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Before the
FEDERAL COMMUNICATIONS COMMISSION
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NOV - 8 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section)
3(n) and 332 of the)
Communications Act)
)
Regulatory Treatment of)
Mobile Services)

GN Docket No. 93-252

To: The Commission

COMMENTS OF
MOBILE TELECOMMUNICATION TECHNOLOGIES CORP.

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November 8, 1993

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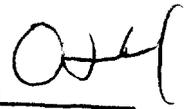


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SUMMARY

In enacting the Budget Act, Congress made clear its intention to establish regulatory parity pursuant to which carriers providing similar services would be subjected to the same regulation. Towards this end, Congress mandated that the Commission establish rules and regulations pursuant to which providers of service to the public would be recognized as commercial mobile service providers.

In its Notice, the Commission sought comment with respect to the definition of commercial mobile service. By these comments, Mtel urges the Commission to broadly define commercial mobile service, consistent with Congressional intent.

The Budget Act also provided the Commission with discretion to forbear from enforcing certain provisions within Title II, and the Commission has sought comment with respect to such forbearance. By these comments, Mtel supports the Commission's proposal to forbear from tariff regulation of commercial mobile service providers generally. Mtel also urged the Commission to forbear specifically from tariff regulation of nationwide paging carriers and provides a demonstration as to why such forbearance is wholly consistent with the criteria set forth in the Budget Act. Mtel also urges the Commission to forbear from the enforcement of other Title II provisions other than those associated with the complaint process, consumer protections and those provisions over which the Commission was afforded to discretion.

Mtel submits that adoption of rules as set forth above would establish the regulatory parity that Congress sought when enacting the Budget Act; increase the availability of competitive offerings, and provide the public with all associated benefits.

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MOBILE TELECOMMUNICATION TECHNOLOGIES CORP.**

Mobile Telecommunication Technologies Corp. ("Mtel"), by its attorneys and pursuant to Section 1.415 of the Commission's rules, respectfully submits its comments in response to the Commission's Notice in the captioned proceeding.^{1/}

I. Statement of Interest

Mtel and its affiliates are Commission licensees providing a wide range of high technology wireless communications services. Collectively, they hold a common carrier nationwide paging license; numerous common carrier non-network paging licenses; multiple common carrier general aviation air-to-ground licenses; several common carrier point-to-point microwave licenses; several local SMR authorizations; applications for 220-222 MHz nationwide non-commercial private carrier authorizations; multiple Public Coast Maritime licenses; and a substantial equity interest in American

^{1/} Notice of Proposed Rule Making in GN Docket No. 93-252 ("Notice"), 58 Fed. Reg. 53169, October 14, 1993. In the Notice, the Commission requested that comments be filed by November 8, 1993, and that Reply Comments be filed by November 23, 1993. Accordingly, these comments are timely filed.

Mobile Satellite Corporation, the sole licensee in the Mobile Satellite Service. In addition, Mtel has been awarded a Pioneer's Preference to operate an advanced Nationwide Wireless Network to operate over 900 MHz spectrum recently allocated for narrowband Personal Communication Service ("PCS"). Accordingly, Mtel is uniquely positioned to provide the Commission with informed comment in response to the Commission's Notice.

II. Introduction

As set forth in the Notice, Title VI, Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act")^{2/} amended Sections 3(n) and 332 of the Communications Act of 1934 (the "Act")^{3/} to create a comprehensive regulatory framework for all mobile radio services, including existing common carrier mobile services, private land mobile services, and future services such as PCS. A primary goal of the legislation was to assure that "consistent with the public interest, similar services are accorded similar regulatory treatment."^{4/} In accordance with the Budget Act, the Commission issued the instant Notice seeking comment on its proposals for the promulgation of regulations which will (1) interpret and apply the statutory definitions of "commercial mobile service" and "private mobile service"; (2) classify existing common

^{2/} Pub. L. No. 103-66, Title VI, §6002(b) 107 Stat. 312, 392 (1993).

^{3/} 47 U.S.C. 153(n), 332.

