

Nextel recommends that the dispatch prohibition not be eliminated at this time. The Commission should defer this issue to a subsequent rulemaking after the three-year transition period.

E. Application of Title II to Commercial Mobile Service

1. Forbearance Policy.

As Nextel has discussed throughout these comments, Sections 332(c)(1)(A) and 332(c)(1)(C) and the Conference Report authorize creating classes or categories of commercial mobile services and permit the Commission to promulgate different regulations for such classes and for individual service providers within a class.^{33/} Specifically, the Commission may forbear from imposing certain Title II provisions on some or all commercial mobile service providers if:

(i) enforcement of such provision is not necessary to ensure that the charges, practices, classifications or regulations for that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not required to protect consumers; and

(iii) forbearance from applying such provision is consistent with the public interest.

In evaluating the public interest element of this test, Section 332(c)(1)(C) mandates that the Commission consider whether the proposed regulation will promote competitive market conditions and enhance competition among providers of commercial mobile

^{33/} Conference Report at p. 491; Notice at paras. 53 and 54.

services.^{34/} Thus, the decision to forbear must include consideration of whether it will promote competition among commercial mobile service providers.

The Notice tentatively concludes that competition in the commercial mobile service marketplace is sufficient to permit forbearance from tariff regulation of the rates for commercial mobile services provided to end users. The record demonstrates that there is significant competition among commercial mobile service providers, and that competition will be further enhanced with the emergence of PCS and other new services.^{35/}

Accordingly, for the reasons discussed in the Notice, Nextel supports the Commission's conclusion that it should forbear from applying Sections 203, 204, 205, 211 (Filing of Contracts) and 214 to commercial mobile service providers. The public interest is best served by regulation (or forbearance from regulation) that promotes competition in the mobile communications marketplace,

The Notice states that existing private carriers that may be reclassified as commercial mobile service providers are unlikely to have market power that would require them to be regulated differently from other mobile service providers.^{36/} Nextel agrees that ESMR and other reclassified private carriers lack

^{34/} Congress recognizes here that classifying all "for-profit" "functionally equivalent" services as common carriers may provide certain consumer protections, but does not, in-and-of-itself, create effective competition among them.

^{35/} See e.g., Notice at para. 63.

^{36/} Notice at para. 63.

market power requiring more stringent regulation; in reality, their lack of market power supports forbearance from virtually all discretionary Title II regulation at this time. The Commission should forbear from applying all Title II provisions other than Sections 201, 202 and 208 to this category of carriers.^{37/}

In addition, Nextel notes that the commercial mobile service will include carriers that offer similar services, but are at very different points in developing their businesses. The commercial mobile service will include cellular carriers with ten years of operating headstart competing with new entrant ESMR systems, as well as 2 GHz PCS operations that are only on the drawing board today. Consistent with the mandate of Section 332(c)(1)(C), the Commission must exercise its discretion to adjust the Title II regulatory mix to assure that these new entrants have a legitimate opportunity to become effective commercial mobile service competitors, and that consumers be protected against unreasonably discriminatory rates, charges and practices for commercial mobile services.

2. Commercial Mobile Affiliates of Dominant Carriers

The Notice observes that a number of commercial mobile service providers are affiliated with dominant common carriers. In other proceedings, the Commission has imposed safeguards on dominant

^{37/} Nextel recognizes that Sections 206, 207 and 209 are associated with the Section 208 complaint process and should be enforced as to all commercial mobile services. Nextel is continuing to review the additional Title II provisions discussed in paragraphs 67 and 68 of the Notice and may offer additional observations at a later date.

common carriers to prevent anti-competitive behavior as to unregulated services provided by their affiliates.^{38/}

The same considerations apply here and warrant application of safeguards to assure that dominant common carriers with commercial mobile service affiliates do not discriminate in favor of their affiliate operations. The provision by some Bell Operating Companies ("BOCs") of local landline, cellular, intraLATA (and in some cases interLATA intrastate) telephone service creates a potential for anti-competitive discrimination to the detriment of competing commercial mobile providers. Unfortunately, the BOCs have repeatedly attempted to discriminate in favor of their own mobile communications affiliates in providing interconnection to non-affiliated wireless service providers.^{39/} They have repeatedly manipulated the split of federal and state jurisdiction over communications to deny or delay providing full, fair and reasonable interconnection to other wireless service providers.^{40/} For these reasons, Nextel maintains that effective safeguards are needed to assure adequate anti-

^{38/} See Notice at para. 64 and n. 85.

^{39/} See The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 59 Rad. Reg. 2d 1275 (1986); Declaratory Ruling, 2 FCC Rcd 2910 (1987), aff'd on recon., 4 FCC Rcd 2369 (1989).

