

Finally, system capacity and service area size should not be considered relevant factors in the analysis. The Notice correctly notes that "low capacity . . . has not been a factor in deciding the regulatory treatment of common carrier mobile services,"⁴⁷ nor should it be. The relevant issue is that even "a small system must make its capacity available in a manner that does not unreasonably discriminate."⁴⁸

With respect to service area size and location, the Notice acknowledges that "[e]very service area has some geographic boundary, but if that area is open to the public and anyone can get service, there is no limitation on eligible users."⁴⁹ As such, the service is "generally available" within the area served.⁵⁰

Moreover, any attempt to distinguish service areas for purposes of the CMS definition would create an unnecessary administrative burden, given the multiplicity of mobile services, each with its unique geographical limitations. Indeed, using such criteria as system capacity or service area size or location in determining whether a particular licensee provides CMS or PMS will create an administrative nightmare, given the frequency in which licensees change the parameters of their respective services.

⁴⁷Id. at 9-10 ¶ 26.

⁴⁸Id. at n.33.

⁴⁹Notice at 10 ¶ 27.

⁵⁰Ibid.

The Commission's tentative conclusion is thus amply supported by the record: "the reference to 'classes of eligible users,' as well as other provisions of the statute and legislative history, make clear that Congress intended to include some existing private services within the scope of its [CMS] definition even if they are not offered to the general public without restriction."⁵¹ There is, then, no basis to exclude mobile services targeted to specific user groups or those with capacity or service area limitations.⁵²

4. Regulatory Treatment of Mixed Services. The Notice emphasizes the Commission's desire to afford licensees flexibility to provide a mix of services regardless of their regulatory classification, and two mixed-use alternatives are proposed. Under the first alternative, licensees engaged in a mix of services would be classified as either commercial or private mobile service providers, based upon their primary use of the spectrum.⁵³ The second alternative would give licensees the option to provide both commercial and private services under a single license, imposing the appropriate classification and regulation on each type of service.⁵⁴

Neither alternative is satisfactory. The first, "primary use," alternative would allow a licensee to provide CMS service as a PMS carrier. Such

⁵¹Notice at 8 ¶ 23.

⁵²Indeed, a service offered to one user group (*e.g.*, taxi companies) often can be used by other user groups for similar purposes and functions (*e.g.*, delivery companies).

⁵³See Notice at 15 ¶ 40.

⁵⁴Ibid.

an arrangement would be inconsistent with the plain language of the statute:

A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this Act.⁵⁵

Even if this alternative were legal, adoption of the primary use approach would continue the very regulatory disparities Congress has sought to eliminate. And it would involve the Commission in endless determinations over which of the two uses is "primary."

The second, "dual classification," alternative, although appearing to avoid the legal infirmities of the first approach, is nevertheless flawed as well. A dual classification ignores the reality that a set of CMS and PMS services offered by a licensee often converge.⁵⁶ Moreover, a dual classification scheme would impose unneeded complexities and administrative burdens on licensees and the Commission alike.⁵⁷

Licensees should not be able to manipulate their regulatory classification simply by providing only some of their capacity on a commercial basis. Congress has determined that similar services should, for regulatory purposes, be treated on a similar basis. Congress has further determined that, for commercial services offered to the public, consumers should have the protections afforded by Sections 201, 202 and 208 of the Communications

⁵⁵Amended Section 332(c)(1)(A), 107 Stat. 393 (emphasis added).

⁵⁶The Commission should strive to avoid a regulatory scheme which will present the types of problems encountered, for example, in the basic/enhanced services dichotomy.

⁵⁷See note 33 *supra*.

Act. These purposes will be undermined if licensees have the flexibility to manipulate their regulatory classification through various means.

To avoid these inevitable conflicts, U S WEST recommends that licensees engaged in the provision of both CMS and PMS should be subject to one classification: CMS. This is particularly the case with respect to PCS, which is expected to be a fully interconnected service provided on a "for-profit" basis — namely, a commercial mobile service.⁵⁸ This suggested approach is supported in the legislative history:

The Committee finds that the disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services and deny consumers the protections they need if new services such as PCS were classified as private.⁵⁹

This approach is, moreover, consistent with the Commission's own initial interpretation of the statute.⁶⁰

Finally, this recommended approach is consistent with the regulatory scheme applicable to cellular carriers engaged in non-conventional cellular services.⁶¹ The Commission should adopt this cellular approach be-

⁵⁸See, e.g., Comments filed in GEN Docket No. 90-314 by Southwestern Bell at 7-8; Fleet Call at 3-4; Sprint at 2-3; NARUC at 3-7; Telmarc Telecommunications at 10-12; Joint Comments of Advanced MobileComm Technologies and Digital Spread Spectrum Technologies at 7-8. Of course, to the extent an entity acquires PCS spectrum for the sole purpose of providing, for example, a non-interconnected service, that entity would fit neatly within the PMS classification.