^{4/} H.R. Conf. Rept. No. 103-213, 103rd Cong. 1st Sess., 494 ("Conference Report").

and private carrier services under those definitions; (3) classify future services such as PCS; (4) determine to what degree Title II regulation shall be imposed on commercial mobile services; and (5) determine what transitional measures are necessary to implement these legislative changes.^{5/}

By these comments, Mtel expresses general support for the Commission's proposals to create a new, streamlined regulatory scheme for all mobile services. In particular, Mtel agrees with the Commission's proposed classification of commercial and private mobile services and with the Commission's proposal to forbear from enforcing certain provisions of Title II of the Act. In support of its position, Mtel provides the following comments in response to the Commission's Notice.

III. Discussion

A. Service Definitions

The Budget Act requires the Commission to resolve a number of definitional issues in the captioned proceeding. Those that are of primary interest to Mtel are discussed below.

1. Mobile Service

The Act defines "mobile service" as a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes both one-way and two-way radio communication services. See 47 U.S.C. 153(n). While this definition does not substantively

^{5/} Notice at Para. 5.

change the Act's prior definition of mobile service, it does specify two services that are included under this definition: (a) traditional private land mobile services and (2) personal communications services recently authorized by the Commission in General Docket No. 90-314. In its Notice, the Commission proposes to include within the term "mobile services" all of the following services: Public mobile services (Part 22); mobile satellite services (Part 25); private land mobile services (Part 90); mobile marine and aviation services (Parts 80 and 87); personal radio services (Part 95); and PCS (Part 99).

Mtel supports the Commission's proposed definition of mobile services. That definition is both fully consistent with the legislative history of the Budget Act and appropriate in view of the nature of the services to be included within the definition.^{6/}

2. Commercial Mobile Service

When Congress elected to replace the current dichotomy between common carriers and private carriers with one including commercial mobile services and private mobile services, its goal was to create "regulatory parity" among carriers providing the same basic services. In this regard, Congress observed that many private carriers had become indistinguishable from common carriers because

^{6/} Mtel takes no position with respect to exclusion of the Interactive Video and Data Service from this definition.

they provide services that are essentially similar, and thus should be treated as common carriers.^{7/}

Section 332(d)(1) of the Act provides that mobile services are to be classified as either "commercial mobile service" or "private mobile service." A service will be classified as a commercial mobile service if the service (a) is provided "for profit" and (b) makes "interconnected service" available "to the public" or "to such classes of eligible users as to be effectively available to a substantial portion of the public." 47 U.S.C. 332(d)(1). In order for a service to be deemed to be an "interconnected service," it must be interconnected with the public switched network, or there must be pending a request for such interconnection. 47 U.S.C. 332(d)(2). The Act specifically requires the Commission (a) to specify what constitutes "effectively available to a substantial portion of the public" and (b) to define "interconnected" and "public switched network." The Commission has requested comment on how each of these various elements of commercial mobile service should be defined and interpreted.

Mtel concurs with the Commission's proposal^{8/} that all mobile service provided by (a) governments; (b) non-profit public safety service groups; and (c) businesses operating mobile service systems solely for their own private, internal use, not be considered as a "for profit" service. In contrast, all mobile

^{7/} H.R. Rept. No. 103-111, 103rd Cong., 1st Sess., 259-260.

^{8/} Notice, at para. 11.

services that are provided by a licensee to customers should be considered "for profit."

This straightforward approach serves to avoid argument over a number of issues that the Commission has neither the need nor the resources to consider and resolve on a case-by-case basis. For example, under this definition, the Commission need not consider how much of a Part 90 provider's capacity must be for internal use before "excess capacity" can be offered to customers before the service becomes "for profit." Similarly, it obviates the need for the Commission to become enmeshed in (a) the intricacies of shared-use arrangements, (b) calculations as to whether profits are being made, and (c) determinations of whether managers of not-for-profit systems (who may or may not be related to operations) can profit from operations where the licensee ostensibly makes no profit.

