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Before the
FEDERAL COMMUNICATIONS COMMISSION Mar 18 3 40 PM '94
Washington, D.C. 20554

DISPATCHED BY

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 ✓

SECOND REPORT AND ORDER

Adopted: February 3, 1994; Released: March 7, 1994

By the Commission: Commissioner Barrett issuing a statement.

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I. INTRODUCTION

1. This Report and Order revises our rules to implement Sections 3(n) and 332 of the Communications Act of 1934 (the Act), as amended by Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 (Budget Act).¹ The Budget Act was signed into law on August 10, 1993. On September 23, 1993, we adopted a Notice of Proposed Rule Making in this proceeding,² in which we sought comment on: (1) definitional issues raised by the Budget Act; (2) which existing mobile services and future mobile services should be classified as "commercial mobile radio services" (CMRS) under the statute and which should be classified as "private mobile radio services" (PMRS); and (3) which provisions of Title II of the Communications Act should not be applied to commercial mobile radio services. We have received 76 comments and 52 reply comments in response to the Notice in this proceeding.³

2. The Order reflects the Commission's efforts to implement the congressional intent of creating regulatory symmetry among similar mobile services. First, we interpret the statutory elements that define commercial mobile and private mobile radio service. Second, using these definitions, we determine the regulatory status of existing mobile services and of personal communications services (PCS). Third, for those services that will be classified as CMRS, we address the degree to which such services will be subject to regulation under Title II of the Act. We also address other issues raised in the Notice, including interconnection rights, and preemption of state regulatory authority over mobile service providers.⁴ Additional issues raised by the Budget Act, such as revisions to our technical rules needed to implement the regulatory scheme discussed herein, will be addressed in a Further Notice of Proposed Rule Making to be issued shortly, and, consistent with the Budget Act, will be resolved by August 10, 1994.⁵ We also anticipate that we will initiate several other proceedings to address related issues.⁶

¹ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993).

² Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Notice of Proposed Rule Making, 8 FCC Rcd 7988 (1993) (Notice).

³ For a list of parties filing comments and reply comments, see Appendix D.

⁴ In an earlier action in this docket we established filing procedures for foreign ownership waivers pursuant to the Budget Act. Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, First Report and Order, FCC 94-2 (released Jan. 5, 1994)(*First Report and Order*). See para. 12 and note 536, *infra*. We are aware that the treatment of alien ownership of CMRS and other common carrier services is of concern to many parties. We intend to examine this issue in a future proceeding.

⁵ Budget Act, § 6002(d)(3).

⁶ See Part IV.C, para. 285, *infra*.

II. BACKGROUND

A. LEGISLATIVE AND COMMISSION ACTIONS PRIOR TO BUDGET ACT

1. *Regulatory Classification of Mobile Services*

3. The Commission has a long history of regulating mobile radio services for the purpose of encouraging the growth of the mobile services industry so that consumers will have greater options for meeting their communications needs. The Commission has traditionally classified land mobile radio services⁷ into two categories: private land mobile services and public mobile services.⁸ Public mobile services are subject to common carrier regulation under Title II of the Communications Act, which, among other things, requires common carriers to provide service upon reasonable request⁹ and prohibits unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication services.¹⁰ Common carriers are generally subject to state regulation of intrastate services if a state chooses to regulate those services.¹¹ In addition, Section 310(b) of the Communications Act limits alien ownership of common carrier radio licensees.

4. Private land mobile services, on the other hand, developed to provide service tailored to the needs of particular user groups, such as local governments, public safety organizations, and businesses requiring specialized services that common carriers could not readily provide. Most early private radio services were established to enable specific user groups to build their own systems for internal use. As the demand for private service grew, however, the Commission also authorized licensees in some services to offer "private carrier" service, *i.e.*, service to limited groups of third-party users on a for-profit basis.¹² In either case, private radio was not subject to common carrier regulation at either the state or the federal level.

⁷ Other categories of mobile services include marine and aviation services, mobile satellite services, and certain personal radio services. These categories are addressed in our discussion of the definition of "mobile service" under Section 3(n) of the Act. See Part III.B.1, paras. 30-38, *infra*.

⁸ Traditionally, the most common type of public mobile service was radio telephone service which interconnected with existing telephone systems. Private services were predominantly dispatch services such as those operated by police departments, fire departments, and taxicab companies, for their own purposes. Private services also extended to services provided to eligible users by third party providers. See National Ass'n of Reg. Util. Comm'ners v. FCC, 525 F.2d 630, 634 (D.C. Cir. 1976) (*NARUC I*).

⁹ Communications Act, § 201, 47 U.S.C. § 201.

¹⁰ *Id.*, § 202, 47 U.S.C. § 202.