⁵⁹House Report, note 7 *supra*, at 260.

⁶⁰See Notice at 4 ¶ 11 ("Thus, government and non-profit public safety services would be outside the scope of the commercial mobile service definition. Similarly, businesses that operate mobile radio systems solely for their own private, internal use would not be considered to be providing mobile radio services to customers for profit.") (emphasis added).

⁶¹Common carrier cellular licensees have been permitted to provide non-conventional, "incidental" radio services (e.g., data services, fixed services such as credit card phone

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cause it is administratively simple, it has proven to be effective, and it will further the regulatory parity directive Congress has imposed.

III. All CMS Providers Should Have the Flexibility to Provide to the Public a Full Range of Services, Including Private Services Like Dispatch

Congress has invited the Commission to reconsider the current prohibition on common carrier provision of dispatch services.⁶² The Commission should accept this invitation. In fact, the public interest would be diserved if this prohibition were retained.

Allowing common carriers to provide dispatch services will give consumers and businesses additional choices — alternatives they do not enjoy today.⁶³ Additional choices in the dispatch market will sharpen competition which, in turn, will give consumers and businesses lower prices and a broader array of services. Clearly, the addition of more competition and more choices promotes the public interest. In addition, removal of the dis-

services) as long as certain conditions are met. See 47 C.F.R. § 22.308. Cellular licensees are likewise able to provide "auxiliary" services on a secondary basis, again as long as certain conditions are met. See 47 C.F.R. § 22.930. The provision of "incidental" or "auxiliary" services does not affect the regulatory treatment of cellular carriers.

⁶²See Amended Section 332(c)(2), 107 Stat. 394.

⁶³Several years ago the Commission amended Part 22 of its rules to "clarify that dispatch-type communications can be provided on cellular frequencies so long as the communication is not directly between a dispatcher and end users, i.e., dispatch service." Part 22 "Flexible Cellular Order, 3 FCC Rcd 7033, 7043 ¶ 77 (Dec. 12, 1988), *on recon.*, 5 FCC Rcd 1138 (Feb. 28, 1990). Under this Order, cellular carriers may provide dispatch-type services as long as the communication passes through the mobile telephone switching office. Thus, although the 1988 rule amendments gave common carrier cellular licensees more flexibility with respect to dispatch-type services, such carriers are still prohibited from providing purely private dispatch services wherein a dispatcher communicates directly with end users through the use of radio facilities only.

patch prohibition would be consistent with the Commission's goal to adopt "new PCS rules [that] will provide licensees . . . the maximum degree of flexibility to introduce a wide variety of new and innovative telecommunications services."⁶⁴

On the other hand, continuation of the restriction will lead to perverse results. It would allow "private" carriers to continue to assert that only they can "uniquely" provide "an integrated package" of services which include "private radio services (dispatch)"⁶⁵ — when the only reason they can make this claim is due to artificial restraints imposed by outmoded regulation.

Finally, removal of the private network/dispatch restriction would be consistent with the action taken in the recent PCS Order. The Commission has defined personal communications services broadly:

Radio communications that encompass mobile and ancillary fixed communications services that provide services to individuals and businesses and can be integrated into a variety of competing networks.⁶⁶

To ensure a level playing field, the Commission also revised its cellular service rules "to state explicitly that cellular licensees may provide any PCS-type services, including wireless PBX, data transmission and telepoint service, without prior notification."⁶⁷

⁶⁴PCS Second Report and Order, GEN Docket No. 90-314, FCC 93-451, at 3 ¶ 1 (Oct. 22, 1993).

⁶⁵NEXTEL Communications 1993 Annual Report at 6-8.

⁶⁶Second Report and Order, GEN Docket No. 90-314, FCC 93-451, at 14 ¶ 24 (Oct. 22, 1993) ("PCS Order").

⁶⁷Id. at 48 ¶ 111.

Removing the one remaining prohibition on the type of services common carrier mobile service providers may offer will promote the public interest. Consequently, the Commission should allow any CMS provider to offer to the American public any service of potential value, including services like dispatch which, for the most part, only private carriers have been allowed to provide.

