

ORIGINAL

BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

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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 )

GEN Docket No. 93-252

To: The Commission

**REPLY COMMENTS  
OF THE  
AMERICAN PETROLEUM INSTITUTE**

The American Petroleum Institute ("API"), by its attorneys and pursuant to Section 1.415 of the Rules and Regulations of the Federal Communications Commission ("Commission" or "FCC"), hereby submits these Reply Comments in response to the Comments of the participants that submitted their views regarding the Notice of Proposed Rule Making adopted by the Commission on September 23, 1993 in the above-styled proceeding.<sup>1/</sup>

**I. INTRODUCTION**

1. API filed Comments in this proceeding on November 8, 1993 that generally supported the Congressional

<sup>1/</sup> Notice of Proposed Rule Making, 58 Fed. Reg. 53169 (October 14, 1993) ("Notice").

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goal to "level the regulatory playing field" for providers of mobile radio services. API agreed that equal regulatory treatment for mobile radio carriers is necessary for a competitive mobile radio service marketplace.

2. API endorsed the Commission's proposal to classify all existing private, non-commercial services as Private Mobile Services. However, API expressed concern that its member companies' regulatory status as Private Mobile Service licensees could be altered if the primary uses of their systems were not fully and clearly explained. API urged the Commission not to apply commercial classification to systems that include a for-profit sharing element which only have a de minimis effect on the overall operation. The Comments of several entities reflected the view that licensees who operate their systems for internal use, but also make excess capacity available on a for-profit basis, should be deemed to be providing a commercial service. API disagrees with this view, and it is therefore pleased to address this issue in these Reply Comments.

## II. REPLY COMMENTS

3. Several parties asserted that mobile radio systems primarily used for the licensee's internal use, but also

operated in a manner that permitted sale of excess capacity to others on a for-profit basis, should be reclassified as Commercial Mobile Service.<sup>2/</sup> API disagrees with this approach because it fails to consider the fact that the vast majority of the Petroleum Radio Service two-way mobile radio systems are operated for internal communication purposes. Such use comports with the Commission's tentative proposal to maintain Private Mobile Service status for non-commercial licensees.<sup>3/</sup>

4. Other commenters urged the Commission to treat as commercial only that portion of the mobile service which is offered on a for-profit basis, thus regulating some licensees as "hybrid" commercial/private mobile service providers.<sup>4/</sup> Such dual regulatory treatment is not only

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<sup>2/</sup> Comments of American Mobile Telecommunications Association, Inc. at p. 9; Paging Network, Inc. at p. 5; The Public Service Commission of the District of Columbia at p. 4; United States Telephone Association at p. 3; McCaw Cellular Communications, Inc. at p. 16; and Rochester Telephone Corporation at pp. 3-4.

<sup>3/</sup> Notice at p. 13.

<sup>4/</sup> Comments of Telocator at p. 9; Telephone and Data Systems, Inc. at pp. 4-5; Vanguard Cellular Systems, Inc. at pp. 3-4; Rockwell International Corporation at p. 2; Southwestern Bell Corporation at pp. 5-6; and the NYNEX Corporation at pp. 6-7. API believes that these commenters erroneously associated the FCC's discretion to apply different Title II regulations to Commercial Mobile Service providers with applying different regulatory classification  
(continued...)

burdensome for the licensee, but also for the Commission. In this regard, API joins BellSouth in the view that the Commission should conserve its valuable resources by providing certainty of classification for existing and new services.<sup>5/</sup> API urges the Commission to avoid dual regulatory classification of two-way mobile radio systems used primarily for a licensee's internal communications.<sup>6/</sup> API recommends that the Commission maintain the Private Mobile Service status of these hybrid systems.

5. The primary motivation prompting Congress to amend Section 332 of the Communications Act of 1934 was its desire to ensure that all providers of Commercial Mobile Services be regulated in a like manner.<sup>7/</sup> It is generally accepted that the impetus of this amendment developed in the cellular industry over concern that other mobile radio service providers, especially Specialized Mobile Radio ("SMR") systems, were providing similar services but without

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<sup>4/</sup> (...continued)  
to the same licensee. See also, Conference Report at pp. 22-23.

<sup>5/</sup> Comments of BellSouth at p. 5.

