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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 OF THE
UTILITIES TELECOMMUNICATIONS COUNCIL

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SUMMARY

In attempting to specify the definition of what constitutes a commercial mobile service the Commission should confine its focus to those services for which regulatory parity is needed and should not narrowly define private mobile services. Accordingly, the Commission should categorically exempt traditional private land mobile radio services in which licensees operate mobile radio systems solely for their own private, internal use.

The FCC should also allow "non-commercial" private radio licensees to lease reserve capacity without being deemed to be acting on a for-profit basis for purposes of commercial mobile service classification, provided that at least 51% of the system is used to meet the licensee's own internal requirements. Classifying these types of systems as commercial mobile services subject to common carrier regulations would not significantly advance any public interest goals since these are not the type of systems at which regulatory parity is directed.

"Interconnected service" should be interpreted as a service under which subscribers are provided with the ability to directly control access to the public switched network for purposes of sending or receiving messages to or from points on the network.

The Commission should make a distinction between "limited-eligibility" services that are available to a "substantial portion of the public" such as SMRs and private carrier paging services that have such broad eligibility service rules as to effectively allow them to provide service to almost anyone, and such services that have significant eligibility requirements that restrict service to small or specialized user groups, e.g., the Power, Petroleum and Public Safety Radio Services.

The "functional equivalency" provision should be interpreted as an "escape valve" for classifying services as private even if they meet the literal definition of commercial mobile service. Issues of functional equivalency should be resolved on a case-by-case basis. This will allow for greater flexibility on the part of the FCC to accommodate individual services and licensees.

All existing private non-commercial land mobile radio services should be classified as private mobile services under Section 332(d)(3). In particular, the Industrial Radio Services should be classified as private mobile services, as these services are utilized to meet the internal mobile communication requirements of the nation's core public service industries.

Licensees on existing private land mobile frequencies, in which certain systems will be reclassified as commercial mobile service and other will not, should be afforded the flexibility to

provide either commercial or private service as defined by the FCC's Rules. However, this should not apply to licensees on bands of frequencies set aside exclusively for private, non-commercial services.

PCS should not be uniformly treated as a commercial mobile service, since there are many potential private, non-commercial applications of PCS that would constitute private mobile service under the Budget Act's statutory definition. Instead, there should be allocations for PCS that are specifically available for commercial mobile service and there should be allocations that are specifically available for private mobile service.

The FCC should attempt to impose as few Title II provisions on the regulation of commercial mobile services as is possible. A regulatory philosophy of "less is more" will help to ensure that smaller entrepreneurs and new communications entrants will be able to develop competitive commercial mobile services.

The FCC should undertake a reorganization of its Private Radio Bureau into a new "Wireless Services Bureau" that would be charged with greater responsibility for developing policy for most non-broadcast radio services. Such a reorganization will be necessary to effectively carry out the provisions of the Budget Act, and will streamline FCC policy, licensing and enforcement activities.

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**COMMENTS OF THE
UTILITIES TELECOMMUNICATIONS COUNCIL**

Pursuant to Section 1.415 of the Commission's Rules, the Utilities Telecommunications Council (UTC) hereby submits its comments with respect to the Notice of Proposed Rulemaking (NPRM), in GN Docket No. 93-252, FCC 93-454, released October 8, 1993, in the above captioned matter.

I. INTRODUCTION AND BACKGROUND

UTC is the national representative on communications matters for the nation's electric, gas, water, and steam utilities, and natural gas pipelines. Approximately 2,000 companies are members of UTC, ranging in size from large combination electric-gas-water utilities serving millions of customers to small, rural electric cooperatives and water districts serving only a few thousand customers. UTC is also the Federal Communications Commission's (FCC) certified frequency coordinator for the Power Radio Service. All utilities and pipelines depend upon reliable and

secure communications facilities in carrying out their public service obligations. In order to meet these communications requirements, utilities and pipelines operate extensive private land mobile radio systems.

