

RECEIVED

NOV - 8 1993

DOCKET FILE COPY ORIGINAL

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

To: The Commission

COMMENTS ON THE NOTICE OF PROPOSED RULE MAKING

NEXTEL COMMUNICATIONS, INC.

Robert S. Foosaner, Esq.
Senior Vice President -
Government Affairs

Lawrence R. Krevor, Esq.
Director - Government Affairs

601 13th Street, N.W.
Suite 1110 South
Washington, D.C. 20005
(202) 628-8111

November 8, 1993

No. of Copies rec'd
List ABCDE

044

TABLE OF CONTENTS

SUMMARY	i
I. INTRODUCTION	1
II. BACKGROUND	3
III. DISCUSSION	5
A. Commercial Mobile Service	7
1. "For-Profit" Service	7
2. "Interconnected Service" and "Public Switched Network"	9
3. "Service available to the public" or "effectively available to a substantial portion of the public"	11
B. Private Mobile Service	12
C. Classification of Mobile Communications Services . .	14
1. Existing Services	14
2. Personal Communications Services	17
3. Dispatch by Common Carriers	18
E. Application of Title II to Commercial Mobile Service	20
1. Forbearance Policy	20
2. Commercial Mobile Affiliates of Dominant Carriers	22
F. Interconnection	24
IV. CONCLUSION	26

SUMMARY

This rule making implements Section 6002(b) of the Omnibus Budget Act of 1993 (the "Budget Act") amending Sections 3(n) and 332 of the Communications Act of 1934 (the "Act") to establish a new regulatory structure for mobile communications services.

Congress' overriding purpose in the Budget Act amendments was to require that all "functionally equivalent" or "like" mobile service be regulated in a similar manner. Toward this end, Nextel Communications, Inc. ("Nextel" formerly Fleet Call, Inc.) supports the definitions proposed in the Notice of Proposed Rulemaking (the "Notice") to classify all "for-profit," interconnected services offered to the general public -- including cellular, Enhanced Specialized Mobile Radio ("ESMR") systems and Personal Communications Services ("PCS") -- as "commercial mobile service."

Revised Section 332 provides for regulating commercial mobile services as common carrier services under Title II of the Act, provided that the Commission may forbear from applying certain provisions of Title II, except for Sections 201, 202 and 208, unless necessary to assure that rates and terms are just and reasonable and not unreasonably discriminatory, or to protect consumers. Forbearance contemplates that there be sufficient competition among commercial mobile services to protect consumers without these regulations. Accordingly, the Commission is authorized to create classes or categories of commercial mobile services and to promulgate different regulations for such classes

and for individual services providers within a class.

Services that are not commercial mobile services or the "functional equivalent" thereof, essentially not-for-profit services used by government, internal business communications, and "for-profit" services of limited capacity and geographic coverage, may be classified as "private mobile services." The legislative history of the Budget Act amendments makes clear that the statutory definition of private mobile services excludes any service that the Commission determines is "functionally equivalent" to a commercial mobile service and should be so classified. By the same token, the Commission may classify as private a "for-profit" interconnected service that is not the "functional equivalent" of or competitive with a commercial mobile service. The Commission should critically exercise this discretion to effectuate Congress' directive that services that are "functionally equivalent," i.e., essentially substitutable from the consumer's viewpoint, are subject to similar regulation.

Because there is significant competition among commercial mobile service providers, which will be increased by the emergence of PCS and other new services, Nextel supports the Commission's conclusion that it should forbear from applying Sections 203, 204, 205, 211 and 214 to commercial mobile service providers. Further, because reclassified ESMR providers lack market power, the Commission should forbear from applying to ESMR carriers all Title II provisions other than Sections 201, 202 and 208.

Nextel notes that the commercial mobile service classification

includes carriers that offer similar services, but are at very different points in developing their businesses. For example, it includes cellular carriers with ten years of operating headstart competing with new entrant ESMR providers and future PCS services. As revised, Section 332 mandates that the Commission adjust the Title II regulatory mix to assure that new entrant ESMR providers have a legitimate opportunity to become effective commercial mobile service competitors. The public interest is best served by regulation, or forbearance from regulation, that promotes competition in the mobile communications marketplace.

