple access (CDMA). Southwestern Bell Mobile Systems has commercial TDMA systems operating in the Chicago and Dallas-Fort Worth markets.[309] Pactel Corp. and US West New Vector are actively testing CDMA systems. A recent press report indicated that Pactel Corp. will spend about $250 million during the next five years to launch digital cellular systems in California and Georgia using CDMA infrastructure equipment.[310] It has also been reported that US West New Vector will deploy CDMA service in Seattle next

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[305] *See* Affidavit of J. Hausman, *United States v. W. Elec. Co., Inc.*, Civil Action No. 82-0192, at 12-13 (July 29, 1992) (Hausman Affidavit). In order to obtain equipment discounts, it is often necessary for the customer to commit to service with a particular licensee for a minimum length of time. The Commission has found that, on balance, these arrangements are pro-competition and in the public interest. *See Cellular CPE Bundling Order*, 7 FCC Rcd at 4029.

[306] *See* Hausman Affidavit at 12-13.

[307] In a recent *ex parte* presentation, NCRA argues that prices for cellular service to low volume end users are rising. *See Ex Parte* Letter, CC Docket No. 93-252, from D. Gusky, Executive Director, NCRA, to Chairman R. Hundt, FCC, Jan. 24, 1994.

[308] *See* para. 146, *supra*.

[309] *See* Telocator Bulletin, "Southwestern Bell Mobile Cuts Over TDMA Service in Dallas/Fort Worth," at 8, Jan. 21, 1994.

[310] *See* Radio Communications Report, "PacTel Plans To Take CDMA into California and Georgia," at 17, Jan. 31, 1994.

year.[311] This addition of more capacity tends to support the conclusion that cellular service is competitively provided, but the record does not provide clear evidence on whether investment is above or below the competitive level.

153. Bell Atlantic and CTIA argue that regulation of cellular carriers may, in fact, cause higher prices. In order to reach a proper finding that regulation causes higher prices, one must address the alternative hypothesis that partially effective regulation is put into place in those states that would otherwise have had the highest prices by an even greater margin. What explains why some states have regulation and others do not? Again, the record in this proceeding is silent on this point.

154. In summary, the data and analyses in the record support a finding that there is some competition in the cellular services marketplace. There is insufficient evidence, however, to conclude that the cellular services marketplace is fully competitive.

3. *Classes of Commercial Mobile Radio Services*

a. Background and Pleadings

155. Section 332(c)(1)(A) of the Act provides that the Commission may specify certain provisions of Title II as inapplicable to a "service or person."[312] In the *Notice* we tentatively concluded that the Commission has the authority to establish classes or categories of CMRS. The Conference Report indicates that Congress intended to provide this flexibility, but did not mandate such differential regulation.[313] In the *Notice* we tentatively concluded that potential classes might include: existing common carrier mobile services; certain PCS services; and certain private mobile radio services. We sought comment regarding whether we should promulgate regulations that vary among these classes and among different service providers within a class.

156. Most commenters argue that there is no justification for differential treatment of CMRS providers.[314] These commenters contend that CMRS are very competitive and, with the advent of PCS, any given area will have two cellular providers, up to seven PCS providers, and one or more SMRs.[315] McCaw and others aver that in changing Section 332, Congress sought

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[311] *See* Telocator Bulletin, "US West New Vector Completes Calls on Qualcomm CDMA Phone," at 8, Jan. 21, 1994.

[312] Communications Act, § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A).

[313] Conference Report at 491 ("Differential regulation of providers of commercial mobile services is permissible but is not required in order to fulfill the intent of this section.").

[314] *See* Bell Atlantic Comments at 21; BellSouth Comments at 26; CTIA Comments at 31; Century Comments at 3; GTE Comments at 17; McCaw Comments at 5-6; New Par Comments at 3; Pacific Comments at 15; Pactel Comments at 16; Southwestern Comments at 25-26; TDS Comments at 19; USTA Comments at 11; US West Comments at 29; US West Reply Comments at 15. US West contends that, at most, the Commission might consider establishing submarkets for one-way services (paging and narrowband PCS) and two-way services (cellular, wide-area SMRs, and broadband PCS). US West notes, however, that such categories may not survive long, given the rapid developments in technology. *Id.* at 28-29. *See also* PageMart Reply Comments at 10.

[315] *See, e.g.*, Pacific Comments at 15; AT&T Reply Comments at 1-2; CTIA Comments at 33. *See also* McCaw Comments at 6-7 (penetration levels of cellular, paging, and other mobile services are low relative to the potential of wireless communications).

to promote regulatory parity.[316] McCaw contends that the differences among CMRS providers are insufficient to justify dissimilar treatment because no mobile service operator has an entrenched, controlling position in the marketplace.[317] New Par argues that differential regulation among CMRS providers would create artificial market forces that would only hinder "the competitive push and shove of the marketplace."[318]

157. Bell Atlantic contends that the appropriate level of forbearance may vary depending on whether the particular service provided is competing with local exchange service, access service, or interexchange service. Bell Atlantic wants us to forbear from regulating all CMRS providers who vigorously compete in providing local service. In contrast, Bell Atlantic argues that, because interexchange competition is minimal, the Commission should not forbear from regulating AT&T's interexchange services. Bell Atlantic asserts that AT&T's planned acquisition of McCaw makes it essential to retain tariffing requirements on AT&T's provision of CMRS.[319]

158. AT&T replies that its current interexchange services are subject to intense competition. Therefore, argues AT&T, it would not be able to cross-subsidize its CMRS affiliates by extracting higher rates for its already competitive wireline services.[320] Finally, asserts AT&T, even after its merger with McCaw, interexchange services will be strongly competitive and CMRS providers will face competition from multiple providers.[321]

159. Some commenters suggest that certain commercial mobile radio services should be subject to differential regulation based upon their ability to exercise market power, or based upon the amount of bandwidth allocated to such services, or both.[322] Nextel argues that the Commission should adjust the application of Title II to assure that new entrants, such as wide-area SMRs, have a legitimate opportunity to become effective competitors.[323] In-Flight argues that an air-to-ground service provider affiliated with a dominant carrier should remain subject to existing Commission regulations governing competitive communications services to help ensure that a dominant carrier does not unfairly use its market power in other markets to impede

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[316] McCaw Comments at 5-6. *See also* Southwestern Comments at 26; TDS Comments at 19; US West Comments at 29.

[317] McCaw Comments at 6-7; McCaw Reply Comments at 7-13.

[318] New Par Comments at 4-5. *See also* CTIA Comments at 31; CTIA Reply Comments at 11.

[319] Bell Atlantic Comments at 28-30 (AT&T and McCaw should not be permitted to bundle local and long distance service together to sell to customers).

[320] AT&T Reply Comments at 2.

[321] *Id.* at 1-3.

[322] *See, e.g.*, Telocator Comments at 13-15; Arch Comments at 10 (maintain like treatment within the narrowband and broadband classes); New York Comments at 9-10 (ensure greater oversight for dominant versus non-dominant classes; since no PCS licenses issued yet, no forbearance for PCS providers); CenCall Comments at 4-5; Nextel Comments at 22; PA PUC Reply Comments at 14-15. *See also* AMTA Reply Comments at 5-6 (arguing that it is premature to conclude that all commercial mobile services should be regulated identically).

[323] Nextel Comments at 22; Nextel Reply Comments at 10-11 (arguing that McCaw's denial of its competitive advantage is at odds with McCaw's opposition to the lifting of the MFJ prohibition on BOC provision of interLATA services).

competition in the air-to-ground market.[324] Grand urges that all existing public electronic data interchange value added network (EDI VAN) operators should be classified as dominant carriers, subject to the Commission's Open Network Architecture (ONA) requirements.[325]

160. NABER proposes that we create two types of CMRS providers: Commercial I (paging, traditional SMR, for-profit two-way radio) and Commercial II (cellular, wide-area SMRs, and PCS). Commercial I providers, according to NABER, are non-dominant and therefore would get the benefit of Title II forbearance. Carriers in the second group would not receive forbearance treatment because they have market power.[326]

161. CTIA and CenCall refute claims that any provider or group of providers possesses market power sufficient to justify differential treatment.[327] CTIA contends that NABER's proposed disparate treatment of commercial mobile radio services is unnecessary and might threaten the growth of the commercial mobile radio services market. Similarly, argues CTIA, disparate treatment based upon bandwidth is unfounded.[328]

b. Discussion

162. Congress granted the Commission the flexibility to identify different classes of CMRS for purposes of determining whether to forbear from Title II regulation.[329] In the *Notice*, we identified common carrier mobile services, certain PCS services, and certain private mobile services as existing services likely to be classified as CMRS.[330] The major policy reason to establish different categories of CMRS is the possibility that one carrier or class of carriers has market power that requires continued Title II regulation to protect consumers or the public interest. There might also exist other reasons that necessitate differential treatment. Section 332 empowers the Commission to make such a distinction at any time if it becomes necessary to do so. At this time, however, differential tariff and exit and entry regulation of CMRS as a general matter does not appear to be warranted.[331] We will, however, continue to monitor actively the cellular services marketplace.[332] In addition, because we recognize that

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[324] In-Flight Comments at 4, *citing* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rule Making, 4 FCC Rcd 2873, 3033-37, 3051-53 (1989).

[325] Grand Comments at 8. Grand also argues that all cellular carriers should be regulated as dominant carriers. *Id.* at 7-8.

[326] NABER Comments at iii, 14-15, App. A at 1, 4-5; NABER Reply Comments at 2-5.

[327] CTIA Reply Comments at 11; CenCall Reply Comments at 3-5 (NABER offers no economic, market, or legal support for its proposals and did not consult with CenCall, a group it represents); Nextel Reply Comments at 11-12 (NABER offers no empirical data, economic studies, or other support for its proposals).

[328] CTIA Reply Comments at 10-12.

[329] *See* Conference Report at 491.

[330] *Notice*, 8 FCC Rcd at 7999 (para. 55).

[331] We note that Grand has not demonstrated any basis for our determining that an electronic data interchange value added network (EDI VAN) is a mobile service. Thus, Grand's request that we classify all existing public EDI VANs as dominant is outside the scope of this proceeding.

[332] *See* para. 194, *infra.*

differential regulatory treatment of different classes of CMRS providers may become warranted because of rapidly changing circumstances in the CMRS marketplace, we have decided to initiate a rule making in the near future to examine more specifically whether such differential treatment should be established. A principal focus of this rule making will be the question of whether we should adopt further forbearance actions under Title II of the Act in the case of certain carriers or specified classes of CMRS providers. Further, as we discuss below, we will still retain certain non-structural safeguards for the CMRS affiliates of a dominant landline carrier as well as existing structural safeguards for cellular affiliates of the Bell Operating Companies. We will review these safeguards in the future and remove them if they become unnecessary.[333]

163. We will not address here the issue of what special conditions we may need to impose upon AT&T if the proposed merger between AT&T and McCaw is consummated. Such issues are best left to the Order addressing transfer of control issues or, if necessary, rule making proceedings conducted subsequent to any grant of the pending transfer application.

4. *Forbearance from Particular Title II Sections*

164. The three prongs of the test contained in Section 332(c)(1) must be satisfied before the Commission may exercise its forbearance authority. As discussed in detail below, we have determined that forbearance from enforcing sections of Title II is appropriate where filing and other regulatory requirements would be imposed on CMRS providers without yielding significant consumer benefits. We were particularly concerned with those instances where application of Title II regulations may impede competition. We have decided that forbearance from enforcing provisions related to the complaint remedy, as well as sections containing specific consumer-related provisions, is not justified under the statutory test. We will retain our authority to invoke certain reporting requirements if necessary, and we intend to initiate a review of the cellular marketplace pursuant to this prerogative. We note that we do not intend, by our actions herein, to impose any unwarranted burdens upon private carriers who, pursuant to this Order, find themselves classified as CMRS providers. As described above, we will soon issue a Further Notice of Proposed Rule Making to consider whether further forbearance action is appropriate.[334]

a. Sections 203, 204, 205, 211, and 214

(1) *Background and Pleadings*

165. In the *Notice* we tentatively concluded that we should forbear from enforcing Sections 203, 204, 205, 211, and 214. Section 203 requires common carriers to file a schedule of rates and charges for interstate common carrier services. Section 204 gives the Commission the power to investigate a common carrier's newly-filed rates and practices and to order refunds, if warranted. Section 205 enables the Commission to investigate existing rates and practices and to prescribe rates and practices if it determines that the carrier's rates or practices do not comply with the Communications Act. Section 211 requires common carriers to file with the Commission copies of certain contracts with other carriers. Section 214 is the market entry and

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[333] *See* Part III.E.5, paras. 214-219, *infra*. Of course, there are mobile service providers that are subject to regulation under other sections of the Act and the Commission's Rules. *See, e.g.*, Part 22 of the Commission's Rules, 47 C.F.R. Part 22.

[334] *See* note 33, *supra*.

exit provision, which requires the carriers to seek Commission approval when adding or removing a line.[335]

166. Most commenters argue that because of the competitive nature of the mobile services market, the Commission should adopt a policy of maximum regulatory forbearance.[336] In addressing the statutory test for forbearance, McCaw and other commenters assert that the charges, practices, classifications, or regulations associated with particular mobile services or imposed by particular providers are likely to be just and reasonable and not unjustly or unreasonably discriminatory.[337] McCaw contends that, because cellular carriers lack market power, and sufficient other safeguards exist, such as the continued applicability of Sections 201, 202, and 208, discretionary imposition of Title II requirements is not necessary to protect consumers.[338]

167. McCaw, Century, and other commenters also insist that forbearance from Title II regulation of CMRS providers will promote the public interest.[339] Bell Atlantic concurs, arguing that the cellular industry's rapid growth, nationwide expansion of coverage, declining prices, and introduction of new technologies and services, all while carriers did not file tariffs, demonstrate that tariffing is "not necessary" and that forbearance would be consistent with the public interest.[340] McCaw argues that detailed tariff filing requirements impose substantial competitive costs without providing consumers with any offsetting benefits.[341]

168. As discussed above,[342] commenters argue that in light of the competitive nature of the CMRS marketplace, forbearance from enforcing the tariff filing obligations of Section 203

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[335] For purposes of this proceeding, we will assume that Section 214 applies to radio-based services. *But see* Transamerican Microwave, Inc., Memorandum Opinion and Order, 10 Rad.Reg. (P&F) 2d 975 (1967).

[336] *See, e.g.*, AMSC Comments at 1; AMSC Reply Comments at 1-2; Bell Atlantic Comments at 20-23; Bell Atlantic Reply Comments at 6-11; CTIA Comments at 25; McCaw Comments at 7-10; McCaw Reply Comments at 3-7.

[337] McCaw Comments at 7-8. *See also* In-Flight Comments at 3 (air-to-ground market is intensely competitive, so marketplace forces will ensure that charges and other practices are reasonable).

[338] McCaw Comments at 9; CTIA Comments at 29-30, 34.

[339] McCaw Comments at 10; Century Comments at 5; Saco River Reply Comments at 4-6.

[340] Bell Atlantic Comments at 23.

[341] McCaw Comments at 10, *citing* Tariff Filing Requirements for Interstate Common Carriers, CC Docket No. 92-13, Report and Order, 7 FCC Rcd 8072, 8079 (1992); CTIA Comments at 26-27. *See also* CenCall Comments at 8, *citing Competitive Carrier Further Notice*, 84 FCC 2d at 478-79 (para. 87); Telocator Comments at 20 (Commission has determined that tariff regulation of a competitive market will actually inhibit competition, innovation, market entry, and flexibility, *citing* Tariff Filing Requirements for Non-Dominant Carriers, CC Docket No. 93-36, 8 FCC Rcd 6752 (1993); Erratum, No. 34716, CC Docket No. 93-36, 58 Fed. Reg. 48323 (Sept. 15, 1993)).

[342] *See* para. 130, *supra*.

is in the public interest.[343] Motorola contends that the imposition of Title II requirements, such as tariffing, would disserve the public interest.[344]

169. NCRA, New York, and the PA PUC believe that a decision to forbear from tariff regulation of PCS providers is premature.[345] NCRA also asserts that the Commission should not exercise its forbearance authority unless the evidence it relies on is "indisputable and compelling."[346] Further, NCRA indicates that the Commission has not reversed its policy of classifying facilities-based cellular providers as dominant carriers.[347] NCRA argues that at least the regulation of wholesale rates in the competitive mobile services markets, and in particular the cellular market, is required for the foreseeable future.[348]

170. NCRA argues that while forbearance as to retail rate regulation is acceptable, the Commission should not forbear from applying Section 203 to wholesale rates of commercial mobile radio services.[349] California, New York, and the PA PUC oppose tariff forbearance, claiming that there is insufficient competition to justify forbearing from Section 203.[350]

171. Bell Atlantic argues that some of these provisions, *i.e.*, Sections 204 and 205, merely duplicate enforcement powers the Commission will retain under Section 208 and its general powers under the Communications Act.[351] CenCall asserts that if the Commission forbears from enforcing Section 203, which CenCall supports, the Commission should also

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[343] *See, e.g.*, AMSC Reply Comments at 1-2; Bell Atlantic Comments at 20-23; Bell Atlantic Reply Comments at 6-10; BellSouth Comments at 29; CTIA Comments at 25; GCI Comments at 3; GCI Reply Comments at 1; NYNEX Comments at 18-19; NYNEX Reply Comments at 14-15.

[344] Motorola Comments at 18.

[345] NCRA Comments at 14-15; New York Comments at 10-11; PA PUC Reply Comments at 15 (any tentative conclusion with regard to the competitive market conditions in the cellular marketplace without an effort to collect the necessary data, would be premature, if not a clear abdication of congressionally mandated duty). *See also* California Comments at 7-8.

[346] NCRA Comments at 15 & n.10, *citing Cellular CPE Bundling Order*, 7 FCC Rcd at 4029; GAO, Concerns About Competition in the Cellular Telephone Service Industry, July 1992. *See also* NCRA Comments at 15-16 (in recognition of Congress's recent amendment to Section 332(c)(1)(C), Commission should perform a detailed review of competitive market conditions with respect to commercial mobile services).

[347] *Id.* at 15-16, *citing Competitive Carrier, Fifth Report*, 98 FCC 2d at 1201 n.41.

[348] *Id.* at 16. NCRA claims that it does not object to forbearance of retail rate regulation if resellers have (1) access to cost-based rates for only those basic bottleneck services that they are forced to obtain from a facilities-based cellular carrier; and (2) an efficient, timely, and effective means of enforcing access to such rates is available at the Commission. NCRA asserts that such means, short of filing tariffs with all supporting data, are within the Commission's power. *Id.* at 17-18.

[349] *Id.*

[350] California Comments at 5-6; New York Comments at 10-11; PA PUC Reply Comments at 14-16.

[351] Bell Atlantic Comments at 27. *See also* TRW Reply Comments at 22-23 ("The anticipated level of competition in the MSS/RDSS field makes Title II regulation of this new service area particularly unnecessary.").

forbear from Sections 204 and 205, which "go hand-in-hand" with the Section 203 tariff requirement.[352]

172. Bell Atlantic and others insist that Sections 211 and 214 burden carriers with paperwork which would be irrelevant once tariffs are not accepted.[353] GTE argues that since competitive market conditions make tariffs unnecessary, the filing of contracts required by Section 211, is also unnecessary.[354] BellSouth contends that on its face, Section 214 applies to communications by wire only and is inapplicable here.[355] CenCall avers that enforcement of Section 214 is unnecessary, since there is no monopoly provider.[356]

(2) *Discussion*

173. As we discussed in the Notice, in a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power. Removing or reducing regulatory requirements also tends to encourage market entry and lower costs. The Commission determined in *Competitive Carrier* that non-dominant carriers are unlikely to behave anti-competitively, in violation of Sections 201(b) and 202(a) of the Act, because they recognize that such behavior would result in the loss of customers.[357]

174. Concerns about the ramifications of tariff forbearance are unwarranted. Despite the fact that the cellular service marketplace has not been found to be fully competitive, there is no record evidence that indicates a need for full-scale regulation of cellular or any other CMRS offerings. As we discussed above, most CMRS services are competitive.[358] Competition, along with the impending advent of additional competitors, leads to reasonable rates. Therefore, enforcement of Section 203 is not necessary to ensure that the charges, practices, classifications, or regulations for or in connection with CMRS are just and reasonable and are not unjustly or unreasonably discriminatory.

175. We have concluded that although the record does not support a finding that the cellular services marketplace is fully competitive, the record does establish that there is sufficient competition in this marketplace to justify forbearance from tariffing requirements. We reach this conclusion for three reasons. First, cellular providers do face some competition today, and the strength of competition will increase the near future. Second, the continued applicability of Sections 201, 202, and 208 will provide an important protection in the event there is a market

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[352] CenCall Comments at 9-10. *See also* GCI Comments at 3.

