In addition to increasing subscriptions, annual revenues from pager sales and services are soaring. In 1992, total industry revenues increased by 18% from 1991.[47] In addition, annual sales for 1992 capped at 5.1 million units, up from 3.4 million in 1991.[48]

Finally, new competitors are not subject to stringent federal or state regulation. Due to the FCC procompetitive policies like continually increasing the number of frequencies available for paging[49], there are expanding numbers of companies competing for paging customers within a particular market. To date, there are scores of frequencies allocated for paging in the overall market, and at least eighty-five channels in every local market.[50] In addition, paging carriers can utilize frequencies allocated for cellular and specialized mobile radio systems ("SMR"), and FM subcarriers. Moreover, the FCC is planning to make new frequencies available for narrowband personal communications services ("PCS"), which may include advanced voice paging, two-way acknowledgment paging, data messaging, electronic mail, and facsimile transmissions.[51] The FCC has also made it relatively easy to obtain licenses such that any carrier may do so if it

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47 Id. at 29.

48 Id. at 94.

49 The Paging Leadership Association, 1993 Industry Performance Report at 9 (1993).

50 47 C.F.R. §§ 90 and 22 (1993).

51 First Report and Order in ET Docket No. 92-100 and GEN Docket No. 90-314, 58 Fed. Reg. 42681 (August 11, 1993).

meets the eligibility requirements.[52] Furthermore, the rates, revenues, and profits of radio service providers are subject to no federal regulation, and most states do not regulate paging providers at all.[53] Most states that do regulate such services do so only to a limited extent.[54]

3. Declining Prices of Pagers and Pager Services

Vigorous competition is displayed not only by the increasing number of carriers and low barriers to entry, but also, and more importantly, by the declining cost of pagers and pager services to consumers.[55] In 1987 the average monthly revenue for a digital display pager was about $26.[56] By 1992, the average revenue had fallen to about $15 per month, a drop of over 40 percent even without including inflationary factors.[57] In fact, the decline in pager prices has been so dramatic that paging is by far the lowest priced wireless communications service.[58] In addition, recent

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52 R. Michael Senkowski et al., Paging's Regulatory Environment, in Comprehensive Guide to Paging (BIA Publications 1992).

53 Report of the Bell Companies on Competition in Wireless Telecommunications Services, 1991 at 8, attachment to Request for Removal of Mobile and Other Wireless Services from the Scope of the Interexchange Restriction and Equal Access Requirement of Section II of the Decree, December 13, 1991. Since this Report was released, numerous other states have either deregulated paging or have proceedings under way considering deregulation.

54 Id.

55 Wysor, supra.

56 Patrick Partridge, The Future Looks Brighter for Paging Business Values, Telocator, June 1993, at 14.

57 Id.

58 Lane & Kealey, supra, at 12.

market studies demonstrate that price competition will continue to intensify among providers in the years to come.[59]

4. Technological Advances

Competition in the paging market has also spurred pager carriers to upgrade their advertising and marketing programs and bring advanced services to the forefront of the industry.[60] New and proposed technological advances include alphanumeric paging, advanced one way communications, two-way paging, advanced architecture paging, ground to air paging, acknowledgment paging, personal information messaging, and digital voice messaging.[61] These innovations raise the quality, functionality, and variety of available products and thereby benefit consumers.

5. Reasonably Substitutable Services

Other technologies such as cellular and personal communications networks often compete with paging. These other services continue to put pressure on paging firms to decrease their prices and improve their own technologies in order to differentiate their products from those of other industries.[62]

C. Forebearance Based on Market Power Is Consistent with the New Statute

In accordance with the new statute, the Commission should exercise its authority to exempt paging service providers from all provisions of Title II, except Sections 201, 202, and 208.

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59 Id. at note 3, at 12.

60 Frost & Sullivan, supra.

61 EMCI 1993, supra, at 147-48.

62 Id.

Section 332(c)(1)(A), as amended, permits the Commission to forbear from regulating commercial mobile services under Title II if the following determinations are made:[63]

> (a) enforcement of such provision is not necessary in order to endure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or 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.