The Notice asks whether the prohibition on offering dispatch applicable to existing common carriers should be modified or eliminated. Nextel believes that the dispatch prohibition should be modified only after the three-year transition period for reclassified private carriers to adjust their operations to the regulatory and competitive realities of commercial mobile service regulation and after the Commission eliminates private carrier technical requirements that do not apply to functionally equivalent common carriers, as required by the Budget Act amendments.

Nextel strongly supports the Commission's proposal to preempt state regulation of the right to interconnection and the types of interconnection available to commercial mobile service carriers. This is essential to safeguard the federal objective that functionally equivalent mobile providers are regulated in the same fashion. Every commercial mobile service provider is entitled to obtain interconnection that is reasonable for the particular mobile

system and no less favorable than that offered to any other customer or carrier; i.e., comparable rates, terms and conditions for comparable interconnection services. In addition, the Commission should adopt safeguards to assure that dominant common carriers with commercial mobile service affiliates cannot discriminate in favor of their affiliate operations.

Nextel points out that the Notice fails to address rule revisions necessary to assure that the technical requirements for reclassified private services are comparable to those pertaining to similar common carriers services. These include, inter alia, loading standards, the "40 Mile Rule," co-channel interference standards, and individual site licensing which must be addressed within one year of the Budget Act amendments.

Finally, as noted above, revised Section 332 provides a three-year transition period during which existing private land mobile services will continue to be so regulated, except for the foreign ownership provisions of the Act. Thus, the decisions made in this proceeding concerning reclassification of existing private services will not become effective until three years after the date of enactment of the Budget Act.

RECEIVED

NOV - 8 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of)
)
Implementation of Sections 3(n)) GN Docket No. 93-252
and 332 of the Communications)
Act)
)
Regulatory Treatment of Mobile)
Services)

To: The Commission

COMMENTS ON THE NOTICE OF PROPOSED RULE MAKING

I. INTRODUCTION

Nextel Communications, Inc. ("Nextel" formerly Fleet Call, Inc.), pursuant to Section 1.415 of the Rules and Regulations of the Federal Communications Commission (the "Commission"), hereby respectfully submits its Comments on the Notice of Proposed Rulemaking (the "Notice") in the above-captioned proceeding.^{1/}

This rule making was initiated to implement Title VI, Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") which amended Section 3(n) and 332 of the Communications Act of 1934 (the "Act") to establish a comprehensive new structure for regulating mobile communications services. In general, the Budget Act amendments classify mobile radio services as either "commercial mobile service" or "private radio service." Commercial mobile services will be regulated as common carriage,

^{1/} 58 F.R. 53169, October 14, 1993.

although the Commission is authorized to exempt or "forbear" from applying any of the provisions of Title II of the Act to commercial mobile carriers, except for Sections 201, 202 and 208.^{2/} Private mobile services will not be subject to common carrier regulation under Title II of the Act. As amended, Section 332(c)(3) preempts state and local rate and entry regulation of both commercial and private mobile services.

The Budget Act directs the Commission to commence a rule making to implement these revisions and to define the regulatory treatment of new Personal Communications Services ("PCS"). Accordingly, the Commission seeks comment on: (1) how to interpret and apply the new statutory definitions of "commercial mobile service" and "private mobile service"; (2) how to classify and treat existing mobile communications providers under these definitions; (3) how to classify future services such as PCS; (4) the scope of Title II common carrier regulation that should be applied to commercial mobile services; and (5) the transitional measures needed to implement the new legislation.

The Budget Act establishes a three-year transition period during which any existing private land mobile service will continue to be regulated as a private mobile service, except for the foreign ownership provisions of Section 332(c)(6). This is designed to

^{2/} Section 201 requires common carriers to provide service upon reasonable request and upon reasonable terms, and to interconnect with other carriers upon order by the Commission. Section 202 forbids unjust or unreasonable discrimination. Section 208 provides for the filing of complaints to enforce these and any other Title II obligations of a common carrier.

give existing private service providers a reasonable opportunity to modify their operations to conform to the commencement of Title II common carrier regulation as a commercial mobile service.^{3/} Thus, the decisions made in this proceeding concerning reclassification of existing private services will not be effective for a minimum of three years from the date of enactment of the Budget Act.

