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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 OF MCCAW CELLULAR COMMUNICATIONS, INC.

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Introduction and Summary

McCaw Cellular Communications, Inc. ("McCaw") hereby submits its comments in response to the Notice of Proposed Rulemaking ("Notice")^{1/} in the above-captioned proceeding.

Congress revised Section 332 because it found that the regulatory structure governing mobile services -- which permitted "private" mobile services to escape regulation while functionally equivalent "common carrier" services were subject to state as well as Federal rules -- could "impede the continued growth and development of commercial mobile services and deny consumers the protections they need."^{2/} Congress recognized that the implementation of original Section 332 had created a cockeyed marketplace in which enhanced specialized mobile radio licensees,

^{1/} In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, FCC 93-454 (rel. Oct. 8, 1993).

^{2/} H.R. Rep. No. 111, 103d Cong., 2d Sess. 260 (hereinafter "House Report").

but not their cellular competitors, were exempt from Title II of the Communications Act and from state regulation, and where radio common carriers were forced to compete against private carrier pagers that faced essentially no regulation at the Federal or state level.^{3/}

Enactment of revised Section 332 was guided by two principles -- like services should be regulated in the same manner, and a recognition that the Federal jurisdiction was the most appropriate regulatory locus for mobile services "that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."^{4/} These core principles must also guide the Commission's implementation of Section 332.

It would thwart the intent of Congress, for instance, to define commercial mobile services in a manner that excluded any provider of interconnected service to the public or a substantial portion of the public. That term should be broadly construed, with exceptions only for services that cannot provide the functional equivalent of a commercial mobile service. Consequently, paging and other store-and-forward services, which offer for-profit interconnected services to the public, should be classified as commercial mobile services.

^{3/} See id. at n.2.

^{4/} Id. See also H.R. Rep. No. 213, 103d Cong., 1st Sess. 490 (1993) (hereinafter "Conference Report") (intent of revised Section 332 is to "establish a Federal regulatory framework to govern the offering of all commercial mobile services") (emphasis supplied).

In an increasingly dynamic mobile services marketplace, characterized by new services and multiple new entrants, a narrow definition of commercial mobile services would inevitably recreate the disparities among functionally equivalent services that Congress sought to prevent. Nor is there any justification in such a marketplace for imposing regulatory restraints on some providers but not on others offering the same services. Such differential regulation of similarly-situated providers will not enhance competition. To the contrary, it will retard the growth of this critical segment of the telecommunications infrastructure by hobbling providers who are faced with regulations that their competitors may ignore.

Likewise, permitting the states to regulate, in divergent ways, the rates of commercial mobile services in any but the most extraordinary cases will undermine Congress's efforts to establish a national mobile services policy that reflects the inherently interstate nature of these services. While the states continue to play a role under Section 332 in regulating wireless mobile services, Congress clearly intended that role to be an exception to the Federal regulatory framework it created. A state's exercise of its authority over the "terms and conditions" of commercial mobile services, for instance, cannot be permitted to become a back door through which the state asserts authority over rates and entry. States that petition the Commission for the limited rate regulatory authority contemplated by the statute must demonstrate conclusively that the exercise of such authority

is justified. The grant of any such petition must be carefully tailored, moreover, to ensure that the state's exercise of authority does not undermine the statutory goal of according similar services similar regulatory treatment.^{5/}

Consistent with the principles underlying the statute, McCaw believes that all providers of commercial mobile services should be given the flexibility to offer, on a private carrier basis, specific services that do not meet the broad commercial mobile services definition. The reasons adduced by the Commission for according such flexibility to licensees in the personal communications services market argue just as strongly for extending the same policy to cellular, paging, and radio common carrier licensees.

