

facilities or the discontinuance of existing facilities.<sup>367</sup> 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.<sup>368</sup> 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.<sup>369</sup>

**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.<sup>370</sup> GCI argues that these provisions relate to the complaint process.<sup>371</sup> GCI also asserts that Congress intended for all providers to comply with sections relating to the complaint process.<sup>372</sup>

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<sup>367</sup> *Competitive Carrier, Second Report*, 91 FCC 2d at 65.

<sup>368</sup> *See Competitive Carrier, Further Notice*, 84 FCC 2d at 489.

<sup>369</sup> 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.

<sup>370</sup> 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.

<sup>371</sup> GCI Comments at 3-4; GCI Reply Comments at 3-4.

<sup>372</sup> 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.<sup>373</sup> 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.<sup>374</sup>

## (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.<sup>375</sup> In the *Notice* we tentatively concluded that we should forbear from enforcing these provisions.

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<sup>373</sup> Mtel Comments at 17-18; NYNEX Comments at 21; Sprint Comments at 13.

<sup>374</sup> NYNEX Comments at 21.

<sup>375</sup> 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.<sup>376</sup> 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.<sup>377</sup> 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.<sup>378</sup> GTE also contends that the management and merger limitations in Sections 212, 218, and 221 are irrelevant in a competitive market.<sup>379</sup>

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.<sup>380</sup> CTIA asserts that these requirements are inconsistent with a regulatory regime which refrains from regulating rates.<sup>381</sup> 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.<sup>382</sup>

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.<sup>383</sup> 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.<sup>384</sup>

## (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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<sup>376</sup> 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.

<sup>377</sup> Bell Atlantic Comments at 26.

<sup>378</sup> GTE Comments at 17.

<sup>379</sup> *Id.*

<sup>380</sup> Bell Atlantic Comments at 27; CTIA Comments at 35.

<sup>381</sup> CTIA Comments at 35.

<sup>382</sup> *Id.* at 35-36; Mtel Comments at 18; Motorola Comments at 18-19.

<sup>383</sup> California Comments at 8.

<sup>384</sup> *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.<sup>385</sup> 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.<sup>386</sup> 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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<sup>385</sup> Section 215 is also one source of our authority to establish our program of equipment registration. See *NCUC I*.

<sup>386</sup> 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.<sup>387</sup>

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."<sup>388</sup>

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<sup>389</sup> or by the antitrust laws.<sup>390</sup> 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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<sup>387</sup> 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*.

<sup>388</sup> Section 62.11 of the Commission's Rules, 47 C.F.R. § 62.11.

<sup>389</sup> *See, e.g.*, Communications Act, §§ 201(b), 221, 47 U.S.C. §§ 201(b), 221.

<sup>390</sup> *See, e.g.*, Clayton Act, § 9, 15 U.S.C. § 19, which governs interlocking directorates.

development of a competitive market.<sup>391</sup> 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.<sup>392</sup> 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.<sup>393</sup> TRW asserts that the Commission has the right to revisit the matter on a case-by-case basis should abuses occur.<sup>394</sup> 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.<sup>395</sup>

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.<sup>396</sup> Watercom argues that Section 225 has virtually no application to Watercom's service, which is rendered to towboats and other similar commercial vessels.<sup>397</sup>

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

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<sup>391</sup> 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.

<sup>392</sup> 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.

<sup>393</sup> TRW Comments at 32.

<sup>394</sup> *Id.* at 33. *See also* McCaw Comments at 11.

<sup>395</sup> McCaw Comments at 11.

<sup>396</sup> 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).

<sup>397</sup> Watercom Comments at 9-10; Watercom Reply Comments at 2. *See also* MMR Reply Comments at 8.

<sup>398</sup> 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.<sup>399</sup> GTE contends that forbearance is justified under revised Section 332.<sup>400</sup> 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.<sup>401</sup>

203. GTE and PTC-C also aver that enforcement of TOCSIA with respect to mobile phone service is not necessary to protect consumers.<sup>402</sup> 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.<sup>403</sup> Further, asserts GTE, the Commission has yet to receive a complaint alleging operator service provider-type abuses by a mobile service provider.<sup>404</sup> 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.<sup>405</sup> 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.<sup>406</sup>

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.<sup>407</sup> These commenters also assert that the Common

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<sup>399</sup> 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).