The new statute also requires the Commission to revise its rules regarding private land mobile services to assure that the technical requirements for private services that are reclassified as common carrier services are comparable to those pertaining to similar common carrier services. The Notice does not address these technical considerations, e.g., loading standards, the "40 Mile Rule," co-channel interference standards, individual site licensing, as they apply to reclassified services. The Commission must address these technical requirements within one year of enactment of the Budget Act.^{4/}

II. BACKGROUND

As a leading licensee of SMR systems, Nextel has extensive experience and expertise in providing mobile communications services. Nextel and its subsidiaries provide mobile communications for approximately 200,000 mobile units on a daily basis on both 800 MHz and 900 MHz SMR systems. Nextel provides

^{3/} For example, private carriers typically have individualized contracts with their subscribers, which must be reconciled with the indiscriminate holding out obligations of common carriers.

^{4/} See Section 332(d)(3)(B).

mobile communications services that help Americans do their jobs more efficiently and effectively.

Moreover, Nextel was the first SMR licensee to seek and obtain authority to implement advanced, wide-area digital mobile communications systems. On February 13, 1991, the Commission authorized Nextel to construct and operate 800 MHz Enhanced Specialized Mobile Radio ("ESMR") systems in Chicago, Dallas, Houston, Los Angeles, New York and San Francisco.^{5/} These ESMR systems incorporate innovative state-of-the-art technology, including digital speech coding, Time Division Multiple Access ("TDMA") transmission and frequency reuse to create in excess of 15 times the customer capacity of existing SMR systems while providing improved transmission quality and coverage and enhanced services. Nextel successfully initiated service on its first ESMR system in Los Angeles last August and will expand to San Francisco and other markets in early 1994.

Through its merger with Dispatch Communications, Inc. and other acquisitions, Nextel will hold authorizations to construct and operate digital wide-area ESMR systems in the top ten markets in the Nation with a combined population of over 100 million persons. Thus, as the pioneer in developing and providing digital, wide-area systems, Nextel has a substantial interest in the outcome of this proceeding and offers the following comments.

^{5/} In Re Request of Fleet Call, Inc. for Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, 6 FCC Rcd 1533 (1991) (the "Fleet Call Waiver Order"), recon. den. 6 FCC Rcd 6989 (1991).

III. DISCUSSION

The Notice states that revised Section 332 governs the regulation of all mobile communications services. It establishes two service classifications: "commercial mobile service" and "private mobile service." Section 332(d) defines commercial mobile service as any mobile service ". . . 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, as specified by regulation by the Commission." Private mobile service means ". . . any mobile service that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by the Commission." As the statutory language indicates, the Commission is specifically directed to define the terms contained in these definitions.

In creating these two classifications, Congress' overriding intention was that essentially substitutable or "like" mobile services be regulated similarly; i.e., that "functionally equivalent" services be regulated in a similar fashion.^{6/} The legislative history makes clear that the Commission has discretion

^{6/} H.R. Rep. No. 102-103, 103rd Cong., 1st Sess. (1993) (the "Conference Report") at p. 496; See Statement of Congressman Fields in support of the Communications Licensing and Spectrum Allocation Improvement Provisions of the Budget Reconciliation Act, Congressional Record, H6164, August 5, 1993. Congressman Fields stated that ". . . this title outlines the regulatory treatment for new commercial mobile services, such as PCS, in order to ensure that like services will be regulated similarly. See also Report of the Committee on the Budget House of Representatives to accompany H.R. 2264, Report No. 103-111, May 25, 1993 at p. 259.

to apply these classifications to both existing and future mobile services to achieve "common sense" results consistent with Congressional intent. The Commission can classify a "for-profit" service offered to the public and interconnected with the public switched network -- the statutory indicia of commercial mobile service -- as a private mobile service if, in fact, it is not "functionally equivalent" to commercial mobile service because it does not incorporate channel reuse and is available in only a limited geographic area.^{7/} Similarly, the Commission may find that a service that does not include each of the statutory indicia of commercial mobile service should be so classified if, in practice, it offers customers a competitive or "functionally equivalent" alternative to a commercial mobile service.