The Commission should also exempt all commercial mobile service providers from the tariffing and other requirements of Title II to the greatest extent permitted by law. A uniform exemption is particularly important in light of the three-year period during which formerly "private" commercial mobile service providers -- which will compete directly against cellular and other common carrier licensees -- will retain their exemption from Title II regulation. In the nascent mobile services marketplace, where no single provider has market power, there is no justification for imposing upon any provider rules and

^{5/} Conference Report at 494 (the Commission "shall ensure that [state] regulation is consistent with the overall intent of [Section 332(c)] as implemented by the Commission, so that . . . similar services are accorded similar regulatory treatment").

requirements that were developed to protect consumers against the abuses characteristic of natural monopolies. Nor should commercial mobile services be subject to other provisions of Title II, such as Sections 226^{6/} and 227,^{7/} which were adopted in response to specific consumer abuses by segments of the telecommunications industry other than providers of mobile services.

Finally, in the interests of a uniform Federal policy for commercial mobile services, the Commission should preempt the states from imposing interconnection requirements on commercial mobile service providers.

In enacting revised Section 332, Congress recognized the critical role that mobile services will play in the development of the information infrastructure and fashioned the legislation to foster the development of these services in an open and competitive marketplace. The rules adopted by the Commission to implement the statute should likewise advance this goal.

I. The Commission Should Treat All Providers of Commercial Mobile Services Equally

Congress's principal purpose in enacting Section 332(c) of the Act was "to establish a Federal regulatory framework to govern the offering of all commercial mobile services."^{8/}

^{6/} Telephone Operator Consumer Services Improvement Act of 1990, 47 U.S.C. § 226.

^{7/} Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227.

^{8/} Conference Report at 490.

Congress was aware that providers of what were, in fact, comparable services were subject to differing regulatory requirements, and sought to promote regulatory parity.^{9/} While Congress also recognized that differences among services and market conditions might warrant dissimilar regulation,^{10/} it pointedly refrained from mandating dissimilar regulation of mobile services or providers as part of the comprehensive Federal regulatory framework for commercial mobile services.^{11/}

Applying the statutory test to determine the extent to which traditional common carrier regulation should apply to providers of commercial mobile services, it is clear that the differences among commercial mobile service providers are insufficient to justify dissimilar regulation.^{12/} The fact that some commercial mobile service providers are operational, while others have not yet entered the market, does not support disparate treatment because no mobile service operator has an entrenched, controlling

^{9/} House Report at 260 & n.2 (citing, inter alia, Fleet Call, Inc., 6 FCC Rcd. 1533 (1991)).

^{10/} Conference Report at 491.

^{11/} Id. ("Differential regulation of providers of commercial mobile services is permissible but is not required in order to fulfill the intent of this section.") (emphasis supplied).

^{12/} The test for determining the applicability of particular provisions of Title II of the Act consists of three elements: (1) whether the provision is necessary to ensure that the charges, practices, classifications, or regulations associated with the service are just and reasonable and not unjustly and unreasonably discriminatory; (2) whether the provision is necessary to protect consumers; and (3) whether forbearing from applying the provision is consistent with the public interest. 47 U.S.C. § 332(c)(1)(A); see Notice ¶ 57.

position in the marketplace. The penetration levels of cellular, paging, and other mobile services are low relative to the marketplace potential of wireless communications.

In the nascent mobile services marketplace, disparate regulation will not "enhance competition."^{13/} To the contrary, it is more likely to thwart the development of an advanced information infrastructure by impeding full competition among all providers of such services. The Commission should therefore forbear from applying common carrier regulation to all commercial mobile services and providers to the maximum extent permitted by the Act.^{14/} Likewise, the Commission should permit all providers of commercial mobile services the flexibility to offer some services on a private carrier basis.

A. The Commission Should Forbear from Regulating All Commercial Mobile Services and Service Providers

1. The Charges, Practices, Classifications, or Regulations Associated with Particular Mobile Services or Imposed by Particular Providers are Likely to be Just and Reasonable and Not Unjustly or Unreasonably Discriminatory

Application of Title II regulation to mobile service providers is unnecessary to ensure that rates, practices, classifications, or regulations are just and reasonable and not unjustly or unreasonably discriminatory.^{15/} In the cellular

^{13/} Cf. 47 U.S.C. § 332(c)(1)(C).

