

entry of new PCS commercial mobile service providers. We also note that few states have seen the need to regulate cellular rates. Domestic public land mobile carriers, which are primarily providing paging services, have already been declared nondominant by the Commission in their provision of interstate services.⁶⁴ In addition, carriers currently classified as private carriers that may be reclassified as commercial mobile service providers as a result of this rulemaking are unlikely to have market power that would require us to regulate them differently from other commercial mobile service providers. We invite comment on whether the public interest would be served by forbearance from application of Sections 203, 204, 205, 211 and 214 of Title II to commercial mobile service providers. We also ask commenters to address whether there are any other concerns that should be addressed before we can forbear from applying these sections of Title II.

64. Some commercial mobile service providers will be affiliated with dominant common carriers. In other circumstances, when we have refrained from regulating certain services provided by affiliates of dominant common carriers, we have imposed safeguard requirements on the dominant common carrier to ensure that it does not act anticompetitively.⁶⁵ We seek comment on whether we should impose any similar requirements on dominant common carriers with commercial mobile service affiliates.

65. While the statute addresses forbearance and Title II generally, all sections of Title II do not share the same functions. Title II encompasses a variety of subjects. Several sections concern matters of Commission authority and obligations placed on carriers.⁶⁶ We tentatively conclude that we should forbear from adopting or enforcing regulations pursuant to the authority of these sections for any commercial mobile service provider. We invite comment on this tentative conclusion and ask commenters to respond on a section by section basis.⁶⁷

66. The Commission has, in the past, forbore from issuing regulations pursuant to

⁶⁴ See Preemption of State Entry Regulation, 59 RR 1518 (1986), remanded, National Association of Regulatory Utility Commissioners v. FCC, No. 86-1205 (D.C. Cir. March 30, 1987), aff'd, Preemption of State Entry Regulation in the Public Land Mobile Service, 2 FCC Rcd 6434 (1987), citing Competitive Carrier, First Report and Order, 85 FCC 2d 1, 20-22 (1980), and Fifth Report and Order, 98 FCC 2d 1191 (1984).

⁶⁵ See 47 C.F.R. §§ 32.27, 64.902; Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities & Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions Between Telephone Companies and Their Affiliates, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987), recon., 2 FCC Rcd 6283 (1987), further recon., 3 FCC Rcd 6701 (1988), aff'd sub nom., Southwestern Bell Corporation v. FCC, 896 F.2d 1978 (D.C. Cir. 1990).

⁶⁶ Section 210 (Franks and Passes); Section 212 (Interlocking directorates -- Officials Dealing in Securities); Section 213 (Valuation of Carrier Property); Section 215 (Transactions Relating to Services, Equipment, and So Forth); Section 218 (Inquiries Into Management); Section 219 (Annual and Other Reports); and Section 221 (Special Provisions Relating to Telephone Companies).

⁶⁷ Sections 222 (Competition Among Record Carriers) and 224 (Regulations of Pole Attachments) do not appear to apply to commercial mobile services so a determination concerning forbearance is not required.

Section 220 (Accounts, Records, and Memoranda; Depreciation Charges), thus refraining from prescribing accounting systems for all types of carriers.⁸⁸ We tentatively conclude that such forbearance is appropriate here. We seek comment on this tentative conclusion.

67. Section 206 (Liability of Carriers for Damages), Section 207 (Recovery of Damages) and Section 209 (Orders for Payment of Money) are provisions associated with the complaint remedy described in Section 208, from which the Commission may not forbear. We tentatively conclude that there is no record, at this time, to support the Commission forbearing from enforcing any of these sections for any commercial mobile service provider and that forbearance would not be consistent with the public interest. For similar reasons, we also tentatively conclude that we should not forbear from applying Section 216 (Application of Act to Receiver and Trustees) and Section 217 (Liability of Carrier for Acts and Omissions of Agents). We invite comment on these tentative conclusions.

