

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

In the Matter of

Implementation of Sections 3(n) and 332 of  
 the Communications Act

Regulatory Treatment of Mobile Services

GN Docket No. 93-252

**SECOND REPORT AND ORDER**

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

By the Commission: Commissioner Barrett issuing a statement.

**TABLE OF CONTENTS**

	Paragraph
I. INTRODUCTION .....	1
II. BACKGROUND .....	3
A. Legislative and Commission Actions Prior to Budget Act .....	3
1. Regulatory Classification of Mobile Services .....	3
2. Competitive Carrier Decisions .....	8
B. Budget Act Revisions .....	11
III. DISCUSSION .....	13
A. Overview .....	13
1. Congressional Objectives .....	13
2. Impact on National Economy .....	18
a. Fostering Economic Growth .....	19
b. Promoting Infrastructure Investment .....	22
c. Enabling Access to Information Superhighways .....	26
B. Definitions .....	30
1. Mobile Service .....	30
2. Commercial Mobile Radio Service .....	39
a. Service Provided for Profit .....	39
b. Interconnected Service .....	50

c. Service Available to the Public . . . . .	61
3. Private Mobile Radio Service . . . . .	71
C. Regulatory Classification of Existing Services . . . . .	81
1. Existing Private Services . . . . .	82
a. Government, Public Safety, and Special Emergency Radio Services . . . . .	82
b. Aviation, Marine, and Personal Radio Services . . . . .	83
c. Industrial and Land Transportation Services . . . . .	84
d. Specialized Mobile Radio . . . . .	88
e. 220-222 MHz Private Land Mobile . . . . .	94
f. Private Paging . . . . .	96
g. Automatic Vehicle Monitoring . . . . .	98
2. Existing Common Carrier Services . . . . .	100
a. Cellular and Other Services . . . . .	100
b. Dispatch . . . . .	103
b. Satellite Services . . . . .	106
3. Commercial and Private Service on Common Frequencies . . . . .	110
D. Regulatory Classification of Personal Communications Services . . . . .	116
E. Forbearance from Title II Regulation . . . . .	124
1. Statutory Test . . . . .	124
2. Competition in the Commercial Mobile Radio Services Marketplace . . . . .	126
3. Classes of Commercial Mobile Radio Services . . . . .	155
4. Forbearance from Particular Title II Sections . . . . .	164
a. Sections 203, 204, 205, 211, and 214 . . . . .	165
b. Sections 206, 207, 209, 216, and 217 . . . . .	183
c. Sections 210, 212, 213, 215, 218, 219, 220, and 221 . . . . .	188
d. Sections 223, 225, 226, 227, and 228 . . . . .	198
5. Safeguards for Affiliates of Landline Dominant Carriers . . . . .	214
F. Other Issues . . . . .	220
1. Interconnection Obligations . . . . .	220
2. State Petitions To Extend Rate Regulation Authority . . . . .	240
3. Miscellaneous Issues Raised by Commenters . . . . .	258
IV. SUMMARY OF ACTIONS; TRANSITION RULES . . . . .	262
A. Summary of Actions . . . . .	262
1. Classification of Mobile Licensees; Other Actions . . . . .	262
2. Impact on Existing Service Providers . . . . .	275
B. Transition Rules . . . . .	278
C. Further Proceedings . . . . .	285

APPENDICES

- A. Final Rules
- B. Index of Rules and Related Provisions
- C. Final Regulatory Flexibility Analysis
- D. List of Commenting Parties

I. INTRODUCTION

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

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

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

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

<sup>3</sup> For a list of parties filing comments and reply comments, see Appendix D.

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

<sup>5</sup> Budget Act, § 6002(d)(3).

<sup>6</sup> See Part IV.C, para. 285, *infra*.

## II. BACKGROUND

### A. LEGISLATIVE AND COMMISSION ACTIONS PRIOR TO BUDGET ACT

#### 1. Regulatory Classification of Mobile Services

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

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

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

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

<sup>9</sup> Communications Act, § 201, 47 U.S.C. § 201.

<sup>10</sup> *Id.*, § 202, 47 U.S.C. § 202.

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

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

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

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

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

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<sup>13</sup> H.R. Rep. No. 97-765, 97th Cong., 2d Sess., at 54 (1982).