Pagenet asserts that the paging industry meets all of these requirements.

As discussed above, the paging industry is vigorously competitive, and any attempt by service providers to unreasonably discriminate will not be tolerated by the market. In fact, the paging industry boasts the lowest cost services to consumers of all commercial mobile service providers, which in effect, forces providers to compete with one another. In addition, consumers will not be harmed from deregulation of the paging industry since the market will not allow providers to harm consumers by charging unjust rates. Rather, such providers will lose business as customers simply switch other carriers. Finally, forbearance from regulation of the paging industry promotes the public interest because it ensures enhanced competition in the marketplace. Any attempt by the Commission to regulate this industry will only result in anti-competitive effects.

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[63] Notice at ¶ 57.

III. THE COMMISSION SHOULD EXERCISE ITS PLENARY JURISDICTION OVER MOBILE SERVICES INTERCONNECTION

The FCC Notice (at ¶¶ 69-74) seeks comment on the interconnection rights of commercial mobile service providers. It also asks whether the new statutory definitions make commercial and private services sufficiently different that private PCS providers could reasonably receive less favorable interconnection than commercial mobile service providers. Id.

PageNet submits that the Commission has plenary jurisdiction over mobile service interconnection with the public switched network, and should exercise it. It also submits that there is no basis for permitting LECs to provide inferior interconnection to private carriers over that provided commercial mobile service providers.

Subsection 332(c)(1)(B) makes clear that the FCC has plenary jurisdiction over the interconnection of commercial mobile service providers to the public switched network.[64] It expressly requires the FCC, upon reasonable request, to "order common carriers to establish physical connections with such services pursuant to the provisions of Section 201 of the Act."[65] Moreover, however, it goes on to clarify that this authority, except insofar as the FCC is now required to respond to such a request, "shall not be construed as a limitation of the Commission's authority to order interconnection pursuant to this Act." Id. This latter language

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[64] 47 U.S.C. § 332(c)(1)(B).

[65] Id.

confirms that the FCC had, and continues to have, jurisdiction to order the LECs to interconnect with mobile service providers regardless of their status as commercial mobile service providers or private carriers.[66]

Even under Louisiana Public Service Commission v. FCC ("Louisiana"),[67] it is clear the FCC has jurisdiction over the physical interconnections provided to radio common carriers. There, the U.S. Supreme Court confirmed that the FCC may regulate and preempt state law ". . . where it is not possible to separate the interstate and intrastate components of the asserted FCC regulation."[68] Louisiana, therefore, sanctions regulation by the FCC even of facilities and services that are located wholly within a single state if those facilities or services are essential or integral parts of interstate communications. In construing the Louisiana decision, federal courts have set up a three step analysis for determining whether to approve of federal preemption.[69] First, a court must examine whether the subject

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66 The Act itself is silent about the possible impact reclassification of an existing common carrier as private would have on interconnection rights of those carriers. One would expect Congress to elaborate on the need to curtail those rights upon reclassification, if it intended that these rights be curtailed. It is reasonable, therefore, to assume that Congress expected the rights of reclassified private carriers to be identical to the rights they enjoyed as common carriers, and which remain critical to providing a seamless, wireless telecommunications network.

67 476 U.S. 355 (1986).

68 Id. at 375 n.4.

69 See generally, Michael J. Apevak, FCC Preemption After Louisiana PSC, 45 Federal Communications Law Journal 185, 206 (1992).

matter is purely intrastate or is jurisdictionally mixed.[70] If the matter is jurisdictionally mixed, a court will determine whether the interstate and intrastate aspects can be severed.[71] Finally, if these components cannot be separated in a reasonable manner, a court must determine whether failure to preempt the state regulation would necessarily negate attainment of some valid federal goal.[72]

Post Louisiana, the FCC exercised its preemption jurisdiction, reiterating that an RCC "may select Type I or Type II interconnection, [in] whichever form is appropriate to its system design."[73] The conclusion was premised on the fact that

> physical plant is inseparable, and thus Section 2(b) does not limit [the FCC's] jurisdiction in this area. Like telephone terminal equipment, the interconnected trunk lines and equipment of a cellular system are used to make both interstate and intrastate calls. Moreover, it would not be feasible to require one set of trunk lines and equipment for intrastate calls and another for interstate calls. 74

The FCC declined to regulate the rates for interconnection, finding that the "charges for interconnection are severable

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70 See, e.g., Pub. Serv. Comm'n of Md., 909 F.2d 1510, 1515 (1990).