68. Sections 223 (Obscene or Harassing Telephone Calls in the District of Columbia or in Interstate or Foreign Communications), 225 (Telecommunications Services for Hearing-Impaired and Speech-Impaired Individuals), 226 (Telephone Operator Services (TOCSIA)), 227 (Restrictions on the Use of Telephone Equipment (auto dialing, telemarketers) and 228 (Regulation of Carrier Offering of Pay-Per-Call Services) are provisions of more recent origin and contain specific protections for consumers. We seek comment on whether the Commission should forbear from applying Sections 223,⁸⁹ 225, 226, 227, and 228 to commercial mobile service providers generally, or to any specific commercial mobile service providers in particular.

E. Other Issues

1. Right to Interconnection

69. In its new form, Section 332(c)(1)(B) requires the Commission to order a common carrier to interconnect with a commercial mobile service provider on reasonable request. In addition, new Section 332(c)(1)(B) states that "this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to . . . [the Communications] Act." Thus, the statute neither limits nor expands the Commission's authority to order interconnection pursuant to Section 201 of the Act.

70. We seek comment on the interconnection rights that should be afforded to commercial mobile service providers. We have previously addressed the application of our Section 201 authority to existing common carrier mobile services. For example, the

⁸⁸ Elimination of Part 34, Uniform System of Accounts for Radiotelegraph Carriers, and Part 35, Uniform System of Accounts for Wire-Telegraph and Ocean-Cable Carriers, of the Commission's Rules and Regulations, and Elimination of Annual Reports Form R, for Radiotelegraph Carriers, and Form O, for Wire-Telegraph and Ocean-Cable Carriers and Amendment of Part 1 and Part 43 of the Commission's Rules, CC Docket No. 92-145, 8 FCC Rcd 4318 (1993).

⁸⁹ Cf. Petition for a Declaratory Ruling that GTE Airfone, GTE Railfone, and GTE Mobilnet Are Not Subject To The Telephone Operator Consumer Services Improvement Act of 1990, File No. MSD-92-14, DA No. 93-1022, (Com.Car.Bur. Aug. 27, 1993) (Bureau found that the petitioning cellular licensees are aggregators and therefore subject to the requirements of TOCSIA).

Commission has required local exchange carriers (LECs) to provide the type of interconnection reasonably requested by all Part 22 licenses.⁷⁰ In the case of cellular carriers, the Commission found that separate interconnection arrangements for interstate and intrastate services are not feasible; that is, the provision of interstate and intrastate interconnection for cellular service is inseverable. Therefore, we concluded that the Commission has plenary jurisdiction over the physical plant used in the interconnection of cellular carriers. We found, however, that the costs of interconnection are severable because the underlying costs of interconnection are segregable.⁷¹ We applied our interconnection standards to all Part 22 licensees.⁷²

71. We see no distinction between the previously established interconnection rights of Part 22 licensees and those of commercial mobile service providers. That is, we tentatively conclude that in the commercial mobile context, LEC provision of interstate and intrastate interconnection and the type of interconnection the LEC provides are inseverable. Moreover, we tentatively conclude that permitting state regulation of the right to interconnect and the type of interconnection for intrastate service would negate the important federal purpose of ensuring interconnection to the interstate network. Accordingly, we propose preempting state regulation of the right to intrastate interconnection and the right to specify the type of interconnection.⁷³ We seek comment on this tentative conclusion. We also seek comment on whether we should require commercial mobile service providers to provide interconnection to other mobile service providers, and on whether, under Section 332(c)(3) of the Act, state regulation of interconnection rates of commercial mobile service providers is preempted. In particular, we seek comment on whether any or all classes of PCS providers of commercial mobile service should be subject to equal access obligations like those imposed on LECs.⁷⁴

72. We also request comment on the interconnection rights of existing mobile services that will be classified as private mobile service providers. It is well settled that the Commission has the authority to require common carriers to provide interconnection to private

⁷⁰ Interconnection Order, 2 FCC Rcd at 2913.

⁷¹ Id. at 2911-2912.

⁷² Id. at 2913.

⁷³ See Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986); Maryland Public Service Comm'n v. FCC, 909 F.2d 1510 (D.C. Cir. 1990); California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Illinois Bell Telephone Co. v. FCC, 883 F.2d 104 (D.C. Cir. 1989); National Ass'n of Regulatory Utility Commissioners v. FCC, 880 F.2d 422 (D.C. Cir. 1989); Public Utility Comm'n of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1989); North Carolina Utilities Comm'n v. FCC, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977); North Carolina Utilities Comm'n v. FCC, 537 F.2d 787 (4th Cir.), cert. denied, 429 U.S. 1027 (1976).