In defining interconnection, Mtel urges the Commission to apply its longstanding test as set forth in its Intelsat^{9/} decision. Pursuant to that decision, interconnection is deemed to exist where an incoming call "terminates in a computer that can store and process the data and subsequently retransmit it over that network." Id. Accordingly, Mtel urges that systems that utilize store-and-forward arrangements be viewed as being interconnected.

^{9/} Report and Order, Establishment of Satellite Systems providing International Communications, CC Docket 84-1299, 101 FCC 2d 1046 (1985), recon., Memorandum Opinion and Order, 61 Rad. Reg. 2d (P&F) 649 (1986), further recon., 1 FCC Rcd 439.

The differences between store-and-forward paging and direct access paging are not material to the extent of conveying different interconnection status. Both of these transmittal methods require the sender to use a conventional telephone line to relay the message or number to an operator or a system computer. At all times, the service provider has control over the timing of when messages are sent because, even with direct access paging, the message will only be sent when the transmitter is not sending out other pages. Finally, Mtel stresses that, were the Commission to permit carriers to avoid being classified as providing commercial mobile service simply by virtue of using store-and-forward arrangements, it would invite carriers to create such arrangements in order to bypass commercial mobile service classification.

While Mtel submits that interconnection should be defined as set out above, in the event that the Commission deems that store-and-forward arrangements do not constitute "interconnection," Mtel submits that such a position must be applied to all entities utilizing such arrangements. Accordingly, the existing dichotomy in treatment between private and common carriers using store-and-forward technology should cease to exist.

3. Service Availability

The statutory definition of commercial mobile service requires that such service be made available "to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public." 47 U.S.C. § 332(d)(1).

Mtel supports the approach set forth in the Notice, at para. 24, whereby all mobile services that are available to a large sector of the public are deemed to be "effectively available," regardless of whether they include certain limitations on eligibility. This is fully consistent with Congressional intent, as set forth in the Conference Report, whereby Congress explained that a mobile service may be a commercial mobile service regardless of whether the classes of persons who may receive service are broad or narrow and regardless of whether the services are available to the public "at large".^{10/}

Mtel also urges the Commission not to consider either system coverage or system capacity in assessing whether mobile services are "effectively available" to the public. To do otherwise would require the Commission to make a number of determinations with respect to how large the coverage area of a system must be, and how large a capacity the system must have, before it can be deemed to provide service that is "effectively available" to the public. Such determinations are not the type in which the Commission has traditionally become enmeshed, especially where such involvement is not necessary to define general availability.^{11/}

^{10/} Conference Report, at 496 n.2.

^{11/} As the Commission properly recognized in its Notice, capacity itself has never been viewed as being a decisionally significant factor in assessing regulatory status. Notice, at para. 26.

4. Private Mobile Service

Pursuant to the Act, all services are private mobile services if they are not commercial mobile services and are not the functional equivalent of commercial mobile services. 47 U.S.C. § para. 332(d)(1). In its Notice, the Commission requested comment on whether services that are the functional equivalent of commercial services, but do not fit squarely with the definition of commercial mobile service, constitute private mobile service.

Mtel submits that any service that either fits the definition of commercial mobile service, or is the functional equivalent of commercial mobile service, should not be classified as a commercial mobile service rather than as a private mobile service. The Act and its legislative history provide that a mobile service that does not squarely meet the statutory test for a commercial mobile service still be classified as a commercial mobile service if it is determined that it is a "functional equivalent." In particular, in the Conference Report, Congress provided that "[t]he definition of 'private mobile service' is amended to make clear that the term includes neither a commercial mobile service nor the functional equivalent of a commercial mobile service."^{12/}

5. Functional Equivalency Test

The Commission seeks comment on whether its existing "functional equivalency" test is appropriate for determining whether a mobile service is the functional equivalent of a

^{12/} Conference Report, at 496 n.1.

commercial mobile service. Notice, at para. 33. This existing test requires the Commission to examine both the nature of the services and customer perception of the functional equivalency of those services.^{13/} The key to this test is customer perception.