<sup>14</sup> Communications Act, § 3(gg), 47 U.S.C. § 153(gg)(Budget Act, § 6002(b)(2)(B)(i)(II), struck this provision).

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

<sup>16</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), *clarified*, 4 FCC Rcd 356 (1989); Amendment of the Commission's Rules To Permit Private Carrier Paging Licensees To Provide Service to Individuals, PR Docket No. 93-38, Report and Order, 8 FCC Rcd 4822 (1993)(*Private Paging Order*).

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

<sup>18</sup> Amendment of the Commission's Rules To Establish New Personal Communications Services, GEN Docket No. 90-314, ET Docket No. 92-100, Notice of Proposed Rule Making and Tentative Decision, 7 FCC Rcd 5676 (1992) (*PCS Notice*).

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

## 2. Competitive Carrier Decisions

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

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

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

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<sup>19</sup> *Id.* at 5712-14 (paras. 94-98).

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

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

<sup>22</sup> *Competitive Carrier, Fifth Report*, 98 FCC 2d at 1204 n.41. See also *Competitive Carrier, Fourth Report*, 95 FCC 2d at 582.

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

## B. BUDGET ACT REVISIONS

11. It is against this background that Congress enacted Section 6002(b) of the Budget Act to revise Section 332 of the Communications Act. The amended statute changes the prior regulatory regime in two significant respects. First, Congress has replaced the common carrier and private radio definitions that evolved under the prior version of Section 332 with two newly defined categories of mobile services: commercial mobile radio service (CMRS) and private mobile radio service (PMRS). CMRS is defined as "any mobile service (as defined in section 3(n)) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public."<sup>24</sup> PMRS means "any mobile service (as defined in section 3(n)) that is not a commercial mobile service or the functional equivalent of a commercial mobile service."<sup>25</sup>

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

## III. DISCUSSION

### A. OVERVIEW

#### 1. Congressional Objectives

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

<sup>24</sup> Communications Act, § 332(d)(1), 47 U.S.C. § 332(d)(1).

<sup>25</sup> *Id.*, § 332(d)(2), 47 U.S.C. § 332(d)(2).

<sup>26</sup> *Id.*, § 332(c)(3), 47 U.S.C. § 332(c)(3).

<sup>27</sup> See note 4, *supra*.

<sup>28</sup> Communications Act, § 332(c)(1)(D), 47 U.S.C. § 332(c)(1)(D).

13. We believe Congress had two principal objectives in amending Section 332. First, Congress saw the need for a new approach to the classification of mobile services to ensure that similar services would be subject to consistent regulatory classification. The Conference Report explains that the intent of Congress is that, "consistent with the public interest, similar services are accorded similar regulatory treatment."<sup>29</sup> This objective was accomplished by replacing the common carrier and private carrier classifications that had evolved under the prior statute with the new categories of CMRS and PMRS. By establishing a new class of commercial mobile radio services, Congress has taken a comprehensive and definitive action to achieve regulatory symmetry in the classification of mobile services.

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

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

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

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

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

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

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

## *2. Impact on National Economy*

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

### *a. Fostering Economic Growth*

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

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

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

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

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

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

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

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

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

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

<sup>35</sup> McCaw Comments at 1-2 (footnote omitted)(emphasis in original).

## **b. Promoting Infrastructure Investment**

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

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

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

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

## **c. Enabling Access to Information Superhighway**

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

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

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

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

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

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

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

## B. DEFINITIONS

### 1. *Mobile Service*

#### a. *Background and Pleadings*

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

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<sup>36</sup> CTIA Comments at iii.

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

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

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

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

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

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

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

<sup>40</sup> See, e.g., AMTA Comments at 6-7; NYNEX Comments at 4.

<sup>41</sup> Bell Atlantic Comments at 3-4.

<sup>42</sup> MCI Comments at 3-4.

<sup>43</sup> Metricom Comments at 1-5.

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

#### b. Discussion

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

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

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

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

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<sup>44</sup> Rockwell Comments at 1-2.

<sup>45</sup> New York Comments at 4 n.1.