IV. Streamlined Regulation and Parity Should be the Touchstones in Applying Title II Regulation to the Competitive CMS Market

Congress has given this Commission express authority to forbear from applying to CMS providers all but three of the provisions of Title II of the Communications Act: Section 201 (interconnection); Section 202 (non-discrimination); and Section 208 (complaints).⁶⁸ The Commission has proposed to exercise this discretion by not applying to CMS providers those Title II provisions relating to tariffs and rates (Sections 203, 204, 205 and 211), market entry (Section 214), and accounting and depreciation practices (Section 220). U S WEST agrees with these proposals.

The Commission's proposals are amply supported by past experience in the mobile services market. Title II of the Communications Act was designed for a monopoly, rather than a competitive, environment. The Commission has repeatedly determined that the application to competitive markets of traditional public utility regulation like that contained in Title II is not only unnecessary to protect consumers but also can be counterproduc-

⁶⁸See Amended Section 332(c)(1)(A), 107 Stat. 393. See also Conference Report, note 2 *supra*, at 490-91; House Report, note 7 *supra*, at 260-61.

tive because rate and entry regulation increases the cost of providing services and can actually stifle development of a fully competitive market.⁶⁹

Mobile services, which did not even exist when the Communications Act was enacted almost 60 years ago, have been provided on a competitive basis from the outset. Of material and critical significance, the Commission does not apply rate, entry and accounting regulation to mobile service providers today.

If rate, entry and accounting regulation has been unnecessary in the past, such regulation is certainly not necessary when the array of choices available to consumers will soon increase dramatically — as narrowband PCS, broadband PCS, enhanced SMRS, and mobile satellite licensees also begin serving the mobile services market. There is, therefore, ample support for the Commission's tentative conclusion that "the level of competition in the commercial mobile services marketplace is sufficient to permit us to forbear from tariff regulation of the rates for commercial mobile services

⁶⁹See, e.g., Competitive Common Carrier, Notice of Inquiry and Proposed Rulemaking, 77 F.C.C.2d 308 (1979), First Report and Order, 85 F.C.C.2d 1 (1980); Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445 (1981); Second Report and Order, 91 F.C.C.2d 59 (1982), *on recon.*, 93 F.C.C.2d 54 (1983); Second Further Notice of Proposed Rulemaking, 47 Fed. Reg. 17,308 (1982); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 F.C.C.2d 554 (1983); Fourth Further Notice of Proposed Rulemaking, 96 F.C.C.2d 922 (1984); Fifth Report and Order, 98 F.C.C.2d 1191 (1984), *on recon.*, 59 R.R.2d 543 (1985); Sixth Report and Order, 99 F.C.C.2d 1020 (1985), *rev'd*, MCI v. FCC, 795 F.2d 1186 (D.C. Cir. 1985). Congress' decision to give this Commission express forbearance authority is powerful evidence that Congress concurs in the Commission's views regarding the application of traditional public utility regulation to competitive markets.

provided to end users."⁷⁰ These same reasons compel forbearance of all entry and accounting regulation as well.⁷¹

The Commission also proposes to classify commercial mobile services into three categories — certain common carrier mobile services; certain PCS services; and certain private mobile services — and it invites comment on these categories and whether its regulation of the services in each category should vary.⁷²

These proposed categories are not satisfactory because they are based on regulatory perception rather than marketplace realities. There is only one mobile services market, and consumers are interested in one-stop shopping, with their mobile services carrier providing a full array of services to meet their needs.⁷³ Consumers perceive no difference among "certain common carrier mobile services," "certain PCS services," and "certain private mobile services," and it would be pointless to establish regulatory classifications which do not match marketplace realities.⁷⁴

⁷⁰Notice at 23 ¶ 62.

⁷¹It bears emphasizing that the Commission always retains the flexibility to revisit its determinations in the remote event of market failure. See Notice at 22 n.75.

⁷²Notice at 21 ¶ 55.

⁷³This is apparent from the NEXTEL Annual Report quoted at pages 10-11 above.

⁷⁴At most, consumers will perceive two sub-markets in the mobile services market: a sub-market for one-way telecommunications services (e.g., paging, narrowband PCS); and a sub-market for two-way telecommunications services (e.g., cellular, enhanced SMRS and broadband PCS). Within each of these sub-markets, one provider may provide a more robust set of features than its competitors, and consumers may be willing to pay extra to obtain those additional features. But, in the end, any two-way (or one-way) mobile telecommunications service may be substituted by any other two-way (or one-way) mobile service. Consequently, even if there were a reason to distinguish among types of commercial mobile services (and those reasons are not readily apparent), the Commission should at

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However, regardless of any classification the Commission may adopt (if any), it should not vary its Title II regulation based upon such classifications. As noted above, the Commission has not imposed rate, entry and accounting regulation on most mobile service providers, whether they provide one-way or two-way services. The market for both sets of services has flourished in this regulatory-free environment, and with increasing frequency mobile services will be provided on an integrated basis using a single handset.