Congress also intended that the Commission implement Section 332 in ways that foster a competitive market for mobile communications services. The Commission is expressly authorized to forbear from applying the discretionary Title II provisions to commercial mobile services unless necessary to assure that rates, practices, terms and conditions are just and reasonable and not unreasonably discriminatory, or to protect consumers.^{8/} The Commission retains discretion to fashion differing regulatory requirements for services within the same classification, consistent with the need to protect consumers and the public

^{7/} Conference Report at p. 496.

^{8/} Sections 332(c)(1)(A) and 332(c)(1)(C) of the Act; Conference Report at p. 491.

interest. As revised, Section 332 permits the Commission to regulate mobile service providers on a service-specific basis with "differential" levels of regulation for individual providers or groups of providers within the overall commercial mobile service classification.

The Commission requests comment on the definitions of the individual elements of the new statutory classifications. Nextel emphasizes that these definitions must be considered in the context of Congress' overriding objective in revising Section 332 of the Act, i.e., that "like" or equivalent services be regulated in a similar manner. This will assure that the Commission reaches common sense results in classifying both existing and future mobile services to promote a robust and competitive mobile communications marketplace.

A. Commercial Mobile Service

1. "For-Profit" Service

As stated above, the statute defines commercial mobile service as any mobile service that is provided for profit and that 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. The Notice asks for comment on when a mobile service is a "for profit" service, and for comment of how to defined "interconnected service" and "service to the public" or "a substantial portion of the public" and "public switched network."

Nextel concurs that the "for-profit" element of the definition

is intended to exclude services not primarily offered on a "for-profit" basis from classification as commercial mobile services.^{9/} Government mobile communications, non-profit public safety services and mobile radio services operated by a business solely for its private, internal use are not commercial mobile services.

In determining whether a particular service is offered "for-profit," Section 332(d) contemplates viewing the service as a whole, i.e., in terms of its functionality from the customer's perspective.^{10/} If an interconnected mobile service is offered to the public on a "for-profit" basis, and is a reasonable substitute for other "for-profit" commercial mobile services, the principle of "like" regulation for "like" services requires that it be classified as a commercial mobile service even if a subcomponent of the overall service is passed through to customers on a non-profit basis.^{11/}

The Commission also asks how the "for-profit" test should be applied to private shared radio systems currently authorized under Part 90 and internal systems offering excess capacity on a for-

^{9/} Notice at para. 11.

^{10/} See Id. at para. 12.

^{11/} This consideration is most relevant to SMR providers who, under the previous version of Section 332, were considered private carriers so long as they did not resell for a profit the interconnected services or facilities of exchange or interexchange common carriers. Under the Budget Act amendments, regulatory status now turns on the provision of competitive, "for-profit" interconnected services, not resale of interconnected services.

profit basis.^{12/} Shared and multiple-licensed systems generally do not serve a substantial portion of the public on a "for-profit" basis. From a functional perspective, these systems are not competitive with or reasonable substitutes for cellular or other mobile telephone services as they do not employ frequency reuse technologies or offer wide-area services.^{13/} Accordingly, they should not be classified as "for-profit" commercial mobile systems.^{14/}

2. "Interconnected Service" and "Public Switched Network"

Based on analysis of the legislative history of the Budget

^{12/} Notice at paras. 12-13. Shared or multiple-licensed systems offer dispatch or limited two-way mobile radio services to small groups of cooperating users with compatible communications needs. Typically, in such sharing arrangements, a licensee offers excess capacity to unlicensed eligible users or each user of the repeater facility is individually licensed. Unlike SMRs, they are not licensed to an entrepreneur whose primary business is providing "for-profit" communications services, although they may be operated on a for-profit basis.

^{13/} This analysis also applies to private internal business systems selling excess capacity on a "for-profit" basis. As a practical matter, these licensees cannot offer service indiscriminately to all who request it -- an essential requirement of common carriage. They have limited capacity and must assure that any use of excess capacity is compatible with their primary internal business communications. If, however, an internal business system has sufficient excess capacity to offer functionally equivalent services competitive with commercial mobile services, it should be regulated as a commercial mobile common carrier service.

^{14/} The Notice also asks whether parties to a non-profit sharing arrangement may employ a "for-profit" entity to manage the system without becoming a "for-profit" service. It also asks whether such a manager should be regulated as a commercial mobile service provider. Employment of a "for-profit" manager by the licensees of a shared system does not change the basic character of the service, as discussed above. These systems are not, in terms of scope, technology and capacity, functionally equivalent to a commercial mobile service.