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

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

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

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

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

## 2. Commercial Mobile Radio Service

### a. Service Provided for Profit

#### (1) Background and Pleadings

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

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<sup>49</sup> Communications Act, § 3(n)(3), 47 U.S.C. § 153(n)(3), as added by Budget Act, § 6002(b)(2)(B)(i)(I).

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

<sup>51</sup> *Broadband PCS Order*, 8 FCC Rcd at 7734 (para. 79).

<sup>52</sup> See para. 260, *infra*, for a discussion of the classification of FM subcarriers.

<sup>53</sup> Basic Exchange Telecommunications Radio Service, Report and Order, 3 FCC Rcd 214, 217 (1988)(*BETRS Order*).

<sup>54</sup> Communications Act, § 332(d), 47 U.S.C. § 332(d).

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

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

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

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

<sup>56</sup> See, e.g., Arch Comments at 4-5 n.11; DC PSC Comments at 4; GTE Comments at 5; NARUC Comments at 14; New York Comments at 4-5; Pacific Comments at 4; Southwestern Comments at 6.

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

<sup>58</sup> See, e.g., McCaw Comments at 15-16; TDS Comments at 3-4.

<sup>59</sup> See, e.g., Bell Atlantic Comments at 7; DC PSC Comments at 4; GTE Comments at 5; Rochester Comments at 4-5; Sprint Comments at 5; TDS Comments at 5.

<sup>60</sup> See, e.g., NYNEX Comments at 5-6; PageNet Comments at 5; Rockwell Comments at 2-3; Southwestern Comments at 6; Telocator Comments at 9; Vanguard Comments at 3.

<sup>61</sup> NARUC Comments at 15 n.5.

<sup>62</sup> See, e.g., American Petroleum Reply Comments at 6-8.

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

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

## (2) Discussion

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

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<sup>63</sup> UTC Comments at 5.

<sup>64</sup> See, e.g., American Petroleum Comments at 6-7; ARINC Comments at 4; ITA Comments at 5; Motorola Comments at 7; Nextel Comments at 9; Telocator Comments at 9; UTC Comments at 7-8.

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

<sup>66</sup> See, e.g., Motorola Comments at 7; Nextel Comments at 9 n.14; UTC Comments at 7-8.

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

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

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

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

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

#### (a) Excess Capacity Activities

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

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

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

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

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

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

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

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

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

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

## (b) Shared-Use Systems

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

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

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

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

<sup>76</sup> 47 C.F.R. § 90.179.

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

<sup>78</sup> 47 C.F.R. § 90.179.

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

## b. Interconnected Service

### (1) Background and Pleadings

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

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

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<sup>79</sup> 47 U.S.C. § 310(d).

<sup>80</sup> Para. 47, *supra*.

<sup>81</sup> Communications Act, § 332(d)(2), 47 U.S.C. § 332(d)(2).

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

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

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

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

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

<sup>84</sup> DC PSC Comments at 5; NABER Comments at 8; PageNet Comments at 9; PRSG Comments at 2; Roamer Comments at 7; Securicor Reply Comments at 5; Southwestern Comments at 7; TDS Comments at 6; UTC Comments at 9.

<sup>85</sup> AmP Reply Comments at 3; NYNEX Comments at 7; Pactal Comments at 9; Pagemart Reply Comments at 6; TDS Comments at 6; TRW Reply Comments at 17; UTC Reply Comments at 10.

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

<sup>87</sup> Bell Atlantic Comments at 9; NYNEX Comments at 7; Roamer Comments at 6-7; Sprint Comments at 6; US West Comments at 16-17.

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

<sup>89</sup> UTC Comments at 10.

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

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

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

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

<sup>92</sup> BellSouth Comments at 8; MCI Comments at 6; Mtel Comments at 7; US West Comments at 17-18.

<sup>93</sup> Grand Comments at 3-5; Pagemart Comments at 5; RMD Comments at 3-4; TRW Reply Comments at 17.