[353] Bell Atlantic Comments at 27; GTE Comments at 14; McCaw Comments at 8. *See also* In-Flight Comments at 4 (since 800 MHz air-ground service is a competitive market, enforcement of these provisions is not necessary to protect consumers because marketplace forces will provide the consumer protection these sections were designed to provide).

[354] GTE Comments at 17.

[355] BellSouth Comments at 29-30.

[356] CenCall Comments at 10-11, *citing Competitive Carrier, Further Notice*, 84 FCC 2d at 490 (para. 117).

[357] *Competitive Carrier Notice*, 77 FCC 2d at 334-38; *Competitive Carrier, First Report*, 85 FCC 2d at 31.

[358] *See* Part III.E.2, paras. 126-154, *supra*.

failure. Third, tariffing imposes administrative costs and can themselves be a barrier to competition in some circumstances.

176. Compliance with Sections 201, 202, and 208 is sufficient to protect consumers. In the event that a carrier violated Sections 201 or 202, the Section 208 complaint process would permit challenges to a carrier's rates or practices and full compensation for any harm due to violations of the Act. Although we will forbear from enforcing our refund and prescription authority, described in Sections 204 and 205, we do not forbear from Sections 206, 207, and 209, so that successful complainants could collect damages.

177. Finally, in light of the fact that tariffs are not essential to our ability to ensure that non-dominant carriers do not unjustly discriminate in their rates, forbearing from applying Section 203 of the Act to CMRS providers is consistent with the public interest for a number of reasons. In a competitive environment, requiring tariff filings can (1) take away carriers' ability to make rapid, efficient responses to changes in demand and cost, and remove incentives for carriers to introduce new offerings; (2) impede and remove incentives for competitive price discounting, since all price changes are public, which can therefore be quickly matched by competitors; and (3) impose costs on carriers that attempt to make new offerings.[359] Second, tariff filings would enable carriers to ascertain competitors' prices and any changes to rates, which might encourage carriers to maintain rates at an artificially high level.[360] Moreover, tariffs may simplify tacit collusion as compared to when rates are individually negotiated,[361] since publicly filed tariffs facilitate monitoring. Third, tariffing, with its attendant filing and reporting requirements, imposes administrative costs upon carriers. These costs could lead to increased rates for consumers and potential adverse effects on competition. Finally, forbearance will foster competition which will expand the consumer benefits of a competitive marketplace. The absence of tariff filing requirements and the attendant notice periods should promote competitive market conditions by enabling CMRS providers to respond quickly to competitors' price changes. Carriers will be motivated to win customers by offering the best, most economic service packages. In this context, with the near-term growth of competition, it is reasonable to conclude, as required by Section 332(c)(1)(C), that forbearance at this time will "promote competitive market conditions" and will enhance competition among CMRS providers. Conversely, retaining tariffs under these conditions may limit competition. In light of the social costs of tariffing, the current state of competition, and the impending arrival of additional competition, particularly for cellular licensees, forbearance from requiring tariff filings from cellular carriers, as well as other CMRS providers, is in the public interest.

178. Even permitting the filing of tariffs, in the case of non-dominant carriers in competitive markets, is not in the public interest. As discussed above, we concluded that in a competitive environment, requiring tariff filings can inhibit competition. Indeed, even permitting voluntary filings would create a risk that competitors would file their rates merely to send price signals and thereby manipulate prices.[362] By refusing to accept these tariff filings we prevent

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[359] This result is supported by an earlier Commission decision. In the *Sixth Report* of the *Competitive Carrier* proceeding the Commission concluded that prohibiting non-dominant carriers from filing tariffs for interstate services would serve the public interest. *Competitive Carrier, Sixth Report*, 99 FCC 2d at 1029-30. We determined that tariffs are not essential to our ability to ensure that non-dominant carriers do not unjustly discriminate in their rates. *Id. See also Competitive Carrier, Further Notice,* 84 FCC 2d at 454.

[360] *See Competitive Carrier, Sixth Report*, 99 FCC 2d at 1029-30.

[361] Of course, the requirements of Section 202(a) of the Act remain intact.

[362] Further, tariffs would add an unnecessary cost to the Commission's administration of the CMRS marketplace.

carriers from hiding behind their tariffs to avoid reducing their rates. To avoid the introduction of these anti-competitive practices, to protect consumers and the public interest, and because continued voluntary filing of tariffs is an unreasonable practice for commercial mobile radio services under Section 201(b) of the Act, we will not accept the tariff filings of CMRS providers.[363] Those CMRS providers with tariffs currently on file for domestic CMRS services must cancel those tariffs within 90 days of publication of this *Order* in the Federal Register.

179. Specifically, we will forbear from requiring or permitting tariffs for interstate service offered directly by CMRS providers to their customers. We also will temporarily forbear from requiring or permitting CMRS providers to file tariffs for interstate access service. At this time, because of the presence of competition in the CMRS market, access tariffs seem unnecessary. We recognize, however, that there may be other public interest factors that would make forbearance with respect to interstate access service inappropriate. As such, we will look at this question in more detail in proceedings addressing interconnection issues and equal access.[364] The revised Section 332 does not extend the Commission's jurisdiction to the regulation of local CMRS rates. Thus, our decision to forbear from requiring the filing of federal (*i.e.*, interstate) tariffs has no impact on those services. States may require CMRS providers to file terms and conditions for their intrastate services and, of course, states may petition the Commission to regulate intrastate commercial mobile service rates.[365]

180. Sections 204 and 205 of the Act aid in the enforcement of tariff regulation. Sections 204 and 205 provide the method of redress in the event that tariffs contain unreasonably discriminatory rates or practices. Since we have determined that we may forbear from enforcing Section 203, forbearance from enforcing Sections 204 and 205 is unlikely to injure consumers and is in the public interest. Moreover, the oversight provisions in these sections duplicate the enforcement powers the Commission will retain in Section 208 and our general powers under the Communications Act. Therefore, we forbear from regulating pursuant to Sections 204 and 205 for commercial mobile radio services.

181. Section 211 of the Act requires that copies of certain contracts with other carriers be filed with the Commission. Because we have found that competition among commercial mobile radio services is sufficient to justify forbearing from requiring tariffs, it is unlikely that contracts will contain unreasonably discriminatory rates or regulations. Therefore, we conclude that consumers will not be harmed if we forbear from the contract filing provisions of Section 211. Competitive market forces will ensure that inter-carrier contracts will not be used to harm consumers. In the unlikely event that they contain provisions that violate Section 201 or Section 202, these contracts can be obtained in the course of a Section 208 complaint proceeding. Therefore, Section 211 forbearance is in the public interest.

182. We will also forbear from exercising our Section 214 authority.[366] Section 214 requires that certain carriers submit applications to the Commission for the provision of new

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[363] The Court of Appeals for the District of Columbia Circuit reversed the Commission's earlier Order requiring carriers to withdraw their existing tariffs, finding that such action was inconsistent with Section 203(a) of the Act. MCI v. FCC, 765 F.2d 1186, 1193-94 (D.C.Cir. 1985). This decision has been superseded by the legislative changes made to Section 332 giving the Commission discretion as to the continuing applicability of Section 203 to CMRS providers.

[364] *See* paras. 236-238, *infra*.

[365] *See* Budget Act, § 6002(c)(2)(A).

[366] *See* note 335, *supra*.

facilities or the discontinuance of existing facilities.[367] One purpose of Section 214 is to protect ratepayers who are captives of monopoly communications service providers from paying for unnecessary or unwise facilities construction and to prevent a dominant carrier from discontinuing needed services where an adequate substitute is unavailable.[368] In *Competitive Carrier*, the Commission recognized that, in a competitive market, application of Section 214 could harm firms lacking market power since certification procedures can actually deter entry of innovative and useful services, or can be used by competitors to delay or block the introduction of such innovations. The presence of Section 214 barriers to exit may also deter potential entrants from entering the marketplace. The Commission also recognized that the time involved in the decertification process can impose additional losses on a carrier after competitive circumstances have made a particular service uneconomic and, if adequate substitute services are abundantly available, the discontinuance application is unnecessary to protect consumers. This analysis is equally applicable to the CMRS marketplace. We conclude that exercise of our Section 214 authority is unnecessary to ensure against unreasonable charges and practices, or to protect consumers, and that forbearance will better serve the public interest by avoiding the social costs identified in this paragraph.[369]

b. Sections 206, 207, 209, 216, and 217

(1) *Background and Pleadings*

183. Sections 206 (Liability of Carriers for Damages), 207 (Recovery of Damages), and 209 (Orders for Payment of Money) are provisions associated with the complaint remedy described in Section 208, from which the Commission may not forbear under the terms of the Budget Act. In the *Notice* we tentatively concluded that there was no record to support forbearance from enforcing any of these sections for any CMRS provider and that forbearance would not be consistent with the public interest. In the *Notice*, we tentatively concluded that there was no record to support the Commission's forbearing from enforcing Sections 216 (Application of Act to Receiver and Trustees) and Section 217 (Liability of Carrier for Acts and Omissions of Agents) for any CMRS provider and that forbearance would not be consistent with the public interest.

184. All parties that submitted comments on this issue agree that the Commission should not forbear from enforcing Sections 206, 207, and 209.[370] GCI argues that these provisions relate to the complaint process.[371] GCI also asserts that Congress intended for all providers to comply with sections relating to the complaint process.[372]

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[367] *Competitive Carrier, Second Report*, 91 FCC 2d at 65.

[368] *See Competitive Carrier, Further Notice*, 84 FCC 2d at 489.

[369] We decline to act at this time on the Motorola suggestion that we issue a Notice of Proposed Rule Making proposing forbearance for international commercial mobile radio services. *See* Motorola Comments at 17.

[370] GCI Comments at 3; Mtel Comments at 17-18; Nextel Comments at 22; NYNEX Comments at 21; PA PUC Reply Comments at 16; Pacific Comments at 17; Southwestern Comments at 29; Sprint Comments at 13.

[371] GCI Comments at 3-4; GCI Reply Comments at 3-4.

[372] GCI Comments at 3-4.

185. Those commenters that addressed the question of forbearance from applying Sections 216 and 217 agree with our tentative conclusion.[373] NYNEX argues that enforcement of these sections is consistent with the intent of Congress to give consumers some measure of protection against possible carrier abuses and to provide the public with adequate safeguards without jeopardizing the development of a competitive market.[374]

(2) *Discussion*

186. We conclude that the public interest will not be served if we forbear from enforcing Sections 206, 207, and 209. These sections make carriers liable for monetary damages to any party aggrieved by a violation of the Communications Act, and guarantee the right of successful complainants to pursue the collection of damages either through the courts or the Commission. By prohibiting forbearance from Section 208, Congress intended that any potential violation of Section 201 or Section 202 could be redressed. Because Section 332 does not permit the Commission to forbear from enforcing Section 208, forbearing from enforcing those sections that provide the remedies for parties who successfully pursue a complaint would eviscerate the protections of Section 208. Without the possibility of obtaining redress through collection of damages, the complaint remedy is virtually meaningless. Therefore, it is in the public interest not to forbear from enforcing these sections against any CMRS provider.

187. We also conclude that the public interest will not be served if the Commission forbears from enforcing Sections 216 and 217. These sections merely extend the Title II obligations of CMRS providers to their trustees, successors in interest, and agents. The sections were intended to ensure that a common carrier could not evade complying with the Act either by acting through others over whom it has control or by selling its business. To assure that the congressional intent behind the decision not to permit forbearance from Sections 201, 202, and 208 is not frustrated, we conclude that we should not forbear from enforcing the obligations imposed by Sections 216 and 217 of the Act.

c. Sections 210, 212, 213, 215, 218, 219, 220, and 221

(1) *Background and Pleadings*

188. As we discussed in the *Notice*, Section 210 (Franks and Passes), Section 212 (Interlocking Directorates - Officials Dealing in Securities), Section 213 (Valuation of Carrier Property), Section 215 (Transactions Relating to Services, Equipment, and So Forth), Section 218 (Inquiries into Management), Section 219 (Annual and Other Reports), Section 220 (Accounts, Records, and Memoranda) and Section 221 (Special Provisions Relating to Telephone Companies) concern matters of Commission authority and specific obligations placed on carriers.[375] In the *Notice* we tentatively concluded that we should forbear from enforcing these provisions.

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[373] Mtel Comments at 17-18; NYNEX Comments at 21; Sprint Comments at 13.

[374] NYNEX Comments at 21.

[375] Sections 222 (Competition Among Record Carriers) and 224 (Regulation of Pole Attachments) do not appear to apply to commercial mobile services, so a determination concerning forbearance is not required. *See Notice*, 8 FCC Rcd at 8001 (para. 65 n.87). BellSouth expressed agreement with the Commission in its comments. BellSouth Comments at 30-31.

189. Several commenters assert that we should forbear from enforcing these sections.[376] Bell Atlantic argues that none of these provisions is necessary to ensure that service rates are just, reasonable, and non-discriminatory, and they are not needed in order to protect consumers.[377] GTE asserts that Sections 213, 215, 219, and 220 are recordkeeping, reporting, accounting, depreciation, and transactional filing requirements that should be forborne for the same reasons that tariff filing requirements should also be forborne.[378] GTE also contends that the management and merger limitations in Sections 212, 218, and 221 are irrelevant in a competitive market.[379]

190. Bell Atlantic contends that all of these sections were intended to impose a level of oversight that was deemed appropriate for regulating monopoly phone companies, but which is unwarranted for the competitive, multi-player mobile services market. Bell Atlantic and other commenters argue that these sections have nothing to do with rates but rather burden carriers with paperwork that would be irrelevant once tariffs are not accepted.[380] CTIA asserts that these requirements are inconsistent with a regulatory regime which refrains from regulating rates.[381] Further, CTIA, Mtel, and Motorola argue that it is not necessary and is unreasonably costly in a competitive market closely to oversee management, including the monitoring of directorship positions, technical developments, annual reports, and specific accounting records, because marketplace forces will ensure that firms perform efficiently.[382]

191. California urges the Commission not to forbear from prescribing accounting systems under Section 220 for dominant providers of commercial mobile radio services in order to guard against anti-competitive abuses by such providers.[383] California alleges that with many of the dominant carriers receiving PCS licenses, proper accounting systems should be prescribed in order to deter cross-subsidy and other anti-competitive behavior.[384]

(2) *Discussion*

192. We note that the Commission infrequently exercises its authority under most of these sections for carriers lacking market power. For example, the Commission has imposed no accounting requirements on non-dominant wireline carriers pursuant to Section 220. In addition, non-dominant wireline carriers have been exempted from filing forms required of dominant wireline carriers pursuant to Section 219. Therefore, none of these provisions places any

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[376] AMSC Comments at 5; AMSC Reply Comments at 2; Bell Atlantic Comments at 27; BellSouth Comments at 30-31; CTIA Comments at 35-36; CenCall Comments at 11-12; GCI Comments at 3; GTE Comments at 17; GTE Reply Comments at 8; In-Flight Comments at 2-3; Mtel Comments at 17-18; Motorola Comments at 18-19; Pacific Comments at 17; RCA Comments at 6-7; Southwestern Comments at 29; Sprint Comments at 12-13; TDS Comments at 20; Telocator Comments at 20; TRW Comments at 31.

[377] Bell Atlantic Comments at 26.

[378] GTE Comments at 17.

[379] *Id.*

[380] Bell Atlantic Comments at 27; CTIA Comments at 35.

[381] CTIA Comments at 35.

[382] *Id.* at 35-36; Mtel Comments at 18; Motorola Comments at 18-19.

[383] California Comments at 8.

[384] *Id.*

unwarranted or burdensome duty upon CMRS providers. Furthermore, we find that the three-pronged statutory test justifying forbearance is not satisfied. While these sections have no direct effect on the reasonableness of rates or practices, they may be necessary for the protection of consumers if some market failure occurs. If such powers were needed, and the Commission had earlier determined to forbear from exercising those powers, the Commission would first have to initiate a rule making proceeding in order to regulate under these sections. There is no countervailing public interest reason to justify our limiting our ability to act if the need arises. Before forbearing, we must determine that the provision is not necessary to protect against unreasonable rates, and to protect consumers, and that forbearing from enforcing the provision is consistent with the public interest. No one has shown that forgoing our authority to act under Sections 210, 213, 215, 218, 219, 220, and 221, will promote competitive market conditions and enhance competition among CMRS providers, which the statute makes part of the public interest analysis of the third prong of the public interest test.

193. Although we proposed to forbear from exercising our authority under Sections 210, 212, 213, 215, 218, 219, 220, and 221 in the *Notice*, upon further review we find that we should only forbear from regulating pursuant to Section 212. Section 210 is unrelated to Commission authority or regulatory obligations. Rather, it allows common carriers to issue franks and passes to their employees, and to provide the Government with free service in connection with preparation for the national defense. The remaining sections, other than Section 212, are primarily reservations of Commission authority, which the Commission may exercise, as necessary. Section 213 authorizes the Commission to make a valuation of all or of any part of the property owned or used by any carrier. Section 215 gives the Commission the authority to examine carrier activities and transactions likely to limit the carrier's ability to render adequate service to the public, or to affect rates.[385] Section 218 authorizes the Commission to inquire into the management of the business of the carrier. Section 219, *inter alia*, authorizes the Commission to require annual reports from carriers.[386] Section 220 gives the Commission the discretion to prescribe the forms of accounts, records, and memoranda to be kept by carriers and also includes depreciation prescription provisions. Section 221, *inter alia*, gives the Commission the power to review proposed consolidations and mergers of telephone companies, and also describes the jurisdiction of the states when an exchange area crosses state lines. Although we will not exercise our authority to require annual reports or to prescribe forms of accounts, relinquishing our power to so act is unnecessary. To date, the Commission has not imposed the reporting requirements listed here on common carriers who are now being classified as CMRS providers. Thus, reservation of these powers should have no adverse impact on competitors.

194. In assessing whether to forbear from Sections 210, 212, 213, 215, 218, 219, 220, and 221 in the case of cellular carriers, we note that the cellular market is not yet fully competitive. Therefore, we have decided to initiate a proceeding in the near future to determine what information collection requirements should apply to cellular carriers. These requirements would be intended to ensure that competition in the cellular marketplace continues to develop in a manner that results in reasonable pricing and the absence of unreasonably discriminatory practices in the pricing and delivery of cellular services. We also wish to underscore our view that a variety of factors (*e.g.*, the advent of personal communications services) will work to enhance competition in the cellular marketplace in the near term. Nonetheless, we believe it is

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[385] Section 215 is also one source of our authority to establish our program of equipment registration. *See NCUC I.*

[386] *See* Section 43.21(a) of the Commission's Rules, 47 C.F.R. § 43.21(a).

prudent for the Commission to gather sufficient data to enable us to confirm our expectations regarding the role competition will play with regard to cellular services.[387]

195. The issues we expect to raise in the proceeding include, *inter alia*: (1) the type of information to be collected; (2) the frequency with which periodic reports of information should be submitted to the Commission; (3) whether these reporting requirements should apply to all cellular carriers and all cellular markets; and (4) policies that should apply to any asserted confidentiality applicable to information submitted.

196. Section 212 does impose an obligation upon carriers. Section 212 empowers the Commission to monitor interlocking directorates, *i.e.*, the involvement of directors or officers holding such positions in more than one common carrier. A person seeking to become an officer in two or more carriers must apply to the Commission and must provide "a full explanation of the reasons why grant of the authority sought will not adversely affect either public or private interests . . . [and] address whether grant of the permission requested could result in anticompetitive conduct."[388]

197. Forbearance from enforcing Section 212 will reduce regulatory burdens without adversely affecting CMRS rates. Section 212 was originally adopted to prevent interlocking directors and officers from engaging in such practices as price fixing. The antitrust concerns that Section 212 was designed to address are already addressed through other Title II provisions[389] or by the antitrust laws.[390] Thus, regulation under Section 212 is not necessary to protect consumers. Finally, forbearance is in the public interest because it eliminates unnecessary filing burdens that could otherwise impose additional costs upon CMRS providers.

d. Sections 223, 225, 226, 227, and 228

(1) *Background and Pleadings*

198. As we stated in the *Notice*, Sections 223 (Obscene or Harassing Telephone Calls in the District of Columbia or in Interstate or Foreign Communications), 225 (Telecommunications Services for Hearing-Impaired and Speech-Impaired Individuals), 226 (Telephone Operator Consumer Services Improvement Act (TOCSIA)), 227 (Restrictions on the Use of Telephone Equipment (auto dialing, telemarketers)) and 228 (Regulation of Carrier Offering of Pay-Per-Call Services) are provisions of more recent origin offering explicit protections to consumers. We sought comment on whether we should forbear from applying any of these provisions to CMRS providers.