⁷⁴ See Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 101 FCC 2d 911, recon. denied, 102 FCC 2d 503 (1985); Investigation of Access and Divestiture Related Tariffs, Allocation Plan Waivers and Tariffs, CC Docket No. 83-1145, 101 FCC 2d 935 (Com.Car.Bur. 1985). Equal access obligations have also been imposed on Bell Operating Company affiliated cellular carriers. See United States v. Western Electric Co., 797 F.2d 1082 (D.C. Cir. 1986). See also MCI Telecommunications Corporation, Policies and Rules Pertaining to Equal Access Obligations of Cellular Licensees, Petition for Rule Making, RM-8012, filed June 2, 1992.

entities as part of our jurisdiction to regulate interstate common carrier service.⁸⁴ We find nothing in the new legislation indicating that this authority has been circumscribed, or that our existing case law extending interconnection rights to private entities is no longer valid.

73. Finally, we propose that PCS providers should have a federally protected right to interconnect with LEC facilities regardless of whether they are classified as commercial or private mobile service providers, and that inconsistent state regulation should be preempted.⁸⁵ In our original Notice of Proposed Rule Making in the PCS proceeding, we advanced a similar proposal, i.e., that both private and common carrier PCS providers (as then defined) would have a federally protected interconnection right and that inconsistent state regulation should be preempted. In addition, we proposed that PCS providers be entitled to secure interconnection from local exchange carriers (LECs) that is reasonable for the particular PCS system and no less favorable than that offered to any other customer or carrier.⁸⁶

74. Commenters expressed overwhelming support for these proposals,⁸⁷ and we see no reason why the intervening amendment of Section 332 should alter their applicability. We do, however, solicit commenters' views on this point, particularly with respect to whether the new statutory definitions make commercial and private services sufficiently different that private

⁸⁴ See, e.g., Public Utility Comm'n of Texas v. FCC, 886 F.2d at 1327-35 (upholding FCC preemption of state regulation of intrastate interconnection of private microwave licensee and noting assumption that "creation of an interconnection right for wholly interstate carriage is securely within the FCC's authority") (emphasis in original); Fort Mill Tel. Co. v. FCC, 719 F.2d 89, 92 (4th Cir. 1983) (recognizing "right of a customer to interconnect his equipment with the interstate telephone network"); North Carolina Utilities Comm'n v. FCC, 552 F.2d at 1046-1047 (Commission has statutory authority over interconnection of terminal facilities and equipment used for interstate communications); North Carolina Utilities Comm'n v. FCC, 537 F.2d at 794-795 (same); Hush-A-Phone Corp. v. United States, 238 F.2d 266, 269 (D.C. Cir. 1956) (right of subscriber to connect equipment to a telephone); In re AT&T, et al., 71 FCC 2d 1, 10-11 (1979) (recognizing right of interconnection of private interstate microwave system).

⁸⁵ Although our authority to require interconnection with PCS and private providers is a function of our jurisdiction to regulate interstate common carrier service, we wish to underscore that our interstate jurisdiction extends to the interconnection between all LECs and PCS providers, even those that operate entirely within a single state, to the extent interstate or foreign communications are conducted through such facilities. Our jurisdiction extends to "facilities and services that might be located within a single state if those facilities and services are essential or integral parts of interstate communications." Amendment of Parts 2 and 22 of the Commission's Rules, 93 FCC 2d 908, 920 (1983), aff'd without opinion sub nom. NARUC v. FCC, No. 83-1485 (D.C. Cir. 1977. See also California v. FCC, 567 F.2d 84, 86 (D.C. Cir. 1977), cert. denied, 434 U.S. 1010 (1978) ("The key issue . . . is the nature of the communications which pass through the facilities, not the physical location of the lines.") (citation omitted).

⁸⁶ See PCS Notice, 7 FCC Rcd at 5714-5716.