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

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

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

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

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

## (2) Discussion

54. We believe that by using the phrase "interconnected service," Congress intended that mobile services should be classified as commercial services if they make interconnected service broadly available through their use of the public switched network.<sup>102</sup> The purpose underlying the congressional approach, we conclude, is to ensure that a mobile service that gives its customers the capability to communicate to or receive communication from other users of the public switched network should be treated as a common carriage offering (if the other elements of the definition of commercial mobile radio service are also present, or if the service can be deemed the functional equivalent of CMRS). Neither the statute nor the legislative history uses the term "end user control." We believe that it would be infeasible for end users, in any literal sense, to control directly access to the public switched network for sending or receiving messages to or from points on the network. The comments explain that subscribers are concerned only with the ability to transmit and receive messages to and from the public switched network.

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

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<sup>98</sup> McCaw Comments at 17; BellSouth Comments at 9-10; Southwestern Comments at 7 n.4; Telocator Reply Comments at 5.

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

<sup>100</sup> New York Comments at 6.

<sup>101</sup> Nextel Comments at 11 n.18; *see also* NYNEX Reply Comments at 8 n.16; Pacific Comments at 5.

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

<sup>103</sup> Communications Act, § 332(d)(2), 47 U.S.C. § 332(d)(2).

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

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

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

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

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

<sup>105</sup> E.g., Use of the Carterfone Device in Message Toll Telephone Service, Decision, 13 FCC 2d 420 (1968).

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

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

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

47 C.F.R. § 90.7.

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

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

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

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

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<sup>109</sup> *International Satellite Systems*, 101 FCC 2d at 1054. An exception was made for emergency restoration service.

<sup>110</sup> *Id.* at 1100.

<sup>111</sup> *Id.* at 1101.

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

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

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

or interexchange switched network will be defined as part of that network for purposes of our definition of "commercial mobile radio services."<sup>115</sup>

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

### c. Service Available to the Public

#### (1) Background and Pleadings

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

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

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

<sup>117</sup> Communications Act, § 332(d)(1), 47 U.S.C. § 332(d)(1).

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

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

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

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

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

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

<sup>120</sup> BellSouth Comments at 11.

<sup>121</sup> Sprint Comments at 7.

<sup>122</sup> US West Comments at 19.

<sup>123</sup> MPX Comments at 4.

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

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

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

## (2) Discussion

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

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

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

<sup>127</sup> E.F. Johnson Comments at 7.

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

<sup>129</sup> GTE Comments at 7; Roamer Comments at 10.

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

adopted instead the Senate's version which deleted the word "broad," indicating legislative intent to:<sup>131</sup>

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

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

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

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<sup>131</sup> Conference Report at 496.

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

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

<sup>134</sup> 47 C.F.R. §§ 90.15-90.25.

<sup>135</sup> 47 C.F.R. §§ 90.33-90.55.

<sup>136</sup> 47 C.F.R. §§ 90.59-90.73, 90.79, 90.81.

<sup>137</sup> 47 C.F.R. §§ 90.85-90.95.

<sup>138</sup> 47 C.F.R. §§ 90.101, 90.103.

<sup>139</sup> 47 C.F.R. § 80.15.

<sup>140</sup> 47 C.F.R. § 87.19.

to a substantial portion of the public," because our rules restrict use of those services to internal applications.<sup>141</sup>

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

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

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

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

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

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

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

### 3. Private Mobile Radio Service

#### a. Background and Pleadings

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

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

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

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

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

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

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<sup>145</sup> Communications Act, § 332(d)(3), 47 U.S.C. § 332(d)(3).

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

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

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

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

<sup>150</sup> Reed Smith Comments at 6; accord UTC Reply Comments at 13.

escape valve for classifying services as private even if they meet the literal definition of CMRS.<sup>151</sup>

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

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

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<sup>151</sup> UTC Comments at 14.

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

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

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

<sup>155</sup> See Bell Atlantic Comments at 13-14; CTIA Comments at 13-14; GTE Comments at 8; McCaw Comments at 20 & n.55.

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

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

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

## b. Discussion

### (1) *Scope of Definition*

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

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<sup>157</sup> See para. 73, *supra*.

<sup>158</sup> US West Comments at 8; *accord* CTIA Reply Comments at 13.

<sup>159</sup> Nextel Comments at 13-14.

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

<sup>161</sup> CTIA Comments at 11-13.

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

<sup>163</sup> NYNEX Comments at 13-14; *see also* Time Warner Comments at 6-7.

<sup>164</sup> McCaw Comments at 21-22; *see also* PA PUC Reply Comments at 10; TRW Comments at 26 n.51; UTC Comments at 14-15.

