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

In the matter of	)
	)
Bell Atlantic Mobile Systems, Inc.	)
	)
Petition for Special Relief Concerning Enhanced Specialized Mobile Radio Applications And Authorizations	)

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OPPOSITION

NEXTEL COMMUNICATIONS, INC.

Robert S. Foosaner
Senior Vice President
Government Affairs

Lawrence R. Krevor
Director-Government Affairs

Of Counsel

Leonard J. Kennedy
Laura H. Phillips

DOW, LOHNES & ALBERTSON
1255 23rd Street, N.W.
Washington, D.C. 20037
(202) 857-2500

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SUMMARY

Bell Atlantic Mobile Systems, Inc. ("BAMS") has filed an unauthorized "Petition for Special Relief" raising specious arguments concerning implementation of the amendments to Section 332 of the Communications Act of 1934, as amended, contained in the Omnibus Budget Reconciliation Act of 1993. Nextel Communications, Inc. ("Nextel") submits the following Opposition to BAMS's Petition.

In April 1990, Nextel (then Fleet Call, Inc.) filed for a waiver of several of the Commission's SMR technical rules to enable it to implement technically advanced digital mobile technology on its licensed SMR frequencies. Nextel coined the term "Enhanced Specialized Mobile Radio" ("ESMR") to describe the improved capabilities to be offered by the implementation of digital system technology on existing SMR frequencies. The Commission specifically ruled that ESMR was not a new service and that ESMR technology could be implemented within the Commission's existing SMR regulatory framework.

Recent changes to the Communications Act revised the regulatory scheme applied to interconnected mobile services offered for profit. These revisions were intended to promote "regulatory parity" among functionally equivalent mobile services. Congress recognized, however, that reclassification of all services as commercial mobile services could not proceed without a complete review of

existing rules. Accordingly, Congress provided for adoption of commercial mobile services regulations for cellular and functionally equivalent services within a year.

The legislation expressly excepted reclassified private land mobile services providers from the new regulatory scheme for three years following enactment. Congress' intention is confirmed by the statement of House Telecommunications Subcommittee Chairman Markey five days prior to enactment:

> I want to clarify that subsection (c)(2) of Section 6002, relating to effective dates, provides a three year period during which current providers of private land mobile service will continue to be treated in the same manner. The intent of this transition period is to provide those whose regulatory status is changed as a result of this legislation a reasonable time to conform with the new regulatory scheme.

There is no factual or legal basis to conclude that ESMR is not entitled to this transition.

Because the BAMS Petition for "special relief" is procedurally defective and legally baseless, it should be dismissed. Moreover, BAMS appears to be acting in concert with its corporate parent in an attempt to use the regulatory process and its landline bottleneck monopoly to inflict competitive harm on a potential competitor. The Commission should institute an investigation and impose appropriate administrative sanctions to dissuade Bell Atlantic/BAMS's outrageous behavior.

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OPPOSITION

I. INTRODUCTION

Nextel Communications, Inc. ("Nextel"), hereby files in opposition to the Bell Atlantic Mobile Systems, Inc. ("BAMS") Petition for Special Relief addressing Enhanced Specialized Mobile Radio ("ESMR") regulation.[1/] BAMS' Petition to eliminate the statutory transition provided to ESMR, and its advocacy of equal access requirements on ESMR, is procedurally defective, totally unsupported by the law or facts, repetitious, anti-competitive and self-serving.

The BAMS Petition is an unauthorized, late-filed pleading, intended to undermine the regulatory structure established by Congress and being implemented by the Federal Communications Commission ("Commission"). BAMS' arguments

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1/ See Petition For Special Relief Concerning Enhanced Specialized Mobile Radio Applications and Authorizations, filed December 22, 1993 at 5 ("Petition").

could and should have been raised in the Commercial Mobile Services ("CMS") rulemaking.[2/] However, no request or motion to file late has been made, and no justification has been offered for raising new issues at this date.[3/] Accordingly, BAMS' Petition should be summarily dismissed as procedurally defective. The Commission cannot tolerate such flagrant disregard of its procedural rules and should not accept BAMS' filing now that the relevant pleading cycle is complete.