⁸⁷ See, e.g., GEN Docket 90-314, Comments of Adelpia Communications at 17; Comments of Concord Telephone Co. at 5; Comments of the Pennsylvania Public Utilities Commission at 5-6; Comments of the United States Department of Justice at 30-31; Comments of Paging Network, Inc. at 27; Comments of Freeman Engineering Associates, Inc. at 8.

PCS providers could receive less favorable interconnection than commercial mobile providers. In addition, commenters are asked to discuss whether we should retain our original proposal to regulate the types of PCS interconnection arrangements and the specific type of interconnection to which particular PCS providers are entitled with respect to interstate service.²⁸ In this regard, we request comment on whether LECs should be required to file tariffs specifying interconnection rates.

75. We believe the new legislation should not affect our original proposal that PCS providers be entitled to obtain interconnection of a type that is reasonable for the PCS system and no less favorable than that offered by the LEC to any other customer or carrier. Similarly, we continue to believe that with respect to rates for interconnection, it is not necessary to preempt state and local regulation at this time. We do propose, however, to reserve the right to consider preemption at a later time if it is demonstrated that state and local regulation is exercised in such a way as to preclude development of interstate PCS service. We seek comment on what impact, if any, the newly enacted Section 332(c)(1)(B) has on the record we have already compiled on these issues.

2. Foreign Ownership

76. Although revised Section 332 is generally effective as of the date of enactment, private licensees providing service prior to August 10, 1993 and private paging licensees on frequencies allocated as of January 1, 1993 will continue to be treated as private land mobile licensees for three years. Nonetheless, all reclassifiable private licensees are immediately subject to the foreign ownership restrictions imposed on common carriers by Section 310(b) of the Communications Act. The statute allows affected licensees to maintain the level of foreign ownership that existed as of May 24, 1993, only if they petition the Commission for waiver within six months of enactment, i.e., by February 10, 1994.

77. We propose to establish the following petition procedure for affected private land mobile licensees to "grandfather" existing foreign ownership under the statute. Petitioners will be required to identify all foreign persons or entities holding an interest in the license and the percentage ownership interest for each. Licensees will further be required to certify that the identity and level of foreign ownership described is unchanged since May 24, 1993, and to certify that no change in foreign ownership will occur in the future (other than divestiture of a foreign ownership interest to a domestic person or entity) without prior notice to the Commission. All petitions must be filed by February 10, 1994, and any licensee who files a timely petition will be allowed to continue operating until the Commission acts on its petition.

78. Because of the short period for filing petitions, we recognize that we may not finally resolve the regulatory status of some private land mobile licensees in time to put them on notice of the need to file. Nonetheless, in light of the statutory deadline, we intend to place the burden on the licensee to determine whether it is necessary to file, regardless of whether we have made a final determination that the licensee is subject to reclassification as a commercial mobile service. Licensees who fail to file a timely petition and who are later determined to be commercial mobile services will be subject to immediate enforcement of our foreign ownership restrictions. At the same time, we will not treat the filing of a petition as dispositive of the classification issue. Thus, a licensee may file a petition without prejudice to any future argument that it should be classified as a private rather than a commercial mobile service.

²⁸ See PCS Notice, 7 FCC Rcd at 5715-5716.

3. State Petitions to Extend Rate Regulation Authority

79. Revised Section 332(c)(3)(A) preempts state and local rate and entry regulation of all commercial mobile services.⁹⁹ Under Section 332(c)(3)(B), however, any state that has rate regulation in effect for a commercial mobile service as of June 1, 1993 may, prior to August 10, 1994, petition the Commission to extend that authority based on a showing that (1) market conditions will not protect subscribers from unjust, unreasonable, or discriminatory rates, or (2) such conditions exist and the service is a replacement for landline telephone exchange service for a substantial portion of landline telephone exchange service in the state.¹⁰⁰ In addition, states may petition the Commission to initiate rate regulation based on these same criteria.¹⁰¹ If the Commission authorizes state rate regulation under either procedure, interested parties may, after a "reasonable time," petition the Commission to suspend the regulation.¹⁰² We intend to establish procedures in this rule making for filing of such petitions by the states and interested parties. We seek comment on what factors should be considered in establishing such procedures.