199. NYNEX, Mtel, and other commenters argue generally that enforcement of Sections 223, 225, 226, 227, and 228 is consistent with the intent of Congress to provide consumers with some measure of protection against possible carrier abuses, and assert that application of these safeguards will provide the public with adequate safeguards without jeopardizing the

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[387] We will also, as required by the statute, conduct an annual review of the CMRS marketplace to determine whether the level of Title II regulation is appropriate. *See* para. 143 & note 300, *supra*.

[388] Section 62.11 of the Commission's Rules, 47 C.F.R. § 62.11.

[389] *See, e.g.*, Communications Act, §§ 201(b), 221, 47 U.S.C. §§ 201(b), 221.

[390] *See, e.g.*, Clayton Act, § 9, 15 U.S.C. § 19, which governs interlocking directorates.

development of a competitive market.[391] These commenters urge the Commission to continue to enforce these provisions.

200. GTE, McCaw, NTCA, and TRW urge the Commission to forbear from enforcing these sections.[392] TRW contends that although these are important protections for consumers, the Commission does not know at this point which of these provisions, if any, are necessary or appropriate for application to CMRS providers.[393] TRW asserts that the Commission has the right to revisit the matter on a case-by-case basis should abuses occur.[394] McCaw argues that because these sections were enacted to remedy perceived deficiencies in other segments of the telecommunications market, they should not apply to CMRS providers unless there is a documented need.[395]

201. Motorola argues that the Commission should forbear from requiring paging service providers to contribute to recovery of Telecommunications Relay Service (TRS) costs, as identified in Section 225 of the Act. Other non-voice services, such as mobile satellite services, are exempt from both providing and funding TRS because these services are already accessible to the hearing impaired. Motorola and Telocator insist that the same is true of paging, which should be treated similarly. Moreover, asserts Motorola, this result is consistent with the congressional intent that TRS contributions come from providers of interstate telephone voice transmission service, rather than from one-way services such as paging.[396] Watercom argues that Section 225 has virtually no application to Watercom's service, which is rendered to towboats and other similar commercial vessels.[397]

202. GTE, McCaw, and other commenters argue that, in particular, the Commission should forbear from enforcing Section 226 (TOCSIA).[398] McCaw and Telocator insist that Section 226 was adopted in response to specific consumer abuses by segments of the

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[391] NYNEX Comments at 21; Mtel Comments at 17-18. *See also* California Comments at 8; GCI Comments at 4; Pacific Reply Comments at 9; Southwestern Comments at 29; Sprint Comments at 13; TDS Comments at 20.

[392] GTE Comments at 18; GTE Reply Comments at 9; McCaw Comments at 11-12; McCaw Reply Comments at 11-12 n.30; NTCA Comments at 7 (premature to apply these sections to PCS providers); TRW Comments at 32-33.

[393] TRW Comments at 32.

[394] *Id.* at 33. *See also* McCaw Comments at 11.

[395] McCaw Comments at 11.

[396] Motorola Comments at 19; Telocator Comments at 22, *citing* Telocator, Petition for Reconsideration at 3-4, CC Docket No. 90-571 (filed Aug. 25, 1993).

[397] Watercom Comments at 9-10; Watercom Reply Comments at 2. *See also* MMR Reply Comments at 8.

[398] GTE Comments at 18-19; McCaw Comments at 5-6. *See also* In-Flight Comments at 5-6; Motorola Comments at 19; PTC-C Comments at 2-11; TDS Reply Comments at 6-7; Telocator Comments at 21; Telocator Reply Comments at 12; TRW Comments at 32-33; TRW Reply Comments at 23; Watercom Comments at 10-12; Watercom Reply Comments at 2. *See also* MMR Reply Comments at 8-9.

telecommunications industry other than providers of mobile services.[399] GTE contends that forbearance is justified under revised Section 332.[400] Specifically, GTE asserts that enforcement of TOCSIA is not necessary to ensure reasonable charges and practices for mobile public phone services since providers of these services already are subject to the non-discrimination requirements of Section 202 of the Act. Moreover, argues GTE, mobile carriers providing interstate service to which TOCSIA might arguably apply are non-dominant and, therefore, presumptively lack the market power to engage in unreasonably discriminatory conduct. In addition, the economic interest of the service provider lies in maximizing demand for its offering in order to build market share. Unreasonable rates or practices would deter consumers from using its service and lower revenues.[401]

203. GTE and PTC-C also aver that enforcement of TOCSIA with respect to mobile phone service is not necessary to protect consumers.[402] GTE contends that the legislative history reveals that when Congress considered TOCSIA, there was no evidence in the record of consumer abuses stemming from public mobile phone service.[403] Further, asserts GTE, the Commission has yet to receive a complaint alleging operator service provider-type abuses by a mobile service provider.[404] In fact, argues GTE, providers of public mobile phone services generally publish the rates and conditions relating to those services, as well as numbers that the user can dial to obtain additional information before incurring any charges, and traditionally have not blocked access to alternative long distance carriers. Thus, according to GTE, application of TOCSIA is not necessary.[405] Finally, GTE contends that waiver of TOCSIA is entirely consistent with the public interest since compliance with that statute would often be impossible or produce absurd results.[406]

204. Coastel, In-Flight, PTC, and Watercom argue that the Commission should forbear from applying TOCSIA to their particular type of service, alleging that compliance would impose an undue hardship upon them.[407] These commenters also assert that the Common

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[399] McCaw Comments at 5; Telocator Comments at 21; Telocator Reply Comments at 12 (tariff regulation in a competitive market is unnecessary and actually harmful to the public interest).

[400] GTE Comments at 18. *See also* In-Flight Comments at 5-6.

[401] GTE Comments at 18.

[402] *Id.*; PTC-C Comments at 5-6.

[403] GTE Comments at 18.

[404] *Id.* at 18-19. *See also* PTC-C Comments at 7.

[405] GTE Comments at 19. *See also* Motorola Comments at 19.

[406] GTE Comments at 19, *citing* Petition for Declaratory Ruling That GTE Airphone, GTE Railphone, and GTE Mobilnet Are Not Subject to TOCSIA, MSD-92-14, Declaratory Ruling, DA 93-1022, 8 FCC Rcd 6171 (Com.Car.Bur. 1993)(*TOCSIA Declaratory Ruling*), *recon. pending*, GTE, Petition for Reconsideration or Waiver at 7-9 (filed Sept. 27, 1993) (asserting that many concepts underlying TOCSIA, such as "local," "toll," and "distance-sensitivity," often do not apply in the case of mobile phone services and landline operator services).

[407] Coastel Reply Comments, *passim*; In-Flight Comments at 5; In-Flight Reply Comments at 2 (it would be unlawful for the Commission to require compliance with Section 226); PTC-C Comments, *passim*; Watercom Comments at 11. Coastel is one of the cellular licensees for the Gulf of Mexico. In-Flight provides air-to-ground service. PTC provides cellular phones for rental cars. Watercom provides maritime common carrier service along the Mississippi, Illinois, and Ohio Rivers, and the Gulf

Carrier Bureau erred when it determined that they are aggregators, as defined in TOCSIA, and therefore subject to the requirements of Section 226.[408] In-Flight urges the Commission to reverse the Bureau's decision.[409] In-Flight, PTC, and Watercom also argue that compliance with TOCSIA is difficult, illogical, and unnecessary to meet any of the three objectives set forth in Section 332(c)(1) of the Act.[410] In-Flight asserts that imposing the equal access requirements of TOCSIA would be beyond the scope of this proceeding.[411]

(2) *Discussion*

205. The commenters, with the exceptions described above, support the continued enforcement of these sections. We conclude that the public interest will not be served if the Commission forbears from enforcing Sections 223, 225, 226, 227, and 228.

206. Section 223 prohibits individuals from placing obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications. Section 223 also regulates "indecent" telephone communications involving children and restricts the access of minors to those services commonly referred to as "Dial-A-Porn," including providing for the assessment of fines of up to $50,000 per violation.[412] Those commenters opposing the enforcement of this section of Title II do not offer any evidence to show that forbearance would meet the test found in Section 332(c)(1)(A). The presence of competition will not protect consumers from the types of activities regulated here. The policy considerations that supported the statute's adoption still exist and there is no reason why CMRS operators should not be required to comply.

207. One of the mandates of the Americans with Disabilities Act of 1990 (ADA), is that the Commission ensure that interstate and intrastate telecommunications relay services[413] are available to the extent possible and in the most efficient manner to individuals in the United States with hearing and speech disabilities. Accordingly, the Commission has required all

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Intracoastal Waterway. These commenters make arguments in support of forbearance for their particular services, not for commercial mobile services generally.

[408] Coastel Reply Comments at 2-3; In-Flight Comments at 5-6; PTC-C Comments at 3, *citing* S. Rep. No. 439, 101st Cong., 2d Sess. at 1 (1990) (legislative history does not list public mobile telephones, so Congress did not intend to include public mobile telephones in its definition of "aggregator"); Watercom Comments at 11.

[409] In-Flight Comments at 5, *citing TOCSIA Declaratory Ruling*. In-Flight notes that the Common Carrier Bureau is presently considering a petition for reconsideration of the Declaratory Ruling which requests reversal of the Bureau's finding that an air-ground licensee is an "aggregator." *Id.*, *citing TOCSIA Declaratory Ruling*, GTE, Petition for Reconsideration or Waiver (filed Sept. 27, 1993).

[410] In-Flight Comments at 5-6, *citing* its comments in the pending *TOCSIA Declaratory Ruling* reconsideration proceeding; PTC Comments at 3-9; Watercom Comments at 10-11. Coastel alleges that if it is forced to comply with the requirements of TOCSIA, it and the other Gulf of Mexico licensee might be forced out of business. Coastel Reply Comments at 5-6.

[411] In-Flight Reply Comments at 1.

[412] *See* Communications Act, § 223(b), 47 U.S.C. § 223(b).

[413] Telecommunications relay service (TRS) allows people with hearing or speech disabilities (or both) to use the telephone.

interstate service providers (other than one-way paging services) to provide TRS.[414] Last year the Commission amended its rules to require that interstate TRS costs be recovered by charges assessed on all interstate telecommunications service providers based on their relative share of gross interstate revenues for telecommunications services.[415]

208. TRS promotes consumer access to the public switched network. Competition does not necessarily induce CMRS providers to make this service available. We do not find any justification, and no commenter has supplied adequate justification, for not applying Section 225 to CMRS providers.[416] Those commenters supporting forbearance failed to provide the information required by Section 332(c)(1)(A) of the Act. The issue of which carriers should contribute to the TRS fund is beyond the scope of this proceeding.

209. In October 1990, Congress enacted TOCSIA,[417] to protect consumers making interstate operator services calls from pay telephones, and other public telephones, against unreasonably high rates and anti-competitive practices.[418] Congress noted that in recent years a number of operator services companies have emerged. These operator service providers (OSPs) compete with local exchange and long distance carriers by providing telephone services to the general public.[419] When a caller places an operator assisted call from a telephone presubscribed to one of these OSPs, the call is routed automatically to that presubscribed OSP. The OSP provides the desired operator services to facilitate completion of the call. Congress had two main objectives in passing TOCSIA. First, Congress wished to ensure that consumers are aware of the identity of the presubscribed operator service provider. Second, Congress wanted to guarantee that callers are able to use the carrier of their choice in placing operator-assisted calls.

210. TOCSIA requires an OSP, *inter alia*, to identify itself to the consumer at the beginning of the call, to permit the consumer to terminate the call at no charge before the call is connected, and to disclose to the consumer, upon request, a quote of its rates and charges for the call, the method of collection, and the method for processing complaints concerning the

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[414] Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Notice of Proposed Rule Making, 5 FCC Rcd 7187 (1990); Report and Order and Request for Comment, 6 FCC Rcd 4657, 4660 (para. 17) (1991) (*TRS Order*); Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rule Making, 8 FCC Rcd 1802 (1993) (*TRS II*); Third Report and Order, 8 FCC Rcd 5300 (1993) (*TRS III*).

[415] *See TRS III*, 8 FCC Rcd at 5303. *See also TRS II* at Appendix D, Section 64.604(c)(4)(iii)(a) of the Commission's Rules, 47 C.F.R. § 64.604(c)(4)(iii)(a).

[416] We note, however, that in a recent *ex parte* presentation, Nextel argues that compliance with the technical requirements of Section 225 is not easily achieved. *See* Nextel *Ex Parte* Letter, from R. Foosaner to G. Vaughan, at 3, Jan. 13, 1994. Section 225 requires compliance "to the extent possible," so presumably if Nextel demonstrates that compliance is not possible, it could request permission from the Commission not to comply with the provisions of Section 225. *See also* Section 64.604(a)(3) of the Commission's Rules, 47 C.F.R. § 64.604(a)(3).

[417] Communications Act, § 226, 47 U.S.C. § 226.

[418] S. Rep. No. 439. 101st Cong., 2d Sess. at 1 (1990). "Operator services" include collect or person-to-person calls, calls billed to a third number, and calls billed to a calling card or credit card. These services may be provided by an automated device as well as by a live operator. *Id.*

[419] *See id.* at 2.

charges and collection practices.[420] Aggregators are required to post on or near the phone, the name, address, and toll-free telephone number of the OSP.[421]

211. No commenter has demonstrated how forbearing from applying TOCSIA to CMRS providers who are also either OSPs or aggregators would be consistent with the public interest. The chief objectives of TOCSIA are to protect consumers from unfair or deceptive practices by OSPs and to ensure that consumers have the opportunity to make informed choices in making such calls.[422] The informational tariff filings required under TOCSIA are much less detailed than those required pursuant to Section 203. Therefore, we will not forbear from requiring CMRS providers to comply with Section 226 if it is applicable to them.[423]

212. Section 227 lists restrictions on the use of auto-dialing equipment, and limits the ability of telemarketers to harass consumers who do not seek their services. Congress enacted this provision in order to protect residential telephone subscribers' privacy by banning the use of automated or prerecorded telephone calls except when the receiving party consents, or in the case of an emergency.[424] Most commenters agree that application of this section to CMRS providers and calls placed over their networks will offer a significant protection for consumers. Competition has little relevance in deciding whether to use auto-dialing equipment in a marketing effort. Those commenters that urge forbearance do not provide sufficient information to satisfy the forbearance test in Section 332(c)(1)(A). Therefore, we will not forbear from enforcing Section 227.[425]

213. Section 228 regulates offerings of pay-per-call services. Section 228 requires carriers, *inter alia*, to maintain lists of information providers (IPs) to whom they assign a telephone number, to provide a short description of the services the IPs offer, and a statement of the cost per minute or the total cost for each service.[426] Those commenters asserting that the Commission should forbear from enforcing Section 228 do not provide the information required by Section 332(c)(1)(A) to justify forbearance. Further, enforcement of this section, while not imposing any unreasonable burden or cost on CMRS providers, provides an important consumer protection. Consequently, we will not forbear from enforcing Section 228.

5. *Safeguards for Affiliates of Dominant Landline Carriers*

a. Background and Pleadings

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[420] Communications Act, §§ 226(b), 226(c), 47 U.S.C. §§ 226(b), 226(c).

[421] *See id.*, § 226(c)(1)(A), 47 U.S.C. § 226(c)(1)(A).

[422] *See id.*, §§ 226(d)(1)(A), 226(d)(1)(B), 47 U.S.C. §§ 226(d)(1)(A), 226(d)(1)(B).

[423] *See also TOCSIA Declaratory Ruling*. GTE, Watercom, and In-Flight have filed petitions for reconsideration of this decision, or for alternative relief or waiver. The specific claims of these commenters will be addressed in the context of the reconsideration or waiver proceeding referenced herein.

[424] *See* Pub.L. 102-243, § 2.

[425] The constitutionality of portions of Section 227 has been questioned. We note that one court has declared Section 227(b)(1)(B) of the Act unconstitutional. *See* Moser v. FCC, 826 F.Supp. 360 (D.Or. 1993), *appeal pending*. There also is currently pending a lawsuit in which the plaintiff asserts that Section 227(b)(1)(C) is unconstitutional. *See* Destination Ventures v. FCC, Civil No. 93-737 AS (D.Or. 1993).

[426] *See* Communications Act, § 228(c), 47 U.S.C. § 228(c).

214. In the *Notice* we noted that some CMRS providers will be affiliated with dominant common carriers. We remarked that in other circumstances, when we have refrained from regulating certain services provided by affiliates of dominant landline common carriers, we have required compliance with safeguards to ensure that the dominant landline carrier does not act anti-competitively or harm ratepayers of regulated services.[427] We sought comment on whether we should impose any similar requirements on dominant landline common carriers with CMRS affiliates prior to applying forbearance to those affiliates.

215. Cox, Comcast, and Nextel argue that the Commission should place additional safeguards on CMRS affiliates of dominant carriers.[428] Cox and Nextel urge that separate subsidiaries for all LEC commercial mobile radio services activities are essential to minimize opportunities for cross-subsidization and anti-competitive behavior.[429] Nextel argues that the provision of local landline, cellular, intraLATA services, and in some instances interLATA, intrastate telephone service by some Bell Operating Companies creates a potential for anti-competitive discrimination to the detriment of competing CMRS providers.[430] PA PUC argues that the record does not support the removal of the existing structural separation requirements, and states that cellular and PCS should be treated similarly.[431]

216. Bell Atlantic contends that the Commission should scrutinize the accounting rules, but claims that such a review is beyond the scope of this proceeding.[432] In the interim, Bell Atlantic contends that the current accounting rules should apply to all CMRS providers, and the structural separation requirement of Section 22.901 of the Commission's Rules,[433] should be applied to all cellular affiliates of dominant carriers, particularly AT&T.[434] Bell Atlantic argues that, in the interest of parity, the Commission should, at a minimum, add AT&T and other dominant carriers to the list of companies identified in Section 22.901(b).[435] MCI agrees that

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[427] *See* Sections 32.27 and 64.902 of the Commission's Rules, 47 C.F.R. §§ 32.27, 64.902; Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities & Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies To Provide for Nonregulated Activities and To Provide for Transactions Between Telephone Companies and Their Affiliates, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298 (1987), *recon.*, 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom.* Southwestern Bell v. FCC, 896 F.2d 1978 (D.C.Cir. 1990).

[428] Cox Comments at 6; Comcast Comments at 14; Nextel Comments at 23; Nextel Reply Comments at 11. *See also* GCI Comments at 3; GCI Reply Comments at 3; MMR Reply Comments at 6 (urging the Commission not to forbear from tariff regulation for commercial mobile radio service providers affiliated with dominant carriers, especially any maritime carrier affiliated with a landline carrier). *See also* New York Comments at 10; PA PUC Reply Comments at 16 (arguing for differential treatment for commercial mobile radio service providers affiliated with dominant carriers).

[429] Cox Comments at 6-8; Nextel Comments at 23-24.

[430] Nextel Comments at 23-24.

[431] PA PUC Reply Comments at 16 n.36.

[432] Bell Atlantic Comments at 36.

[433] 47 C.F.R. § 22.901.

[434] Bell Atlantic Comments at 36-38. Bell Atlantic urges that, in the alternative, the Commission should repeal Section 22.901 of the Commission's Rules.

[435] *Id.* at 39.

this issue needs to be addressed, but urges that its resolution be handled in other proceedings or deferred until after the conclusion of the initial phase of this rule making.[436]

217. AMSC, NYNEX, Pacific, and Rochester contend that the Commission should not place additional safeguards on CMRS affiliates of dominant carriers.[437] AMSC asserts that the decision to place any safeguards on these carriers should be made on a case-by-case basis, with a particular focus on the market power of the CMRS provider and the potential for abuse that may arise from its relationship with the dominant carrier.[438] NYNEX and Pacific assert that the Commission should follow its approach in the PCS proceeding, in which the Commission rejected the imposition of additional cost accounting or separate subsidiary rules on LECs that provide PCS services.[439] NYNEX also argues that Nextel's proposal is self-serving, with the intent to protect its wide-area SMR services from competition.[440] OPASTCO contends that such regulatory burdens would curb the development of commercial mobile radio services in areas served by small and rural companies, noting that no additional burdens were placed on LECs that provide PCS.[441]

b. Discussion

218. In the *Broadband PCS Order* the Commission decided to impose accounting safeguards, but not structural separation, for PCS providers affiliated with local exchange carriers, including the Bell Operating Companies.[442] These rules require separation of costs incurred by a local exchange carrier from those incurred by its non-regulated affiliates, and accounting for local exchange carrier transactions with affiliates.[443] These safeguards are necessary because they help to ensure that costs of non-regulated affiliates are not passed to and included as costs of the local exchange carrier. For the same reason we will apply to all CMRS providers with local exchange carrier affiliates the same accounting safeguards that were adopted by the Commission in the PCS proceeding. We decline, however, to address the cellular structural separation requirements for the Bell Operating Companies. This issue was not contained in the *Notice* and evaluation of Section 22.901 of the Commission's Rules is an undertaking that would require a separate rule making. Moreover, there is not enough information in the record to evaluate whether we should remove these safeguards.