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

<sup>166</sup> Geotek Comments at 7-8.

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

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

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<sup>167</sup> Conference Report at 496 (emphasis added).

<sup>168</sup> *Id.*; see also CTIA Reply Comments at 13.

<sup>169</sup> Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 649 (1990).

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

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

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

### (2) *Functional Equivalence Test*

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

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

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<sup>170</sup> See Part II.A, paras. 3-10; Part III.A.1, paras. 13-17, *supra*.

<sup>171</sup> House Report at 259-60 (footnotes omitted).

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

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

### C. REGULATORY CLASSIFICATION OF EXISTING SERVICES

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

#### 1. Existing Private Services

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

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

##### b. Aviation, Marine, and Personal Radio Services

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

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

<sup>174</sup> See, e.g., AAR Comments at 4-5; AAR Reply Comments at 2-3; American Petroleum Comments at 6; DC PSC Comments at 8; PRSG Comments at 2.

<sup>175</sup> See, e.g., ARINC Comments at 4-6; PRSG Comments at 2; Grand Comments at 2.

### c. Industrial and Land Transportation Services

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

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

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

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

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

<sup>177</sup> See, e.g., AAR Comments at 4-5; American Petroleum Comments at 4.

<sup>178</sup> See, e.g., CTIA Comments at 7-8; McCaw Comments at 16; TDS Comments at 3-4.

<sup>179</sup> See ARINC Reply Comments at 2; American Petroleum Comments at 3-6; AAR Reply Comments at 4.

<sup>180</sup> USTA Comments at 5-6.

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

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

#### d. Specialized Mobile Radio

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

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

90. Under our interpretation of the statute, most SMR licensees automatically meet two of the elements of the CMRS definition. First, because all our rules define SMR licensees as "commercial" service providers,<sup>187</sup> they are by definition providing for-profit service under our interpretation of the CMRS definition. Second, we have concluded that the SMR end user eligibility criteria set forth in our rules<sup>188</sup> allow licensees to make service available to the public. With respect to the "interconnection" element of the definition, however, our rules allow but do not require SMRs to provide interconnected service to subscribers. We therefore

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<sup>182</sup> See para. 68, *supra*.

<sup>183</sup> See, e.g., AMTA Comments at 14-15; DC PSC Comments at 8; NYNEX Comments at 14-15 & n.18.

<sup>184</sup> E.F. Johnson Comments at 9.

<sup>185</sup> E.g., CTIA Comments at 15; Pacific Comments at 10; Mtel Comments at 10-11; Arch Comments at 8.

<sup>186</sup> ITA Comments at 5.

<sup>187</sup> Section 90.7 of the Commission's Rules, 47 C.F.R. § 90.7.

<sup>188</sup> Section 90.603(c) of the Commission's Rules, 47 C.F.R. § 90.603(c).

conclude that classification of all SMR systems turns on whether they do, in fact, provide interconnected service as defined by the statute. Licensees who provide interconnected service will be classified as CMRS providers, while those who do not will be classified as PMRS providers.<sup>189</sup>

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

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

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

#### e. 220-222 MHz Private Land Mobile

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

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

<sup>190</sup> Telocator Comments at 12.

<sup>191</sup> Para. 70, *supra*.

<sup>192</sup> See Part 90 of the Commission's Rules, Subpart T, 47 C.F.R. §§ 90.701-90.741.

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

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

#### f. Private Paging

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

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

<sup>193</sup> Roamer Comments at 3-5.

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

<sup>195</sup> See Section 90.703 of the Commission's Rules, 47 C.F.R. § 90.703.

<sup>196</sup> See paras. 44, *supra*.

<sup>197</sup> See, e.g., Bell Atlantic Comments at 15; CTIA Comments at 15; McCaw Comments at 29-30; Motorola Comments at App. A; Nextel Comments at 16-17; NYNEX Comments at 15; Pagemart Comments at 8-10.

<sup>198</sup> See paras. 57-58, *supra*.

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

#### g. Automatic Vehicle Monitoring

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

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

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<sup>199</sup> Nextel Comments at 16.

<sup>200</sup> Section 90.239 of the Commission's Rules, 47 C.F.R. § 90.239.