¹¹ The Commission may preempt State regulations when interstate and intrastate services are inseparable and state regulations would thwart or impede federal policies. See *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986) (*Louisiana PSC*); *Maryland Pub. Serv. Comm'n v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989) (*NARUC II*); *National Ass'n of Reg. Util. Comm'ners v. FCC*, 880 F.2d 422 (D.C. Cir. 1989); *Public Util. Comm'n of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989) (*Texas PUC*); *North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.) (*NCUC I*), *cert. denied*, 434 U.S. 874 (1977); *North Carolina Util. Comm'n v. FCC*, 537 F.2d 787 (4th Cir.) (*NCUC II*), *cert. denied*, 429 U.S. 1027 (1976).

¹² See *Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz*, Docket No. 18262, Second Report and Order, 46 FCC 2d 752 (1974), *recon.*, 51 FCC 2d 945 (1975), *aff'd*, *NARUC I*.

5. In 1982, Congress amended the Communications Act by adding Section 3(gg) and Section 332(c). The purposes of adding these provisions were: (1) to define private land mobile service; (2) to distinguish between private and common carrier land mobile services; and (3) to specify the appropriate authorities empowered to regulate these same services.¹³ Section 3(gg) defined private land mobile service as "a mobile service . . . for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation."¹⁴ In addition, Section 332(c)(3) preempted state authority to impose rate or entry regulation upon any private land mobile service.

6. The Commission interpreted Section 332(c)(1) of the Act as confirming that the commercial sale of interconnected telephone service was a common carrier offering, but also concluded that the statute allowed private land mobile services to interconnect with the public switched telephone network and retain their regulatory status so long as the licensee did not profit from the provision of interconnection.¹⁵ In a parallel development, the Commission concluded that Section 332 allowed it to extend the range of eligible users for Specialized Mobile Radio (SMR) and Private Carrier Paging (PCP) services, enabling licensees in these services to offer service to a broad customer base with only minimal restrictions.¹⁶

7. The Commission's decisions, however, also created the prospect of direct competition between private land mobile services and similar common carrier services under disparate regulatory regimes. In 1991, for example, we authorized Fleet Call, Inc. (now Nextel Corp.) to develop an SMR system that Fleet Call claimed would offer wide-area, digital voice and data service comparable or superior to cellular in quality.¹⁷ Similarly, the liberalization of the Commission's PCP rules made it difficult for consumers to distinguish private paging from common carrier paging. Because of the greater degree of regulation imposed on common carriers (federal and state regulation) than on private carriers, common carriers argued that continuing to treat wide-area SMRs and PCPs as private carriers placed competing common carrier services at a regulatory disadvantage. In 1992, this debate was given new urgency by the Commission's proposal to allocate spectrum to PCS.¹⁸ In its PCS proposal, the Commission left open the

¹³ H.R. Rep. No. 97-765, 97th Cong., 2d Sess., at 54 (1982).

¹⁴ Communications Act, § 3(gg), 47 U.S.C. § 153(gg)(Budget Act, § 6002(b)(2)(B)(ii)(II), struck this provision).

¹⁵ See *Interconnection of Private Land Mobile Systems with the Public Switched Telephone Network in the Bands 806-821 and 851-866 MHz*, Docket No. 20846, Memorandum Opinion and Order, 93 FCC 2d 1111 (1983).

¹⁶ See Amendment of Part 90, Subparts M and S of the Commission's Rules, PR Docket No. 86-404, Report and Order, 3 FCC Rcd 1838 (1988), *clarified*, 4 FCC Rcd 356 (1989); Amendment of the Commission's Rules To Permit Private Carrier Paging Licensees To Provide Service to Individuals, PR Docket No. 93-38, Report and Order, 8 FCC Rcd 4822 (1993)(*Private Paging Order*).

¹⁷ See *Fleet Call, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 1533, *recon. dismissed*, 6 FCC Rcd 6989 (1991) (*Fleet Call*). Although Fleet Call requested waiver of several sections of the Commission's Rules to construct its wide-area SMR system, we determined that it was necessary to waive only Section 90.631, which requires that trunked systems must be constructed within a one-year period. We granted a waiver of this section and provided Fleet Call five years to construct any stations that would be part of its digital networks. 6 FCC Rcd at 1535.

¹⁸ Amendment of the Commission's Rules To Establish New Personal Communications Services, GEN Docket No. 90-314, ET Docket No. 92-100, Notice of Proposed Rule Making and Tentative Decision, 7 FCC Rcd 5676 (1992) (*PCS Notice*).

question of whether PCS would be treated as a common carrier service, a private carrier service, or a combination of both.¹⁹ The concern that a new generation of mobile services could be subject to inconsistent regulation caused many to argue that the existing regulatory regime should be revised.