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[436] MCI Reply Comments at 6. *See also* USTA Reply Comments at 7 (to provide regulatory parity, the Commission should eliminate other regulatory barriers, such as separate subsidiary requirements, currently imposed upon exchange carriers).

[437] AMSC Comments at 4 n.5; NYNEX Comments at 21; Pacific Comments at 17; Pacific Reply Comments at 5, 8; Rochester Comments at 8-9; Rochester Reply Comments at 5. *See also* GTE Reply Comments at 11-12; PRTC Reply Comments at 6-8; Southwestern Reply Comments at 12-15; Sprint Reply Comments at 7; USTA Reply Comments at 6; US West Reply Comments at 16-17.

[438] AMSC Reply Comments at 4 n.5.

[439] NYNEX Comments at 21; Pacific Comments at 17-18, *citing Broadband PCS Order*, 8 FCC Rcd at 7751-52 (para. 126).

[440] NYNEX Reply Comments at 18-19.

[441] OPASTCO Reply Comments at 3-4, *citing Broadband PCS Order*, 8 FCC Rcd at 7751-52 (para. 126).

[442] *Broadband PCS Order*, 8 FCC Rcd at 7751-52 (para. 126).

[443] *See* Part 32 and Part 64 of the Commission's Rules, 47 C.F.R. Parts 32, 64.

219. The issues raised by commenters regarding accounting, structural separation, and other safeguards address important questions with regard to steps that should be taken to promote a competitive commercial mobile radio services environment in which the various market participants, including both established service providers and new entrants, and including both large and small carriers, have a fair opportunity to compete for new customers and in the development of new services. We believe that the Commission can play a positive role in fostering this competitive environment by examining and establishing the proper mix of safeguards designed to ensure that no CMRS provider gains an unfair competitive advantage resulting from its size or its preexisting position in particular CMRS markets. Thus, the issue of regulatory symmetry in the application of these safeguards is an important one. Although we defer this issue to a separate proceeding, we draw attention here to the fact that we recognize the importance of the decisions we must make in examining these issues.

F. Other Issues

1. *Interconnection Obligations*

a. Background and Pleadings

220. The Budget Act requires the Commission to respond to the request of any person providing commercial mobile radio service, and if the request is reasonable, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of Section 201 of the Communications Act. This provision does not limit or expand the Commission's authority to order interconnection pursuant to the Act.[444] The *Notice* requested comment on the rights of CMRS providers and PMRS licensees to demand interconnection with common carriers. We explained that the Commission has previously addressed the application of its Section 201 authority to require local exchange carriers (LECs) to interconnect with Part 22 licensees. The *Notice* tentatively concluded that there should be no distinction between the interconnection rights of Part 22 licensees and those of CMRS providers. The *Notice* also tentatively concluded that, in the commercial mobile context, LEC provision of interstate and intrastate interconnection and the type of interconnection the LEC provides are inseverable. Therefore, we proposed to preempt state regulation of the right to interconnect and the type of interconnection. We did not propose to preempt state regulation of the interconnection rates charged by LECs.

221. The Commission requested comment on whether we should require CMRS providers to provide interconnection to other mobile service providers. The *Notice* also asked whether, under Section 332(c)(3) of the Act, state regulation of interconnection rates of CMRS providers is preempted. The *Notice* additionally sought comment on whether service providers using PCS spectrum to offer commercial mobile radio service should be subject to equal access obligations like those imposed on LECs.

222. The *Notice* tentatively concluded that the Commission's power to require common carriers to provide interconnection to PMRS providers is unaffected by the Budget Act. The Commission proposed that PCS licensees should have a federally protected right to interconnect with LEC facilities regardless of whether the PCS licensees are classified as commercial or private mobile radio service providers, and that inconsistent state regulation should be preempted. The Commission contended that the new legislation should not affect its original proposal that PCS providers be entitled to obtain interconnection of a type that is reasonable for the PCS system and no less favorable than that offered by the LEC to any other customer or carrier, but we asked for comment on this issue. The *Notice* requested comment on whether LECs should be required to file tariffs specifying interconnection rates applicable to PCS

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[444] Communications Act, § 332(c)(1)(B), 47 U.S.C. § 332(c)(1)(B).

providers. The Commission also indicated that we continue to believe that, with respect to the rates for interconnection, it is unnecessary to preempt state and local regulation at this time.

223. Commenters and reply commenters generally agree that the Commission should require LECs to interconnect with commercial mobile radio service providers in the same manner they interconnect with Part 22 licensees.[445] Several parties, however, argue that the interconnection obligations proposed in the *Notice* are insufficient and have not provided adequate interconnection for cellular carriers.[446] Others reply that these proposals are unnecessary or go beyond the scope of this rule making.[447] Commenters and reply commenters agree with the Commission's tentative conclusion to preempt state regulation of the right to intrastate interconnection and the right to specify the type of interconnection.[448] Most commenters also agree with the Commission's decision not to preempt state regulation of LEC interconnection rates.[449] Several parties, however, urge the Commission to preempt state regulation of LEC interconnection rates.[450]

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[445] Century Comments at 7; GTE Comments at 21; McCaw Comments at 31; MCI Comments at 2, 7; Motorola Comments at 20-21; NABER Comments at 17; NYNEX Reply Comments at 19-20; Rig Comments at 5-6; TDS Reply Comments at 4; Telocator Comments at 23; USTA Comments at 11; US West Comments at 31-32; Vanguard Comments at 18; *see also* Ameritech Comments at 10; Pactel Comments at 17; PageNet Comments at 25-26; RMD Comments at 8. *But see* BellSouth Comments at 35 (claiming that the Commission is obligated under Section 201 to evaluate each case on its merits).

[446] Comcast Comments at 6-10; Cox Comments at 2-4; GCI Comments at 4-5; MCI Comments at 3; Nextel Reply Comments at 14-15; *see also* Radiofone Reply Comments at 7 (urging that commercial paging services must receive interconnection of the same quality and on the same terms provided by the LECs to their own paging subsidiaries); Rig Comments at 6 & n.3 (describing dispute over whether Southwestern will provide direct inward dial service to Rig).

[447] Bell Atlantic Reply Comments at 11 n.16; BellSouth Reply Comments at 1-2; Pacific Reply Comments at 3; Rochester Reply Comments at 6; US West Reply Comments at 17-18; USTA Reply Comments at 7-8.

[448] AMTA Comments at 21; Comcast Comments at 11 n.13; Cox Comments at 2 n.3; CTIA Comments at 40; GCI Comments at 5; McCaw Comments at 32-33; NTCA Comments at 7; Nextel Comments at 24; NYNEX Reply Comments at 20-21; PageNet Comments at 26-29; Pacific Comments at 18; Pactel Paging Reply Comments at 5; Southwestern Comments at 29; TDS Reply Comments at 4; TRW Comments at 34-35; US West Comments at 30; Vanguard Comments at 18-19. *But see* California Comments at 9-10; NARUC Comments at 21 (suggesting that the Commission's preemption proposal is premature); PA PUC Reply Comments at 17-19.

[449] BellSouth Comments at 36; California Comments 10-11; CTIA Comments at 40-41; DC PSC Comments at 10; Nevada Reply Comments at 1-2; PA PUC Reply Comments at 17-18; Pacific Comments at 18; PRTC Reply Comments at 25; Rochester Reply Comments at 6 n.20; TDS Reply Comments at 5; US West Comments at 30; Vanguard Comments at 19.

[450] See GCI Comments at 5 (arguing that a State should be allowed to regulate interconnection rates only if the Commission grants it authority after notice and comment); Nextel Comments at 25-26 (claiming that the Commission has both the legal authority and sufficient justification to preempt State regulation of interconnection rates); PageNet Comments at 28 n.75 (contending that paging carriers may not be well suited for dual interconnection rate regulation because it is impossible to segregate interstate from intrastate calls); TRW Comments at 36 (asserting that the Commission should preempt State regulation of interconnection rates for inherently national or international services such as those provided

224. Commenters disagree over our proposal to require commercial mobile radio service providers to interconnect with other mobile service providers. Some commenters contend that the Commission should impose interconnection obligations on CMRS providers.[451] NCRA urges the Commission to require facilities-based CMRS providers to allow collocation consistent with the Commission's Expanded Interconnection proceeding[452] for local exchange carriers.[453] Many parties, however, argue that commercial mobile radio service providers do not have control over any monopoly, bottleneck facilities, and therefore no need exists to impose upon them any interconnection obligations.[454] In particular, several parties oppose MCI's proposal that CMRS providers give interexchange carriers access to customer information stored in mobile service data bases.[455] Reply commenters also oppose NCRA's proposal that the Commission impose expanded interconnection obligations on CMRS providers.[456] GTE points out that the Commission may defer considering whether commercial mobile radio service providers have an interconnection obligation and, if it appears that demand is not being met, revisit the issue.[457] Commenters also differ regarding the extent of state authority over a CMRS provider's interconnection obligations and interconnection rates. McCaw and Nextel argue that, in the interest of a uniform federal policy for commercial mobile radio service, the Commission should preempt states from imposing interconnection requirements on CMRS providers.[458] CTIA and McCaw contend that the Budget Act specifically preempts states from

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over MSS/RDSS systems).

[451] Ameritech Comments at 10 n.20; Bell Atlantic Comments at 40; GCI Comments at 4; Grand Comments at 2-3; MCI Comments at 10; NCRA Comments at 23; NYNEX Reply Comments at 19-23 ("However, new licensees or developing services should not be permitted to use interconnection as a substitute for the prompt construction and implementation of their own independent networks."); Pacific Comments at 19-20; USTA Comments at 11; US West Comments at 33-34. *But see* TDS Comments at 20 (arguing that the Commission should require commercial mobile service providers to provide interconnection to other mobile service providers only where necessary to assure that the operations of adjacent non-regional systems providing CMRS offerings in the same radio service have a fair opportunity to interconnect to promote regional roaming).

[452] *See* note 489, *infra*.

[453] NCRA Comments at 9-13.

[454] AllCity Comments at 2-3; Arch Comments at 8 n.20; CTIA Comments at 41-42; IVC Partnerships Comments at 2-3; McCaw Comments at 31-32; New Par Comments at 11-12; Nextel Reply Comments at 15; Pactel Comments at 10-11; Pactel Paging Comments at 6 n.13; PageNet Reply Comments at 2; PNC Comments at 4-5; Southwestern Comments at 29-30. *See also* BellSouth Comments at 36; Century Comments at 7; TRW Comments at 36 n.72; Vanguard Comments at 15-17.

[455] Pactel Reply Comments at 15-16; Southwestern Reply Comments at 9-10.

[456] Bell Atlantic Reply Comments at 11; CTIA Reply Comments at 21-22; Pacific Reply Comments at 2-3; Pactel Reply Comments at 14 n.38; Southwestern Reply Comments at 8; TDS Reply Comments at 5-6.

[457] GTE Comments at 22. *See also* Sprint Reply Comments at 7-8.

[458] McCaw Comments at 32-33; Nextel Reply Comments at 15-16. *See also* NCRA Comments at 23 (arguing that the possibility of State regulation must be kept open unless there is a federally mandated right of access on a cost basis to commercial mobile radio service providers); New Par Comments at 12-13 (asserting that if the Commission imposes interconnection obligations on commercial mobile radio service providers, it should preempt State authority to regulate such interconnection).

regulating the rates charged by a CMRS provider, including rates for interconnection.[459] Other parties, however, claim that Congress did not intend to preempt state regulation of the interconnection rates of CMRS providers, only the rates those providers charge to end users.[460]

225. Many parties support the Commission's determination that the Budget Act does not limit the Commission's authority to require common carriers to provide interconnection to private mobile radio service providers.[461] Some parties urge the Commission to clarify or strengthen the rights of private mobile radio service providers.[462] Several paging companies specifically argue that if common carrier paging is reclassified as PMRS, these mobile service providers should not lose their existing interconnection rights.[463] Other commenters and reply commenters argue that PMRS providers should not have the same interconnection rights as common carriers.[464]

226. Commenters also expressed opinions with respect to LEC obligations to interconnect with PCS providers specifically. Many parties support the proposal in the *Notice* that PCS licensees should have a federally protected right to interconnect with LEC facilities regardless of whether the PCS licensees are classified as commercial or private mobile radio service providers.[465] Several commenters urge the Commission to clarify or strengthen the interconnection rights of PCS providers.[466] Commenters agree with our proposal to preempt inconsistent state regulation of PCS interconnection.[467] MCI also supports our proposal not to preempt,

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[459] CTIA Comments at 41; New Par Comments at 13-14.

[460] NARUC Comments at 22-23; New York Comments at 12-14; Vanguard Comments at 19-20.

[461] AMTA Comments at 21; Celpage Comments at 4; RMD Comments at 8; Pagemart Comments at 10-11; PageNet Comments at 25-26.

[462] Motorola Comments at 21; NABER Comments at 17.

[463] Pagemart Comments at 10-11; PageNet Comments at 25-26; *see also* AmP Reply Comments at 4-5; Telocator Reply Comments at 10.

[464] Bell Atlantic Comments at 40-41; GTE Comments at 21-22; MCI Reply Comments at 4-5; US West Comments at 32-33. *See also* GTE Reply Comments at 13 (urging the Commission to defer judgment to allow market forces to take effect first); Nextel Comments at 25 n.44 (arguing that to the extent that private mobile radio service carriers require the same interconnection arrangements as a commercial mobile radio service, they are likely offering a functionally equivalent service and should be classified as a CMRS provider for regulatory purposes).

[465] Celpage Comments at 5; CTP Comments at 2; NCRA Comments at 23-24; Pacific Comments at 20; Pagemart Comments at 19; RMD Comments at 8; Telocator Comments at 23; Time Warner Comments at 7-10; TRW Comments at 35. *But see* MCI Reply Comments at 3-5 (questioning the Commission's authority to grant private carriers the same interconnection rights as commercial mobile radio service providers).

[466] Cox Comments at 3; GCI Comments at 4-5; MCI Comments at 8; Telocator Reply Comments at 10.

[467] CTP Comments at 2; Comcast Comments at 11; MCI Comments at 8; Pagemart Comments at 20; Time Warner Comments at 10.

at this time, state regulation of the rates LECs charge for PCS interconnection.[468] In addition, several parties support the Commission's proposal to require LECs to tariff rates for PCS interconnection.[469]

b. Discussion

227. The *Notice* refers to the right of mobile service providers, particularly PCS providers, to interconnect with LEC facilities. The "right of interconnection" to which the *Notice* refers is the right that flows from the common carrier obligation of LECs "to establish physical connections with other carriers" under Section 201 of the Act.[470] The new provisions of Section 332 do not augment or otherwise affect this obligation of interconnection.

228. Previously, the Commission has required local exchange carriers to provide the type of interconnection reasonably requested by all Part 22 licenses.[471] In the case of cellular carriers, the Commission found that separate interconnection arrangements for interstate and intrastate services are not feasible. Therefore, we concluded that the Commission has plenary jurisdiction over the physical plant used in the interconnection of cellular carriers and we preempted state regulation of interconnection. We found, however, that a LEC's rates for interconnection are severable because the underlying costs of interconnection are segregable. Therefore, we declined to preempt state regulation of a LEC's rates for interconnection. The Commission recognized, however, that the charge for the intrastate component of interconnection may be so high as to effectively preclude interconnection. This would negate the federal decision to permit interconnection, thus potentially warranting our preemption of some aspects of particular intrastate charges.[472]

229. The Commission has allowed LECs to negotiate the terms and conditions of interconnection with cellular carriers. We required these negotiations to be conducted in good faith. The Commission stated, "we expect that tariffs reflecting charges to cellular carriers will be filed only after the co-carriers have negotiated agreements on interconnection."[473] We also preempted any state regulation of the good faith negotiation of the terms and conditions of interconnection between LECs and cellular carriers. The *Notice*, however, requested comment on whether we should require LECs to file tariffs specifying interconnection rates for PCS providers.

230. We see no distinction between a LEC's obligation to offer interconnection to Part 22 licensees and all other CMRS providers, including PCS providers. Therefore, the Commission will require LECs to provide reasonable and fair interconnection for all commercial

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[468] MCI Comments at 9; *see also* CTP Comments at 2 (contending that the Commission does not need to preempt the rate setting of a settlements process as long as the same process is used for independent telephone companies); Nevada Reply Comments at 1-3 (Commission preemption is neither necessary nor permissible). ***But see*** Pagemart Comments at 20 (urging preemption).

[469] Cox Comments at 5-6; CTP Comments at 1-2; Pagemart Comments at 19; *see also* Comcast Comments at 11-12 (urging the Commission to order LECs to submit sufficient information, such as intrastate interconnection tariffs and all contracts for interconnection and for billing and collection). ***But see*** Pacific Comments at 20 (opposing a federal tariff requirement).

[470] 47 U.S.C. § 201.

[471] *Interconnection Order*, 2 FCC Rcd at 2913.

[472] *Id.* at 2912.

[473] *Id.* at 2916.

mobile radio services. The Commission finds it is in the public interest to require LECs to provide the type of interconnection reasonably requested by all CMRS providers. The Commission further finds that separate interconnection arrangements for interstate and intrastate commercial mobile radio services are not feasible (*i.e.*, intrastate and interstate interconnection in this context is inseverable) and that state regulation of the right and type of interconnection would negate the important federal purpose of ensuring CMRS interconnection to the interstate network. Therefore, we preempt state and local regulations of the kind of interconnection to which CMRS providers are entitled.[474]

231. With regard to the issue of LEC intrastate interconnection rates, we continue to believe that LEC costs associated with the provision of interconnection for interstate and intrastate cellular services are segregable,[475] and, therefore, we will not preempt state regulation of LEC intrastate interconnection rates applicable to cellular carriers at this time. With regard to paging operations, PageNet and Pagemart argue that we should preempt state regulation of LEC rates charged to paging carriers for interconnection because LEC costs associated with such interconnection are not jurisdictionally segregable.[476] We do not find the arguments presented by PageNet and Pagemart to be persuasive, in light of the fact that our Part 22 Rules already have been applied to LEC interconnection rates for common carrier paging companies, as well as cellular companies, without any complaints.

232. In providing reasonable interconnection to CMRS providers, LECs shall be subject to the following requirements. First, the principle of mutual compensation shall apply, under which LECs shall compensate CMRS providers for the reasonable costs incurred by such providers in terminating traffic that originates on LEC facilities. Commercial mobile radio service providers, as well, shall be required to provide such compensation to LECs in connection with mobile-originated traffic terminating on LEC facilities. This requirement is in keeping with actions we already have taken with regard to Part 22 providers.[477]

233. Second, we require that LECs shall establish reasonable charges for interstate interconnection provided to commercial mobile radio service licensees. These charges should not vary from charges established by LECs for interconnection provided to other mobile radio service providers. In a complaint proceeding, under Section 208 of the Act, if a complainant shows that a LEC is charging different rates for the same type of interconnection, then the LEC shall bear the burden of demonstrating that any variance in such charges does not constitute an unreasonable discrimination in violation of Section 202(a) of the Act.

234. Third, in determining the type of interconnection that is reasonable for a commercial mobile radio service system, the LEC shall not have authority to deny to a CMRS provider any form of interconnection arrangement that the LEC makes available to any other carrier or other customer, unless the LEC meets its burden of demonstrating that the provision of such interconnection arrangement to the requesting commercial mobile radio service provider either is not technically feasible or is not economically reasonable.

235. Although we requested comment on whether LECs should tariff interconnection rates for PCS providers only, our experience with cellular interconnection issues and our review

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[474] *See Louisiana PSC*, 476 U.S. at 375 n.4; Maryland Pub. Serv. Comm'n v. FCC, 909 F.2d 1510 (D.C. Cir. 1990); California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Illinois Bell Tel. v. FCC, 883 F.2d 104 (D.C. Cir. 1989); *NARUC II*; *Texas PUC*; *NCUC I; NCUC II*.

[475] *See Interconnection Order*, 2 FCC Rcd at 2912.

[476] PageNet Comments at 28 n.75; Pagemart Comments at 12.