Mtel supports this form of test for determining functional equivalency. Customer perception is the most accurate indicator of functional equivalency. Moreover, there already exists a considerable body of case law interpreting this existing standard, and it would be both unnecessary and counterproductive to devise a new criterion.

B. Regulatory Classification of Services

Consistent with the positions set forth above and, in particular, with Congress's desire to have all mobile services that are indistinguishable from existing common carrier services recognized as commercial mobile service, Mtel urges that the Commission classify as commercial mobile radio services several services currently classified as private. These include (a) 800 MHz and 900 MHz SMR services, both wide-area and traditional SMRs; (b) 220 MHz SMR service, to the extent that any capacity can be

^{13/} See AT&T Communications, Revisions to Tariff FCC No. 12, CC Docket No. 87-568, Memorandum Opinion and Order on Remand, 6 FCC Rcd 7039 (1991), affirmed, Competitive Telecommunications Assoc. v. FCC, slip op., No. 92-1013 (D.C. Cir. Aug. 6, 1993); Ad Hoc Telecommunications Users Comm. v. FCC, 680 F.2d 790 (D.C. Cir. 1982); American Broadcasting Cos. v. FCC, 663 F.2d 133 (D.C. Cir. 1980); Western Union International, Inc. v. FCC, 568 F.2d 1012 (2d Cir. 1977), cert. denied, 436 U.S. 944 (1978); American Trucking Assoc. v. FCC, 377 F.2d 121 (D.C. Cir. 1966), cert. denied, 386 U.S. 943 (1967).

utilized to provide for-profit interconnected service; and (c) private carrier paging service, including those utilizing store-and-forward systems.^{14/}

Mtel also urges that mobile services authorized pursuant to Parts 22 and 25 of the Commission's rules, including cellular, air-ground, paging and satellite services, be classified as commercial mobile service.

Finally, Mtel urges that the classification of PCS services be based upon the types of service to be provided. As the Commission properly observed in its Notice, at para. 45, while most broadband and many narrowband PCS applications are expected to provide commercial mobile service, there is no legislative or regulatory prohibition on the use of PCS to provide private mobile service. Accordingly, it is the nature of the services provided -- and not any regulatory feat or the "self-designation" of a provider -- that should dictate classification.

C. **Application of Title II to Commercial Mobile Services**

1. **Governing Authorities**

Section 332(c)(1)(A) provides that any person providing commercial mobile service be treated as a common carrier subject to the requirements of Title II of the Communications Act. At the

^{14/} It is apparent that Congress contemplated the reclassification of some private land radio services as commercial mobile service. Section 6002(c)(2)(B) of the Budget Act specifically grandfathers existing private paging services as private mobile services for three years after enactment.

same time, Sections 322(c)(1)(A) and 332(c)(1)(C) authorize the Commission to promulgate regulations exempting some or all commercial mobile services from all provisions of Title II other than Sections 201, 202 and 208.^{15/}

Pursuant to Section 332(c)(1)(A), the Commission is empowered to provide "differential regulation of providers of commercial mobile services" as may be appropriate. Accordingly, the Commission has sought comment on the appropriateness of it establishing regulation requirements that differ for individual service providers within a class.

Section 332(c)(1)(A) permits the Commission to forbear from imposing Title II regulation upon some or all commercial mobile service providers only if (a) 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 area just and reasonable and are not unjustly and unreasonably discriminatory; (b) enforcement of such provision is not necessary for the protection of consumers; and (c) specifying such provision is consistent with the public interest.

Section 332(c)(1)(C) provides that, in evaluating wherein lies the public interest, the Commission must consider "whether the proposed regulation...will promote competitive market conditions,

^{15/} Section 201 generally prohibits unreasonable practices; Section 202 generally prohibits unreasonable discrimination;

including the extent to which such regulation...will enhance competition among providers of commercial mobile services...."