The Petition demonstrates the extremes to which a monopolist will go to protect its market position, particularly at the expense of potential competitors. Not only does BAMS strain to reinterpret recent changes to the Communications Act solely to disadvantage a future wireless competitor, its filing of the Petition appears to be

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2/ See Notice of Proposed Rulemaking, Treatment of Mobile Services, 8 FCC Rcd 7988 (1993) ("CMS Rulemaking").

3/ Nextel respectfully requests that the Commission waive Section 1.45 of its Rules and accept and consider this Opposition. BAMS filed its Petition for Special Relief on December 22, 1993, without serving Nextel or otherwise apprising the company of the Petition and its exceptional request for relief. Nextel did not become aware of the Petition until several days later and attempted to determine whether the Petition would be placed on public notice. Once it became apparent that no formal notice and comment period would be established, Nextel prepared this Opposition. Nextel submits that the public interest requires that the Commission consider its Opposition in ruling on BAMS' Petition.

motivated by other considerations.[4] BAMS' Petition highlights classic competitive concerns, and graphically illustrates that Bell Atlantic's potential to unfairly handicap its competitors by leveraging its landline monopoly bottleneck is the same in the wireless world as in the wireline world.[5]

Bell Atlantic, and its affiliate BAMS, should not be permitted to misrepresent facts and misconstrue the law in an attempt to disadvantage competitors and delay interconnection with impunity. Nextel respectfully requests

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4/ BAMS affiliate, Bell Atlantic Network Services, Inc. ("NSI"), has delayed negotiating an interconnection agreement with Nextel for over a year. Not coincidentally, within 48 hours of this filing, Bell Atlantic NSI, purportedly a separate subsidiary of BAMS, refused to provide Nextel with interconnection unless it acquiesced to Bell Atlantic NSI's interpretation of Nextel's regulatory status. See Letter of Kenneth R. Baranowski to Lawrence R. Krevor, undated. Not only is Bell Atlantic usurping the Commission's authority in making its own determination of Nextel's regulatory status, it is seeking to do what it has been unable to achieve either in the marketplace or before the Commission or Congress by utilizing its control over critical landline bottleneck facilities to impose its own determinations regarding future CMS classifications, by ignoring the statutorily-imposed three year transition period.

As discussed below, the timing of this Petition, in combination with Bell Atlantic NSI's dilatory negotiation tactics, strongly suggests a violation of the conditions imposed on BAMS' cellular licenses, and further suggests illegal, anti-competitive collusion in contravention of the Commission's rules.

5/ Contrary to the rhetoric of the Petition, there is no basis to conclude that fledgling ESMR providers such as Nextel either possess or have the incentive to exploit any bottleneck monopoly. That is a competitive "privilege" available only to monopoly dominant carriers such as the LECs and their affiliates.

that the Commission initiate an investigation of violations of the Commission's separate subsidiary rules and good faith interconnection negotiation policy and impose appropriate administrative sanctions on BAMS and Bell Atlantic, its corporate parent, pursuant to Sections 403 and 312 of the Communications Act.

II. BACKGROUND

As a leading licensee of SMR systems, Nextel and its subsidiaries provide mobile communications services to approximately 200,000 mobile units on daily basis on both 800 and 900 MHz SMR systems, covering a population of over 100 million. Nextel began its acquisition of SMR systems in 1987 by purchasing existing SMR systems and two-way mobile radio operators and continues to acquire SMR systems to offer its customers additional service options and system coverage.