[477] *See Interconnection Order*, 2 FCC Rcd at 2915.

of the comments have convinced us that our current system of individually negotiated contracts between LECs and Part 22 providers warrants review and possible revision.[478] We believe that commercial mobile radio service interconnection with the public switched network will be an essential component in the successful establishment and growth of CMRS offerings. From the perspective of customers, the ubiquity of such interconnection arrangements will help facilitate the universal deployment of diverse commercial mobile radio services. From a competitive perspective, the LECs' provision of interconnection to CMRS licensees at reasonable rates, and on reasonable terms and conditions, will ensure that LEC commercial mobile radio service affiliates do not receive any unfair competitive advantage over other providers in the CMRS marketplace. Therefore, we intend to issue a Notice of Proposed Rule Making requesting comment on whether we should require LECs to tariff all interconnection rates.[479]

236. Although we requested comment on whether to impose equal access obligations on PCS providers, the Budget Act does not require us to make such a determination within any statutory deadline. Because this issue also arises in a pending petition for rule making filed by MCI[480] regarding equal access obligations for cellular service providers, we believe it is more efficient to defer any final decision in this area and to address these issues in the context of the MCI petition.

237. The *Notice* also requested comment on whether we should require CMRS providers to provide interconnection to other carriers. As commenters point out, our analysis of this issue must acknowledge that CMRS providers do not have control over bottleneck facilities. In addition, we note that the relatively few complaints the Commission has received concerning cellular carriers' denial of interconnection have involved allegations that cellular carriers refused to allow resellers to interconnect their own facilities with those of cellular carriers under reasonable or non-discriminatory terms and conditions.[481] This situation may change as more competitors enter the CMRS marketplace. In particular, PCS providers may wish to interconnect with cellular facilities, or vice versa, which could also allow for the advantages of interconnecting with a LEC. Also, we do not wish to encourage a situation where most commercial traffic must go through a LEC in order for a subscriber to send a message to a subscriber of another commercial mobile radio service. Because the comments on this issue are so conflicting and the complexities of the issue warrant further examination in the record, we have decided to explore this issue in a Notice of Inquiry. This proceeding will address many of the related issues raised by commenters. For example, MCI raises the issue of whether CMRS providers' interconnection obligations include providing access to mobile location data bases, and providing routing

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[478] *See, e.g.*, Comcast Comments at 6-10; Cox Comments at 2-4; GCI Comments at 4-5; MCI Comments at 3; Rig Comments at 6 & n.3.

[479] This *Notice* may also request comment on whether we should mandate specific tariff rate elements and, if so, how these rate elements should be structured, or whether we should apply alternative requirements on LECs that would ensure reasonable interconnection charges for CMRS providers.

[480] MCI Telecommunications Corp., Policies and Rules Pertaining to Equal Access Obligations of Cellular Licensees, Petition for Rule Making, RM-8012, filed June 2, 1992. We note that the federal court having jurisdiction over the Modification of Final Judgment in the Bell System divestiture proceeding may be asked to determine whether equal access obligations attach to GTE's or the Bell Operating Companies' offering of PCS.

[481] *See, e.g.*, Continental Mobile Tel. Co. v. Chicago SMSA Limited Partnership, File No. E-92-02 (filed Oct. 9, 1991); Cellnet Communications, Inc. v. Detroit SMSA Limited Partnership, File No. 91-95 (filed Mar. 6, 1991).

information to interexchange carriers and other carriers.[482] We agree, however, with commenters who say that the statutory language is clear, that if we do require interconnection by all CMRS providers, the statute preempts state regulation of interconnection rates of CMRS providers.[483]

238. The Notice of Inquiry will also allow the Commission to explore the issue of resale of commercial mobile radio service. NCRA raises the issue of CMRS providers' interconnection obligations to resellers. Several commenters also question whether the Commission should require CMRS providers to allow facilities-based competitors to resell their services. The Commission has a long history of dealing with issues relating to resellers.[484] Our policy has been to prohibit wireline common carriers and cellular carriers from denying service to resellers.[485] In the case of cellular, however, the Commission has allowed a cellular carrier to deny resale to its facilities-based competitor in the same market after that competitor's five-year fill-in period has expired.[486] The Commission reasoned that requiring resale to a facilities-based competitor would discourage cellular licensees from building out their own systems.[487] While these issues are pending before us, we will continue our resale policy with respect to cellular CMRS providers. Our Notice of Inquiry will explore whether we should require all CMRS licensees to provide resale to those who are non-facilities based competitors in the licensees' service area as well as to facilities-based competitors that have held licenses less than five years.

239. In addition, we requested comments on whether we should require local exchange carriers to interconnect with PMRS licensees. Although Section 201(a) of the Act provides the Commission with explicit jurisdiction to require carriers to "establish physical connections with other carriers," and there is no similar provision for interconnection with non-carriers, this does not preclude the Commission's ability to create a right to interconnection for PMRS licensees.[488] In this regard, we conclude that if a complainant shows that a common carrier provides interconnection to CMRS licensees while denying interconnection of the same type and at the same rate to PMRS licensees, the carrier will bear the burden of establishing why this would not constitute denial of a reasonable request for service in violation of Section 201(a),

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[482] *See* MCI Comments at 10. We note that these issues are being explored for dominant carriers in the Commission's Intelligent Network proceeding. *See* Intelligent Networks, CC Docket No. 91-346, Notice of Proposed Rule Making, 8 FCC Rcd 6813 (1993).

[483] Communications Act, § 332(c)(3), 47 U.S.C. § 332(c)(3).

[484] *E.g.*, Resale and Shared Use of Common Carriers Services and Facilities, Docket No. 20097, Report and Order, 60 FCC 2d 261 (1976), *modified on other grounds,* 62 FCC 2d 588 (1977), *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir. 1978), *cert. denied,* 439 U.S. 875 (1978); Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, CC Docket No. 80-54, Report and Order, 83 FCC 2d 167 (1980); Cellular Communications Systems, CC Docket No. 79-318, Report and Order, 86 FCC 2d 469 (1981), *modified,* 89 FCC 2d 58 (1982), *further modified,* 90 FCC 2d 571 (1982), *appeal dismissed sub nom.* United States v. FCC, No. 82-1526 (D.C. Cir. Mar. 3, 1983).

[485] See Commission decisions cited in note 484, *supra.*

[486] Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies, CC Docket No. 91-33, Report and Order, 7 FCC Rcd 4006 (1992).

[487] *Id.* at 4007-08.

[488] *See, e.g., Texas PUC,* 886 F.2d 1325, 1327-35 (D.C.Cir. 1989); Fort Mill Tel. Co. v. FCC, 719 F.2d 89, 92 (4th Cir. 1983); *NCUC I,* 537 F.2d at 794-795; Hush-A-Phone Corp. v. United States, 238 F.2d 266, 269 (D.C.Cir. 1956); AT&T, 71 FCC 2d 1, 10-11 (1979).

establishment of an unreasonable condition of service in violation of Section 201(b), and unreasonable discrimination in violation of Section 202(a).[489] We also note that if a service classified as PMRS is provided for profit and made available to the public, interconnection would bring the service within the definition of a CMRS because the definition of interconnected service includes "service for which a request for interconnection is pending pursuant to subsection (c)(1)(B)."[490]

2. *State Petitions To Extend Rate Regulation Authority*

a. Background and Pleadings

240. The statute preempts state and local rate and entry regulation of all commercial mobile radio services, effective August 10, 1994.[491] Under Section 332(c)(3)(B), however, any state that has rate regulation in effect as of June 1, 1993, may petition the Commission to extend that authority based on a showing that (1) "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory;" or (2) "such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State." [492]

241. Section 332(c)(3)(B) of the revised statute further provides that the Commission must complete all actions on such petitions, including reconsideration, within 12 months of submission. Under Section 332(c)(3)(A) of the revised statute, states may also petition the Commission to initiate rate regulation, based on the criteria noted above, if no such rate regulation has been in effect in the state involved.[493] If the Commission authorizes state rate regulation under either procedure, interested parties may, after a "reasonable time," petition the Commission to suspend the regulations.[494] In the *Notice* we indicated that we intended to establish procedures for the filing of such petitions by the states and interested parties, and we sought comments on what factors should be considered in establishing such procedures.

242. Most of the commenters point out that Section 332(c)(3)(A) is clear as to the congressional intent to preempt State and local rate and entry regulation of commercial mobile

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[489] *See* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rule Making, 7 FCC Rcd 7369, 7472-73 (1992), *appeal pending sub nom.* Bell Atlantic Corp. v. FCC, No. 92-1619 (D.C. Cir., filed Nov. 25, 1992), *recon.*, 8 FCC Rcd 127 (1992), *further recon.*, 8 FCC Rcd 7341 (1993), Second Report and Order and Third Notice of Proposed Rule Making, 8 FCC Rcd 7374 (1993). We note that the Commission may not forbear regarding the requirements of Sections 201, 202, and 208 of the Act. *See* Communications Act, § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A).

[490] Communications Act, § 332(d)(2), 47 U.S.C. § 332(d)(2).

[491] Budget Act, § 6002(c)(2)(A).

[492] Communications Act, § 332(c)(3)(A)-(B), 47 U.S.C. § 332(c)(3)(A)-(B). States must file such petitions prior to August 10, 1994. Communications Act, § 332(c)(3)(B), 47 U.S.C. § 332(c)(3)(B).

[493] Communications Act, § 332(c)(3)(A), 47 U.S.C. § 332(c)(3)(A). The Commission must allow public comment on any such petition and must grant or deny the petition within nine months of submission.

[494] The Commission must allow public comment on any such petition and grant or deny the petition in whole or in part within nine months of the date of submission. Communications Act, § 332(c)(3)(B), 47 U.S.C. § 332(c)(3)(B).

radio services, the narrow circumstances under which the states may be permitted to petition the Commission for authority to continue or initiate CMRS rate regulation, and the criteria upon which they must base their petitions.[495] These commenters believe that the state should bear the burden of proving that rate regulation of commercial mobile radio service providers is justified because of significant market failures. In this regard, GTE urges the Commission to establish a strong presumption against the imposition or continuation of state regulation where there are multiple CMRS providers. Citing the legislative history, it argues that this presumption would further the congressional intent that states not be permitted to regulate commercial mobile radio service, even when provided for basic telephone service, where "several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of this service."[496]

243. Several of the commenters assert that the Commission must adopt specific procedures regarding the threshold showing that the states must make in order to justify rate regulation of commercial mobile radio services.[497] With respect to petitions filed by any state seeking to demonstrate that prevailing market conditions will not protect CMRS subscribers from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory, McCaw contends that the states must demonstrate through empirical evidence that (1) market conditions vary from national norms; (2) CMRS carriers have engaged in anti-competitive behavior which has resulted in harm to consumers; and (3) ad hoc regulation is a better means of protecting consumers than a uniform federal policy.[498]

244. Bell Atlantic argues that, in accordance with Section 332(c)(3), the Commission should adopt procedures that ensure that the petition authorized by Section 332 is in fact filed on behalf of the state itself. Thus, the sponsor of a state petition should demonstrate that it is duly authorized by order or consent of all interested state agencies or departments or, preferably, by state legislation directing the appropriate agency to file the petition.[499] In addition, Bell Atlantic argues that the state petition should identify the specific existing or proposed rules that the state wishes to have imposed on CMRS providers. Such disclosure will allow all interested parties fair notice of the specific rules that the states may apply to them should the petition be granted.[500]

245. Several of the commenters argue that any state regulation that is permitted should be narrowly tailored in terms of scope and duration to remedy the identified market breakdown and to protect consumers. In addition, the commenters argue that states should be permitted to regulate comparable mobile services differently only to the extent that the Commission has established separate regulatory classifications of CMRS providers.[501]

246. A small number of commenters favor the adoption of more liberal procedures that would enable the states to regulate rates. Initially, NARUC and DC PSC contend that the language in the second prong of the statutory showing concerning existing market conditions

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[495] *See, e.g.*, McCaw Comments at 23; CTIA Comments at 38; GTE Comments at 24; Rochester Comments at 10.

[496] GTE Comments at 24-25, *quoting* Conference Report at 493.

[497] *See* Bell Atlantic Comments at 42-43; McCaw Comments at 24-25.

[498] McCaw Comments at 23.

[499] Bell Atlantic Comments at 41-42.

[500] *Id.* at 42-43.

[501] GTE Comments at 25; McCaw Comments at 24; Century Comments at 38.

cannot be read literally because such a showing is the basis for granting the petition under the first prong of the statutory showing.[502] DC PSC notes that the statute specifies that a state need meet only one of the two clauses, and the legislative history does not indicate any intent to limit a state petition based on a claim that the new service was a substitute for an existing service by a requirement that certain market conditions exist.[503]

247. DC PSC proposes that states may file a petition at any time showing: "(1) that 15 percent of basic service subscribers in any telephone exchange area do not have access to basic services offered from any telephone company other than a commercial mobile service licensee, (2) that the rates for basic services offered by the commercial mobile service provider are higher than the rates of the pre-existing landline carrier, or (3) that the commercial mobile service provider has market power in a relevant market."[504] DC PSC recommends that the proceeding should provide for public notice and comment within 30 days and a response within 15 days by the state.[505] According to DC PSC, the Commission should grant the petition if either of the first two tests is met. Otherwise, the Commission should exercise its judgment to evaluate a showing based on the third test. Finally, DC PSC argues that petitions to eliminate state regulations after a state petition is granted should not be permitted for a period of three years. Nevada concurs with DC PSC's proposal.[506] It believes that the use of DC PSC's proposed three-pronged test will allow the Commission to consider the monopoly power of commercial mobile radio service providers within specific market areas, not for the state as a whole.

248. In addition, NARUC, PA PUC, and New York believe that the Commission should not adopt rigid criteria for state petitions filed with the Commission. PA PUC maintains that the criteria adopted in the statute are clear, and given the states' interests involved, the states should be allowed to set forth in their petitions any factors they consider relevant.[507] NCRA proposes that the Commission adopt a review standard that is sufficiently generous to "assure that local and state interests continue to exercise their state statutory duties."[508] Finally, New York argues that the Commission may not preempt states from rate regulating CMRS unless it is satisfied that consumers in the telecommunications market have the ability to choose among CMRS services offered by several entities, and no entity or combination of entities has the ability to control the market prices of these services.[509]

249. Bell Atlantic and Southwestern disagree with DC PSC's proposal.[510] Bell Atlantic emphasizes that the statute and the legislative history make clear that substitution of wireless for wireline service is not sufficient to warrant state rate regulation. Rather, the states must also show that there is inadequate competition in the provision of commercial mobile service. Thus, it rejects DC PSC's proposal to allow state regulation whenever 15 percent of basic service

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[502] DC PSC Comments at 10-11; NARUC Comments at 5-6.

[503] DC PSC Comments at 11.

[504] *Id.* at 12.

[505] *Id.*

[506] Nevada Reply Comments at 4-5. Nevada proposes that the first test suggested by DC PSC be amended slightly to replace the term "telephone exchange area" with the word "area." *Id.* at 5.

[507] PA PUC Reply Comments at 22.

[508] NCRA Comments at 24-25.

[509] New York Comments at 15.

[510] Bell Atlantic Reply Comments at 12-15; Southwestern Reply Comments at 15-17.

subscribers receive such service from CMRS providers. It also rejects DC PSC's proposal to require a grant of a state petition whenever a CMRS provider's rates for basic service are higher than rates for landline service because a comparison of wireless to wireline rates in no way shows that the wireless market is not competitive.[511] Southwestern disagrees with DC PSC's test concerning market power of CMRS providers in a particular CMRS market. It notes that DC PCS does not explain how it would measure market power or whether the states would have to demonstrate that such power had an actual adverse effect on rates.[512] Finally, Bell Atlantic believes that the proposal to impose a three-year period before parties may seek to repeal state regulations is misguided. Those time frames, Bell Atlantic asserts, will depend on such factors as the extent of rate regulation granted, conditions in the state, and how rapidly conditions change.[513]

b. Discussion

250. We believe that Congress, by adopting Section 332(c)(3)(A) of the Act, intended generally to preempt state and local rate and entry regulation of all commercial mobile radio services to ensure that similar services are accorded similar regulatory treatment and to avoid undue regulatory burdens, consistent with the public interest. We also agree with the commenters that Section 332(c)(3) is clear as to the circumstances under which states may be permitted to petition the Commission for authority to regulate rates for CMRS and the criteria upon which they must base their petitions.

251. With respect to all petitions filed by the states under Section 332, we agree with the commenters that any such petition should be acceptable only if the state agency making such filing certifies that it is the duly authorized state agency responsible for the regulation of telecommunications services provided in the state. With respect to petitions seeking to demonstrate that prevailing market conditions will not protect CMRS subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory, we agree with the parties who argue that the states must submit evidence to justify their showings. Any state filing a petition pursuant to Section 332(c)(3) shall have the burden of proof that the state has met the statutory basis for the establishment or continuation of state regulation of rates. In any event, interested parties will be allowed to file comments in response to these petitions within 30 days after public notice of the filing of the petition. The comments should also be based on evidence that can rebut the showing made in the petition. Any interested party may file a reply within 15 days after the time for filing comments in response to the petition has expired. If we determine that the state has failed to meet this burden of proof, then we will deny the petition.

252. We agree with the commenters that a state should have discretion to submit whatever evidence the state believes is persuasive regarding market conditions in the state and the lack of protection for CMRS subscribers in the state. As a general matter, we would consider the following types of evidence, information, and analysis to be pertinent to our examination of market conditions and consumer protection:

(1) The number of CMRS providers in the state, the types of services offered by these providers, and the period of time during which these providers have offered service in the state.

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[511] Bell Atlantic Reply Comments at 12-13.

[512] Southwestern Reply Comments at 17.

[513] Bell Atlantic Reply Comments at 14.

(2) The number of customers of each such provider, and trends in each provider's customer base during the most recent annual period (or other reasonable period if annual data is not available), and annual revenues and rates of return for each such provider.

(3) Rate information for each CMRS provider, including trends in each provider's rates during the most recent annual period (or other reasonable period if annual data is not available).

(4) An assessment of the extent to which services offered by the CMRS providers that the state proposes to regulate are substitutable for services offered by other carriers in the state.

(5) Opportunities for new entrants that could offer competing services, and an analysis of existing barriers to such entry.

(6) Specific allegations of fact (supported by an affidavit of a person or persons with personal knowledge) regarding anti-competitive or discriminatory practices or behavior on the part of CMRS providers in the state.

(7) Evidence, information, and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, imposed upon CMRS subscribers. Such evidence should include an examination of the relationship between rates and costs. We will consider especially probative the demonstration of a pattern of such rates, if it also is demonstrated that there is a basis for concluding that such a pattern signifies the inability of the CMRS marketplace in the state to produce reasonable rates through competitive forces.

(8) Information regarding customer satisfaction or dissatisfaction with services offered by CMRS providers, including statistics and other information regarding complaints filed with the state regulatory commission.

In addition to the above-described evidence, information, and analysis that a state may submit in connection with its petition, we conclude that a state must identify and provide a detailed description of the specific existing or proposed rules that it would establish if we were to grant its petition.

253. With respect to petitions filed by any state seeking to demonstrate that state rate regulation is appropriate because the commercial mobile radio service is a replacement for landline telephone exchange service for a substantial portion of the telephone land line exchange service provided within the state, we disagree with DC PSC's argument that the language of the statute cannot be read literally to require states to demonstrate that market conditions are such that customers are not protected from unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory. As the legislative history points out:[514]

> If, however, several companies offer radio service as a means of providing basic service in competition with each other such that consumers can choose among alternative providers of this service, it is not the intention of the conferees that states should be permitted to regulate these competitive services simply because they employ radio as a transmission means.

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[514] Conference Report at 493.

We agree with the other commenters that such petitions must demonstrate both that market conditions are such that they do not protect subscribers adequately from unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, and a substantial portion of the CMRS subscribers in the state or a specified geographic area have no alternative means of obtaining basic telephone service. Thus, we will require the state to provide such information as may be necessary to enable us to determine market conditions prevalent in the state and the range of basic telephone service alternatives available to consumers in the state.

254. Similarly, petitions to suspend state rate regulation must be based on recent empirical data or other significant evidence. Finally, as to what constitutes a "reasonable time" for interested parties to file such petitions with the Commission, we agree with those commenters who state that parties should not be allowed to file such petitions until the state has had an opportunity to implement rate regulation and make the necessary adjustments. We disagree, however, with the DC PSC and others who seek to adopt a period of three years before parties may challenge state regulations. Rather, we believe that an 18-month period should provide the states with adequate time to implement rate regulation. Such a period will afford the states as well as interested parties sufficient opportunity to assess the impact of rate regulation on market conditions and the provision of services to consumers. Therefore, interested parties may not file petitions to suspend state rate regulation until 18 months after such regulatory authority has been granted or extended.

255. In any event, interested parties will be allowed to file comments in response to these petitions (*i.e.*, petitions filed by parties seeking to discontinue state regulation) within 30 days after public notice of the filing of the petition. The comments should also be based on evidence that can rebut the showing made in the petition. Any interested party may file a reply within 15 days after the time for filing comments has expired.