^{14/} Revised Section 332 of the Act mandates that Sections 201, 202, and 208 must apply to all providers of commercial mobile services. 47 U.S.C. § 332(c)(1)(A); see Notice ¶ 56.

^{15/} See Notice at ¶¶ 62, 63.

market, the presence of two facilities-based providers, in addition to often numerous resellers, assures competitive conditions that prevent any one competitor from possessing the ability and incentive to engage in prohibited practices. Moreover, cellular carriers are also subject to competition from other mobile service providers.^{16/} For instance, the Commission has authorized enhanced specialized mobile radio ("ESMRs") providers, such as Nextel, to offer services comparable to cellular and, more recently, has proposed to create a new category of expanded mobile service providers ("EMSPs") to do the same.^{17/} Moreover, the Commission has authorized a minimum of three and as many as seven personal communications service ("PCS") providers to operate in each market.^{18/}

2. Full Title II Regulation Is Not Necessary to Protect Consumers

Traditionally, detailed tariffing requirements have been imposed to ensure that carriers with market power are unable to

^{16/} See Economic and Management Consultants International (EMCI), The Changing Role of Cellular in the Wireless Marketplace (Dec. 1992).

^{17/} See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, RM-8117, RM-8030, RM-8029 (rel. June 9, 1993) (Notice of Proposed Rule Making).

^{18/} Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, FCC 93-451 (rel. October 22, 1993) (Second Report and Order) [hereinafter "PCS Second Report and Order"].

raise prices or restrict output.^{19/} In the commercial mobile services market, however, the level of competition is sufficient to justify forbearance from Title II regulation.^{20/} The discretionary application of Title II regulation, including detailed tariff requirements, to commercial mobile services is unwarranted because cellular carriers remain bound by Sections 201 and 202 of the Act.^{21/} Consumers also have the option of filing a Section 208 complaint in the event a carrier violates the Act.^{22/} Because cellular carriers lack market power, and sufficient other safeguards exist, discretionary imposition of Title II requirements is not necessary to protect consumers.

^{19/} Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 77 F.C.C.2d 1 (1980); Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445 (1981); Second Report and Order, 91 F.C.C.2d 59 (1982), recon., 93 F.C.C.2d 54 (1983); Second Report and Order, 48 Fed. Reg. 28,292 (1984); Fifth Report and Order, 98 F.C.C.2d 1191 (1984), recon. 59 Rad. Reg. 2d 543 (1985); Sixth Report and Order, 99 F.C.C.2d 1020 (1985), rev'd sub nom. MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

^{20/} Notice at ¶ 62.

^{21/} 47 U.S.C. §§ 201, 202. As the Commission recently explained, "the tariff filing procedures set forth in Section 203 of the Communications Act were designed principally to facilitate enforcement of the substantive requirements, contained in Sections 201(b) and 202(a), that carriers' rates and practices be just, reasonable, and not unreasonably discriminatory." Tariff Filing Requirements for Interstate Common Carriers, 7 FCC Rcd. 8072, 8078-79 (1992), stayed, 7 FCC Rcd. 7989 (1992).

^{22/} See 47 U.S.C. § 332(c)(1)(A); Conference Report at 490.

3. **Maximum Forbearance from Title II Regulation of Commercial Service Providers will Promote the Public Interest**

In requiring the Commission to make a public interest determination,^{23/} the statute directs the Commission to pay particular attention to the effect regulatory forbearance may have on competition in the commercial mobile services market. Because regulatory forbearance is in accord with the Congressional goal of promoting competitive market conditions in the mobile services market,^{24/} the Commission should find that forbearance and permissive detariffing, in particular, would promote the public interest.

In its most recent examination of permissive detariffing, the Commission reaffirmed its conclusion that detailed tariff filing requirements pose substantial competitive costs without providing consumers with any offsetting benefits.^{25/} Specifically, where carriers lack "substantial market power, [tariff filing requirements] impair competition by delaying or deterring carriers in their service and rate offerings and [by] causing them to bear additional costs."^{26/} Rather than realizing offsetting benefits, "users would pay higher rates and . . . the services available to meet the needs of users would be

^{23/} See 47 U.S.C. § 332(c)(1)(A)iii.