Responding to the explosive growth in consumer demand for wireless communications, Nextel conceptualized and is implementing ESMR systems using innovative digital technologies to increase dramatically the capacity, service flexibility and quality of existing communications systems. These ESMR systems incorporate Time Division Multiple Access ("TDMA") transmission technologies and frequency reuse to yield up to 50 times the capacity of existing SMR systems. Nextel's innovative technology achieves these efficiencies

with less than half the spectrum assigned to a cellular carrier.

The deployment of ESMR systems was approved by the Commission in 1991 when Nextel (formerly Fleet Call, Inc.) was granted a limited waiver to construct ESMR systems in six frequency congested markets within the United States.[6] At that time, the Commission recognized that the proposed implementation of digital technology and multiple base station configurations was consistent with SMR technical rules. The Commission stated:

> Given that digital technology and multiple base station configurations are also permitted under current rules, we must conclude that Fleet Call's proposal does not create a de facto new service.[7]

III. BAMS IS WRONG ON BOTH THE FACTS AND THE LAW

A. BAMS Reclassification Argument Relies on False Assumptions.

BAMS seeks to have ESMR service "reclassified" as CMS and subjected to common carrier regulation immediately.[8] BAMS argues that ESMR is not eligible for

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6/ See Fleet Call, Inc., 6 FCC Rcd 1533 (1991), recon. denied, 6 FCC Rcd 6989 (1991) ("Fleet Call Waiver Order").

7/ Id. at 1537. In fact, the Commission did not originate the appellation "Enhanced Specialized Mobile Radio." Nextel created the term, much as McCaw Communications trademarked the term "Cellular One" to provide an identity for non-wireline cellular service offerings. There is no separate "ESMR" service regulated under the Commission's private radio rules.

8/ Petition at 5.

the three year regulatory transition period contained in the Budget Act for private land mobile services reclassified as commercial mobile services. BAMS' argument, however, is factually and legally flawed and blatantly misrepresents Congressional and Commission views of the regulatory framework of SMR and ESMR.

BAMS' sole justification for subjecting ESMR services to immediate common carrier regulation is its allegation that ESMR is a wholly new service that was not being offered as a private land mobile radio service on August 10, 1993, the date of enactment of the Omnibus Budget Reconciliation Act (the "Budget Act").[9/] BAMS cites in support of its contention news accounts announcing the

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9/ See Pub. L. No. 103-66, Title VI, §6002(c), 107 Stat. 312 (1993). In relevant part, Section 6002(c) provides as follows:

The amendments made by subsection (b)(2) shall be effective on the date of enactment of this Act, except that

. . .

> (B) any private land mobile service provided by any person before such date of enactment, and any paging service utilizing frequencies allocated as of January 1, 1993, for private land mobile services, shall, except for purposes of section 332(c)(6) [foreign ownership] of such Act, be treated as a private service until 3 years after such date of enactment.

implementation of ESMR service by Nextel in Los Angeles in late August of 1993.[10/]

The Commission has consistently found, however, that ESMR service offerings are not new services, but rather the introduction of new technology to enhance the quality and capacity of existing services. BAMS, in a bizarre flight of revisionism, has ignored the Commission's consistent regulatory treatment of SMR that served as a basis for the statutory language concerning commercial mobile services regulation and the transition periods contained in the Budget Act.

B. ESMR Is Not a New Service.

On April 5, 1990, Fleet Call filed a request for waiver of several of the Commission's rules to implement a wide area, low power digital SMR systems.[11/] In

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10/ BAMS cites the following news sources: "Nextel Activates Digital Mobile Network," Reuters Ltd., August 31, 1993; "Nextel Activates Los Angeles Digital Mobile System," Business Wire, August 31, 1993.

The absurdity of BAMS' argument is demonstrated by the fact that it would result in dual private mobile/commercial mobile regulations applying to different stations within a single integrated ESMR system. For example, Nextel's Los Angeles ESMR system includes more than 100 stations licensed under existing Part 90 SMR rules. When Nextel adds additional sites, BAMS would have them regulated as CMS. As a call is handed-off from base station to base station, the applicable regulations -- private mobile or CMS -- would be determined by the status of the base station then carrying the call, a riduculous and totally impractical result.