256. We point out that the standards for preemption established in *Louisiana PSC* do not apply to the rules adopted today.[515] In *Louisiana PSC* the Supreme Court found that Section 2(b) of the Communications Act prohibits the Commission from exercising federal jurisdiction with respect to "'charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services.'"[516] Here, Congress has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile radio services without regard to Section 2(b).

257. We emphasize that the rules adopted today do not prohibit the states from regulating other terms and conditions of commercial mobile radio service.[517] Finally, we also note that in those cases where the Commission authorizes the state to regulate rates for commercial mobile radio services, such regulations will be authorized only for the specified period of time we find

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[515] Under *Louisiana PSC*, the Commission may preempt State regulation of intrastate service when it is not possible to separate the interstate and intrastate components of the asserted Commission regulation. *Louisiana PSC*, 476 U.S. at 375 n.4. In construing the "inseparability doctrine" recognized by the Supreme Court in *Louisiana PSC*, federal courts have held that where interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the states, state regulation of the intrastate service that affects interstate service may be preempted where the State regulation thwarts or impedes a valid Federal policy. *See NARUC II*; Illinois Bell Tel. v. FCC, 883 F.2d 104 (D.C. Cir. 1989); California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

[516] *Louisiana PSC*, 476 U.S. at 373, *quoting* Communications Act, § 2(b), 47 U.S.C. § 152(b).

[517] As explained in note 515, *supra*, if we determine that a State's regulation of other terms and conditions of jurisdictionally mixed services thwarts or impedes our federal policy of creating regulatory symmetry, we would have authority under *Louisiana PSC* to preempt such regulation.

to be necessary to ensure that rates will be neither unjust nor unreasonably discriminatory.[518] We will make such determination on a case-by-case basis at the time regulatory authorization is extended to a petitioning state. To the extent that such rulings are made, they will remain in effect until such time as circumstances dictate.

3. *Miscellaneous Issues Raised by Commenters*

258. UTC expresses the view that Commission reorganization is a "necessary element" in carrying out the requirements of the Budget Act, and then goes on to propose a "conversion" plan under which the Commission would be reorganized with regard to our administration of non-broadcast radio services.[519] We did not seek comment on the issue advanced by UTC. While this would not preclude us from reaching the issue,[520] we have chosen not to propose or pursue Commission reorganization in this rule making.

259. NARUC suggests that the Commission and the states should work together to develop methods to monitor mobile services for purposes of determining whether particular services classified as private continue to be entitled to that classification. NARUC also proposes that the Commission and the states should agree to the provision of "complete reciprocal access to information" relevant to mobile service monitoring.[521] We agree with NARUC that state and federal cooperation regarding methods of monitoring the manner in which services are provided by mobile service carriers is reasonable, and we believe that such cooperation can improve monitoring efforts. We further agree with NARUC that state and federal cooperation could address issues such as reciprocal access to mobile service monitoring information. As an initial step toward a cooperative effort, we are committed to meeting informally with NARUC's Communications Committee.

260. Hardy requests that we clarify how the new regulatory scheme would apply to services provided over FM subcarrier channels, including PCS service.[522] We currently allow subsidiary communication services transmitted on a subcarrier within the FM baseband signal. Under our rules, subsidiary communication services that are common carrier services in nature are subject to common carrier regulation.[523] FM subcarriers may offer a variety of services.[524] Any mobile services provided over FM subcarriers that fall within the definition of CMRS and were previously subject to common carrier regulation will now be regulated as CMRS. Mobile services provided over FM subcarriers that meet the definition of CMRS but have been regulated as private radio services, will receive the benefit of our transition rules before becoming subject to CMRS rules. Finally, mobile services provided over FM subcarriers that do not meet the definition of CMRS will be regulated as PMRS.

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[518] Communications Act, § 332(c)(3)(B), 47 U.S.C. § 332(c)(3)(B).

[519] UTC Comments at 19. *See also* AMTA Comments at 16 n.4. UTC also revisits its proposal in its reply comments. UTC Reply Comments at 23-24.

[520] We are not required to give any notice before adopting a rule of Commission organization. 5 U.S.C. § 553(b)(3)(A).

[521] NARUC Comments at 11-12.

[522] Hardy Comments at 1-2.

[523] *See* Section 73.295 of the Commission's Rules, 47 C.F.R. § 73.295.

[524] These services include: functional music, specialized foreign language programs, radio reading services, utility load management, market and financial data and news, paging and calling, traffic control signal switching, bilingual television audio, and point-to-point or multipoint messages. *See id.*

261. RMD asks whether foreign governments and their representatives are eligible end users of SMR services under Section 90.603(c) of the Commission's Rules.[525] SMR systems are considered shared systems pursuant to Section 90.179 of the Commission's Rules, and persons may share stations only on frequencies for which they would be eligible for a separate authorization.[526] Our rules expressly enumerate those classes of persons that may be served by SMR licensees.[527] End user eligibility was limited for some time to persons eligible for licensing under Subparts B, C, D, or E of Part 90 of the Commission's Rules.[528] Wireline telephone common carriers and foreign governments and their representatives were expressly ineligible for licensing, pursuant to Sections 90.603 and 90.115 of the Rules.[529] In 1988, the Commission amended Section 90.603(c) of the Rules to permit SMRs to serve individuals and Federal Government agencies.[530] In other words, we expressly allowed two classes of entities that were previously not permitted to share SMR facilities, to do so. The Commission did not make comparable amendments that would expressly permit foreign governments or their representatives to receive SMR service. Section 90.115 continued to render such entities ineligible under Parts B, C, D, and E of Part 90, and thus they remained ineligible to receive service from SMR licensees. Subsequently, we eliminated individual licensing of SMR end users, and SMR systems therefore achieved some of the freedom in end user selection that is enjoyed by other commercial mobile service providers, such as cellular carriers.[531] Cellular services are not restricted in their ability to serve foreign governments or their representatives, however, whereas we have not amended our Part 90 rules to expand SMR end user eligibility to include foreign governments or their representatives. To facilitate symmetrical regulation of CMRS, therefore, we intend to examine in our Further Notice of Proposed Rule Making on the transition to new regulatory treatment of reclassified mobile services whether such a restriction is still appropriate for SMR services.

IV. SUMMARY OF ACTIONS; TRANSITION RULES

A. Summary of Actions

1. *Classification of Mobile Licensees; Other Actions*

262. In summarizing the actions we have taken in this Order, we believe that the following points highlight the decisions we have made to implement the objectives of Congress in amending Section 332 of the Act. First, we have given comprehensive scope to the term "mobile service," including within the definition all public mobile services, private land mobile services, and mobile satellite services, and most marine and aviation wireless services.

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[525] *See* RMD Comments at 7 n.8.

[526] 47 C.F.R. § 90.179(a).

[527] *See* 47 C.F.R. § 90.603(c).

[528] *See, e.g.,* Amendment of Part 90 of the Commission's Rules To Release Spectrum in the 806-821/851-866 MHz Bands and To Adopt Rules and Regulations Which Govern Their Use, PR Docket No. 79-191, Second Report and Order, 90 FCC 2d 1281, 1361 (1982) (setting forth previous version of Section 90.603).

[529] 47 C.F.R. §§ 90.603, 90.115.

[530] *See* Amendment of Part 90, Subparts M and S, of the Commission's Rules, PR Docket No. 86-404, Report and Order, 3 FCC Rcd 1838 (1988).

[531] *See* Amendment of Part 90 of the Commission's Rules To Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems, Report and Order, 7 FCC Rcd 5558 (1992).

263. Second, we have defined the term "commercial mobile radio service" in a manner that covers a significant portion of services provided by mobile carriers, because of our conclusion that such a definition best serves the congressional purpose of making mobile services widely available at reasonable rates and on reasonable terms in a competitive marketplace, and is consistent with the broad language of the statute. Our reading of congressional intent finds support in the record.[532] There are three prongs to the CMRS definition: the service must be provided for profit, it must be interconnected to the public switched network, and it must be available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public. Under the first element of the definition, we have provided that "for profit" includes any mobile service that is provided with the intent of receiving compensation or monetary gain. In the case of services that are not-for-profit, except for a portion of excess capacity that the licensee offers with the intent of receiving compensation, the service will be treated as for-profit to the extent of such excess capacity activities.

264. Under the second element of the CMRS definition, we have concluded that a mobile service offers interconnected service if it allows subscribers to send or receive messages to or from anywhere on the public switched network. Both direct and indirect interconnection with the PSN satisfy this criterion, as well as the use of store-and-forward technology. In addressing this element of the CMRS definition, we also have given an expansive meaning to the term "public switched network," concluding that the network includes the facilities of common carriers that participate in the North American Numbering Plan and have switching capability.

265. Under the third prong of the definition, we have decided that service made available "to the public" means any service that is offered without restriction on who may receive it. We also have concluded that whether a service is offered to "such classes of eligible users as to be effectively available to a substantial portion of the public" depends on several relevant factors such as the type, nature, and scope of users for whom the service is intended. We have decided not to consider limited system capacity or coverage of small geographic areas as factors in restricting public availability. If a service is provided only for internal use or only to a specified class of eligible users under the Commission's Rules, then the service will not meet the "public availability" prong of the CMRS definition.

266. Third, we have interpreted the term "private mobile radio service" by closely adhering to the statutory definition, and with the aim of advancing the congressional objective of applying a symmetrical regulatory framework to mobile services. We have determined that

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[532] Ameritech, for example, argues that:

> This proceeding was initiated at the direction of Congress to establish a level wireless playing field. At present, common carrier and private radio services that are indistinguishable to the consumer are subject to very different regulation. This caused the House Committee on Energy and Commerce to conclude that "the disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services." . . . By establishing like regulation of substitutable services, the Commission will promote competition. This, in turn, will enable licensees to better serve the communications needs of all wireless consumers and further allow them to maximize the efficient use of their assigned spectrum. A crucial step toward achieving Congress' goal of regulatory parity is the establishment of equal regulation for cellular and PCS licensees.

Ameritech Comments at 1-2 (citation and footnote omitted).

the statutory language and the legislative history support our conclusion that a mobile service may be classified as PMRS only if it does not fall within the statutory definition of CMRS and is not the functional equivalent of a service that meets the three-part definition of CMRS. Those services that are classified as PMRS will, however, be presumed PMRS unless it is demonstrated that the service is the functional equivalent of CMRS. In applying the functional equivalence test, we have decided to consider a variety of factors, including whether the mobile service at issue is a close substitute for any CMRS offering as evidenced by the cross-price elasticity of demand.

267. Fourth, we have applied the various definitions discussed in the preceding paragraphs to decide how to classify existing private land mobile services and common carrier mobile services. We have decided to classify all existing Government and Public Safety services, including the Special Emergency Radio Service, and all existing Industrial and Land Transportation Services, other than certain licensees in Business Radio Service, as private mobile radio services. We also have classified Automatic Vehicle Monitoring as a private mobile radio service.

268. In the Business Radio Service, which has a broader range of eligible users than other Industrial and Land Transportation services, we have classified Business Radio licensees who provide for-profit interconnected service to third-party users as CMRS. Business Radio licensees who operate not-for-profit internal systems, or who do not offer interconnected service, are classified as private.

269. We also have decided to classify SMR licensees as CMRS if they offer interconnected service to customers. This classification will apply to providers of wide-area SMR service, and to "traditional" SMR systems as well. SMR licensees who do not offer interconnected service, however, are classified as PMRS. In addition, we have concluded that private carrier paging (PCP) services should be classified as CMRS, based on our finding that PCP licensees fit the statutory definition of CMRS. We have classified as PMRS those private paging systems that service the licensee's internal communications needs but do not offer for-profit service to third-party customers. We have classified 220-222 MHz private land mobile systems using the same approach we used for classifying SMR and PCP licensees.

270. With respect to existing common carrier services, we have concluded that cellular services, 800 MHz air-ground services, common carrier paging services, mobile telephone service, improved mobile telephone service, trunked mobile telephone service, 454 MHz air-ground service, and Offshore Radio Service all should be classified as CMRS because they meet the statutory definition. With regard to mobile satellite service, we have concluded that we will exercise our discretion under the statute to determine whether the provision of space segment capacity by satellite licensees and other entities may be treated as common carriage. The provision of both space and earth segment capacity, either by satellite system licensees providing service through, for example, their own licensed earth station, or by earth station licensee resellers directly to users of commercial mobile radio services, will be treated as common carriage. In addition, we have concluded that we should seek further comment on whether we should remove current restrictions that bar CMRS providers from offering dispatch service.

271. Fifth, we have determined that personal communications services (PCS) should be classified presumptively as CMRS. Under this approach a PCS applicant or licensee would be regulated as a CMRS carrier, but would be able to offer private PCS, and be regulated as PMRS, upon making the requisite showing during the application process or subsequently. We conclude that treating PCS as presumptively CMRS most suits the manner in which we have defined PCS, and the four goals that we have established for the service — speed of deployment, universality, competitive delivery, and diversity of services.

272. Sixth, we have decided to exercise our forbearance authority regarding several Title II provisions in order to maximize market competition. We have found that our forbearance

actions will promote competition. We have also found that application of the three-pronged test set forth in Section 332(c) of the Act warrants forbearance from many Title II provisions. In general, we have forborne from enforcing any tariffing requirements, and Commission authority to investigate into existing and newly filed rates and practices, collection of intercarrier contracts, certification concerning interlocking directorates, and Commission approval relating to market entry and exit (respectively, Sections 203, 204, 205, 211, 212, and 214 of the Act). We have not forborne from provisions that are unrelated to Commission authority and regulatory obligations (Section 210), are primarily reservations of Commission authority (Sections 213, 215, 218, 219, and 221), or are consumer protection-related (Sections 223, 225, 226, 227, and 228). In addition, in the case of cellular service, we will shortly issue a Notice of Proposed Rule Making to establish monitoring provisions applicable to the cellular marketplace because of our conclusion that the cellular marketplace is not yet fully competitive. Further, as noted below,[533] we intend to issue a Notice of Proposed Rule Making addressing whether we should adopt further forbearance actions under Title II of the Act in the case of specified classes of CMRS providers.

273. Seventh, we have required LECs to provide reasonable and fair interconnection for all commercial mobile radio services, since we see no distinction between cellular carriers (to whom LECs currently are required to provide such interconnection) and all other CMRS providers, including PCS providers. In addition, we have concluded that if a LEC provides interconnection to CMRS providers while denying the same interconnection to private mobile radio service providers, the carrier would bear the burden of demonstrating why such a practice does not constitute a violation of Title II of the Act.

274. Finally, we have concluded that Congress, in revising Section 332, intended to preempt state and local rate and entry regulation of all CMRS, and we have established a range of procedural and other requirements states must meet if they seek to retain any existing CMRS rate regulation or initiate such rate regulation for the first time.

2. *Impact on Existing Service Providers*

275. The following carriers are not subject to any new regulatory requirements as a result of this Order: (1) public land mobile service; (2) domestic public cellular radio telecommunications service; (3) 800 MHz air-ground radiotelephone service; (4) public coast and aviation stations; (5) public safety radio services; (6) special emergency radio service; (7) industrial radio services (except for business radio services); (8) land transportation radio services; and (9) radiolocation service. Those CMRS services which have traditionally been classified as common carrier services will be subject to fewer regulatory requirements because we are forbearing from applying Sections 203, 204, 205, 211, 212, and 214 of the Act.

276. AVM, most Business Radio Service (BRS) licensees, and some 220-222 MHZ land mobile system licensees will remain PMRS. Private Carrier Paging (PCPs) licensees, BRS licensees, 220-222 MHz land mobile system licensees, and SMRs that are reclassified as CMRS licensees are placed under Title II obligations. Under Sections 201, 202, and 208 of the Act, these licensees must provide interconnection upon reasonable request, must not engage in any unreasonable discriminatory practices, and will be subject to Section 208 complaints regarding any unlawful practices. These licensees will also be subject to new obligations set forth in the following Title II provisions: Sections 206, 207, and 209, which authorize the Commission to provide remedial relief to an aggrieved party pursuant to grant of a Section 208 complaint or finding of a violation of the Communications Act; and consumer protection-related provisions of Sections 223, 225, 226, 227, and 228 of the Act. The other Title II provisions from which we have not forborne do not create any new obligations for these licensees, or have only indirect impact upon them, because they are either unrelated to Commission authority and regulatory

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[533] *See* para. 285, *infra*.

obligations, or are primarily reservations of Commission authority. We believe we are not imposing any unwarranted burdens on private carriers who, by our actions herein, are now classified as CMRS providers. We are, however, initiating a Further Notice of Proposed Rule Making in this proceeding to assess whether Title II regulation should be further streamlined for certain classes of CMRS providers.

277. As existing common carrier service providers, cellular licensees are not subject to any new Title II obligations. As we have indicated, however, we intend to initiate a rule making in which we will propose to collect information regarding the cellular marketplace.

B. Transition Rules

1. *Background and Pleadings*

278. The statute provides effective dates for the "regulatory treatment" amendments to the Communications Act and sets forth deadlines for an orderly transition to the changed regulatory structure.[534] First, the statute provide that before August 10, 1994, the Commission "shall issue such modifications or terminations of the regulations applicable (before the date of enactment of this Act) to private land mobile services as are necessary to implement the amendments made by subsection (b)(2)."[535] Second, Congress has established a three-year transition period during which "any private land mobile service provided by any person before such date of enactment, and any paging service utilizing frequencies allocated as of January 1, 1993, for private land mobile services, shall . . . be treated as a private mobile service."[536]

279. Several commenters raise the issue of whether the three-year transition period should apply to all private land mobile licensees who are subject to reclassification or whether some private licensees, particularly providers of wide-area SMR services, should be subject to immediate regulation as CMRS. PN Cellular and PacTel assert that the three-year transition period should only apply to private licensees whose systems were operational as of August 10, 1993.[537] PacTel argues that SMR services that are significantly different from services provided on August 10, 1994, should be immediately subject to CMRS regulation, without benefit of the three-year transition period.[538] AMTA contends, however, that the transition provision was intended to ensure that all providers of reclassified services would have three years to "adjust their business plans and marketplace strategies to an entirely new regulatory scheme."[539] Finally, in a pleading not filed in this docket, Bell Atlantic petitioned the Commission to subject all wide-area, digitally enhanced SMR services, such as those provided by Nextel, to immediate regulation as CMRS on the grounds that these are "new" services that

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[534] In most respects, Sections 332 and 3(n), as amended, became effective on August 10, 1993. Certain provisions relating to State regulation of terms and conditions regarding commercial mobile radio services, however, will take effect on August 10, 1994. *See* Budget Act, §§ 6002(c)(1), 6002(c)(2); Section 332(c)(3)(A) of the Communications Act, 47 U.S.C. § 332(c)(3)(A).

[535] Budget Act, § 6002(d)(3).

[536] *Id.*, § 6002(c)(2)(B). The provisions of Section 332(c)(6) (foreign ownership) are excepted from the three-year period. The *First Report and Order* addresses those foreign ownership provisions.

[537] PN Cellular Comments at 2-3; PacTel Reply Comments at 18-19.

[538] PacTel Reply at 18-19. PacTel also notes that this approach would not apply to paging services, because paging services are "grandfathered" based on when the frequencies were allocated.

[539] AMTA Reply Comments at 6.

were not provided at the time the Budget Act was enacted.[540] Several parties filed oppositions to Bell Atlantic's petition.[541] They argue that the Commission has previously rejected the argument that wide-area, digitally enhanced SMR service is a "new" service. The parties opposing the Bell Atlantic petition claim that the Commission authorizes digital SMR services within the existing SMR regulatory framework.[542] The parties conclude that the three-year transition period applies to wide-area, digitally enhanced SMR providers.[543]

2. Discussion

280. The Budget Act provides that the three-year transition period applies to "any private land mobile service provided by any person before [the] date of enactment [*i.e.*, August 10, 1993], and any paging service using frequencies allocated as of January 1, 1993." Existing private services that are subject to reclassification as CMRS under this Order will therefore continue to be regulated as private until August 10, 1996, when reclassification becomes effective. We believe that Congress established the three-year period to ensure an orderly transition for all reclassified private services. First, the statute allows one year for the Commission to establish rules, regulations, and policies that will govern the reclassified services. After we complete this transitional rule making, licensees will have notice of regulations and policies that will govern their reclassified services. Because these policies may require significant adjustments by licensees, however, *e.g.*, modification of equipment, implementation of new accounting practices, and the like, the statute provides an additional two years for private licensees to bring their services into compliance with our CMRS rules.[544]

281. With respect to private land mobile services other than paging, the statute applies the transition to "service provided by any person" before the date of enactment. We interpret this language to mean that the three-year transition applies to all private land mobile licensees who were licensed, and therefore authorized to provide service, as of August 10, 1993. On the other hand, private mobile licensees who are subject to reclassification as CMRS and were not licensed as of the enactment date, are not subject to the three-year "grandfathering" period, and will therefore be treated as CMRS as soon as our rules go into effect.