Act, an "interconnected service," for purposes of defining commercial mobile service, is a mobile service which provides its subscribers with the ability on a real-time basis to directly initiate and receive messages to and from other parties accessible through the public switched network.^{15/} It is the functionality or capability of accessing subscribers to other landline or wireless systems through the public switched network that is determinative of an interconnected service offering -- not the mere physical interconnection of a mobile service with landline exchange or interexchange switched services. A mobile service offering its subscribers a "dial tone" enabling direct dialing of any number accessible through the public switched network is an interconnected service.

As to "public switched network," the Commission tentatively concludes that this term is essentially similar to the term "public switched telephone network" which has been defined as the local and interexchange common carrier switched telephone network, encompassing both the wireless and wireline facilities of such carriers.^{16/}

Nextel does not disagree with this definition; however, the Commission should consider that new wireless communications

^{15/} The Senate Amendment to the original House bill changed the definition of commercial mobile service to contemplate that "interconnected service" be broadly available to the public, rather than simply being interconnected in some aspect. The Conference Committee adopted the Senate Amendment on this point. See Conference Report at p. 496.

^{16/} Notice at para. 22.

systems, such as PCS, may in some cases eventually become substitutes for current wireline local exchange telephone facilities. Part 22 carriers, such as cellular radio systems, are today considered co-carriers with the local exchange telephone company because they generally provide local, intrastate exchange telephone services.^{17/} Other wireless systems, such as ESMR systems, are providing similar co-carrier services. In the not-to-distant future, telephony will consist of "networks of networks" linking together landline, fiber, wireless, microwave and satellite systems to offer true personal mobility communications capabilities. These developments suggest that "public switched network" should be defined to include any services -- whether landline or wireless -- offered on a co-carrier basis to enhance or extend the reach and functionalities of traditional local exchange or interexchange facilities.^{18/}

3. "Service available to the public" or "effectively available to a substantial portion of the public"

The requirement that a commercial mobile service be available "to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public" is obviously met by a service offered to the public without restriction. The Commission tentatively concludes that service

^{17/} See Need to Promote Competition for Radio Common Carriers, 2 FCC Rcd 2910, 2918 at n.27 (1987).

^{18/} Therefore, in defining "public switched network" the Commission should consider a definition that encompasses the capability to reach any subscriber or equipment addressable through the North American Numbering Plan.

available to "a substantial portion of the public" is intended to capture some existing private radio services that, despite eligibility limitations, are effectively available to the public at large.^{19/} This effectuates the Congressional intent that similar services generally available to the public be regulated as commercial mobile services.

On the other hand, many traditional private mobile services are targeted to limited or specialized user groups and are not suitable or available for use by the general public or even a substantial portion of the public regardless of whether they include interconnected service. The legislative history recognizes that effective limits on capacity and geographic coverage are valid indicia of services that are not functionally equivalent to commercial mobile service.^{20/} The Commission's rules should recognize, therefore, that some services that otherwise meet the "for-profit" and interconnection tests are not properly classified as commercial mobile if they are not "functionally equivalent" to a competing commercial mobile service.

B. Private Mobile Service

Section 332(d)(3) defines "private mobile service" as any

^{19/} For example, the SMR and private carrier paging eligibility rules today impose virtually no practical limits on the availability of these services to the general public.

^{20/} Conference Report at p. 496. For example, a five-channel SMR system in a rural area, even if interconnected, is limited in both subscriber capacity and geographic coverage such that it must of necessity be marketed to specialized groups and cannot offer effective competition with a nationally compatible cellular radio service.

mobile service that is not a commercial mobile service or its functional equivalent. The Notice discusses two interpretations of the statutory language. First, a mobile service would be private if it fails to meet the statutory definition of a commercial mobile service or is not "functionally equivalent" to a commercial mobile service. Thus, a service meeting the literal definition of commercial mobile service could nonetheless be classified as private if not functionally equivalent thereto. Under the second interpretation, a mobile service that does not meet the statutory test of a commercial mobile service could still be so classified if the Commission determines that it is a functional equivalent of commercial mobile service.