11/ See generally Fleet Call Waiver Order.

considering the request, the Commission observed that the rules governing SMR service:

> allow, by design, flexibility to foster and accommodate innovation. Hence, Fleet Call's proposal generally falls within the rules and policies governing the Specialized Mobile Radio Service. Indeed, our regulatory scheme itself provides much of the latitude that Fleet Call seeks.[12/]

The Commission expressly rejected arguments by the cellular industry, including Bell Atlantic, that Fleet Call's proposed digital ESMR service was a new service. The cellular industry's principal argument was that Fleet Call's request should be considered only in a notice and comment rulemaking rather than by waiver, primarily because the service Fleet Call proposed was fundamentally different from traditional SMR service.[13/] The Commission explicitly rejected this argument stating:

> We reject this line of reasoning. The Commission's current rules and policies permit a multiple base station digital configuration for SMRs. Furthermore, the services that Fleet Call will provide in its enhanced networks are not functionally different from any service that it currently provides through its existing stations. ... Given that digital technology and multiple base station configurations are also permitted under current rules, we must conclude

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12/ Id. at 1534. (footnote omitted).

13/ See e.g. Fleet Call Waiver Order at ¶24 and n.50. Cellular industry opposition to Fleet Call's proposal was spearheaded by extensive lobbying of the Commission and staff by ex-Chairmen and ex-Bureau Chiefs retained by the Cellular Telecommunications Industry Association ("CTIA") and its members.

that Fleet Call's proposal does not create a de facto new service.[14]

Accordingly, the Commission concluded that Fleet Call needed only a limited construction period waiver to convert its SMR systems to digital ESMR systems and that ESMR would operate within the existing Part 90 regulatory structure. That SMR and ESMR are the same service is a settled point of law that is no longer subject to judicial review.

C. Digital Conversion Does Not Change the Nature of the Service.

To provide support for its arguments that SMR and ESMR are different services, BAMS states that the advent of digital ESMR service is similar to the service changes customers experienced in moving from IMTS to cellular telephone service.[15] BAMS overlooks, however, the obvious distinction that cellular service was implemented only after the allocation of new spectrum specifically for a new cellular radio service and the adoption of license processing and eligibility rules for the new radio service. In contrast, the evolution from SMR to ESMR did not require the allocation of new spectrum or the adoption of new service and licensing rules. Nextel's conversion of its systems to ESMR is far more analogous to the cellular

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14/ Fleet Call Waiver Order at 1537.

15/ Petition at 5.

industry's conversion of its systems from analog to digital cellular technology.[16/]

As the Commission was fully aware, the SMR spectrum at issue in the Fleet Call Waiver Order was already licensed to or managed by Fleet Call, representing constructed, operational facilities already in full use.[17/] Fleet Call served a substantial customer base prior to its initiation of ESMR conversions. Nextel has continued to add to its SMR user base and currently has approximately 200,000 SMR users. In fact, the first customers for Nextel's ESMR systems are existing Nextel customers. There is simply no factual or legal basis for BAMS' contention that ESMR was not a private land mobile service in existence at the time of the Budget Act enactment.[18/]

16/ Cellular operators and their industry association have not suggested in comments to the Commission in the CMS proceeding that digital cellular is a new service subject to entirely different regulatory schemes than analog cellular. BAMS simply has no support for its argument.

17/ Fleet Call's application to the Commission stated that it provided dispatch, interconnect and related services to more than 150,000 users. See Fleet Call Waiver Request at 5.