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

<sup>202</sup> Metricom Comments at 5-6.

<sup>203</sup> Southwestern Comments at 8, 17.

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

<sup>205</sup> See para. 68, *supra*.

<sup>206</sup> *LMS Notice*, 8 FCC Rcd at 2503.

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

## 2. Existing Common Carrier Services

### a. Cellular and Other Services

#### (1) Background and Pleadings

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

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

#### (2) Discussion

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

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<sup>207</sup> See, e.g., CTIA Comments at 15; GTE Comments at 9; Motorola Comments at App. A; NYNEX Comments at 16.

<sup>208</sup> See AMTA Comments at 15; E.F. Johnson Comments at 9-10.

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

<sup>210</sup> See paras. 57-58, *supra*.

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

## b. Dispatch

### (1) *Background and Pleadings*

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

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

### (2) *Discussion*

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

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

<sup>212</sup> See, e.g., MCI Comments at 6-7; NYNEX Comments at 16; Telocator Comments at 16-17.

<sup>213</sup> See, e.g., E.F. Johnson Comments at 10.

<sup>214</sup> See, e.g., Bell Atlantic Comments at 17-19; Telocator Comments at 16-17.

<sup>215</sup> See, e.g., AMTA Comments at 21-22.

<sup>216</sup> AMSC Comments at 6-7; AMSC Reply Comments at 1-2.

service between a user terminal and a base station.<sup>217</sup> This Order does not alter AMSC's current authorization to provide service.

### c. Satellite Services

#### (1) Background and Pleadings

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

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

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

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

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

<sup>220</sup> Motorola Comments at 13-15; NYNEX Comments at 17; Starsys Comments at 2.

<sup>221</sup> AMSC Comments at 5.

<sup>222</sup> AMSC Reply Comments at 3-4.

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

## (2) Discussion

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

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

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<sup>223</sup> Reed Smith Comments at 5; TRW Reply Comments at 13.

<sup>224</sup> TRW Comments at 16-21.

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

<sup>226</sup> See Conference Report at 494.

<sup>227</sup> AMSC Authorization Order.

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

<sup>229</sup> See RDSS Order.

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

### 3. Commercial and Private Service on Common Frequencies

#### a. Background and Pleadings

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

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

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

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

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

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

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

<sup>234</sup> *Id.* at para. 81.

<sup>235</sup> AMTA Comments at 16.

E.F. Johnson asserts that the Commission need only establish compatible co-channel protection criteria between the services to ensure co-existence.<sup>236</sup>

#### b. Discussion

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

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

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

### D. REGULATORY CLASSIFICATION OF PERSONAL COMMUNICATIONS SERVICES

#### 1. *Background and Pleadings*

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

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<sup>236</sup> E.F. Johnson Comments at 9.

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

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

## 2. Discussion

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

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

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

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

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

<sup>240</sup> See, e.g., New York Comments at 9; Southwestern Comments at 18; UTC Comments at 17-18; UTC Reply Comments at 19-20.

<sup>241</sup> Mtel Comments at 11.

<sup>242</sup> Time Warner Comments at 4.

<sup>243</sup> *PCS Notice*, 7 FCC Rcd at 5679 (para. 6).

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

<sup>245</sup> *Broadband PCS Order*, 8 FCC Rcd at 7712 (para. 23); *Narrowband PCS Order*, 8 FCC Rcd at 7164 (para. 13).

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

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

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

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

<sup>247</sup> *Broadband PCS Order*, 8 FCC Rcd at 7712 (para. 23).

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

<sup>249</sup> See, e.g., Communications Act, §§ 312(a), 503(b), 47 U.S.C. §§ 312(a), 503(b).

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

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

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

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

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

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<sup>251</sup> *Broadband PCS Order*, 8 FCC Rcd at 7753-54 (paras. 132-134).

<sup>252</sup> *Narrowband PCS Reconsideration Order* at para. 32.

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

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

Conference Report at 491.

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

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

## E. FORBEARANCE FROM TITLE II REGULATION

### 1. Statutory Test

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

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

- (1) Enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory.
- (2) Enforcement of such provision is not necessary for the protection of consumers.
- (3) Specifying such provision is consistent with the public interest.