<sup>6/</sup> See also, Comments of Rural Cellular Association at pp. 2-4 regarding the dual classification of Personal Communications Service.

<sup>7/</sup> 47 U.S.C. § 332(c)(1).

adhering to the same regulatory regimen. In effect, the cellular industry argued that its SMR competitors enjoyed an unfair advantage in the marketplace.

6. API submits that the Commission may discharge its responsibility of determining which private carrier services should be reclassified as commercial by employing a competition standard. In this regard, API supports the comments of the Industrial Telecommunications Association ("ITA") which expressed the view that mobile services which cannot compete with common carriers should not be considered "functionally equivalent" to Commercial Mobile Services, nor classified as such.<sup>8/</sup> Specifically, ITA stated that traditional two-way cooperative shared systems providing service on either a for-profit or non-profit basis, are private because they cannot compete with common carrier mobile systems.<sup>9/</sup> Other commenters agreed. For example, Nextel stated that shared systems do not serve a substantial portion of the public on a for-profit basis and, from a functional perspective, are not competitive with reasonable substitutes for cellular or other mobile service. Nextel

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<sup>8/</sup> Comments of ITA at p. 4.

<sup>9/</sup> Id. at 5.

concluded that these systems should not be classified as for-profit, commercial mobile systems.<sup>10/</sup>

7. API respectfully submits that the Commission should look to the primary use of the service to determine its classification as commercial or private. The Commission's attention is directed to other commenters who support this view. The National Association of Business and Educational Radio, Inc. ("NABER") stated that for-profit service on an ancillary basis should not necessarily convert a private mobile service licensee into a Commercial Mobile Service provider, asserting that the Commission should look to the primary activity of the system.<sup>11/</sup> Additionally, Motorola stated that neither the provision of for-profit service on an ancillary basis or through a third-party manager should be considered as for-profit under Section 332.<sup>12/</sup> Finally, the Utilities Telecommunications Council ("UTC") argued that non-commercial private land mobile radio licensees should be permitted to lease reserve capacity on a for-profit basis without being classified as Commercial Mobile Service systems, provided that at least

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<sup>10/</sup> Comments of Nextel at p. 9.

<sup>11/</sup> Comments of NABER at pp. 7-8.

<sup>12/</sup> Comments of Motorola at p. 7.

51% of the system is used 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.<sup>13/</sup> API supports each of these Comments.

8. Even the cellular industry recognizes the need to examine the primary use of a licensee's system in determining whether the service meets the for-profit requirement. In its Comments, the Cellular Telecommunications Industry Association ("CTIA") urged the Commission to use a broad test in determining "for-profit." Specifically, CTIA stated that the Commission should determine whether the service as a whole is offered commercially.<sup>14/</sup> API agrees. As stated in the its Comments, the vast majority of the Petroleum Radio Service licensees use their systems solely for internal communications. Few, if any, of these systems are shared with other users. Where sharing arrangements do exist in the Petroleum Radio Service, they are predominantly on a non-profit, cost-sharing basis.<sup>15/</sup> The for-profit sharing arrangements in the Petroleum Radio Service are so de minimis as to barely

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<sup>13/</sup> Comments of UTC at p. 5.

<sup>14/</sup> Comments of CTIA at pp. 7-8.

<sup>15/</sup> Comments of API at pp. 6-7.

warrant mention in this proceeding. Surely, Congress did not intend to include such de minimis use within the definition of Commercial Mobile Service.<sup>16/</sup> Two-way mobile radio systems operated in the Petroleum Radio Service are non-commercial; they do not compete with common carrier or private carrier mobile radio systems.

### III. CONCLUSION

9. API urges the Commission not to alter the traditional private service definition simply because a system may be shared on a non-profit basis and, if any, on a limited for-profit basis. The Commission should preserve a private licensee's right to share its excess capacity on both a for-profit or not-for-profit basis as currently permitted under Section 90.179 of the FCC Rules and Regulations.

**WHEREFORE, THE PREMISES CONSIDERED,** the American Petroleum Institute respectfully submits the foregoing Reply Comments, and urges the Federal Communications Commission to

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<sup>16/</sup> See generally, Conference Report at pp. 22-23.

take action in this proceeding in a manner consistent with  
the views expressed herein.

Respectfully submitted,

**AMERICAN PETROLEUM INSTITUTE**

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