2. Forbearance of Tariff Regulation of Commercial Mobile Service Generally

In its Notice, the Commission tentatively concluded that the level of competition in the commercial mobile services marketplace is sufficient to permit the Commission to forbear from tariff regulation for commercial mobile services.^{16/} Mtel wholeheartedly supports the Commission's tentative conclusion. Such forbearance merely reflects the existing competitive nature of wireless services, as the Commission has recently recognized in its PCS proceeding. There, the Commission properly recognized the continuing (indeed growing) level of competition in the commercial mobile service area when it observed that PCS providers will be subject to substantial competition from a wide range of radio-based services currently offered.^{17/} Mtel also observes that the Commission's position is wholly consistent with numerous prior Commission decisions over the last decade, both in the area of mobile services and in other common carrier arenas. For example, in wireline proceedings (where there is considerably less competition than exists in mobile services) the Commission has

^{16/} The Commission's language proposed forbearance of tariff regulation "to end users". Notice at para. 62. Mtel interprets that terminology to include forbearance of the regulation of mobile services ultimately used by end users, as opposed to being used for external communications purposes.

^{17/} 7 FCC Rcd 5676 (1992).

repeatedly recognized that rate regulation is not only unnecessary, but can be counterproductive.^{18/} In the area of mobile services, as far back as 1981, when cellular service was first authorized, the Commission observed that sufficient competition exists to preclude the need for the Commission to become involved in rate regulation.^{19/} Similarly, the Commission has already found other common carrier mobile licensees, which are primarily engaged in the provision of paging service, to be non-dominant^{20/} in their provision of interstate services.^{21/}

^{18/} See, e.g., the Commission's numerous decisions in its Competitive Common Carrier proceeding, including the following: Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979), First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Report and Order, 91 FCC 2d 59 (1982), on recon., 93 FCC 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 FCC 2d 554 (1983); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984), on recon., 59 R.R.2d 543 (1985); Sixth Report and Order, 99 FCC 2d 1020 (1985), rev'd, MCI v. FCC, 795 F.2d 1186 (D.C. Cir. 1985).

^{19/} See Cellular Communications Systems, 86 FCC 2d 469, recon. 89 FCC 2d 58 (1982).

^{20/} Non-dominant carriers, by definition, are those that lack the power to violate Sections 201 or 202 of the Act without simply losing customers. See Competitive Carrier Notice, 77 FCC 2d at 334-338; First Report, 85 FCC 2d at 31 (1980).

^{21/} 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).

Given the existing competitive nature of mobile services, and the fact that such competition has flourished in the absence of rate regulation, it appears clear that rate regulation is unnecessary and that the public can be best served without it.

3. Forbearance of Tariff Regulation of Nationwide Paging

In view of the discretion accorded to the Commission to establish different regulatory arrangements for different categories of commercial mobile service providers, and in view of Mtel's long experience in the area of nationwide paging,^{22/} Mtel believes it to be appropriate to highlight the competitive nature of nationwide paging, including certain of the findings that the Commission has already made on this matter.

From the inception of the common carrier network paging service, it has been clear that this is a very competitive field. The Commission specifically 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. Mobile Radio Service, 93 FCC 2d 908 (1983). It also recognized that these were also two nationwide private radio systems for which spectrum was allocated at that same time. Id. Moreover, the Commission created a common carrier nationwide paging regulatory structure in which all qualified radio

^{22/} Mtel's subsidiary, SkyTel Corporation, has successfully operated one of three common carrier nationwide paging systems for several years.

common carriers were permitted to become affiliated with the nationwide licensees by virtue of their acting as nationwide operators. Id.

Shortly after nationwide service was established, the Commission completed a rulemaking proceeding by focusing on the state of competition in nationwide paging and the need for rate regulation. See, Third Report and Order, 97 FCC 2d 900 (1984). There, the Commission noted that there would be more than ample competition in nationwide paging. The Commission emphasized that, in addition to there being three authorized nationwide common carrier providers, there were also a number of alternative services that would compete with nationwide. These include de facto nationwide networks created by connecting local radio common carrier paging systems, or by connecting other forms of communications systems and using them to provide wide-area paging service. They also include the two private radio nationwide license allocations and nationwide systems utilizing FM subcarrier frequencies. As a result of the considerable competition in the nationwide service, the Commission preempted rate regulation of nationwide service by states and municipalities and determined to forbear from regulating rates of this nationwide service. Id.