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

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

<sup>256</sup> See para. 119, *supra*.

<sup>257</sup> Communications Act, § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A).

<sup>258</sup> Conference Report at 491.

<sup>259</sup> Communications Act, § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A).

<sup>260</sup> *Id.*, § 332(c)(1)(C), 47 U.S.C. § 332(c)(1)(C).

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

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

### a. Background and Pleadings

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

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

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

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

<sup>263</sup> Bell Atlantic Comments at 21-24; McCaw Comments at 7-8. See also Southwestern Comments at 27.

<sup>264</sup> McCaw Comments at 9.

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

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

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

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

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

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

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

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

<sup>270</sup> Bell Atlantic Comments at 23, *quoting* Cellular CPE Bundling Order, 7 FCC Rcd at 4029.

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

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

<sup>273</sup> Bell Atlantic Comments at 23.

<sup>274</sup> *Id.* at 24-25.

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

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

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

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<sup>275</sup> NCRA Comments at 15-16.

<sup>276</sup> PA PUC Reply Comments at 14.

<sup>277</sup> NCRA Comments at 15-16.

<sup>278</sup> New York Comments at 10-11; PA PUC Reply Comments at 15.

<sup>279</sup> California Comments at 6.

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

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

<sup>282</sup> PacTel Reply Comments at 2-3. *See also* Telocator Reply Comments at 11-12.

<sup>283</sup> Bell Atlantic Reply Comments at 8.

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

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

#### b. Discussion

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

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

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

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

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

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

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

<sup>287</sup> PacTel Reply Comments at 4-5.

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

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

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

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

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<sup>288</sup> See para. 194, *infra*.

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

<sup>290</sup> See *Cellular CPE Bundling Order*, 7 FCC Rcd at 4028.

<sup>291</sup> See EMCI, "The State of the US Paging Industry" (1990); EMCI, "The State of the US Paging Industry" (1993).

<sup>292</sup> See Ridley Survey at 20.

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

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

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

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

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

<sup>295</sup> See note 17, *supra*.

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

<sup>297</sup> EMCI SMR Report at 146; M. Carter-Lome, "An Answer to Cellular," *Communications*, at 29 (Sept. 1993).

<sup>298</sup> Merrill Lynch, "SMR in the United States: A Window of Opportunity," at 28 (Oct. 1993).

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

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

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

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

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

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

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

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

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

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<sup>302</sup> See *id.*

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

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

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

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

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

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

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

<sup>306</sup> See Hausman Affidavit at 12-13.

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

<sup>308</sup> See para. 146, *supra*.

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

<sup>310</sup> See Radio Communications Report, "PacTel Plans To Take CDMA into California and Georgia," at 17, Jan. 31, 1994.

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

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

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

### 3. *Classes of Commercial Mobile Radio Services*

#### a. *Background and Pleadings*

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

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

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<sup>311</sup> See Telocator Bulletin, "US West New Vector Completes Calls on Qualcomm CDMA Phone," at 8, Jan. 21, 1994.

<sup>312</sup> Communications Act, § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A).

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

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

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

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

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

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

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

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<sup>316</sup> McCaw Comments at 5-6. *See also* Southwestern Comments at 26; TDS Comments at 19; US West Comments at 29.

<sup>317</sup> McCaw Comments at 6-7; McCaw Reply Comments at 7-13.

<sup>318</sup> New Par Comments at 4-5. *See also* CTIA Comments at 31; CTIA Reply Comments at 11.

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

<sup>320</sup> AT&T Reply Comments at 2.

<sup>321</sup> *Id.* at 1-3.

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

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

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

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

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

#### b. Discussion

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

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

<sup>325</sup> Grand Comments at 8. Grand also argues that all cellular carriers should be regulated as dominant carriers. *Id.* at 7-8.

<sup>326</sup> NABER Comments at iii, 14-15, App. A at 1, 4-5; NABER Reply Comments at 2-5.

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

<sup>328</sup> CTIA Reply Comments at 10-12.

<sup>329</sup> See Conference Report at 491.

<sup>330</sup> *Notice*, 8 FCC Red at 7999 (para. 55).

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

<sup>332</sup> See para. 194, *infra*.