Nextel submits that both interpretations are correct and effectuate Congress' directive that functionally equivalent or substitutable services be subject to similar regulation. The Conference Report expressly permits the Commission to classify as private a "for-profit," interconnected service that is not the functional equivalent of a commercial mobile service (because it is not available to the public or otherwise not similar).^{21/} By the same token, the statutory definition of private mobile service excludes services that the Commission determines are "functionally equivalent" to commercial mobile service and should be so classified. The Commission should look critically at services and service providers that attempt to conceal their functional similarity with a commercial mobile service offering in the hopes

^{21/} Conference Report at p. 496.

of evading Title II regulation.

C. Classification of Mobile Communications Services

1. Existing Services

The Notice asks commenters to identify existing private radio services which should be reclassified as commercial mobile services as well as existing common carrier services reclassifiable as private mobile services. There is no debate that existing private not-for-profit services are private mobile services, including government, public safety, non-commercial Part 90 services (those used only for a licensee's internal communications),^{22/} private mobile marine and aviation services and personal mobile radio services.

As discussed above, existing Part 90 "for-profit" services offering interconnected service to a substantial portion of the public are commercial mobile services under the new statute, including any wide-area SMR or "ESMR-type" systems, whether operating at 220 MHz, 800 MHz or 900 MHz, as well as any other "for-profit" private carrier services that are "functionally equivalent" to wide-area or other advanced SMR systems.

Traditional dispatch-only SMRs, i.e., systems that offer limited service coverage and do not use frequency reuse technologies to increase subscriber capacity, present a different question. An individual dispatch-only SMR system that is not part

^{22/} This would include non-commercial 220 MHz systems to be used for meeting licensees' internal communications needs. To the extent, however, that such licensees sell their excess capacity on a "for-profit" basis in competition with commercial mobile services, they should be regulated as a commercial mobile service.

of a wide-area advanced technology network is not functionally equivalent to cellular, ESMR or other commercial mobile services and may be classified as private under Section 332.^{23/} On the other hand, in two pending rule makings, the Commission is considering permitting SMR licensees to obtain a single license authorizing wide-area service throughout large geographic areas.^{24/} All services provided pursuant to these licenses would presumptively be commercial mobile services.

The Commission asks whether a wide-area licensee providing non-interconnected service "entirely separate from the public switched network," or one primarily dedicated to specialized user groups should be classified as private.^{25/} As discussed above, revised Section 332 requires that any service "functionally equivalent" to a commercial mobile service must be so classified. To the extent a wide-area licensee provides a service competitive with a commercial service from the customer's viewpoint, it should

^{23/} As indicated above, the prototype five-channel stand-alone SMR station in a rural area, even if interconnected, should be regulated as a private mobile service.

^{24/} Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, First Report and Order and Further Notice of Proposed Rule Making, 8 FCC Rcd 1469 (1993); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Notice of Proposed Rule Making, 8 FCC Rcd 3950 (1993).

^{25/} As an example, the Commission cites an SMR offering a wide-area 900 MHz data service that is not physically interconnected with the public switched telephone network suggesting that it should therefore be classified as a private mobile service.

be classified as a commercial mobile service.

As to paging services, the Commission states that both private carrier and common carrier paging services are generally provided "for-profit" and without significant restrictions on eligibility, service area or capacity. It suggests, therefore, that whether they should be classified as commercial mobile services depends on whether they are providing interconnected service or are the "functional equivalent" of a commercial mobile service.^{26/}

Regulatory distinctions based on whether a particular type of paging technology, e.g., "store-and-forward" services, constitutes interconnected service are no longer relevant to regulatory status under the new statute.^{27/} In revised Section 332(c)(2)(B), Congress specifically contemplated reclassification of private carrier paging services to commercial mobile regulation by grandfathering them under private regulation for three years. The fact is that there are no longer any real differences between private paging and common carrier paging systems.^{28/} Both offer interconnected service to enable subscribers to be reached by any user of the public switched network. These services are functionally equivalent to each other, and competitive with the

^{26/} Notice at para. 39 and n. 53.

^{27/} This analysis focused on whether the private carrier paging licensee was operating a shared-use system subject to the restraints on resale of interconnected service contained in the prior version of Section 332 of the Act.