The Commission adopted the present NPRM in order to implement amendments to the Communications Act made by Title VI of the Omnibus Budget Reconciliation Act of 1993 (the Budget Act).^{1/} The Budget Act amended Sections 3(n) and 332 of the Communications Act to create a comprehensive framework for the regulation of mobile radio services and directed the FCC to establish rules defining the regulatory status and treatment of mobile services including Personal Communications Services (PCS).

In attempting to guide the FCC's regulatory process, UTC's comments will focus on: (1) the statutory definitions of "commercial mobile service" and "private mobile service;" (2) the proper treatment and classification of existing private and common carrier services under these definitions; (3) the classification of future services such as PCS; (4) the degree of Title II regulation that should be imposed on commercial mobile services; and (5) the transitional measures that are necessary to implement these changes, including a proposal to reorganize the FCC's Private Radio Bureau into a new "Wireless Services Bureau."

^{1/} Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993).

II. IN ATTEMPTING TO DEFINE COMMERCIAL MOBILE SERVICES THE FCC SHOULD NOT NARROWLY DEFINE PRIVATE MOBILE SERVICES

As revised by the Budget Act, Section 332 of the Communications Act, governs the regulation of all "mobile services" as defined in Section 3(n) of the Act. The statute divides all mobile services into two categories, "commercial mobile service" and "private mobile service," both of which are defined in section 332(d). However, the statute directs the Commission to further clarify these terms through regulation.

At the outset of this interpretive regulatory process the Commission must be guided by the legislative intent in the adoption of the new statutory language. By all accounts the primary force that precipitated the adoption of this new language was not that traditional private land mobile services were in need of greater regulation. Instead, the language is aimed at creating "regulatory parity" between common carrier cellular providers and emerging commercial mobile services such as PCS and a new class of enhanced specialized mobile radio (SMR) licensees whose operations resemble cellular in almost all respects except that they are regulated on a private carrier basis.

Thus, in attempting to specify the definition of what constitutes a commercial mobile service the Commission should confine its focus to those services for which regulatory parity is needed and should not narrowly define private mobile services.

A. Mobile Service

The first step in the process of defining commercial mobile service and private mobile service is to establish the definition of "mobile services" over which Section 332 of the Communications Act gives the Commission authority. The definition of mobile service under revised Section 3(n) does not substantively change the Act's prior definition of "mobile service." Instead, the revised version simply contains the addition of two subsections to clarify that private land mobile service and PCS are to be included within the general category of mobile services for purposes of regulation under Section 332.

The intention of the statutory definition therefore appears to be to bring all existing mobile services under the authority of Section 332. Accordingly, UTC agrees with the FCC's proposal to include within the definition of mobile service all private land mobile services, public mobile services, mobile satellite services, mobile marine and aviation services, personal radio services and PCS.

B. Commercial Mobile Service

Under the Budget Act a mobile service will be classified as a "commercial mobile service" if it meets two criteria: the service (1) is "provided for profit;" and (2) 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." The FCC requests public comment on how these various elements of commercial mobile service should be interpreted or defined.

1. Service Provided for Profit

The first element in the definition of commercial mobile service is that the service must be provided on a "for profit" basis. As a general matter the Commission should categorically exempt traditional private land mobile radio services in which licensees operate mobile radio systems solely for their own private, internal uses, such as utilities, pipelines, state and local government agencies and public safety entities.

The Commission should also allow "non-commercial" private radio licensees to lease reserve capacity without being deemed to be acting on a for-profit basis for purposes of commercial mobile service classification, provided that at least 51% of the system is used (e.g., as measured by loading, erlangs, etc.) to meet the licensee's own internal requirements and that none of the leased facilities are used to meet the licensee's basic loading requirements.^{2/} Such an approach will promote greater spectrum efficiency and will encourage investment into more advanced technologies by private land mobile radio licensees. For

^{2/} The FCC supported a similar concept in its "Part 88" Notice of Proposed Rulemaking (NPRM), PR Docket No. 93-235, 7 FCC Rcd 8105, 8162 (1992).

example, many utilities require extensive trunked radio systems in order to meet their public service obligations and yet such facilities often provide a limited amount of reserve capacity that could be leased to third-parties thereby lowering the total cost that has to be passed on to utility ratepayers. Further, it should be noted that classifying these types of systems as commercial mobile services subject to common carrier regulations would not significantly advance any public interest goals, and would in fact discourage efficient use of private land mobile spectrum.