18/ Bell Atlantic's untenable position is further exemplified by the fact that the Commission granted Fleet Call a waiver in 1991 for five years to permit the construction of the hundreds of base stations that comprise a single ESMR system. The Commission continues to permit Nextel and other ESMR licensees five years to implement ESMR technology for newly issued permits and recently revised SMR construction rules to expressly provide for a five-year construction period. See Amendment of Part 90, Report and Order, 8 FCC Rcd 3975 (1993) (prolonging maximum extended implementation construction period from three to five years). It is indisputable that ESMR was fully authorized

(continued...)

IV. THE THREE YEAR TRANSITION APPLIES TO ESMR SERVICES PROVIDED BY NEXTEL.

BAMS' contrary statements notwithstanding, review of the Congressional intent in the Budget Act confirms that the three year transition period is meant to apply to ESMRs. Nextel has never disputed that its ESMR operations should be reclassified as commercial mobile services under the Budget Act's "functionally equivalent" regulatory classification standards. However, BAMS' is wrong in contending that ESMR is not a beneficiary of the three year transition period for compliance with commercial mobile services regulation.

A. The Language, Legislative Intent and History of the Budget Act Confirms That The Three Year Transition Rule Applies to ESMR.

Title VI, Section 6002(b) of the Budget Act amends Sections 3(n) and 332 of the Communications Act of 1934 to create a comprehensive framework for the regulation of mobile radio services. The purpose of the amendment is to ensure that functionally equivalent mobile services are subject to similar regulation.[19] In providing for this reclassification, Congress was spurred by the impending development of new Personal Communications Services, as well as the development of the SMR industry, and changes to the Commission's rules that made SMR services more broadly

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18/ (...continued)
and fully in the process of implementation prior to the passage of the Budget Act.

19/ See H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. at 259-60 (1993) ("House Report").

available. Congress was concerned that certain private carrier offerings had become functionally indistinguishable from common carrier offerings.[20] Consequently, in describing "private carriers" that had become functionally equivalent to common carriers, Congress specifically cited the broad availability of SMR services.[21]

At the same time, Congress recognized the potential harm that would be occasioned by a "flash-cut" to common carrier regulation of services that had been regulated as and operated for years as private land mobile services.[22] Congress therefore provided a three year transition period during which affected parties could

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20/ Id.

21/ See House Report at 260, citing, In the Matter of Amendment of Part 90, Subparts M and S, 3 FCC Rcd 1838, 1840 (1988), aff'd 4 FCC Rcd 356 (1988). Prior law defined "private land mobile service" to include "service provided by specialized mobile radio, multiple licensed radio dispatched systems, and all other radio dispatch systems, regardless of whether such service is provided indiscriminately to eligible users on a commercial basis." 47 U.S.C. § 332(c)(1).

22/ See House Conf. Rep. No. 103-213, 103 Cong., 1st Sess. at 497-98 (1993) ("Conference Report"). For example, one of the Commission's primary objectives in establishing private SMR carriers was to permit them to use individualized contracts responsive to a customer's unique communications requirements. Such existing contracts may not comply with the obligations of a common carrier pursuant to Sections 201 and 202 of the Act. Immediate reclassification would vitiate thousands of existing customer service contracts as well as Commission-encouraged business strategies. Congress mandated a three-year transition period to enable reclassified private carriers--primarily ESMRS--to adjust their business practices and existing obligations to the new regulatory structure.

prepare for the application of common carrier guidelines and requirements.[23] Indeed, Congress mandated that while commercial mobile service rules for PCS licensees must be established within six months, the Commission was provided a full year to resolve the more complex task of rationalizing divergent service and technical regulations that apply to already existing SMR and cellular licensees.[24]

23/ Further, legislative recognition and protection from disruption of existing services and service providers under a new statutory or regulatory scheme is not new. For example, the 1982 amendments to Section 332 grandfathered existing common carrier dispatch operations, but did not convert these carriers to private land mobile status by virtue of their provision of dispatch service. See House Conf. Rep. No. 97-765, 97th Cong., 2d Sess. at 2299 (1982).