282. While we believe that Congress intended to distinguish between pre-enactment and post-enactment licensees for transition purposes, we also conclude that Congress did not intend the transition period to apply in a rigid fashion to pre-enactment licensees and that it did intend some flexibility in the implementation of these transition provisions. Therefore, we will allow grandfathered licensees to modify and expand existing systems and to acquire additional licenses in the same service for which they were licensed prior to August 10, 1993. In addition, with respect to non-grandfathered licensees, we conclude that reclassification should be effective upon the effective date of our transitional rules for reclassified services, which will be considered in

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[540] *See* Petition for Special Relief Concerning Enhanced Specialized Mobile Radio Applications and Authorizations, filed Dec. 22, 1993, by Bell Atlantic Mobile Systems, Inc. (Bell Atlantic Petition). Although the Bell Atlantic Petition and responsive pleadings were not filed in this proceeding, we are incorporating the petition into this docket because the issues that it raises are identical to those raised by other comments.

[541] AMTA Opposition, Dial Page Opposition, and Nextel Opposition. Bell Atlantic filed a reply.

[542] AMTA Opposition at 3-4; Dial Page Opposition at 3-6; Nextel Opposition at 7-10.

[543] AMTA Opposition at 4-5; Dial Page Opposition at 2; Nextel Opposition at 11-17.

[544] *See, e.g.*, 139 Cong. Rec. H6163 (daily ed. Aug. 5, 1993) (statement of Chairman Markey that transition period provides those with changed regulatory status a "reasonable time to conform with the new regulatory scheme").

our transitional rule making to be commenced shortly. The transitional rule making will enable the Commission to modify licensing procedures and harmonize technical and operational rules for services that are reclassified as CMRS. Attempting to make reclassification effective before this process is complete would cause significant disruption and confusion in the ongoing licensing and regulation of affected private mobile services.

283. We also disagree with Bell Atlantic's view that the three-year transition should not apply to wide-area SMR services on the grounds that these are "new" services. We agree with parties opposing Bell Atlantic that we have expressly concluded in past decisions that authorizing wide-area SMR systems did not require creation of a new service because SMR operators could provide wide-area service under their existing authorizations and our existing service rules.[545] We note that although Congress was clearly aware of the advent of wide-area SMR systems, there is no indication that Congress intended to distinguish these systems from more traditional SMR systems for transition purposes.[546] Therefore, so long as SMR licensees who provide wide-area service were licensed in the SMR service prior to August 10, 1993, such service will be regulated as private for the statutory three-year period.

284. With respect to paging services, the transition period applies more broadly. Congress specifically provided that all paging licensees "utilizing" private paging frequencies allocated as of January 1, 1993, are to be treated as private mobile radio service providers for three years. The Conference Report explains that paging was treated separately to prevent states from attempting to restrict entry of paging licensees on private frequencies prior to the effective date of our preemption regulations, which do not go into effect until August 10, 1994.[547] Based on this provision, we conclude that all private paging licensees are to be treated as private mobile service providers, regardless of whether they were licensed before or after the date of enactment.

C. Further Proceedings

285. The further proceedings relating to mobile services regulation that we now anticipate are as follows:

(1) We intend to issue a Notice of Inquiry in order to address the issue whether CMRS licensees should be required to provide interconnection to other carriers. We anticipate that this proceeding will define the nature and scope of such interconnection obligations. In addition, this proceeding will explore the extent to which we will require CMRS providers to allow resale of their services.

(2) We intend to initiate a proceeding on whether to impose equal access obligations on cellular, PCS, and all other CMRS providers.

(3) As soon as possible, we intend to issue a Notice of Proposed Rule Making in order to establish technical rules, as required by the Budget Act, § 6002(d)(3), with respect to the transition of existing PMRS licensees that we have reclassified as CMRS licensees. This Notice will also delineate the licensing requirements for

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[545] *See* Fleet Call, Inc., 6 FCC Rcd 1533 (1991). We have at times provided SMR operators with additional time to change their equipment and put in place more advanced technologies, but such operations take place within the terms of their existing SMR licenses.

[546] To the contrary, Chairman Markey has indicated that the transition was not intended to distinguish traditional SMR systems from so-called " enhanced SMR" systems. Letter from Chairman E. Markey to Chairman R. Hundt, FCC, Jan. 28, 1994.

[547] Conference Report at 498; *see* Budget Act, § 6002(c)(2)(A).

mobile services. One purpose of this proceeding will be to examine the extent to which existing rules can be modified and consolidated to account for the regulatory restructuring we have implemented in this Order pursuant to the Budget Act, as required by the Budget Act, § 6002(d)(3).

(4) We intend to issue a Notice of Proposed Rule Making addressing whether LECs should be required to file tariffs for their interconnection rates applicable to CMRS providers.

(5) We intend to issue a Notice of Proposed Rule Making to establish monitoring provisions applicable to cellular licensees.

(6) We intend shortly after the release of this item to issue a Notice of Proposed Rule Making addressing whether we should adopt further forbearance actions under Title II of the Act in the case of specified classes of CMRS providers.

(7) We intend to issue a Notice of Proposed Rule Making addressing whether we should remove the prohibition of common carriers providing dispatch service.

V. PROCEDURAL MATTERS; ORDERING CLAUSES

286. The analysis pursuant to the Regulatory Flexibility Act of 1980[548] is contained in Appendix C.

287. Accordingly, IT IS ORDERED that the rule changes as specified in Appendix A ARE ADOPTED.

288. IT IS FURTHER ORDERED that the rule changes made herein WILL BECOME EFFECTIVE 90 days after publication in the Federal Register. This action is taken pursuant to Sections 4(i), 4(j), 7(a), 302, 303(c), 303(f), 303(g), 303(r), 332(c), and 332(d) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 157(a), 302, 303(c), 303(f), 303(g), 303(r), 332(c), 332(d).

289. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), and 332(c)(1)(A) of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 332(c)(1)(A), that all commercial mobile radio service providers with tariffs on file with the Commission SHALL CANCEL such tariffs. Cancellation shall be by supplement effective upon five days' notice and the supplement shall reference this Order as authority for cancellation. For this purpose, Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, ARE WAIVED. These cancellations SHALL BE FILED no later than 90 days from publication of this Order in the Federal Register.

290. IT IS FURTHER ORDERED, that the Petition for Special Relief Concerning Enhanced Specialized Mobile Radio Applications and Authorizations filed by Bell Atlantic Mobile Systems, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[548] 5 U.S.C. § 608.

APPENDIX A
Final Rules

1. The authority citation for Part 20 is as follows:

Authority: Sections 4, 303, 332, 48 Stat. 1066, 1082, as amended; 47 C.F.R. §§ 154, 303, 332.

2. Part 20 is added to read as follows:

PART 20 COMMERCIAL MOBILE RADIO SERVICES

Section

Section 20.1 Purpose.

The purpose of these rules is to set forth the requirements and conditions applicable to commercial mobile radio service providers.

Section 20.3 Definitions.

Commercial mobile radio service. A mobile service that is: (1)(A) provided for profit, *i.e.*, with the intent of receiving compensation or monetary gain; (B) an interconnected service; and (C) available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (2) the functional equivalent of such a mobile service described in paragraph (1).

Interconnection or Interconnected. Direct or indirect connection through automatic or manual means (by wire, microwave, or other technologies such as store and forward) to permit the transmission or reception of messages or signals to or from points in the public switched network.

Interconnected service. A service (1) that is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network; or (2) for which a request for such interconnection is pending pursuant to Section 332(c)(1)(B) of the Communications Act, 47 U.S.C. § 332(c)(1)(B). A mobile service offers interconnected service even if the service allows subscribers to access the public switched network only during specified hours of the day, or if the service provides general access to points on the public switched network but also restricts access in certain limited ways. Interconnected service does not include any interface between a

licensee's facilities and the public switched network exclusively for a licensee's internal control purposes.

Mobile Service. A radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (1) both one-way and two-way radio communication services; (2) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation; and (3) any service for which a license is required in a personal communications service under Part 24 of this chapter.

Private Mobile Radio Service. A mobile service that is neither a commercial mobile radio service nor the functional equivalent of a service that meets the definition of commercial mobile radio service. Private mobile radio service includes the following:

(a) Not-for-profit land mobile radio and paging services that serve the licensee's internal communications needs as defined in Part 90 of this chapter. Shared-use, cost-sharing, or cooperative arrangements, multiple licensed systems that use third party managers or users combining resources to meet compatible needs for specialized internal communications facilities in compliance with the safeguards of Section 90.179 are presumptively private mobile radio services.

(b) Mobile radio service offered to restricted classes of eligible users. This includes the following services: Public Safety Radio Services; Special Emergency Radio Service; Industrial Radio Services (excluding Business Radio Services that offer customers for-profit interconnected services); Land Transportation Radio Services; and Radiolocation Services.

(c) 220-222 MHz land mobile service and Automatic Vehicle Monitoring systems (Part 90) that do not offer interconnected service or that are not-for-profit.

(d) Personal Radio Services under Part 95 of the rules (General Mobile Services, Radio Control Radio Services, and Citizens Band Radio Services); Maritime Service Stations (excluding Public Coast stations) (Part 80); and Aviation Service Stations (Part 87).

Public Switched Network. Any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services.

Section 20.5 Citizenship.

(a) This rule implements Section 310 of the Communications Act, 47 U.S.C. § 310, regarding the citizenship of licensees in the commercial mobile radio services. Commercial mobile radio service authorizations may not be granted to or held by:

(1) Any foreign government or any representative thereof;

(2) Any alien or the representative of any alien;

(3) Any corporation organized under the laws of any foreign government;

(4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country; or

(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

(b) The limits listed in subsection (a) may be exceeded by eligible individuals who held ownership interests on May 24, 1993, pursuant to the waiver provisions established in Section 332(c)(6) of the Communications Act. Transfers of ownership to any other person in violation of paragraph (a) are prohibited.

Section 20.7 Mobile services.

The following are mobile services within the meaning of Sections 3(n) and 332 of the Communications Act, 47 U.S.C. §§ 153(n), 332.

(a) Public mobile services (Part 22), including fixed operations that support the mobile systems, but excluding Rural Radio Service and Basic Exchange Telecommunications Radio Service (Subpart H);

(b) Private land mobile services (Part 90), including secondary fixed operations, but excluding fixed services such as call box operations and meter reading;

(c) Mobile satellite services (Part 25) including dual-use equipment, terminals capable of transmitting while a platform is moving, but excluding satellite facilities provided through a transportable platform that cannot move when the communications service is offered;

(d) Marine and aviation services (Part 80 and Part 87), including fixed operations that support these marine and aviation mobile systems;

(e) Personal radio services (Part 95), but excluding Interactive Video and Data Service;

(f) Personal communications services (Part 24);

(g) Auxiliary services provided by mobile service licensees, and ancillary fixed communications offered by personal communications service providers;

(h) Unlicensed services meeting the definition of commercial mobile radio service in Section 20.3 of this part, such as the resale of commercial mobile radio services, but excluding unlicensed radio frequency devices under Part 15 of this chapter (including unlicensed personal communications service devices).

Section 20. 9 Commercial mobile radio service.

(a) The following mobile services shall be treated as common carriage services and regulated as commercial mobile radio services (including any such service offered as a hybrid service or offered on an excess capacity basis to the extent it meets the definition of commercial mobile radio service, or offered as an auxiliary or ancillary service), pursuant to Section 332 of the Communications Act, 47 U.S.C. § 332:

(1) Private Paging (Part 90), excluding not-for-profit paging systems that serve only the licensee's own internal communications needs.

(2) Business Radio Services (Section 90.75) that offer customers for-profit interconnected service.

(3) Land Mobile Systems on 220-222 MHz (Part 90), except services that are not-for-profit or do not offer interconnected service.

(4) Specialized Mobile Radio services that provide interconnected service (Part 90).

(5) Public Coast Stations (Part 80, Subpart J).

(6) Public Land Mobile Service (paging, mobile telephone, improved mobile telephone, trunked mobile, and 454 MHz air-ground services) (Part 22, Subpart G).

(7) Domestic Public Cellular Radio Telecommunications Service (Part 22, Subpart K).

(8) 800 MHz Air-Ground Radiotelephone Service (Part 22, Subpart M).

(9) Offshore Radio Service (Part 22, Subpart L).

(10) Any mobile satellite service involving the provision of commercial mobile radio service (by licensees or resellers) directly to end users, except that mobile satellite licensees and other entities that sell or lease space segment capacity, to the extent that it does not provide commercial mobile radio service directly to end users, may provide space segment capacity to commercial mobile radio service providers on a non-common carrier basis, if so authorized by the Commission.

(11) Personal Communications Services (Part 24), except as provided in paragraph (b) of this section.

(12) For-profit subsidiary communications services transmitted on subcarriers within the FM baseband signal, that provide interconnected service (47 C.F.R. § 73.295).

(13) A mobile service that is the functional equivalent of a commercial mobile radio service.

(i) A mobile service that does not meet the definition of commercial mobile radio service is presumed to be a private mobile radio service.

(ii) Any interested party may seek to overcome the presumption that a particular mobile radio service is a private mobile radio service by filing a petition for declaratory ruling challenging a mobile service provider's regulatory treatment as a private mobile radio service.

(A) The petition must show that:

(1) the mobile service in question meets the definition of commercial mobile radio service; or

(2) the mobile service in question is the functional equivalent of a service that meets the definition of a commercial mobile radio service.

(B) A variety of factors will be evaluated to make a determination whether the mobile service in question is the functional equivalent of a commercial mobile radio service, including: consumer demand for the service to determine whether the service is closely substitutable for a commercial mobile radio service; whether changes in price for the service under examination, or for the comparable commercial mobile radio service would prompt customers to change from one service to the other; and market research information identifying the targeted market for the service under review.

(C) The petition must contain specific allegations of fact supported by affidavit(s) of person(s) with personal knowledge. The petition must be served on the mobile service provider against whom it is filed and contain a certificate of service to this effect. The mobile service provider may file an opposition to the petition and the petitioner may file a reply. The general rules of practice and procedure contained in Section 1.1 through Section 1.52 of this chapter shall apply.

(b) Licensees of a Personal Communications Service or applicants for a Personal Communications Service license proposing to use any Personal Communications Service spectrum to offer service on a private mobile radio service basis must overcome the presumption that Personal Communications Service is a commercial mobile radio service.

(1) The applicant or licensee (who must file an application to modify its authorization) seeking authority to dedicate a portion of the spectrum for private mobile radio service, must include a certification that it will offer Personal Communications Service on a private mobile radio service basis. The certification must include a description of the proposed service sufficient to demonstrate that it is not within the definition of commercial mobile radio service in Section 20.3. Any application requesting to use any Personal Communications Service spectrum to offer service on a private mobile radio service basis will be placed on public notice by the Commission.

(2) Any interested party may file a petition to deny the application within 30 days after the date of public notice announcing the acceptance for filing of the application. The petition shall contain specific allegations of fact supported by affidavit(s) of person(s) with personal knowledge to show that the applicant's request does not rebut the commercial mobile radio service presumption. The petition must be served on the applicant and contain a certificate of service to this effect. The applicant may file an opposition with allegations of fact supported by affidavit. The petitioner may file a reply. No additional pleadings will be allowed. The general rules of practice and procedure contained in Section 1.1 through Section 1.52 and Section 22.30 of this chapter shall apply.

(c) Any provider of private land mobile service before August 10, 1993 (including any system expansions, modifications, or acquisitions of additional licenses in the same service, even if authorized after this date), and any private paging service utilizing frequencies allocated as of January 1, 1993, that meet the definition of commercial mobile radio service, shall, except for purposes of Section 20.5 (applicable August 10, 1993 for the providers listed in this paragraph), be treated as private mobile radio service until August 10, 1996. After this date, these entities will be treated as commercial mobile radio service providers regulated under this part.

Section 20.11 Interconnection to facilities of local exchange carriers.

(a) A local exchange carrier must provide the type of interconnection reasonably requested by a mobile service licensee or carrier, within a reasonable time after the request, unless such interconnection is not technically feasible or economically reasonable. Complaints against carriers under Section 208 of the Communications Act, 47 U.S.C. Section 208, alleging a violation of this section shall follow the requirements of Sections 1.711-1.734 of this chapter, 47 C.F.R. §§ 1.711-1.734.

(b) Local exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation.

(1) A local exchange carrier shall pay reasonable compensation to a commercial mobile radio service provider in connection with terminating traffic that originates on facilities of the local exchange carrier.

(2) A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider.

Section 20.13 State petitions for authority to regulate rates.

(a) States may petition for authority to regulate the intrastate rates of any commercial mobile radio service. The petition must include the following:

(1) Demonstrative evidence that market conditions in the state for commercial mobile radio services do not adequately protect subscribers to such services from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory. Alternatively, a state's petition may include demonstrative evidence showing that market conditions for commercial mobile radio services do not protect subscribers adequately from unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, and that a substantial portion of the commercial mobile radio service subscribers in the state or a specified geographic area have no alternatives means of obtaining basic telephone service This showing may include evidence of the range of basic telephone service alternatives available to consumers in the state.

(2) The following is a non-exhaustive list of examples of the types of evidence, information, and analysis that may be considered pertinent to determine market conditions and consumer protection by the Commission in reviewing any petition filed by a state under this section:

(i) The number of commercial mobile radio service providers in the state, the types of services offered by commercial mobile radio service providers in the state, and the period of time that these providers have offered service in the state.

(ii) The number of customers of each commercial mobile radio service provider in the state; trends in each provider's customer base during the most recent annual period or other data covering another reasonable period if annual data is unavailable; and annual revenues and rates of return for each commercial mobile radio service provider.

(iii) Rate information for each commercial mobile radio service provider, including trends in each provider's rates during the most recent annual period or other data covering another reasonable period if annual data is unavailable.

(iv) An assessment of the extent to which services offered by the commercial mobile radio service providers the state proposes to regulate are substitutable for services offered by other carriers in the state.

(v) Opportunities for new providers to enter into the provision of competing services, and an analysis of any barriers to such entry.

(vi) Specific allegations of fact (supported by affidavit of person with personal knowledge) regarding anti-competitive or discriminatory practices or behavior by commercial mobile radio service providers in the state.

(vii) Evidence, information, and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates, or rates that are unjust or unreasonably discriminatory, imposed upon commercial mobile radio service subscribers. Such evidence should include an examination of the relationship between rates and costs. Additionally, evidence of a pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces will be considered especially probative.

(viii) Information regarding customer satisfaction or dissatisfaction with services offered by commercial mobile radio service providers, including statistics and other information about complaints filed with the state regulatory commission.

(3) Petitions must include a certification that the state agency filing the petition is the duly authorized state agency responsible for the regulation of telecommunication services provided in the state.

(4) Petitions must identify and describe in detail the rules the state proposes to establish if the petition is granted.

(5) States have the burden of proof. Interested parties may file comments in support or in opposition to the petition within 30 days after public notice of the filing of a petition by a state under this section. Any interested party may file a reply within 15 days after the expiration of the filing period for comments. No additional pleadings may be filed. Except for Section 1.45, practice and procedure rules contained in Sections 1.42-1.52 of this chapter shall apply. The provisions of sections 1.771-1.773 do not apply.

(6) The Commission shall act upon any petition filed by a state under this paragraph not later than the end of the nine-month period after the filing of the petition.

(7) If the Commission grants the petition, it shall authorize the state to regulate rates for commercial mobile radio services in the state during a reasonable period of time, as specified by the Commission. The period of time specified by the Commission will be that necessary to ensure that rates are just and reasonable, or not unjustly or unreasonably discriminatory.

(b) States that regulated rates for commercial mobile services as of June 1, 1993, may petition the Commission under this section before August 10, 1994, to extend this authority.

(1) The petition will be acted upon by the Commission in accordance with the provisions of paragraphs (a)(1) through (a)(5) of this section.

(2) The Commission shall act upon the petition (including any reconsideration) not later than the end of the 12-month period following the date of the filing of the petition by the state involved. Commercial mobile radio service providers offering such service in the state shall comply with the existing regulations of the state until the petition and any reconsideration of the petition are acted upon by the Commission.

(3) The provisions of paragraph (a)(7) of this section apply to any petition granted by the Commission under this paragraph.

(c) No sooner than 18 months from grant of authority by the Commission under this section for state rate regulations, any interested party may petition the Commission for an order to discontinue state authority for rate regulation.