^{24/} Conference Report at 491.

^{25/} Tariff Filing Requirements for Interstate Common Carriers, 7 FCC Rcd. at 8079.

^{26/} Id.

limited."^{27/} The Commission also found that permissive detariffing reduces the likelihood of collusive pricing.^{28/}

While the Commission did not extend its streamlined tariffing requirements for nondominant carriers to cellular providers,^{29/} its decision was based on the fact that cellular has never been explicitly declared nondominant, and not on concerns regarding the competitiveness of the cellular marketplace.^{30/} As demonstrated above, the commercial mobile services market, including cellular, is competitive. Accordingly, the Commission should forbear from generally applying Title II regulation, including tariff filing requirements, to cellular carriers in order to promote competition and the public interest.^{31/}

^{27/} Id.

^{28/} Id.

^{29/} Tariff Filing Requirements for Nondominant Common Carriers, 8 FCC Rcd. 1395, 1397 (1993).

^{30/} Cellular Telecommunications Industry Association Petition for Waiver of Part 61 of the Commission's Rules, 8 FCC Rcd. 1412 (1993). The Commission's actions here will address the petition filed by the Cellular Telecommunications Industry Association to declare cellular to be "nondominant" and subject to streamlined tariffing rules. CTIA Petition for Waiver of Part 61 of the Commission's Rules, RM-8179, filed Feb. 4, 1993.

^{31/} Because Sections 223, 225, 226, 227 and 228 were enacted to remedy perceived deficiencies in other segments of the telecommunications market, they should not apply to commercial mobile service providers unless there is a documented need. In fact, the commercial practices of mobile service providers has elicited few consumer complaints. Moreover, in the event the need subsequently arises to apply these sections, the Commission retains the authority to do so. See Conference Report at 491 (stating that the Commission "may choose to 'unspecify' certain
(continued...)

B. The Commission's Tentative Decision to Permit PCS Licensee "Self-Designation" Should be Extended to All Commercial Mobile Service Providers

The Commission has tentatively concluded that no single regulatory classification should be applied to all PCS services.^{32/} Permitting PCS licensees to self-designate their regulatory status on the basis of the services they provide "would allow licensees to choose the type of services they will provide based on market demand rather than based on regulatory preconditions."^{33/}

For the same reason, and consistent with the underlying goals of the statute to ensure regulatory parity, all providers of commercial mobile services should be accorded the same flexibility to select private status for certain mobile services. The Commission's practical experience with licensee self-designation in other contexts,^{34/} as well as the substantial

^{31/}(...continued)
provisions [of Title II]" that it had previously refrained from applying). Finally, commercial mobile service providers remain subject to Sections 201 and 202 and the Section 208 complaint process.

^{32/} Notice at ¶ 45. Of course, PCS services that are provided for profit and that offer interconnected service to the public or large segments of the public would be classified as commercial mobile services. Id. Cf. 47 U.S.C. § 332(c)(1)(A) (a provider of commercial mobile services "shall . . . be treated as a common carrier for purposes of [the Communications] Act"). House Report at 260 (purpose of classifying providers of commercial mobile services as common carriers was to protect consumers, who would be "den[ie]d the protections they need if new services such as PCS were classified as private") (emphasis supplied).

^{33/} Notice at ¶ 46.

^{34/} Id. at ¶ 46 n.67.

support for licensee choice elicited in the PCS rulemaking proceeding,^{35/} demonstrate the wisdom of relying on market forces to dictate the type and quantity of mobile services that are made available to the public. Carriers offering private services enjoy significant freedom to price flexibly, customize their service, and respond rapidly to market demand, representing a potential competitive advantage over their common carrier competitors. There is no basis for according such an advantage to one provider of commercial mobile services but not to others.