<sup>400</sup> GTE Comments at 18. *See also* In-Flight Comments at 5-6.

<sup>401</sup> GTE Comments at 18.

<sup>402</sup> *Id.*; PTC-C Comments at 5-6.

<sup>403</sup> GTE Comments at 18.

<sup>404</sup> *Id.* at 18-19. *See also* PTC-C Comments at 7.

<sup>405</sup> GTE Comments at 19. *See also* Motorola Comments at 19.

<sup>406</sup> 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).

<sup>407</sup> 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.<sup>408</sup> In-Flight urges the Commission to reverse the Bureau's decision.<sup>409</sup> 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.<sup>410</sup> In-Flight asserts that imposing the equal access requirements of TOCSIA would be beyond the scope of this proceeding.<sup>411</sup>

## (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.<sup>412</sup> 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<sup>413</sup> 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.

<sup>408</sup> 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.

<sup>409</sup> 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).

<sup>410</sup> 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.

<sup>411</sup> In-Flight Reply Comments at 1.

<sup>412</sup> See Communications Act, § 223(b), 47 U.S.C. § 223(b).

<sup>413</sup> 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.<sup>414</sup> 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.<sup>415</sup>

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.<sup>416</sup> 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,<sup>417</sup> to protect consumers making interstate operator services calls from pay telephones, and other public telephones, against unreasonably high rates and anti-competitive practices.<sup>418</sup> 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.<sup>419</sup> 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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<sup>414</sup> 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*).

<sup>415</sup> 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).

<sup>416</sup> 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).

<sup>417</sup> Communications Act, § 226, 47 U.S.C. § 226.

<sup>418</sup> 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.*

<sup>419</sup> See *id.* at 2.

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

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.<sup>422</sup> 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.<sup>423</sup>

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.<sup>424</sup> 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.<sup>425</sup>

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.<sup>426</sup> 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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<sup>420</sup> Communications Act, §§ 226(b), 226(c), 47 U.S.C. §§ 226(b), 226(c).

<sup>421</sup> See *id.*, § 226(c)(1)(A), 47 U.S.C. § 226(c)(1)(A).

<sup>422</sup> See *id.*, §§ 226(d)(1)(A), 226(d)(1)(B), 47 U.S.C. §§ 226(d)(1)(A), 226(d)(1)(B).

<sup>423</sup> 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.

<sup>424</sup> See Pub.L. 102-243, § 2.

<sup>425</sup> 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).

<sup>426</sup> 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.<sup>427</sup> 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.<sup>428</sup> 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.<sup>429</sup> 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.<sup>430</sup> 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.<sup>431</sup>

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.<sup>432</sup> 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,<sup>433</sup> should be applied to all cellular affiliates of dominant carriers, particularly AT&T.<sup>434</sup> 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).<sup>435</sup> MCI agrees that

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<sup>427</sup> 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).

<sup>428</sup> 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).

<sup>429</sup> Cox Comments at 6-8; Nextel Comments at 23-24.

<sup>430</sup> Nextel Comments at 23-24.

<sup>431</sup> PA PUC Reply Comments at 16 n.36.

<sup>432</sup> Bell Atlantic Comments at 36.

<sup>433</sup> 47 C.F.R. § 22.901.

<sup>434</sup> 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.

<sup>435</sup> *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.<sup>436</sup>

217. AMSC, NYNEX, Pacific, and Rochester contend that the Commission should not place additional safeguards on CMRS affiliates of dominant carriers.<sup>437</sup> 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.<sup>438</sup> 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.<sup>439</sup> NYNEX also argues that Nextel's proposal is self-serving, with the intent to protect its wide-area SMR services from competition.<sup>440</sup> 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.<sup>441</sup>

#### 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.<sup>442</sup> 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.<sup>443</sup> 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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<sup>436</sup> 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).

<sup>437</sup> 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.

<sup>438</sup> AMSC Reply Comments at 4 n.5.