24/ See Budget Act §6002(d). The Commission's current rules illustrate the burdensome nature of SMR/ESMR regulations vis-a-vis the regulatory requirements applied to cellular operators. For example, current SMR rules license five-channel systems on a "first come, first served" basis within limited geographic areas of no more than 70 miles. In contrast, cellular licensees receive an exclusive license for over 400 channels throughout an MSA/RSA. Further, SMR licensees are prevented from having more than one unloaded (70 mobiles per channel) system within 40 miles of each other and must fully construct and operate their systems within one year unless a special waiver is granted. Cellular licensees operate under significantly more flexible construction requirements. Moreover, SMR operators are subject to loading requirements, deconstruction restrictions and station identification requirements for which no comparable cellular regulations exist. Restrictions on the ability of SMR operators to expand their systems without prior Commission approval, restrictions on license assignments and transfers and limitations on interconnection profits find no counterparts in the regulation of cellular carriers. Perhaps most onerous is individual site licensing, which is currently taking approximately a year, in contrast to cellular's after-the-fact notification procedures for base stations.

The Budget Act plainly provides for a three year transition period for private land mobile services such as ESMR that will be reclassified under the Act. It is illogical to argue, as BAMS does here, that Congress intended any affected private land mobile service to be classified and regulated as a CMS prior to the statutorily mandated technical equalization evaluation. To argue that the Budget Act requires the immediate imposition of common carrier regulation of ESMRs, BAMS ignores these other relevant statutory provisions.

BAMS urges the Commission to repudiate a transition that reflects the full, fair and balanced support of both Houses of Congress. The radical and illogical nature of BAMS' Petition is highlighted by the fact that even common carrier commercial mobile service providers, who will be affected by the rule changes to a far lesser degree, were granted a period of one year before any new regulations are imposed on their operations.[25/]

B. Statutory Construction Compels Commission Implementation of an ESMR Transition.

Agencies and courts are required to give effect to the legislative intent of Congress as expressed in statutory language.[26/] In interpreting statutory provisions,

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25/ See Budget Act at § 6002(c).

26/ See e.g., Estate of Cowart v. Nicklos Drilling Co., 122 S.Ct. 2589, 2594 (1992); Atlanta College of Med. and Den. Careers v. Riley, 987 F.2d 821, 827-28 (D.C. Cir.

(continued...)

agencies and courts also must presume that Congress did not engage in meaningless word games.[27]

Contrary to these basic rules of statutory construction, BAMS' reading of the Budget Act would render the statutory language conferring a three year transition virtually meaningless. If the transition language was not intended to apply to SMR providers that are transitioning to wide area digital systems, it is hard to imagine the group or class of private land mobile radio operators for whom the transition period would be applicable. It would be ludicrous to suggest that the transition period would apply to Public Safety Radio Services, Special Emergency Radio Services, Industrial Radio Services and the other services that are regulated by the Commission as private land mobile

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26/ (...continued)
1993); Norfolk Western v. American Train Dispatchers, 499 U.S. 117, 128 (1991) citing Chevron, 467 U.S. at 842-843 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 98-99 (1991) ("The best evidence of [the statute's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where th[e statute] contains a phase that is unambiguous -- that has a clearly accepted meaning in both legislative and judicial practice -- we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.").

27/ See e.g., Mail Order Ass'n of America v. U.S. Postal Service, 986 F.2d 509, 515 (D.C. Cir. 1993) ("we are to construe statutes, where possible, so that no provision is rendered 'inoperative or superfluous, void or insignificant'"); Horn v. C.I.R., 968 F.2d 1229, 1239 (D.C. Cir. 1992)("the canon of statutory interpretation [is] that statutes should not be read to create 'absurd results'.").

radio services under Part 90 of the Rules. As Nextel stated in its comments in the Commercial Mobile Services proceeding, many of these services do not satisfy the statutory requisites to be reclassified as commercial mobile services (e.g., the services are not provided on a for-profit basis). However, once these services are discarded from consideration, very few services besides SMR remain as private land mobile services potentially subject to reclassification and the Budget Act's transition provisions.