IV. PROCEDURAL MATTERS

A. Ex Parte Rules -- Non-restricted Proceeding

80. This is a non-restricted notice and comment rule making proceeding. Ex parte presentations are permitted except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

B. Initial Regulatory Flexibility Analysis

81. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (1981), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of the policies and rules proposed in this Notice on small entities. The IRFA is contained in Appendix A to this Notice. The Secretary shall cause a copy of this Notice, including the IRFA, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.

C. Comment Period

82. Interested persons may file comments in this proceeding on or before November 8, 1993, and reply comments on or before November 23, 1993. For filing requirements, see generally 47 C.F.R. §§ 1.415, 1.419. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting materials.

⁹⁹ This provision takes effect on August 10, 1994. Budget Act, § 6002(c)(2)(A).

¹⁰⁰ The Commission must complete all action on such petitions, including reconsideration, within 12 months of submission. 47 U.S.C. § 332(c)(3)(B).

¹⁰¹ 47 U.S.C. § 332(c)(3)(A). The Commission must allow public comment on any such petition and must grant or deny the petition within 9 months of submission.

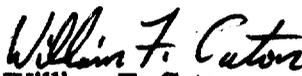
¹⁰² 47 U.S.C. § 332(c)(3)(B).

If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington D.C. 20554. In addition, commenters are requested to submit courtesy copies to the Chief, Mobile Services Division, Common Carrier Bureau, 1919 M St., N.W., Room 644, Washington, DC 20554, and to the Chief, Land Mobile and Microwave Division, Private Radio Bureau, 2025 M St., N.W., Room 5202, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) at the Commission's headquarters at 1919 M Street, N.W., Washington, D.C.

D. Further Information

83. For further information regarding this Notice, contact Peter Batacan at (202) 632-6450 or Nancy Booker at (202) 632-0935 (Common Carrier Bureau, Mobile Services Division); Judith Argentieri at (202) 632-6917 (Common Carrier Bureau, Tariff Division); or David Furth at (202) 634-2443 (Private Radio Bureau, Land Mobile and Microwave Division).

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A

Initial Regulatory Flexibility Act Analysis

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. Written public comments are requested on the IRFA.

Reason for Action

This rule making proceeding was initiated to secure comment on various proposals for the implementation of Sections 3(n) and 332 of the Communications Act, 47 U.S.C. §§ 153(n), 332, as amended by Title VI of the Omnibus Budget Reconciliation Act. The proposals advanced herein are designed to carry out Congress's intent to establish a uniform regulatory framework for all mobile radio services.

Objectives

Congress has directed the Commission to implement Sections 3(n) and 332, as amended. In accordance with this directive, the Commission seeks to devise a regulatory scheme that will allow for the equitable treatment of comparable mobile services providers, as categorized under the terms of the new legislation. In turn, this will promote regulatory certainty and allow for the enhanced provision of service to the public.

Legal Basis

The proposed action is authorized under the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), and Sections 3(n), 4(i), 303(r), 332(c), and 332(d) of the Communications Act of 1934, 47 U.S.C. §§ 153(n), 154(i) and 303(r), 332(c), and 332(d), as amended.

Reporting, Recordkeeping and Other Compliance Requirements

The proposals under consideration in this Notice may impose certain new reporting and recordkeeping requirements on mobile services licensees whose regulatory status has changed from private to commercial as a result of the new legislation. The extent of this increase will depend in substantial part on the degree of Title II regulation imposed on such licensees.

Federal Rules Which Overlap, Duplicate or Conflict with These Rules

None.

Description, Potential Impact, and Number of Small Entities Involved

Many small entities could be affected by the proposals contained in the Notice. Depending on the final resolution of the issues, the regulatory classification of some existing private land mobile licensees and possibly some existing common carrier services may be changed. The full extent of these changes cannot be predicted until various other issues raised in the proceeding have been resolved. After evaluating the comments filed in response to the Notice, the Commission will examine further the impact of all rule changes on small entities and set forth its findings in the Final Regulatory Flexibility Analysis.

Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

The Notice solicits comment on a variety of alternatives. Any additional significant alternatives presented in the comments will also be considered.

IRFA Comments

We request written public comment on the foregoing Initial Regulatory Flexibility Analysis. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines provided in paragraph 82 of this Notice.