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

<sup>440</sup> NYNEX Reply Comments at 18-19.

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

<sup>442</sup> *Broadband PCS Order*, 8 FCC Rcd at 7751-52 (para. 126).

<sup>443</sup> *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.<sup>444</sup> 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 inseparable. 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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<sup>444</sup> 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.<sup>445</sup> Several parties, however, argue that the interconnection obligations proposed in the *Notice* are insufficient and have not provided adequate interconnection for cellular carriers.<sup>446</sup> Others reply that these proposals are unnecessary or go beyond the scope of this rule making.<sup>447</sup> 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.<sup>448</sup> Most commenters also agree with the Commission's decision not to preempt state regulation of LEC interconnection rates.<sup>449</sup> Several parties, however, urge the Commission to preempt state regulation of LEC interconnection rates.<sup>450</sup>

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<sup>445</sup> 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).

<sup>446</sup> 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).

<sup>447</sup> 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.

<sup>448</sup> 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.

<sup>449</sup> 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.

<sup>450</sup> *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.<sup>451</sup> NCRA urges the Commission to require facilities-based CMRS providers to allow collocation consistent with the Commission's Expanded Interconnection proceeding<sup>452</sup> for local exchange carriers.<sup>453</sup> 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.<sup>454</sup> In particular, several parties oppose MCI's proposal that CMRS providers give interexchange carriers access to customer information stored in mobile service data bases.<sup>455</sup> Reply commenters also oppose NCRA's proposal that the Commission impose expanded interconnection obligations on CMRS providers.<sup>456</sup> 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.<sup>457</sup> 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.<sup>458</sup> CTIA and McCaw contend that the Budget Act specifically preempts states from

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over MSS/RDSS systems).

<sup>451</sup> 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).

<sup>452</sup> See note 489, *infra*.

<sup>453</sup> NCRA Comments at 9-13.

<sup>454</sup> 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.

<sup>455</sup> Pactel Reply Comments at 15-16; Southwestern Reply Comments at 9-10.

<sup>456</sup> 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.

<sup>457</sup> GTE Comments at 22. *See also* Sprint Reply Comments at 7-8.

<sup>458</sup> 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.<sup>459</sup> 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.<sup>460</sup>

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.<sup>461</sup> Some parties urge the Commission to clarify or strengthen the rights of private mobile radio service providers.<sup>462</sup> 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.<sup>463</sup> Other commenters and reply commenters argue that PMRS providers should not have the same interconnection rights as common carriers.<sup>464</sup>

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.<sup>465</sup> Several commenters urge the Commission to clarify or strengthen the interconnection rights of PCS providers.<sup>466</sup> Commenters agree with our proposal to preempt inconsistent state regulation of PCS interconnection.<sup>467</sup> MCI also supports our proposal not to preempt,

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<sup>459</sup> CTIA Comments at 41; New Par Comments at 13-14.

<sup>460</sup> NARUC Comments at 22-23; New York Comments at 12-14; Vanguard Comments at 19-20.

<sup>461</sup> AMTA Comments at 21; Celpage Comments at 4; RMD Comments at 8; Pagemart Comments at 10-11; PageNet Comments at 25-26.

<sup>462</sup> Motorola Comments at 21; NABER Comments at 17.

<sup>463</sup> Pagemart Comments at 10-11; PageNet Comments at 25-26; *see also* AmP Reply Comments at 4-5; Telocator Reply Comments at 10.

<sup>464</sup> 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).

<sup>465</sup> 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).

<sup>466</sup> Cox Comments at 3; GCI Comments at 4-5; MCI Comments at 8; Telocator Reply Comments at 10.

<sup>467</sup> 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.<sup>468</sup> In addition, several parties support the Commission's proposal to require LECs to tariff rates for PCS interconnection.<sup>469</sup>

#### 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.<sup>470</sup> 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.<sup>471</sup> 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.<sup>472</sup>

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."<sup>473</sup> 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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<sup>468</sup> 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).

<sup>469</sup> 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).

<sup>470</sup> 47 U.S.C. § 201.

<sup>471</sup> *Interconnection Order*, 2 FCC Rcd at 2913.