However, UTC's support of allowing private system licensees to lease reserve capacity should not be construed as support for the direct licensing of third-party entrepreneurs to provide commercial services to eligible end-users in the Power Radio Service Pool or the Industrial Radio Service Pool generally. As highly regulated industries providing essential public services over expansive operating territories, it is doubtful that entrepreneurs would be capable of providing the quality and quantity of communications that public service utilities require. Moreover, the essential nature of utility communications during emergency situations dictates that utilities maintain control over their communications systems. Further, public service utilities cannot rely on the marketplace to weed-out the inefficient or undercapitalized third-party private carriers. As entrepreneurs, private carriers would be free to vacate the

market and discontinue service if their operations prove unprofitable. This kind of instability is an anathema to the reliable communications service demanded by public service utilities.^{3/}

Finally, private carrier entrepreneurs could tie-up scarce frequencies which could be used by the utilities themselves in implementing new systems or expanding existing systems. Therefore, the Commission should expressly limit eligibility for private carrier systems to those entities that are themselves eligible for licensing as end users in a particular service category. Further, UTC recommends that the Commission consider the adoption of minimum operation/construction requirements that have to be met by an internal-use private land mobile licensee prior to being eligible to lease reserve capacity.^{4/}

Shared systems, under which a licensee offers reserve capacity to unlicensed eligible users or where each user of the licensed facilities is individually licensed, should continue to be treated as private mobile services since they operate on a "not-for-profit" basis. This approach is consistent with the language of revised Section 3(n), which provides that "private"

^{3/} See UTC's Comments, filed May 19, 1989, in PR Docket No. 89-45.

^{4/} The FCC adopted a similar requirement for non-commercial nationwide licensees in the 220-222 MHz band, 47 C.F.R. § 90.733(d).

communications systems may be licensed on an "individual, cooperative, or multiple basis" (emphasis added).

Similarly, entities involved in a non-profit cost shared system should be able to employ a for-profit system manager without subjecting the underlying licensee(s) or the system manager to regulation as a commercial mobile service provider. The fee charged by a third-party system manager is a cost that is shared by the system users and is in the nature of an operational expense. Further, it would make little sense to subject the manager to commercial mobile service obligations since the manager has no direct control over the system license and has no authority to bind the underlying shared system owners to Title II provisions.^{5/}

2. Interconnected Service

The second element in the definition of commercial mobile service is that "interconnected service" must be available. UTC supports an interpretation of "interconnected service" under which interconnected service must be offered at the end user level, i.e., the service must provide subscribers to mobile radio service with the ability to directly control access to the public switched network for purposes of sending or receiving messages to

^{5/} Of course, any system manager must operate the system in compliance with the rules applicable to that system, and the agreement must not vest unfettered discretion in the system manager.

or from points on the network. For example, if subscribers are not provided with access to the interconnected portion of a licensee's system it is not a commercial mobile service since all of the elements of commercial mobile service are not being offered.

Such an interpretation is consistent with Congress' use of the term "interconnected service" which makes a distinction between those communications systems that are physically interconnected with the network and those that are not only interconnected but that also make interconnected service available.^{6/}

At a minimum, the FCC must maintain the current Private Land Mobile Radio Rule Section 90.7 under which licensees that use public switched facilities strictly for internal control purposes, such as dial-up circuits for transmitter control, are not considered to be interconnected. Many utilities and pipelines as well as other public service/public safety entities utilize such interconnection as an integral part of their system operations. In the case of utilities and pipelines, access to the switched telephone network is under the exclusive control of the licensee and end-users are not permitted routine access.