^{28/} See e.g., Amendment of the Commission's Rules to Permit Private Carrier Paging Licensees to Provide Service to Individuals, 8 FCC Rcd. 4822 (1993) at paras. 10-12.

messaging capabilities of other commercial mobile services, such as cellular and ESMR systems. Thus, paging services must be regulated as commercial mobile services.

2. Personal Communications Services

In paragraph 45 of the Notice, the Commission states,

"We believe the primary objective of Congress in revising Section 332 was to ensure that such [PCS] services would be regulated as commercial mobile services."

In floor debate on the House Energy and Commerce Committee Bill, on H.R. 2264, Congressman Markey stated,

"A fundamental regulatory step that this legislation takes is to preserve the core principle of common carriage as we move into a new world of services such as PCS. . . The fact that this legislation ensures PCS, the next generation of communications, will be treated as a common carrier is an important win for consumers . . . and for those who seek to carry those core notions of nondiscrimination and common carriage into the future."^{29/}

The legislative history unambiguously demonstrates that Congress intended to regulate PCS as a commercial mobile service. There is no suggestion in the legislative history that some PCS services could be classified as private mobile services. The Commission's proposal to define PCS to include both commercial mobile and private mobile applications, and to allow all PCS licensees to choose which service to provide, is inconsistent with Congress' intent in revising Section 332.^{30/}

^{29/} Congressional Record, H3287, May 27, 1993.

^{30/} Moreover, the self-designation option for PCS licensees, while attractive prior to the Budget Act, would be difficult to administer consistent with the revised statutory provisions. The Notice raises a number of difficult questions concerning whether
(continued...)

The Notice expresses concern that uniformly regulating PCS as a commercial mobile service could be inconsistent with the Commission's desire that PCS provide a diverse array of innovative communications services. On the contrary, Congress has expressly provided the Commission with sufficient regulatory discretion to alleviate any undue limitation on the development of innovative, consumer-responsive PCS services. Sections 332(c)(1)(A) and 332(c)(1)(C) permit the Commission to forbear from most Title II requirements where competitive market forces are sufficient to ensure reasonable rates and guard against unreasonably discriminatory practices. Moreover, the Commission is authorized to establish differing levels of regulation for different providers within the commercial mobile classification to promote competition. These are the statutorily permissible means to "customize" the PCS and ESMR regulatory structure to facilitate development of a rich diversity of PCS and ESMR services -- consistent with Congressional intent that PCS be regulated as a common carrier service.

D. Dispatch by Common Carriers

Prior Section 332(c)(2) of the Act prohibited common carriers from providing fleet dispatch service on common carrier radio

30/(...continued)
this approach would permit inefficient spectrum use. Additional concerns include under what circumstances licensees could change their regulatory selection, as well as the administrative burden and difficulty of keeping track of whether a licensee is providing PCS under one or the other or a combination of the two regulatory classifications.

spectrum.^{31/} The Budget Act retained the prohibition, but revised Section 332 to grant the Commission discretion to eliminate it, in whole or in part, through rule making. The Notice asks whether the public interest would be served by allowing existing common carrier commercial mobile service providers to offer dispatch service in the future.

Revised Section 332 provides a three-year transition period for reclassified private carriers to remain under private mobile service regulation as they reorder their operations consistent with common carriage regulatory obligations. The Commission has been directed to eliminate technical requirements currently imposed on private carriers that are not applicable to functionally equivalent common carriers. Eliminating the prohibition during this transition would be inconsistent with the revised Act. In addition, private carriers would be subjected to competition in the traditionally private land mobile dispatch market prior to creating regulatory parity and at the same time that they are attempting to adjust to the regulatory and competitive challenges of offering commercial mobile service.^{32/}

Thus, consistent with the statutorily-mandated transition period for existing private carriers subject to reclassification,

^{31/} In this context, dispatch communications are those that are transmitted between a dispatcher and one or more mobile stations, without passing through the mobile telephone switching facilities. See Section 22.2 of the Commission's Rules.

^{32/} The purpose of the transition period is to give reclassified private carriers time to adjust their practices and operations to the new regulatory scheme. See Statement of Mr. Markey, Congressional Record, H6163, August 5, 1993.