<sup>472</sup> *Id.* at 2912.

<sup>473</sup> *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.<sup>474</sup>

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,<sup>475</sup> 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.<sup>476</sup> 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.<sup>477</sup>

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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<sup>474</sup> 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*.

<sup>475</sup> See *Interconnection Order*, 2 FCC Red at 2912.

<sup>476</sup> PageNet Comments at 28 n.75; Pagemart Comments at 12.

<sup>477</sup> See *Interconnection Order*, 2 FCC Red 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.<sup>478</sup> 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.<sup>479</sup>

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<sup>480</sup> 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.<sup>481</sup> 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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<sup>478</sup> 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.

<sup>479</sup> 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.

<sup>480</sup> 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.

<sup>481</sup> 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.<sup>482</sup> 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.<sup>483</sup>

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.<sup>484</sup> Our policy has been to prohibit wireline common carriers and cellular carriers from denying service to resellers.<sup>485</sup> 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.<sup>486</sup> The Commission reasoned that requiring resale to a facilities-based competitor would discourage cellular licensees from building out their own systems.<sup>487</sup> 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.<sup>488</sup> 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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<sup>482</sup> 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).

<sup>483</sup> Communications Act, § 332(c)(3), 47 U.S.C. § 332(c)(3).

<sup>484</sup> 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).

<sup>485</sup> See Commission decisions cited in note 484, *supra*.

<sup>486</sup> *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).

<sup>487</sup> *Id.* at 4007-08.

<sup>488</sup> 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).<sup>489</sup> 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)."<sup>490</sup>

## 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.<sup>491</sup> 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."<sup>492</sup>

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.<sup>493</sup> If the Commission authorizes state rate regulation under either procedure, interested parties may, after a "reasonable time," petition the Commission to suspend the regulations.<sup>494</sup> 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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<sup>489</sup> 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).

<sup>490</sup> Communications Act, § 332(d)(2), 47 U.S.C. § 332(d)(2).

<sup>491</sup> Budget Act, § 6002(c)(2)(A).

<sup>492</sup> 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).

<sup>493</sup> 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.

<sup>494</sup> 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.<sup>495</sup> 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."<sup>496</sup>

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.<sup>497</sup> 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.<sup>498</sup>

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.<sup>499</sup> 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.<sup>500</sup>

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.<sup>501</sup>

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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<sup>495</sup> See, e.g., McCaw Comments at 23; CTIA Comments at 38; GTE Comments at 24; Rochester Comments at 10.

<sup>496</sup> GTE Comments at 24-25, quoting Conference Report at 493.

<sup>497</sup> See Bell Atlantic Comments at 42-43; McCaw Comments at 24-25.

<sup>498</sup> McCaw Comments at 23.

<sup>499</sup> Bell Atlantic Comments at 41-42.

<sup>500</sup> *Id.* at 42-43.

<sup>501</sup> 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.<sup>302</sup> 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.<sup>303</sup>

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."<sup>304</sup> 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.<sup>305</sup> 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.<sup>306</sup> 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.<sup>307</sup> 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."<sup>308</sup> 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.<sup>309</sup>

249. Bell Atlantic and Southwestern disagree with DC PSC's proposal.<sup>310</sup> 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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<sup>302</sup> DC PSC Comments at 10-11; NARUC Comments at 5-6.

<sup>303</sup> DC PSC Comments at 11.

<sup>304</sup> *Id.* at 12.

<sup>305</sup> *Id.*

<sup>306</sup> 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.

<sup>307</sup> PA PUC Reply Comments at 22.

<sup>308</sup> NCRA Comments at 24-25.

<sup>309</sup> New York Comments at 15.

<sup>310</sup> 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.<sup>511</sup> 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.<sup>512</sup> 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.<sup>513</sup>

#### 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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<sup>511</sup> Bell Atlantic Reply Comments at 12-13.

<sup>512</sup> Southwestern Reply Comments at 17.

<sup>513</sup> 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:<sup>314</sup>

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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<sup>314</sup> 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.<sup>515</sup> 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."<sup>516</sup> 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.<sup>517</sup> 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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<sup>515</sup> 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).