^{6/} Conference Report, H.R. Rep. No. 102-213, 103 Cong., 1st Sess., 496 (1993).

The FCC seeks comment on how to define "public switched network." The Commission notes that in general it has used the similar term "public switched telephone network" (PSTN) to refer to the local and interexchange and common carrier switched network, whether by wire or radio. UTC supports the application of the FCC's traditional interpretation of the term PSTN to the statute's use of the term switched telephone network.

An important aspect in this interpretation is that the FCC should exclude certain private line services that are interconnected to and use facilities of the PSTN, but which limit the scope of communications to specific points in the network so that the user does not have "true access" to the entire PSTN. Often utilities and pipelines have dedicated private lines that only utilize and allow access to a portion of the PSTN. Such services do not appear to be the type of interconnected service offering at which the statute is directed.

3. Service Available To The Public

The third and final element of commercial mobile service is that interconnected 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." In drafting regulations to implement this provision the Commission should focus on whether a given service is effectively available to a substantial portion of the public, since any service that is offered to the

public generally would necessarily meet this more limited requirement.

The Commission should make a distinction between "limited-eligibility" services that are available to a "substantial portion of the public" such as SMRs and private carrier paging services that have such broad eligibility service rules as to effectively allow them to provide service to almost anyone,^{2/} and such services that have significant eligibility requirements that restrict service to small or specialized user groups, e.g., the Power, Petroleum and Public Safety Radio Services. Such a distinction would appear to be the best method at getting at Congress' concern with regard to creating regulatory parity between services that are available to the public generally and those that are effectively available to a substantial portion of the public, while at the same time preserving the private regulatory treatment of land mobile radio services that are not intended for use by a substantial portion of the public.

Factors such as system capacity or service area should not be considered in determining effective availability for purposes of commercial mobile service classification. Many public service utilities operate large trunked radio systems that cover their extensive service territories. However, there is not necessarily any correlation between the size of the service area or the

^{2/} 47 C.F.R § 90.603.

system's capacity, and the service location or amount of reserve capacity that a utility (or other private land mobile licensee) is interested in leasing on a for-profit basis.

Moreover, if "public availability" is based upon user eligibility as suggested above, there is no need to examine system capacity or size of service area.^{8/}

C. Private Mobile Service

Section 332(d)(3) defines "private mobile service" as any mobile service that is not a commercial mobile service or the "functional equivalent of a commercial mobile service." In determining the definition of "functional equivalent of commercial mobile service," the Commission seeks comment on whether this language: (1) was intended to provide that a service meeting the literal statutory definition of a commercial mobile service could still be classified as private if it is not the functional equivalent of a commercial mobile service; or (2) whether it was intended to provide that a service not meeting the literal statutory definition of a commercial mobile service could still be classified as a commercial mobile service if it is the functional equivalent of a commercial mobile service.

^{8/} As discussed below, the Commission should allow for determinations on a case-by-case basis that a given system, while meeting the technical requirements of commercial mobile service, should nonetheless be regulated on a private basis since system capacity or service area effectively limit the provision of service to less than a substantial portion of the public.

While both interpretations are admittedly plausible, the former better advances the ultimate goals of the legislation and is supported by the Conference Report to the Budget Act. As discussed above, the primary intent of the Budget Act revisions to Section 332 was to establish regulatory parity between cellular carriers and: (1) "enhanced SMR" operators, such as Nextel, that have recently emerged as the functional equivalent of cellular without common carrier obligations; and (2) emerging services such as PCS.^{2/}

Thus, the statute addresses competition among "cellular-like" carriers and was not adopted in response to a perceived public need to increase the general level of regulations on truly private carrier radio systems.^{10/} Therefore, to the extent that a service meets the literal definition of a commercial mobile service but is not in any way on a competitive par with cellular or other large scale mobile radio common carriers, it does not appear to have been the intent of Congress to impose common carrier regulations.