As a factual matter, cellular and PCS are sufficiently similar to warrant uniform regulatory treatment in this regard as in all others. Congress recognized this comparability when it sought to assure the uniform treatment of similar mobile services.^{36/} The Commission relied on its prior experience in regulating cellular service in developing its PCS rules.^{37/} Indeed, the Commission's initial reluctance to permit cellular carriers to obtain PCS licenses within their cellular service areas is attributable to its recognition of the substitutability of cellular and PCS service.^{38/} Given the comparability of

^{35/} See id. ¶ 46 (citing Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314).

^{36/} See House Report at 260.

^{37/} See Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 FCC Rcd. 5676, 5686-87 (1992) (Notice of Proposed Rule Making and Tentative Decision).

^{38/} See id. at ¶¶ 62-64.

cellular service and PCS, no basis exists for differential regulation of such services.^{39/}

While the Commission expresses concern over the practical aspects of self-designation by common carrier licensees, that concern should not lead it to reject a policy that promises to enhance competition and promote the development of new services. As it did in the cellular flexibility proceeding,^{40/} the Commission can assure the continued availability of commercial mobile services on a common carrier basis by requiring all commercial mobile service providers -- including PCS licensees -- to notify the Commission prior to implementing a new service.^{41/} The Commission should permit market forces to determine the most efficient use of the radio frequency spectrum consistent with the continued availability of commercial mobile services.

^{39/} Pending before the Commission is a rulemaking petition proposing that cellular carriers be permitted to offer auxiliary services on a private rather than common carrier basis. See Amendment of the Commission's Rules to Authorize Cellular Carriers to offer Auxiliary and Non-Common Carrier Services, RM-7823 (filed Sept. 4, 1991). As the pleadings in that proceeding demonstrate, the public interest would be served by according common carrier licensees the flexibility to offer some services on a private carrier basis. See, e.g., Comments of McCaw Cellular Communications, Inc. at 1-3 (filed Nov. 26, 1991).

^{40/} Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service, 3 FCC Rcd. 7033 (1988).

^{41/} See 47 C.F.R. § 22.930(b). Cf. PCS Second Report and Order at ¶ 111 (permitting cellular licensees to offer PCS-type services, including wireless PBX, data transmission, and telepoint services, without prior notification).

II. The Commission Should Define Commercial Mobile Services Broadly to Avoid Disparate Treatment of Comparable Services

In response to disparate regulation of the nascent mobile services market,^{42/} Congress revised Section 332 to assure the continued growth and development of mobile services by mandating the establishment of a comprehensive regulatory scheme featuring equivalent regulation of comparable services.^{43/} Given this mandate, constructing hypertechnical definitions of the relevant statutory terms will only produce the result Congress specifically sought to remedy -- the disparate regulatory treatment of comparable mobile services. Accordingly, the Commission should interpret the phrase "commercial mobile service" broadly to encompass all mobile services that are provided for profit and that make interconnected service available to the public.

A. "For Profit" Service Should Include Any Service Offered For Profit, Even Where a Licensee Also Offers Services on a Not-For-Profit Basis Using the Same Facilities

As the Notice recounts, Congress included the "for profit" element to establish a fundamental distinction between licensees that offer mobile radio service commercially and those that do not.^{44/} Thus, "any mobile service . . . that is provided for profit" should encompass any service that is offered on a

^{42/} See House Report at 259-260.

^{43/} See Conference Report at 490; House Report at 259-60.

^{44/} See Notice at ¶ 11.

commercial basis to entities other than the licensee itself.^{45/} In contrast to original Section 332,^{46/} the critical question is whether the mobile service is offered to end users on a for-profit basis. Such a service would be classified as a commercial mobile service, even where a particular element of the service might not be provided "for profit."

Licensees that share facilities they use internally but that also sell capacity to users on a for-profit basis would also be classified as providers of "commercial mobile services." Because the statutory language extends to any service that is provided for profit, licensees of shared systems and their system managers that seek to realize a profit from the service -- like commercial service providers generally -- satisfy the "for-profit" component of the "commercial mobile service" definition.