Similarly, when Congress acts, it is presumed to have notice of the Commission's actions and regulatory scheme.[28/] The Budget Act's changes to the Commission's existing private carrier/common carrier regulatory scheme were made with full knowledge of the state of Commission regulations, rules and policies in the private and common carrier land mobile areas. It is precisely for this reason that Congress determined the need for regulatory parity and a reasonable transition period for its implementation.

Indeed, the comments of Telecommunications Subcommittee Chairman Markey just prior to passage of the Budget Act are indicative of Congressional intent to allow affected carriers the opportunity to transition their operations into compliance with a changed regulatory framework. On the House floor, Congressman Markey stated:

28/ See Nationwide Mut. Ins. Co. v. Darden, 112 S.Ct. 1344, 1348 (1992).

> I want to clarify that subsection (c)(2) of Section 6002, relating to effective dates, provides a 3 year period during which current providers of private land mobile service will continue to be treated in the same manner. The intent of this transition period is to provide those whose regulatory status is changed as a result of this legislation a reasonable time to conform with the new regulatory scheme."[29]

Nextel is unquestionably a current provider of private land mobile service whose regulatory status will be changed by the Budget Act.

C. Parity Would Be Thwarted by Elimination of the Transition Period.

As stated by Nextel and others in their comments to the Commission in the CMS rulemaking, Congress was aware of the potential disruption that would occur should existing SMR service providers and their customers suddenly become subject to different regulatory treatment.[30] The three year period to permit the orderly transition to new service rules and regulatory systems for affected carriers and their customers was Congress' means of achieving parity over a reasonable time period.

Even BAMS does not suggest that Nextel's non-digital SMR services fail to qualify for transition treatment under the terms of the Budget Act. Instead, BAMS

29/ See Congressional Record, H6163, August 5, 1993 (emphasis added).

30/ See Comments of Nextel at 2-3; See also Reply Comments of American Mobile Telecommunications Association, Inc. at 6-7.

takes aim at ESMR, a digital service capable of competing with its existing analog and digital cellular offerings. In doing so, BAMS reveals its concern is not with competitive equity, but with preserving its upper hand by seeking to disadvantage a potential competitor.

BAMS' Petition observes that Nextel "has already emerged as a formidable competitor to cellular service providers."[31/] This statement is completely inconsistent with BAMS' fundamental argument that ESMR is a totally new service, not even offered four months ago. BAMS' contradictory assertions reveal the illogic of its statutory misinterpretation and the bald anti-competitive agenda of its Petition.

The overarching Congressional objective of the regulatory parity provision is to promote competition among providers of similar services. This objective would be thwarted if the Commission were to ignore a critical aspect of the statutory requirement to adopt new regulatory parity rules: provide affected carriers with a reasonable period of time to come into compliance.

Finally, BAMS complains that a reasonable transition period for ESMRs unfairly burdens it with more onerous regulation.[32/] Even assuming this is true, which

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31/ Petition at 7.

32/ Petition at 7-8. BAMS' empty assertion fails entirely to account for the far more burdensome operational

(continued...)

it is not, a cursory review of the legislation's regulatory parity provisions reveals that Congress did not believe that all commercial mobile services providers should be subject to identical regulation. Congress conferred authority on the Commission to develop appropriate regulatory classifications and to permit asymmetric regulation, if, in the Commission's judgment, such treatment was necessary to promote competition.[33] The Commission, in its Competitive Carrier regulatory scheme, has for years treated carriers that provide similar services -- but that exercise different degrees of market power -- under disparate regulatory standards.[34] The Budget Act's regulatory parity provisions validate this approach for commercial mobile services. Further, the Commission has already recognized its ability to regulate CMS providers differently based on differing circumstances.[35]

32/ (...continued)
constraints faced by SMR operators vis-a-vis cellular operators. See footnote 24, supra.