^{2/} In this regard, it is particularly noteworthy that at the time of the statute's adoption Congress was not sure of the extent to which cellular carriers would be permitted to participate in PCS, and the legislation was aimed in large measure to assuage cellular operators' concerns that commercial PCS would not be regulated on a private carrier basis.

^{10/} This is further evidenced by the latitude that the statute provides the FCC to relax certain Title II obligations on commercial mobile services.

As the FCC correctly notes, in amending the 332(d)(3) to include the "functional equivalence" test, Congress did not change the definition of commercial mobile service in Section 332(d)(1). Instead, Congress added an "escape valve" for classifying services as private even if they meet the literal definition of commercial mobile service. As an example, the Conference Report states that

The Commission may determine, for instances [sic], that a mobile service offered to the public and interconnected with the public switched network is not the functional equivalent of a commercial mobile service if it is provided over a system that, either individually or as part of a network of systems or licensees, does not employ frequency or channel reuse or its equivalent (or any other technique for augmenting the number of channels of communications made available for such mobile service) and does not make service available throughout a standard metropolitan statistical area or other similar wide geographic area.^{11/}

The specificity of this example is strong evidence that Congress intended the functional equivalency clause to broaden the definition of private mobile service.

The FCC should resolve issues of functional equivalency on a case-by-case basis. This approach will allow for greater flexibility on the part of the Commission to accommodate individual services and licensees. In the alternative, the Commission could establish certain presumptions in favor of "private mobile service" which could be rebutted if a would-be

^{11/} Conference Report, 496 (1993).

competitor is able to demonstrate that the licensee's service is, in fact, the functional equivalent of "commercial mobile service."

III. REGULATORY CLASSIFICATION OF EXISTING SERVICES

In accordance with UTC's recommendation that all not-for-profit traditional private land mobile radio services be excluded from the definition of commercial mobile service, all existing private non-commercial land mobile radio services should be classified as private mobile services under Section 332(d)(3). In particular, the Industrial Radio Services should be classified as private mobile services, as these services are utilized to meet the internal, private mobile communication requirements of the nation's core public service industries.

Further, existing private land mobile radio systems that lease reserve capacity that is less than their overall internal usage to other eligible end-users should also be classified as private mobile services, since they do not offer service on a "for-profit" basis for purposes of the statute's definition, and because they do not make service available to the public or a substantial portion of the public. This classification should extend to 220-222 MHz licensees that operate primarily on a non-commercial basis.

Individual system capacity or size of service territory should only be a factor in those instances where the Commission is undertaking an analysis of a service that meets the literal statutory definition of commercial mobile service, yet, nevertheless might not be the functional equivalent of a commercial mobile service. In all other instances system capacity and size of service territory are irrelevant to the classification of existing or future systems.

UTC supports the Commission's proposal to afford licensees on existing private land mobile frequencies, in which certain systems will be reclassified as commercial mobile service and other will not, the flexibility to provide either commercial or private service (but not both under a single license) as defined by the FCC's Rules. However, this should not apply to licensees on bands of frequencies set aside for non-commercial limited eligibility purposes (e.g., Industrial Radio Services frequencies).

UTC does not oppose an amendment of the rules to allow existing common carriers that are classified as commercial mobile service providers to offer dispatch communications on their existing frequencies. Similarly, existing private system operators offering dispatch services that are subsequently reclassified as commercial mobile services and subject to common carrier regulations should be allowed to continue to offer

dispatch. Such flexibility would serve the public interest by increasing competition in the dispatch market and thereby lower cost and enhance service.

IV. THE REGULATORY CLASSIFICATION OF PCS SHOULD INCLUDE PRIVATE MOBILE SERVICE AS WELL AS COMMERCIAL MOBILE SERVICE

PCS should not be uniformly treated as a commercial mobile service, as defined by Section 332. There are many potential private, non-commercial applications of PCS that would constitute private mobile service under the Budget Act's statutory definition. Utilities and other public service/public safety organizations will continue to have security, priority, and reliability requirements that dictate that some PCS systems be privately owned and operated.