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

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

#### *4. Forbearance from Particular Title II Sections*

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

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

###### *(1) Background and Pleadings*

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

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

<sup>334</sup> See note 33, *supra*.

exit provision, which requires the carriers to seek Commission approval when adding or removing a line.<sup>335</sup>

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

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

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

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

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

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

<sup>338</sup> McCaw Comments at 9; CTIA Comments at 29-30, 34.

<sup>339</sup> McCaw Comments at 10; Century Comments at 5; Saco River Reply Comments at 4-6.

<sup>340</sup> Bell Atlantic Comments at 23.

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

<sup>342</sup> *See* para. 130, *supra*.

is in the public interest.<sup>343</sup> Motorola contends that the imposition of Title II requirements, such as tariffing, would disserve the public interest.<sup>344</sup>

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

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

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

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

<sup>344</sup> Motorola Comments at 18.

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

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

<sup>347</sup> *Id.* at 15-16, citing *Competitive Carrier, Fifth Report*, 98 FCC 2d at 1201 n.41.

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

<sup>349</sup> *Id.*

<sup>350</sup> California Comments at 5-6; New York Comments at 10-11; PA PUC Reply Comments at 14-16.

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

forbear from Sections 204 and 205, which "go hand-in-hand" with the Section 203 tariff requirement.<sup>332</sup>

172. Bell Atlantic and others insist that Sections 211 and 214 burden carriers with paperwork which would be irrelevant once tariffs are not accepted.<sup>333</sup> GTE argues that since competitive market conditions make tariffs unnecessary, the filing of contracts required by Section 211, is also unnecessary.<sup>334</sup> BellSouth contends that on its face, Section 214 applies to communications by wire only and is inapplicable here.<sup>335</sup> CenCall avers that enforcement of Section 214 is unnecessary, since there is no monopoly provider.<sup>336</sup>

## (2) Discussion

173. As we discussed in the Notice, in a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power. Removing or reducing regulatory requirements also tends to encourage market entry and lower costs. The Commission determined in *Competitive Carrier* that non-dominant carriers are unlikely to behave anti-competitively, in violation of Sections 201(b) and 202(a) of the Act, because they recognize that such behavior would result in the loss of customers.<sup>337</sup>

174. Concerns about the ramifications of tariff forbearance are unwarranted. Despite the fact that the cellular service marketplace has not been found to be fully competitive, there is no record evidence that indicates a need for full-scale regulation of cellular or any other CMRS offerings. As we discussed above, most CMRS services are competitive.<sup>338</sup> Competition, along with the impending advent of additional competitors, leads to reasonable rates. Therefore, enforcement of Section 203 is not necessary to ensure that the charges, practices, classifications, or regulations for or in connection with CMRS are just and reasonable and are not unjustly or unreasonably discriminatory.

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

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<sup>332</sup> CenCall Comments at 9-10. See also GCI Comments at 3.

<sup>333</sup> Bell Atlantic Comments at 27; GTE Comments at 14; McCaw Comments at 8. See also In-Flight Comments at 4 (since 800 MHz air-ground service is a competitive market, enforcement of these provisions is not necessary to protect consumers because marketplace forces will provide the consumer protection these sections were designed to provide).

<sup>334</sup> GTE Comments at 17.

<sup>335</sup> BellSouth Comments at 29-30.

<sup>336</sup> CenCall Comments at 10-11, citing *Competitive Carrier, Further Notice*, 84 FCC 2d at 490 (para. 117).

<sup>337</sup> *Competitive Carrier Notice*, 77 FCC 2d at 334-38; *Competitive Carrier, First Report*, 85 FCC 2d at 31.

<sup>338</sup> See Part III.E.2, paras. 126-154, *supra*.

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

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

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

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

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

<sup>360</sup> See *Competitive Carrier, Sixth Report*, 99 FCC 2d at 1029-30.

<sup>361</sup> Of course, the requirements of Section 202(a) of the Act remain intact.

<sup>362</sup> Further, tariffs would add an unnecessary cost to the Commission's administration of the CMRS marketplace.

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

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

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

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

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

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

<sup>364</sup> See paras. 236-238, *infra*.

<sup>365</sup> See Budget Act, § 6002(c)(2)(A).

<sup>366</sup> See note 335, *supra*.