Given this success and the overriding objective of the new statutory scheme in "securing regulatory parity,"⁷⁵ there is no reason to apply rate, entry and accounting regulation on any CMS providers. CMS providers should be able to distinguish their respective services based upon their skill and ingenuity, rather than continued regulatory disparities.

V. Interconnection Rights, Obligations and Federal Preemption

This section responds to the request for comment concerning interconnection issues with and between mobile service providers and the relationship of the Commission's jurisdiction with that of state regulatory commissions.

most classify all mobile services into two categories — one-way services, and two-way services, although even such categories may not survive long, given the rapid developments in technology and the market interest in the availability of an integrated package of services.

⁷⁵Conference Report, note 2 *supra*, at 495. See also *id.* at 497.

A. The Extent of this Commission's Jurisdiction Over Mobile Services Interconnection

The Commission has proposed to continue to exercise its jurisdiction to the same extent it has always been applied to cellular and other common carrier mobile services.⁷⁶ Specifically, the Commission has proposed:

- (1) To preempt state jurisdiction over the availability of physical interconnection (because the provision of such connections is inseverable); and
- (2) Not to preempt state regulation over the rates for interconnection (because the costs of interconnection are severable).⁷⁷

U S WEST supports these two proposals. Regardless of the regulatory classification of mobile service providers, the physical plant used in interconnection with wireline networks remains the same, as does the applicable legal, preemption analysis. What is more, the Commission's past practices have allowed the common carrier mobile services market to flourish. There is, therefore, no reason to change the current arrangement.

B. The Interconnection Rights of CMS Providers

Congress has made clear the importance of interconnection to CMS providers. Revised Section 332(c)(1)(B) expressly requires the Commission

⁷⁶See, e.g., Mobile Services Interconnection Order, 2 FCC Rcd 2910 (May 18, 1987); Indianapolis Telephone Co. v. Indiana Bell, 1 FCC Rcd 228 (1986).

⁷⁷See Notice at 26 ¶¶ 70-71 and 28 ¶ 75.

to "order a common carrier to establish physical connections with [a commercial mobile] service." Indeed, Congress has emphasized that "the right to interconnect [is] an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network."⁷⁸ However, Congress assigned to the Commission the task of defining one's right to, and the scope of, physical connections respecting CMS.⁷⁹

In undertaking these definitional tasks, the Commission can draw upon its experience with the well-established regulatory framework it has applied in the past to mobile services common carriers.⁸⁰ Rather than prescribing in its rules specific forms of interconnection that must be made available, the Commission has determined that the better course is to establish general guidelines governing requests for interconnection. Under those guidelines, parties must negotiate in good faith new forms of interconnection, and reasonably-requested interconnection must be made available within six months.

This Commission practice has been successful, and there is no reason to change it. The framework provides relative certainty over the respective rights of carriers concerning interconnection, yet it gives carriers considerable flexibility in negotiating specific interconnection arrangements

⁷⁸House Report, note 7 *supra*, at 261.

⁷⁹See Amended Section 332(d)(2), 107 Stat. 396.

⁸⁰See, e.g., Guardband, 12 F.C.C.2d 841 (1968), *recon. denied*, 14 F.C.C.2d 269, *aff'd*, Radio Relay Corp. v. FCC, 409 F.2d 269 (2d Cir. 1969); FCC Policy Statement of Interconnection of Cellular Systems, 59 R.R.2d 1283 (March 5, 1986).

that best suit their individual needs. This certainty and flexibility would be welcomed by all CMS providers, particularly as the needs of PCS providers will likely be so diverse and will likely evolve over time. Importantly, the Commission's framework gives parties a forum to resolve disputes: if any CMS provider believes it has been unreasonably denied a particular form of interconnection, it always has the option of filing a complaint with the Commission.

Given the success of the current practice, U S WEST encourages the Commission to apply its current Part 22 interconnection practices to all commercial service providers.

C. The Interconnection Rights of PMS Providers

The Commission questions whether the new statutory definitions of CMS and PMS are "sufficiently different" such that the interconnection rights of PMS providers may be less than those of CMS providers.⁸¹ U S WEST believes that the new statutory classifications do impact upon the interconnection rights of PMS providers.