33/ See Budget Act Section 6002 (c)(1)(A); Conference Report at 491. ("Differential regulation of providers of commercial mobile services is permissible....").

34/ See Memorandum Opinion and Order, Tariff Filing Requirements for Nondominant Common Carriers, 8 FCC Rcd. 6752 (1993) (adopting significantly streamlined federal tariffing requirements for nondominant common carriers).

35/ In the CMS proceeding, for example, the Commission sought comment on whether LEC affiliated providers of commercial mobile services should be subject to different regulatory treatment in light of their affiliation. See CMS Rulemaking, 8 FCC Rcd at 8000.

V. BAMS HAS HAD AMPLE OPPORTUNITY TO PRESENT ITS CASE IN THE COMMERCIAL MOBILE SERVICES RULEMAKING.

A. SMR Transition Issues Were Raised in the Commercial Mobile Services Proceeding and Were Addressed by Many Parties.

Pursuant to statutory directive, the Commission initiated a Notice of Proposed Rulemaking to implement the examination and reclassification of mobile services on September 23, 1993.[36] While the Commission could have bifurcated rulemakings on PCS and existing mobile services in light of the different statutory deadlines, the Commission chose at the outset to combine creation of PCS regulatory rules and reclassification of existing mobile operators in a single proceeding. The Notice requested comment on the definitional issues raised by the Budget Act, the services potentially affected by the new legislation and the potential application of provisions of Title II of the Communications Act.[37] Along with many other interested parties, Bell Atlantic filed extensive comments and reply comments in the proceeding presenting its views on the meaning of regulatory parity, interconnection obligations of

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36/ See Budget Act §332(d). The Commission was required by Congress to review its rules affecting private land mobile services, and issue changes that would achieve regulatory parity within one year. The assessment was to include an examination of a number of issues including loading requirements and spacing limitations. See House Report at 262. Of particular concern was a reexamination of the rules applicable to SMR services. Id.

37/ See CMS Rulemaking, 8 FCC Rcd at 7988.

Commercial Mobile Services providers, and proposed regulatory modifications.[38/]

In addition to recommending that the Commission adopt a broad definition of "commercial mobile service," Bell Atlantic took the position that no service should be exempt from commercial mobile service regulation simply because it had limited geographic coverage or capacity, or did not employ frequency reuse. Consequently, it argued that SMR, private and common carrier paging, PCS and cellular services should be presumptively treated as commercial mobile services.[39/] Bell Atlantic never suggested that ESMR providers are not eligible for the three-year transition.[40/] Many other commenters, including

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38/ See Comments of Bell Atlantic, Regulatory Treatment of Mobile Services, filed November 8, 1993 ("CMS Comments of Bell Atlantic"); Reply Comments of Bell Atlantic, Regulatory Treatment of Mobile Services, filed November 23, 1993 ("CMS Reply Comments of Bell Atlantic").

39/ See CMS Comments of Bell Atlantic at 14-17.

40/ There can be no question that Bell Atlantic, in submitting its CMS comments, was cognizant of the emergence of ESMR and was in favor of its characterization as CMS. Bell Atlantic specifically referred to "SMR systems which compete for customers with cellular systems and other mobile service providers" and argued that CMS reclassification would be proper for these services. See CMS Comments of Bell Atlantic at 14-15. In addition, although Bell Atlantic cited GTE's comments regarding ESMR in its own Reply Comments, it failed to raise the transitional period issue or the alleged distinctive nature of ESMR service until now. See CMS Reply Comments of Bell Atlantic at 4 n.5.; see also Affidavit of Professor Jerry A. Hausman at 6, filed with Bell Atlantic Reply Comments (noting that ESMR networks will compete with cellular, are currently operating, and "cannot be wished away at the stroke of a lawyer's pen.") It is

(continued...)