71 See, e.g., Pub. Util. Comm'n of Tex. v. FCC, 886 F.2d 1325, 1334 (D.C. Cir. 1989).

72 See, e.g., California v. FCC, 905 F.2d 1217, 1244 (9th Cir. 1990).

73 In re The Need To Promote Competition and Efficient Use of Spectrum for Radio Common Services, 2 FCC Rcd at 2913 (1987).

74 Id. at 2912.

between jurisdictions because the underlying costs of interconnection are segregable. Id. at 2911.[75]

The FCC's application of this analysis has been upheld by numerous courts. For example, in Public Service Commission of Maryland, the Court refused to modify an FCC regulation preempting state authority to regulate rates local exchange carriers ("LECs") charge to interexchange carriers for the disconnection of a subscriber's telephone for nonpayment of an interstate bill.[76] The court found that services provided locally by LECs which support access to the interstate communications network have interstate as well as intrastate aspects that could not be severed in a practical manner.[77]

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75 The FCC's decision not to preempt the interconnection rates charges by LECs to cellular carriers was premised on the belief that "the actual costs and charges for the physical interconnection of cellular systems are suited to dual intrastate and interstate regulation. "As with telephone plant depreciation costs, it is possible to divide the actual interstate and intrastate costs of cellular interconnection in a manner similar to the separations process of Section 410(c) as implemented in Part 67 of the Rules for landline telephone companies." 2 FCC Rcd at 2912. That premise may not apply to the provision of interconnection services to paging carriers offering regional and national services. In the paging context, there is simply no way to know where the call terminates. The paging carrier sends the page to a transmitter system which often spans several states, and all of those transmitters in turn send the page throughout their coverage area. The termination point could be intrastate, and it could just as easily be interstate. It is impossible to know. It therefore can be argued that it is equally impossible to appropriately segregate costs between the intrastate and interstate jurisdictions.

76 909 F.2d at 1515-17.

77 Id.

In Public Utilities Commission of Texas, federal preemption was upheld where the state public utility commission prohibited Southwestern, a local telephone exchange, from providing a customer with additional interconnections to the public switched telephone network.[78] The court noted that it was not possible to separate the interstate and intrastate components of federal regulation because of Southwestern's "inability to distinguish between intrastate and interstate calls on its lines."[79]

In accord with these cases, PageNet submits that it is similarly impossible to separate the interstate and intrastate interconnection facilities provided to mobile service providers, regardless of their classification as private or common, and that federal preemption of state interconnection of the paging industry is therefore lawful. Failure to occupy the field here will impede the FCC's goal of promoting interstate interconnection services.

CONCLUSION

Competition in the paging industry is robust, and all indications suggest that competition will continue into the foreseeable future. Consequently, no one carrier has the ability to harm consumers by charging unjust rates since all carriers must accept the market price as given. If any carrier seeks to charge supracompetitive rates, consumers will simply switch to other carriers. In addition, no one carrier can harm competitors by

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78 886 F.2d at 1334.

79 Id.

dropping prices in an effort to drive them out of business because that carrier will suffer grave monetary losses. Accordingly, in this highly competitive market where no one carrier wields market power, there is no need to regulate paging companies under Title II other than what is required by Sections 201, 202, and 208. Competition in the paging industry is the appropriate surrogate for federal regulation, and any attempt to regulate the industry will only have anti-competitive effects.

Respectfully submitted,

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November 8, 1993

CERTIFICATE OF SERVICE

Pursuant to ¶ 82 of the Notice, courtesy copies of the foregoing Comments have been delivered to the following:

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