Importantly, revised Section 332(c)(1)(B) awards interconnection rights to CMS providers only. While it is true that this Section states that it neither limits nor expands the Commission's authority to order interconnection, Congress' failure to include PMS within the ambit of Section 332(c)(1)(B) must have some meaning.

⁸¹Notice at 227-28 ¶ 74.

Moreover, it is not readily apparent what types of interconnection (if any) PMS providers will require, given the fact that entities providing interconnected service will, for the most part, be classified as CMS providers rather than PMS providers.⁸² In these circumstance, prudence would dictate that the Commission address the interconnection rights of PMS providers on a case-by-case basis — that is, through the complaint process.⁸³

D. The Obligation of Mobile Services Carriers to Provide Interconnection to Others

The right to interconnection carries with it a corresponding obligation to honor reasonable interconnection requests made by others. It is noteworthy that Congress, while explicitly giving CMS providers the right to interconnect, did not "limit[] or expan[d] . . . the Commission's authority to order interconnection" pursuant to Section 201 of the Communications Act.⁸⁴

Section 201(a) empowers the Commission to order a common carrier to provide interconnection upon reasonable request. Congress has defined

⁸²Of course, if a PMS provider enhances its service offerings in a manner which allows for interconnected service, its regulatory classification should be modified accordingly.

⁸³U S WEST cannot agree with the Commission's tentative conclusion that the new legislation has not changed "existing case law extending interconnection rights to private entities," at least with respect to private mobile services. Notice at 27 ¶ 72. As noted in Parts I and II above, Congress has substantially narrowed the definition of private mobile services, and this change may very well require the Commission to re-examine its past decisions concerning PMS interconnection rights.

⁸⁴Amended Section 332(c)(1)(B), 107 Stat. 393.

CMS providers as common carriers.⁸⁵ Consequently, CMS providers must honor reasonable requests for interconnection made by other common carriers — be they providers of mobile services or non-mobile services. Simply stated, there is a reciprocal right and obligation to provide physical connections among all common carriers.

E. The Obligation of CMS Providers to Provide "Equal Access"

The Commission asks whether CMS providers "should be subject to equal access obligations like those imposed on LECs."⁸⁶ As explained below, this issue should be addressed in the proceeding already established to consider this issue.

At the outset, U S WEST questions whether it is productive to use the term "equal access" in the context of mobile services. The concept of equal access was developed in a specific context (where one carrier had local connections not available to its competitors), and many in the industry now connote equal access with a particular form of interconnection: Feature Group D service. This context does not apply to the mobile services market (*i.e.*, no one carrier has connections not available to others), and mobile service providers generally desire connections other than Feature Group D. Besides, the Section 202 non-discrimination obligation ensures that all CMS providers will provide all their services on a non-discriminatory basis.

⁸⁵See Amended Section 332(c)(1)(A), 107 Stat. 393 ("A person engaged in the provision of . . . a commercial mobile service shall . . . be treated as a common carrier . . .").

⁸⁶Notice at 26 ¶ 71.

The real issue, in U S WEST's judgment, is presubscription: must mobile service providers provide 1+dialing (or equivalent arrangements) to carriers other than themselves. This issue is already pending in RM-8012, although that rulemaking is currently limited to cellular carriers only.⁸⁷ Given the many issues which must be resolved in this proceeding by February 6, 1994, and given the complexities associated with these "equal access" issues, U S WEST recommends that the Commission expand the scope of the RM-8012 proceeding to encompass all CMS providers and to consider the presubscription issue in that proceeding.

VI. Conclusion

Congress' intention in amending Section 332 is unmistakable: it wants regulatory parity and to expand the class of mobile carriers treated as common carriers so consumers are protected and competition is facilitated. However, Congress has agreed with this Commission's past practices in not applying to the competitive mobile services market provisions designed for a monopoly environment, and it has now given the Commission express authority to forbear from all Title II/monopoly regulation except for the general common carrier obligations of Sections 201 and 202 and the enforcement of these obligations by complaint under Section 208.

⁸⁷See Policies and Rules Pertaining to Equal Access Obligations of Cellular Licensees, RM-8012, filed June 2, 1992.

The proposals discussed above, at least in U S WEST's judgment, discharge in full these Congressional directives.

Respectfully submitted,

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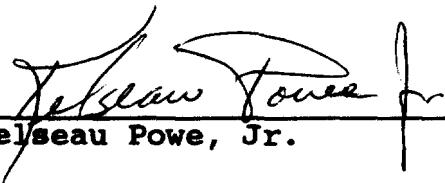
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CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 5th day of November, 1993, I have caused a copy of the foregoing **U S WEST COMMENTS** to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.


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