In view of the considerable existing competition that has already been found to exist in the nationwide paging service, and the additional competition that PCS will bring to it, there is no question but that the Commission can, and should, exercise the

discretion afforded to it by Section 332(c)(1)(A) of the Act and forbear from the regulation of rates and changes for this service.

4. Forbearance of Other Title II Provisions

Title II encompasses a variety of regulations governing matters other than rates. While the Commission is not empowered to refrain from enforcing certain of those provisions,^{23/} Section 332(c)(1)(A) of the Act provides the Commission with the discretion not to enforce the remaining provisions of Title II. Accordingly, the Commission requested comment on whether it should forbear from enforcing the following specific Title II provisions: Section 210 (franks and passes), Section 212 (interlocking directorates), Section 213 (valuation of property), Section 214 (termination of services), Section 215 (transactions relating to services), Section 218 (inquiries into management), Section 219 (annual and other reports), Section 220 (prescribed accounting systems and depreciation schedules), and Section 221 (special provisions relating to telephone companies).^{24/}

Mtel urges the Commission to forbear from regulating each of the above provisions, and supports the Commission's proposal not to forbear from enforcing those Title II provisions specifically

^{23/} These include Section 201; 202 and 208. See n. 15, supra.

^{24/} The Commission also tentatively concluded that it would not forbear from enforcing those Title II provisions (i.e., Sections 206, 207, 209, 216, and 217) associated with the complaint remedy set out in Section 208 and those recently-adopted provisions (i.e., Sections 223, 225, 226, 27, and 228) providing specific protections to consumers.

enumerated by the Commission (See n. 24, supra), that are either associated with the Commission's complaint process or provide specific protections for consumers.

Such forbearance from regulation of Title II would be entirely consistent with the criteria set forth in Section 332(c)(1)(A) of the Act. Enforcement is not necessary to protect consumers and the public interest generally. Nor is it necessary to assure that consumers are not subjected to unfair or discriminatory pricing.

The provisions in question were included in the Act at a time when there was no genuine competitive mobile services. Indeed, they were designed to facilitate regulation of wireline-based monopoly services, without meaningful regard ever being given to their applicability to mobile services.

Mtel also observes that many of these provisions have never been actively enforced with respect to mobile service providers, and that in the absence of such enforcement mobile service has evolved into one of the most competitive of all common carrier service areas.

In view of all of the above, Mtel urges the Commission to exercise its discretion and to refrain from the enforcement of those Title II provisions listed in its Notice that are not related to the complaint process and specific consumer protections.

IV. Conclusion

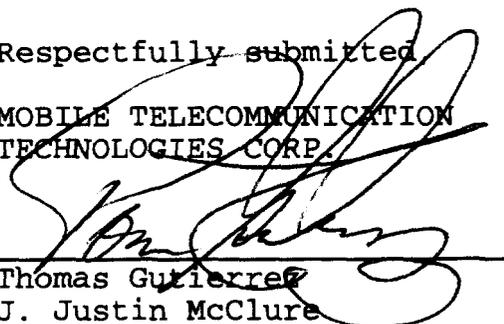
In enacting the Omnibus Budget Reconciliation Act, Congress made clear its intention to establish regulatory parity pursuant to

which carriers providing similar services would be subjected to the same regulation. Towards this end, Congress mandated that the Commission establish rules and regulations pursuant to which all providers of services to the public would be recognized as commercial mobile service providers. Mtel urges the Commission to establish a broad definition of commercial mobile service to facilitate Congressional goals.

Congress has also recognized that the Commission should be accorded discretion to refrain from enforcing certain provisions of Title II. By these comments, Mtel urges the Commission to utilize such discretion and to forbear from enforcing Title II provisions, other than those relating to consumer protection, the complaint process, and those specific provisions over which no discretion was afforded to the Commission. Utilizing such discretion would further the public interest and be wholly consistent with Congress' intent, for the reasons set forth herein.

Respectfully submitted,

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