B. "Interconnected Service" Means Service That Includes the Capability for End Users to Make and Receive Calls Transmitted Over the Public Switched Network

In defining "interconnected service," the Commission must again look to the legislative intent to avoid disparities in the regulation of mobile services. Under the original Section 332, the Commission distinguished between private and common carriers based on whether the carrier resold interconnected service for

^{45/} See 47 U.S.C. § 332(d)(1) (emphasis supplied).

^{46/} See H.R. Rep. No. 765, 97th Cong. 2d Sess. 56 (1982) (permitting private carriers to interconnect with the public switched network so long as they are not "reselling for profit interconnected common carrier services").

profit.^{47/} In enacting the revised Section 332, Congress rejected this distinction in order to assure greater regulatory parity among commercial mobile services. Consistent with Congressional intent, if the mobile service encompasses an interconnection with the public switched network, such that end users can initiate and terminate communications to telephones and other devices connected to that network, the services should be regulated as a commercial mobile service.

C. "Public Switched Network" Means the Ubiquitous Landline Facilities Used to Provide Telephone Exchange Service and Telephone Toll Service

The absence of any discussion of the phrase "public switched network" in the statute or the legislative history strongly suggests that Congress intended the Commission to apply the ordinary meaning of the phrase: the network of local and long distance telephone companies that form the backbone of the telecommunications infrastructure. Had Congress intended to include commercial mobile services within the definition,^{48/} it would have explicitly broadened the scope of "public switched network" to include this new class of services. This interpretation is also consistent with the Congressional intent to define as "commercial mobile service" providers all carriers that offer comparable commercial mobile services. The Commission should adopt its proposed definition of the term "public switched

^{47/} House Report at 260 n.2.

^{48/} Cf. Notice at ¶ 22.

telephone network" to refer to the local and interexchange common carrier switched network, whether by wire or radio.^{49/}

D. "Available to the Public or to . . . Classes of Eligible Users as to be Effectively Available to . . . the Public" is Intended to Include Services Offered by a Licensee to Multiple "Limited Eligibility" Segments of the Public as Well as Those Offered to the Public Generally

The Commission should, as proposed in the Notice, define this element to encompass all carriers that offer interconnected services to the public without imposing eligibility requirements and those carriers that serve a substantial portion of the public, notwithstanding limitations on subscriber eligibility.^{50/} In particular, "commercial mobile service" should encompass all interconnected services available to the public without restriction, even though a particular service may be of use to only a small percentage of the general population.^{51/} While the specialized nature of service may limit the number of likely customers, it does not constitute an eligibility requirement. For similar reasons, if an interconnected service is offered to the public in a limited

^{49/} Id. at ¶ 22 n.26.

^{50/} Id. at ¶ 23.

^{51/} See National Ass'n of Regulatory Utility Com'rs v. FCC, 525 F.2d 630, 641 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) ("One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population.").

geographic area, such as a shopping mall, it is nonetheless "available" to the public.^{52/}

Moreover, even those services that are only offered to specialized classes of customers should be deemed "available" to the public if, in the aggregate, service is provided to a substantial portion of the public. A service that is offered only to doctors or plumbers, for instance, should be deemed a "commercial mobile service" because it would be available to a substantial portion of the total population, notwithstanding the limitation on eligibility. In addition, because a limited eligibility service is likely to compete with comparable, generally available services, comparable regulatory treatment of the services is consistent with the Congressional intent.

E. The "Functional Equivalence" Test Should be Interpreted so that the Definition of Commercial Mobile Services Includes any Interconnected Service Offered for Profit and any Service Perceived by Customers as Substitutable for a Commercial Mobile Service

While the statutory language describing "functional equivalence" may be susceptible to multiple interpretations, as the Notice demonstrates,^{53/} application of the functional equivalence test should be guided by the Congressional intent underlying the statute. Consistent with that intent, the Commission should interpret the functional equivalence test so that the definition of commercial mobile services includes those services that, even if they do not literally meet the criteria

^{52/} See Notice at ¶ 27.