Moreover, if PCS is defined exclusively as a commercial mobile service, there is a strong possibility that the potential diversity of applications developed would be unnecessarily restricted. For example, utilities have a strong need for advanced mobile data communications capabilities that would enable the mobile transmission of schematic diagrams and power switching orders. Public safety agencies require mobile imaging capabilities in order to implement "mobile fingerprinting." Many other industries ranging from petroleum companies to railroads have also expressed an interest in the development of private emerging technologies such as PCS.

Accordingly, there should be allocations for PCS that are specifically available for commercial mobile service and there should be allocations that are specifically available for private mobile service. In addition, within their individual service blocks, PCS licensees should be allowed to choose whether to provide some portion, less than 50 percent of their internal usage requirements, on either a commercial mobile service or private mobile service basis.

V. THERE SHOULD BE MINIMAL APPLICATION OF TITLE II REGULATIONS TO COMMERCIAL MOBILE SERVICES

While revised Section 332 requires that any entity providing commercial mobile service be treated as a common carrier subject to Title II of the Communications Act, the Budget Act authorizes the Commission to exempt some or all commercial mobile services from regulation under any provision of Title II other than Sections 201 (offer service on reasonable request/reasonable charges), 202 (make no unreasonable discrimination in service) and 208 (complaint enforcement mechanism).

As a general matter, the FCC should attempt to impose as few Title II provisions on the regulation of commercial mobile services as possible. A regulatory philosophy of "less is more" will help to ensure that smaller entrepreneurs and new communications entrants will be able to develop competitive commercial mobile services. At a minimum the FCC should forbear

from regulations that impose high administrative burdens without a significant offsetting public benefit. For example, the FCC should not require the filing of tariffs by commercial mobile service providers.

VI. THE FCC SHOULD REORGANIZE THE PRIVATE RADIO BUREAU INTO A "WIRELESS SERVICES BUREAU"

As part of its mandate that the FCC adopt regulations implementing the regulatory parity provisions of the Budget Act, the statute directs the Commission to enact all "provisions necessary to provide for an orderly transition."^{12/} UTC believes that a reorganization of the Commission is a necessary element in carrying out this legislation. Absent a reorganization the NPRM would create a duplication in decision-making authority that could result in the adoption of conflicting policies, and would almost certainly be an inefficient allocation of Commission staff and resources.

While the NPRM focuses on mobile services the Budget Act implicitly endorses the FCC's existing practice of distinguishing "mobile" radio services from "fixed" radio services. UTC has therefore attempted to develop an organizational structure that will balance these four criteria: (1) commercial; (2) non-commercial; (3) mobile; and (4) fixed.

^{12/} Budget Act, Section 6002(d)(2).

UTC recommends conversion of the Private Radio Bureau into a new "Wireless Services Bureau"^{13/} that would be charged with greater responsibility for developing policy for most non-broadcast radio services. The Divisions within the Bureau would be as follows:

- a. Commercial Services Division -- to establish policies and rules on all "commercial" radio services, both fixed and mobile.
- b. Safety/Industrial Services Division -- to establish policies and rules on all "traditional" or "non-commercial" radio services, both fixed and mobile (including special radio services such as marine, aviation and amateur radio services).
- c. Licensing Division -- to perform the licensing function for all fixed and mobile radio services and to provide administrative support to the Bureau.
- d. Enforcement Division -- to provide enforcement of all fixed and mobile radio services, with the exception of tariffing or other "Title II" issues, which would be handled by the Common Carrier Bureau.

Under the proposed structure, "commercial services" and "safety/industrial" services would each have equal representation in the Bureau. This is particularly appropriate given the recent legislation authorizing the use of competitive bidding for the assignment of commercial radio services. Otherwise the interests of traditional private radio users that would comprise the safety/industrial category may not be given full voice in the disposition of existing and future spectrum allocations.

^{13/} Appendix A contains a table depicting the organization structure of the new Wireless Services Bureau.