^{40/} For example, Nextel has been attempting for nearly one year to negotiate an interconnection agreement with Bell Atlantic's affiliate, New Jersey Bell, for standard Type II local exchange interconnection for its ESMR in the New York-New Jersey area. Bell Atlantic has yet to tender a definitive proposed agreement, even though it provides precisely such interconnection to its own cellular affiliate, Bell Atlantic Mobile Systems, and has done so for many years.

discrimination and cross-subsidy protection for BOC local monopoly customers.^{41/}

F. Interconnection

The Commission proposes preempting state regulation of the right to intrastate interconnection and the right to specify the type of interconnection available to commercial mobile service carriers.^{42/} It tentatively concludes that permitting state regulation of the right to interconnect and the type of interconnection for intrastate service would undercut the federal objective of ensuring interconnection to the interstate network.

Nextel strongly supports this proposal. Preempting state regulation of the right to interconnect and forms of interconnection available 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 from the LECs that is reasonable for the particular mobile system and no less favorable than that offered to any other customer or carrier.^{43/}

^{41/} In addition, Nextel strongly supports the Commission's proposal to preempt state regulation of the right to interconnection and the types of interconnection a LEC is permitted to provide, as discussed in the next section. This will also help prevent continued BOC manipulation of jurisdiction over local communications services to deny reasonable, non-discriminatory interconnection to non-affiliated competing wireless carriers.

^{42/} Notice at para. 71.

^{43/} Section 332(c)(1)(B) provides that the Commission shall order a common carrier to provide interconnection with any provider of commercial mobile services, upon reasonable request. In combination with the Commission's existing authority under Section
(continued...)

The guiding principle should be that functionally equivalent consumers of interconnection services should pay comparable rates with comparable terms and conditions for comparable interconnection capabilities.^{44/}

The Commission tentatively concludes that it need not preempt state regulation of the rates (and presumably terms and conditions) for local exchange interconnection services. LEC interconnection is, of course, an intrastate local exchange telephone service subject to state regulatory jurisdiction under Section 2(b) of the Act. So long as states do not use this authority to discriminate among equivalent mobile service providers, or to impede or hinder their entry, preemption may not be required to achieve federal regulatory objectives.

However, by not preempting state rate regulation of interconnection services, mobile carriers could be subjected to multiple state regulatory requirements and proceedings. The increasing prevalence of wide-area, regional and even nationwide services means that cellular, ESMR and other providers could be required to participate in up to 50 different state ratemaking proceedings. This could impose a burden that would frustrate the

^{43/}(...continued)

201 of the Act, all commercial mobile service providers are entitled to non-discriminatory interconnection at comparable rates, terms and conditions for comparable interconnection services.

^{44/} This does not mean that private mobile providers should automatically be consigned to an inferior form of interconnection. However, to the extent that such carriers require the same interconnection arrangements as a commercial mobile service, they are likely offering a functionally equivalent service and should be so classified for regulatory purposes.

development of competitive advanced interconnected mobile communications services.

Nextel's experience in obtaining LEC interconnection in various states confirms the need to preempt state jurisdiction of the right to interconnect and the availability of interconnection services reasonable for different mobile carriers. Preemption of state rate regulation of LEC interconnection would further ease regulatory burdens and assure comparable treatment of mobile carriers.^{45/} The Commission has both the legal authority and sufficient justification to preempt rate regulation in this proceeding. Nextel concurs, however, with the Commission's proposal to reserve the right to preempt state regulation of interconnection rates at a later time if such regulation precludes or impedes the development of competitive mobile services or is applied in a discriminatory fashion among functionally equivalent mobile carriers.

IV. CONCLUSION

The Congressional intent in revising Section 332 is to assure that "functionally equivalent" services; i.e., those that are reasonable substitutes for each other, are regulated under the same regulatory classification. The Budget Act definitions of "commercial mobile service" and "private mobile service," as interpreted herein, accomplish this objective and assure that

^{45/} Nextel is expending considerable resources to assure that it pays the same rates and receives the same terms and conditions for LEC interconnection that is accorded cellular carriers purchasing comparable interconnection elements.

functionally equivalent "for-profit" commercial services for the general public are regulated on a common carrier basis as mandated by Section 332 of the Act.

As discussed herein, Nextel supports classifying as commercial mobile all "functionally equivalent" "for-profit" services. At the same time, Congress authorized the Commission to examine the "real world" competitive environment and establish appropriately different regulation for different classes of commercial mobile providers to promote a competitive mobile communications marketplace, so long as consumers are protected from unreasonably discriminatory rates and practices or unjust and unreasonable rates. Nextel recommends that the Commission exercise this discretion to assure effective competition among commercial mobile service providers at different stages of their business development, consistent with the Congressional intent in Section 332(d).

Respectfully submitted,
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CERTIFICATE OF SERVICES

I hereby certify that a copy of the foregoing Comments of Nextel Communications, Inc. has been mailed by United States first class mail, postage prepaid, this 8th day of November 1993, to the following:

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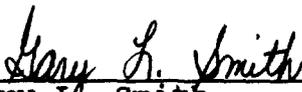
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