^{53/} See id. at ¶¶ 29-31.

for such services, are in fact perceived by customers as being substitutable for a commercial mobile service.

Thus, no interconnected service provided for profit to the public would fall within this exception,^{54/} and any effort to exclude services that otherwise meet the statutory definition will serve only to recreate the disparities that the statute was intended to correct. It was, after all, the classification of SMR operators as "private" that led ultimately to the authorization of "enhanced" SMRs that offered cellular-like services outside the constraints of common carrier regulation.^{55/} SMR operators that band together to offer subscribers the ability to "roam" from one system to another and "EMSPs" recently proposed by the Commission^{56/} -- like the ESMRs such as Nextel -- would also be classified as commercial mobile

^{54/} Cf. id. at ¶ 33 (noting that "[c]ustomer perception is the linchpin" in determining the "likeness" of services).

^{55/} Likewise, a "functional equivalence" test based on whether a licensee utilizes frequency reuse or other technologies employed by providers of commercial mobile service would be unavailing. Under such an approach, entities that developed alternative technological means to offer services that are comparable to commercial mobile services would be classified as "private." See, e.g., G. Naik, Geotek Will Get Infusion of Cash from Soros, Others, Wall St. J., Nov. 3, 1993, at B6 (describing carrier's plans to provide "cellular-like services" using digital technology that "divides a radio frequency into several 'sectors'").

^{56/} See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, RM-8117, RM-8030, RM-8029 (rel. June 9, 1993) (Notice of Proposed Rule Making).

services.^{57/} Similarly, paging services that are currently licensed on a private basis should be classified as commercial mobile services if they are interconnected with the public switched network and are offered to the public for profit.

Given Congress's preference for consistent regulation of comparable mobile services, applying a "broader, more flexible definition of 'private mobile services'" to expand the potential number of services classified as "private"^{58/} would conflict directly with the Congressional intent. The more appropriate interpretation would be one that narrowly defines "private mobile services" to avoid providing a regulatory "windfall" to services that are functionally equivalent to commercial services.

The Commission need not, however, develop a unified construction of the statute that anticipates every future application of wireless technology. Given the rapid evolution of wireless technology, the most sensible approach would be to define "functional equivalence" on a case-by-case basis,^{59/} so long as comparable services remain subject to equivalent

^{57/} The elimination of the old distinctions between "private" and "common carrier" mobile services, and its replacement by Section 332(c)'s functional test, also argues for repealing the ban on the offering of dispatch services by common carriers. The Commission clearly has the authority to do so. 47 U.S.C. § 332(c)(2). Particularly as SMR licensees begin to offer "enhanced" or "wide area" services, with less of their channel capacity available for dispatch, there is likely to be an unserved market for dispatch that common carriers with excess capacity should be permitted to serve.

^{58/} Notice at ¶¶ 29-30.

^{59/} See id. at ¶ 33.

regulation. Confronted by a particular type of service in the future, the Commission can determine at that time whether classification as a private or commercial mobile service best comports with the Congressional desire to achieve regulatory parity. Such a determination should, of course, be made at the time the service is authorized by the Commission. This approach would permit the Commission to classify a service as private if it is not functionally equivalent to a commercial mobile service -- while reserving to the Commission the authority to reclassify the service as a commercial mobile service if it evolves into a functional equivalent as the result of changes in technology or the manner in which the service is offered.

III. Consistent with the Statutory Intent, The Commission Must Ensure that State Authority over Commercial Mobile Services is Exercised in a Manner that Does Not Inhibit the Growth and Development of Such Services

In preempting state regulatory authority, Congress recognized that a patchwork of inconsistent state regulation would undermine the growth and development of mobile services.^{60/} Preemption is necessary to foster the growth and development of mobile services because mobile services are inherently national services.^{61/} Indeed, Congress envisioned the exercise of state entry and rate regulatory authority only in extreme cases: when significant market failure justified

^{60/} See Conference Report at 494.

^{61/} House Report at 260.