(1) Petitions to discontinue state authority for rate regulation must be based on recent empirical data or other significant evidence demonstrating that the exercise of rate authority by a state is no longer necessary to ensure that the rates for commercial mobile are just and reasonable or not unjustly or unreasonably discriminatory.

(2) Any interested party may file comments in support of or in opposition to the petition within 30 days after public notice of the filing of the petition. Any interested party may file a reply within 15 days after the time for filing comments has expired. No additional

pleadings may be filed. Except for 1.45, practice and procedure rules contained in Sections 1.42-1.52 apply. The provisions of Sections 1.771-1.773 do not apply.

(3) The Commission shall act upon any petition filed by any interested party under this paragraph within nine months after the filing of the petition.

Section 20.17 Requirements under Title II of the Communications Act.

(a) Commercial mobile radio services providers, to the extent applicable, must comply with Sections 201, 202, 206, 207, 208, 209, 216, 217, 223, 225, 226, 227, and 228 of the Communications Act, 47 U.S.C §§ 201, 202, 206, 207, 208, 209, 216, 217, 223, 225, 226, 227, 228; part 68 of this chapter, 47 C.F.R. Part 68; and sections 1.701-1.748, and 1.815 of this chapter, 47 C.F.R. §§ 1.701-1.748, 1.815.

(b) Commercial mobile radio service providers are not required to:

(1) File tariffs for interstate service to their customers, or for interstate access service, or comply with sections 1.771-1.773 and part 61 of this chapter;

(2) File with the Commission copies of contracts entered into with other carriers or comply with other reporting requirements, or with sections 1.781-1.814 and 43.21 of this chapter;

(3) Seek authority for interlocking directors (section 212 of the Communications Act);

(4) Submit applications for new facilities or discontinuance of existing facilities (Section 214 of the Communications Act).

(c) Nothing in this section shall be construed to modify the Commission's rules and policies on the provision of international service under Part 63 of this chapter.

3. The authority citation for Part 22 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 C.F.R. §§ 154, 303.

Part 22 Public Mobile Service

4. Section 22.1 is amended by adding paragraph (g) to read as follows:

Section 22.1 Other applicable rule parts.

* * * * * * *

(g) Part 20 which governs commercial mobile radio services which include the following services in this part:

(1) Public Land Mobile;

(2) Offshore Radio Service;

(3) Domestic Public Cellular Radio Telecommunications Service;

(4) 800 MHz Air-Ground Radiotelephone Service.

5. Section 22.13 is amended by removing paragraph (f).

6. Section 22.43 is amended by removing paragraph (b)(2).

7. Section 22.304 is removed.

8. The authority citation for Part 80 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 C.F.R. §§ 154, 303.

Part 80 Stations in the Maritime Service

9. Section 80.3 is amended by removing paragraphs (g) through (k), by redesignating paragraphs (f), and (l) through (o) as (g), and (h) through (k), respectively, and by adding new paragraph (f) to read as follows:

Section 80.3 Other applicable rule parts of this chapter.

* * * * * * *

(f) Part 20 which governs commercial mobile radio services which include Subpart J of this part (public coast stations).

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10. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 C.F.R. §§ 154, 303.

Part 90 Private Land Mobile Radio Service

11. Section 90.5 is amended by redesignating paragraphs (h) through (j) as paragraphs (i) through (k), respectively, and by adding paragraph (h) to read as follows:

Section 90.5 Other applicable rule parts.

* * * * * * *

(h) Part 20 which governs commercial mobile radio service applicable to certain providers in the following services in this part:

(1) Business radio service;

(2) Private paging;

(3) Land mobile service on 220-222 MHz;

(4) Specialized Mobile Radio Service.

* * * * * * *

12. The authority citation for Part 99 continues to read as follows:

Authority: Sections 4, 301, 302, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 301, 302, 303 and 332, unless otherwise noted.

13. In 47 C.F.R. Part 99 is redesignated as Part 24.

Part 24 Personal Communications Services

14. In redesignated Part 24, Section 24.2 is amended by redesignating paragraphs (g) through (i) as paragraphs (h) through (j), respectively, and by adding a new paragraph (g) to read as follows:

Section 24.2 Other applicable rule parts.

* * * * * * *

(g) Part 20. This part governs commercial mobile radio services.

* * * * * * *

APPENDIX B

Index of Rules and Related Provisions

The following table lists the provisions of Part 20 of the Commission's Rules, as adopted in this Order, together with related provisions in the Communications Act and this Order. The table is intended as a guide for the reader, and is not intended to have any decisional or interpretative significance. Paragraphs in the third column refer to the text of the Order; sections refer to the Communications Act.

RULE	TOPIC	RELATED PROVISION
20.1	Purpose of Part 20	None applicable.
20.3	Definition — Commercial mobile radio service	¶¶ 43-49, 54-60, 65-70, 79-80; § 332(d)(1)
20.3	Definition — Interconnection or Interconnected	¶ 56-58; §§ 332(c)(1)(B), 332(d)(2)
20.3	Definition — Interconnected service	¶¶ 54-60; § 332(d)(2)
20.3	Definition — Mobile service	¶¶ 34-38; § 3(n)
20.3	Definition — Private mobile radio service	¶¶ 76-80; § 332(d)(3)
20.3	Definition — Public switched network	¶¶ 59-60; § 332(d)(2)
20.5(a)	Citizenship — General requirements	§ 310
20.5(b)	Citizenship — Exception	§ 332(c)(6)
20.7	Mobile services	¶¶ 34-38
20.7(a)	Public mobile service (Part 22)	¶¶ 34, 38
20.7(b)	Private land mobile service (Part 90)	¶ 35
20.7(c)	Mobile satellite service (Part 25)	¶¶ 35, 38
20.7(d)	Marine, aviation services (Parts 80, 87)	¶ 34
20.7(e)	Personal radio service (Part 95)	¶ 35
20.7(f)	Personal communications service (Part 24)	¶ 35
20.7(g)	Auxiliary services; PCS ancillary fixed services	¶ 36
20.7(h)	Unlicensed services	¶ 37
20.9	Commercial mobile radio service	§§ 332(c)(1)(A), 332(d)(1)
20.9(a)(1)	Private paging (Part 90)	¶¶ 96-97
20.9(a)(2)	Business Radio Services	¶¶ 86-87
20.9(a)(3)	220-222 MHz land mobile service (Part 90)	¶¶ 94-95
20.9(a)(4)	Specialized mobile radio service (Part 90)	¶¶ 88-93
20.9(a)(5)	Public coast stations (Part 80)	¶ 83
20.9(a)(6)	Public land mobile service (Part 22)	¶ 102
20.9(a)(7)	Cellular service (Part 22)	¶ 102

RULE	TOPIC	RELATED PROVISION
20.9(a)(8)	Air-ground service (Part 22)	¶ 102
20.9(a)(9)	Offshore radio service (Part 22)	¶ 102 & note 211
20.9(a)(10)	Satellite service (Part 25)	¶¶ 108-109
20.9(a)(11)	Personal communications services (Part 24)	¶ 118
20.9(a)(12)	FM subcarrier (47 C.F.R. § 73.295)	¶ 260
20.9(a)(13)	Functionally equivalent services	¶¶ 79-80
20.9(b)	Personal communications service	¶ 119
20.9(c)	Transition	¶¶ 280-284
20.11(a)	LEC interconnection requirements	¶¶ 230, 233-234; § 332(c)(1)(B)
20.11(b)	Mutual compensation	¶ 232
20.13(a)(1)	State petitions for rate regulation — General evidence	¶¶ 251, 253; § 332(c)(3)(A)
20.13(a)(2)	Types of evidence	¶ 252
20.13(a)(3)	Filing entitiy	¶ 251
20.13(a)(4)	Proposed state rules	¶ 252
20.13(a)(5)	Evidentiary burdens; filing procedures	¶ 251; § 332(c)(3)(A)
20.13(a)(6)	Commission action	§§ 332(c)(3)(A), 332(c)(3)(B)
20.13(a)(7)	Grant of state petitions	¶ 257; § 332(c)(3)(A)
20.13(b)	Extension of existing state rate authority	§ 332(c)(3)(B)
20.13(c)	Suspension of state rate regulation	¶ 254; § 332(c)(3)(B)
20.15(a)	Title II requirements — applicable sections	¶¶ 186-187, 205-213; § 332(c)(1)(A)
20.15(b)	Forborne sections	¶¶ 173-181, 192-197; § 332(c)(1)(A)
20.15(c)	International service	¶126 & note 261

APPENDIX C
Final Regulatory Flexibility Analysis

Pursuant to Section 603 of Title 5, United States Code, 5 U.S.C. § 603, an initial Regulatory Flexibility Analysis was incorporated in the Notice of Proposed Rulemaking in GN Docket No. 93-252. Written comments on the proposals in the *Notice*, including the Regulatory Flexibility Analysis, were requested.

A. Need for and Purpose of Rules

This rule making proceeding was initiated to implement Sections 3(n) and 332 of the Communications Act. The rules adopted herein will carry out the intent of Congress to establish a uniform regulatory framework for all mobile services. This action will enhance the ability of mobile service providers to make services available to the public.

B. Issues Raised by the Public in Response to the Initial Analysis

While all the parties recognize that this rulemaking will impose new legal obligations on licensees whose regulatory status has changed from private to commercial as a result of the new legislation and the actions we have taken in this Order, a number of parties propose that licensees should be able to offer both commercial and private radio service on the same system and under a single license. As a result of these comments, we have adopted these proposals. As a result of other comments, we have made modifications to other proposals as appropriate.

C. Significant Alternatives Considered

We have reduced the burdens wherever possible. In an effort to reduce the burdens on small entities, we will not impose any tariff filing obligations. In striving to adopt an appropriate level of regulation for commercial mobile radio service (CMRS) providers, we have ensured that unwarranted regulatory burdens are not imposed upon small entities, especially those that are currently private mobile licensees and are reclassified as CMRS providers. First, in keeping with this objective, we have forborne from establishing market entry or exit requirements under Section 214 of the Act. Second, although we have decided not to forbear with respect to Sections 210, 213, 215, 218, 219, 220, and 221, we have decided not to invoke our authority under these provisions. The imposition of requirements under these provisions could cause unwarranted burdens for CMRS providers that are small entities.

Third, while we have chosen not to forbear from specific provisions of Title II that are designed to protect customers, we do not believe that small entities will incur significant burdens as a result of becoming subject to these provisions. Thus, the regulatory burdens that we have retained are necessary to ensure that commercial mobile radio service is made available to the public at reasonable rates and on reasonable terms in a competitive marketplace. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant impact on small entities. Accordingly, we intend to issue a Notice of Proposed Rule Making addressing whether we should adopt further forbearance action under Title II of the Act in the case of specific classes of providers. Finally, we emphasize that the three-year transition rules adopted in this Order will allow existing licensees that are subject to reclassification as CMRS providers to continue to be regulated as private until August 10, 1996. This three-year period will ensure an orderly transition for all reclassified private licensees that are small entities.

APPENDIX D

List of Parties Filing Comments

Party (and Short Title)

Advanced MobileComm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc. (AMT/DSST)
Aeronautical Radio, Inc. (ARINC)
AllCity Paging, Inc. (AllCity)
American Mobile Telecommunications Association, Inc. (AMTA)
American Petroleum Institute (American Petroleum)
Ameritech
AMSC Subsidiary Corporation (AMSC)
Arch Communications Group, Inc. (Arch)
Association of American Railroads (AAR)
Association of Public-Safety Communications Officials-International, Inc. (APCO)
Bell Atlantic Companies (Bell Atlantic)
BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corp., and Mobile Communications Corporation of America (BellSouth)
Cellular Telecommunications Industry Association (CTIA)
Celpage, Inc., Network USA, Denton Enterprises, Copeland Communications & Electronics, Inc. and Nationwide Paging (Celpage)
CenCall Communications Corporation (CenCall)
Century Cellunet Inc. (Century)
Comcast Corporation (Comcast)
Corporate Technology Partners (CTP)
Cox Enterprises, Inc. (Cox)
E.F. Johnson Company (E.F. Johnson)
General Communication, Inc. (GCI)
Geotek Industries, Inc. (Geotek)
Grand Broadcasting Corporation (Grand)
GTE Service Corporation (GTE)
Hardy & Carey (Hardy)
Illinois Valley Cellular RSA 2 Partnerships (IVC Partnerships)
In-Flight Phone Corporation (In-Flight)
Industrial Telecommunications Association, Inc. (ITA)
Liberty Cellular, Inc. (Liberty)
Lower Colorado River Authority (LCRA)
McCaw Cellular Communications, Inc. (McCaw)
MCI Telecommunications Corporation (MCI)
Metricom, Inc. (Metricom)
Mobile Telecommunication Technologies Corp. (Mtel)
Motorola, Inc. (Motorola)
MPX Systems (MPX)
National Association of Business and Educational Radio, Inc. (NABER)

National Association of Regulatory Utility Commissioners (NARUC)
National Cellular Resellers Association (NCRA)
National Telephone Cooperative Association (NTCA)
New Par
New York State Department of Public Service (New York)
Nextel Communications, Inc. (Nextel)
North Pittsburg Telephone Company (NPTC)
NYNEX Corporation (NYNEX)
Pacific Bell and Nevada Bell (Pacific)
Pacific Telecom Cellular, Inc. (PTC)
Pactel Corporation (Pactel)
Pactel Paging (Pactel Paging)
Pagemart, Inc. (Pagemart)
Paging Network, Inc. (PageNet)
People of the State of California and the Public Utilities Commission of the State of California (California)
Personal Radio Steering Group Inc. (PRSG)
Pioneer Telephone Cooperative, Inc., Pioneer Telecommunications, Inc., and O.T.&T. Communications, Inc. (Pioneer)
PN Cellular, Inc. and Affiliates (PNC)
PTC Cellular (PTC-C)
Public Service Commission of the District of Columbia (DC PSC)
Ram Mobile Data USA Limited Partnership (RMD)
Reed Smith Shaw & McClay (Reed Smith)
Rig Telephones, Inc. (Rig)
Roamer One, Inc. (Roamer)
Rochester Telephone Corporation (Rochester)
Rockwell International Corporation (Rockwell)
Rural Cellular Association (Rural Cellular)
Southwestern Bell Corporation (Southwestern)
Sprint Corporation (Sprint)
Starsys Global Positioning, Inc. (Starsys)
Telephone and Data Systems, Inc. (TDS)
Telocator, The Personal Communications Industry Association (Telocator)
Time Warner Telecommunications (Time Warner)
TRW Inc. (TRW)
United States Telephone Association (USTA)
US West
Utilities Telecommunications Council (UTC)
Vanguard Cellular Systems, Inc. (Vanguard)
Waterway Communications System, Inc. (Waterway)

List of Parties Filing Reply Comments

Aeronautical Radio, Inc. (ARINC)
American Mobile Telecommunications Association, Inc. (AMTA)
American Paging, Inc. (AmP)
American Petroleum Institute (American Petroleum)
American Telephone and Telegraph Company (AT&T)
AMSC Subsidiary Corporation (AMSC)
ARCH Communication Group (Arch)
Association of American Railroads (AAR)
Bell Atlantic Companies (Bell Atlantic)
BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corp. and Mobile Communications Corp. of America (BellSouth)
Cellular Telecommunications Industry Association (CTIA)
CenCall Communications Corporation (CenCall)
Century Cellunet Inc. (Century)
E.F. Johnson Company (E.F. Johnson)
General Communication, Inc. (GCI)
GTE Service Corporation (GTE)
In-Flight Phone Corporation (In-Flight)
Industrial Telecommunications Association, Inc. (ITA)
McCaw Cellular Communications, Inc. (McCaw)
MCI Telecommunications Corporation (MCI)
Metricom, Inc. (Metricom)
Mobile Marine Radio, Inc. (MMR)
National Association of Business and Educational Radio, Inc. (NABER)
Nextel Communications, Inc. (Nextel)
NYNEX Corporation (NYNEX)
Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
Pacific Bell and Nevada Bell (Pacific)
PacTel Paging (Pactel Paging)
Pactel Corporation (PacTel)
Pagemart, Inc. (Pagemart)
Paging Network, Inc. (PageNet)
Pennsylvania Public Utility Commission (PA PUC)
PSC of Nevada (Nevada)
Puerto Rico Telephone Company (PRTC)
Radiofone Inc. (Radiofone)
Ram Mobile Data USA Limited Partnership (RMD)
Roamer One, Inc. (Roamer)
Rochester Telephone Corporation (Rochester)
Rural Cellular Association (Rural Cellular)
RVC Services, Inc., d/b/a Coastel Communications Co. (Coastel)
SACO River Cellular Telephone company (Saco River)
Securicor PMR Systems Ltd. (Securicor)
Southwestern Bell Corporation (Southwestern)

Sprint Corporation (Sprint)
Telephone and Data System Inc. (TDS)
Telocator, The Personal Communications Industry Association (Telocator)
TRW Inc. (TRW)
Two Way Radio of Carolina, Inc. (2-Way)
United States Telephone Association (USTA)
US West
Utilities Telecommunications Council (UTC)
Waterway Communications Systems, Inc. (Waterway)

Separate Statement

of

Commissioner Andrew C. Barrett

Re: Communications Act Section 332 Regulatory Treatment of Mobile Services

This comprehensive Report and Order revises our rules to implement Sections 3(n) and 332 of the Communications Act, as amended in the Omnibus Budget Reconciliation Act of 1993[Act]. I believe this Act is intended to regulate commercial mobile service providers [CMRS] in a "like" manner, where such services can be considered in compliance with the three-prong definition of a commercial mobile service, or the services are a functional equivalent of the service categories clearly defined as CMRS. In this regard, I believe the Act provides the Commission with sufficient flexibility to simplify its regulatory structure for all services classified as CMRS. Further, with respect to forbearance from Title II regulation under the CMRS designation, I believe the Act provides plenty of flexibility for the Commission to avoid any perverse, or unintended consequences of imposing Title II regulation on various classes of CMRS providers. In addition, the Act clearly contemplates a three-year transition period for those services who are presently classified as Private Mobile Service licensees [PMRS] to adapt to any reclassification as a CMRS licensee under Title II regulation.

After examining the comprehensive nature of this attempt to implement the Act and adopt a CMRS classification, I support the overall framework of this Order as a general matter, but remain seriously concerned about a variety of issues which must still be resolved or refined from my perspective---- either with respect to potential unintended consequences due to a broad application of the CMRS definition, or with respect to the need for greater flexibility in deciding which classes of CMRS services should be subject to less Title II regulation than others. Fortunately, the Order accommodates a further notice addressing the potential need for a more streamlined subclass of CMRS regulation under Title II. This is an important issue due to my desire to avoid regulatory classifications which could create undue economic hardship or regulatory burdens on certain classes of services which are not offered across wide areas, in cellular-like configurations, or traditionally are not provided indiscriminately to broad classes of users. Hopefully, the further notice will allow the Commission to develop a more complete record in this regard, and allow us to justify further forbearance from Title II for certain subclasses of CMRS providers.

In addition to the further notice on potential CMRS subclasses of streamlined regulation, I also am encouraged by our effort to develop a record on interconnection and equal access issues in the CMRS context. I believe these are important issues to address as we develop a network-of-network concept within the CMRS classification. I look forward to addressing these issues in a subsequent Order.

This Order also accommodates my concerns regarding flexible PCS methodologies which allow future PCS licensees to apply under the CMRS definition, or make a showing that they will not provide CMRS services, and thus should be regulated as private carriers. I believe this approach in the Order will allow flexibility for future PCS services to provide PMRS or CMRS services.

With respect to other provisions which will be enforced under this Order, I have two additional implementation concerns. First, the Order defines the public switched network with respect to CMRS classifications as any entity that utilizes the North American Numbering Plan [NANP]. My concern is that this definition should not result in the unintended result of subjecting any CMRS networks to ONA unbundling requirements, network outage reporting requirements, universal service obligations, or other requirements typically associated with the regulation of Bell Operating Companies. The Order clarifies that this will not be the result of this expansive definition of public switched network under the CMRS classification.

Second, the Order establishes a regulatory precedent for hybrid CMRS/PMRS regulation of any network that offers both CMRS service and PMRS service. From an enforcement perspective, I am unclear as to the implications of this type of regulatory structure in the market. If there is potential confusion created by this classification, I hope interested parties will provide further guidance as to the regulatory consequences or economic implications of regulating one part of a network with an array of Title II provisions, including TDD and TOCSIA, and regulating the other side of the same network as a PMRS provider.

Overall, this Order addresses complex, interrelated issues in a comprehensive manner. The remaining issues which can be refined should strengthen this Order in the future, and provide more clarity in the marketplace. Thus, I support the item.

*U.S. Government Printing Office: 1994 — 300-842/00014