<sup>516</sup> *Louisiana PSC*, 476 U.S. at 373, quoting Communications Act, § 2(b), 47 U.S.C. § 152(b).

<sup>517</sup> 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.<sup>318</sup> 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.<sup>319</sup> We did not seek comment on the issue advanced by UTC. While this would not preclude us from reaching the issue,<sup>320</sup> 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.<sup>321</sup> 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.<sup>322</sup> 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.<sup>323</sup> FM subcarriers may offer a variety of services.<sup>324</sup> 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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<sup>318</sup> Communications Act, § 332(c)(3)(B), 47 U.S.C. § 332(c)(3)(B).

<sup>319</sup> 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.

<sup>320</sup> We are not required to give any notice before adopting a rule of Commission organization. 5 U.S.C. § 553(b)(3)(A).

<sup>321</sup> NARUC Comments at 11-12.

<sup>322</sup> Hardy Comments at 1-2.

<sup>323</sup> *See* Section 73.295 of the Commission's Rules, 47 C.F.R. § 73.295.

<sup>324</sup> 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.<sup>325</sup> 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.<sup>326</sup> Our rules expressly enumerate those classes of persons that may be served by SMR licensees.<sup>327</sup> 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.<sup>328</sup> 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.<sup>329</sup> In 1988, the Commission amended Section 90.603(c) of the Rules to permit SMRs to serve individuals and Federal Government agencies.<sup>330</sup> 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.<sup>331</sup> 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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<sup>325</sup> See RMD Comments at 7 n.8.

<sup>326</sup> 47 C.F.R. § 90.179(a).

<sup>327</sup> See 47 C.F.R. § 90.603(c).

<sup>328</sup> 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).

<sup>329</sup> 47 C.F.R. §§ 90.603, 90.115.

<sup>330</sup> 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).

<sup>331</sup> 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.<sup>332</sup> 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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<sup>332</sup> 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 forbore 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 forbore 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,<sup>333</sup> 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 forbore 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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<sup>333</sup> 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.<sup>334</sup> 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)."<sup>335</sup> 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."<sup>336</sup>

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.<sup>337</sup> 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.<sup>338</sup> 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."<sup>339</sup> 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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<sup>334</sup> 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).

<sup>335</sup> Budget Act, § 6002(d)(3).

<sup>336</sup> *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.

<sup>337</sup> PN Cellular Comments at 2-3; PacTel Reply Comments at 18-19.

<sup>338</sup> 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.

<sup>339</sup> AMTA Reply Comments at 6.

were not provided at the time the Budget Act was enacted.<sup>540</sup> Several parties filed oppositions to Bell Atlantic's petition.<sup>541</sup> 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.<sup>542</sup> The parties conclude that the three-year transition period applies to wide-area, digitally enhanced SMR providers.<sup>543</sup>

## 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.<sup>544</sup>

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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<sup>540</sup> 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.

<sup>541</sup> AMTA Opposition, Dial Page Opposition, and Nextel Opposition. Bell Atlantic filed a reply.

<sup>542</sup> AMTA Opposition at 3-4; Dial Page Opposition at 3-6; Nextel Opposition at 7-10.

<sup>543</sup> AMTA Opposition at 4-5; Dial Page Opposition at 2; Nextel Opposition at 11-17.

<sup>544</sup> 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.<sup>545</sup> 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.<sup>546</sup> 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.<sup>547</sup> 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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<sup>545</sup> 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.

<sup>546</sup> 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.

<sup>547</sup> 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<sup>548</sup> 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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<sup>548</sup> 5 U.S.C. § 608.

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# 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

- 20.1 Purpose.
- 20.3 Definitions.
- 20.5 Citizenship.
- 20.7 Mobile services.
- 20.9 Commercial mobile radio service.
- 20.11 Interconnection to facilities of local exchange carriers.
- 20.13 State petitions for authority to regulate rates.
- 20.15 Requirements under Title II of the Communications Act.

#### 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).

\* \* \* \* \*

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 entity	¶ 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 forbore 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.

# THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO  
1887-1987  
A CENTENNIAL HISTORY

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.