2. Competitive Carrier Decisions

8. In its *Competitive Carrier* docket, the Commission classified common carriers with market power, such as the local exchange carriers (LECs) and American Telephone and Telegraph Company (AT&T), as dominant and thereby subject to full Title II regulation; carriers without market power were classified as non-dominant. Because non-dominant carriers lacked market power to control prices and were presumptively unlikely to discriminate unreasonably, the Commission adopted for them a policy of forbearance from certain regulations.²⁰ These carriers were not required to file tariffs under Section 203 of the Act and were not subject to certain other Commission regulations adopted pursuant to the authority of other Title II provisions. Non-dominant carriers did, however, remain subject to the general common carrier obligations of Sections 201 and 202 of the Act, and to the enforcement of these obligations pursuant to complaint procedures under Section 208.

9. Title II has been applied to paging and cellular services in somewhat different manners. The Commission has declared domestic public land mobile carriers, which are primarily providing paging services, to be non-dominant in their provision of interstate services.²¹ Cellular service was designated as dominant by the Commission although without any analysis of the market power of cellular carriers.²²

10. Last year, however, the United States Court of Appeals for the District of Columbia Circuit found the Commission's forbearance policy of permissive detariffing to be inconsistent

¹⁹ *Id.* at 5712-14 (paras. 94-98).

²⁰ Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252 (*Competitive Carrier*), Notice of Inquiry and Proposed Rule Making, 77 FCC 2d 308 (1979) (*Competitive Carrier Notice*); First Report and Order, 85 FCC 2d 1 (1980) (*First Report*); Further Notice of Proposed Rule Making, 84 FCC 2d 445 (1981) (*Further Notice*); Second Further Notice of Proposed Rule Making, FCC No. 82-187, 47 Fed Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982) (*Second Report*), recon., 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rule Making, 48 Fed Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (*Fourth Report*), vacated, AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), rehearing en banc denied, Jan. 21, 1993; Fourth Further Notice of Proposed Rule Making, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984) (*Fifth Report*), recon., 59 Rad. Reg. 2d (P&F) 543 (1985); Sixth Report and Order, 99 FCC 2d 1020 (1985) (*Sixth Report*), rev'd, MCI Telecomm. Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

²¹ See Preemption of State Entry Regulation in the Public Land Mobile Service, CC Docket No. 85-89, Report and Order, FCC 86-112, 59 Rad.Reg. (P&F) 1518 (1986), remanded on other grounds, National Ass'n of Reg. Util. Comm'ners v. FCC, No. 86-1205 (D.C. Cir. Mar. 30, 1987), clarified, Preemption of State Entry Regulation in the Public Land Mobile Service, CC Docket No. 85-89, Memorandum Opinion and Order, 2 FCC Rcd 6434 (1987), citing *Competitive Carrier, First Report; Competitive Carrier, Fifth Report*.

²² *Competitive Carrier, Fifth Report*, 98 FCC 2d at 1204 n.41. See also *Competitive Carrier, Fourth Report*, 95 FCC 2d at 582.

with Section 203 of the Act.²³ As a result of this decision, mobile common carriers began to file new tariffs for their interstate services.

B. BUDGET ACT REVISIONS

11. It is against this background that Congress enacted Section 6002(b) of the Budget Act to revise Section 332 of the Communications Act. The amended statute changes the prior regulatory regime in two significant respects. First, Congress has replaced the common carrier and private radio definitions that evolved under the prior version of Section 332 with two newly defined categories of mobile services: commercial mobile radio service (CMRS) and private mobile radio service (PMRS). CMRS is defined as "any mobile service (as defined in section 3(n)) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public."²⁴ PMRS means "any mobile service (as defined in section 3(n)) that is not a commercial mobile service or the functional equivalent of a commercial mobile service."²⁵

12. Second, Congress has replaced traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework and gives the Commission flexibility to establish appropriate levels of regulation for mobile radio services providers. Section 332(c) states that a person providing commercial mobile radio service will be treated as a common carrier, but grants the Commission the authority to forbear from applying the provisions of Title II, except for Sections 201, 202, and 208. Sections 332(c)(1)(A) and 332(c)(1)(C) identify the criteria for forbearance. The statute also preempt state regulation of entry and rates for both CMRS and PMRS providers. States, however, may petition the Commission for authority to regulate CMRS rates under some circumstances.²⁶ In addition, the Budget Act "grandfathers" the foreign ownership, as of May 24, 1993, of current private land mobile service providers that we reclassify as CMRS so that such providers are not required to divest their foreign ownership interests if they file a waiver request in a timely manner.²⁷ Finally, the statute requires the Commission to determine the regulatory status of PCS before February 6, 1994.²⁸

III. DISCUSSION

A. OVERVIEW

1. Congressional Objectives

²³ AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), *rehearing en banc denied*, Jan. 21, 1993, *cert. denied*, S. Ct. Docket No. 92-1684, 1993 Lexis 4392, 113 S. Ct. 3020, 61 U.S.L.W. 3853 (June 21, 1993). See also *Tariff Filing Requirements for Interstate Common Carriers*, CC Docket No. 92-13, Notice of Proposed Rule Making, 7 FCC Rcd 804 (1992), Report and Order, 7 FCC Rcd 8072 (1992), *rev'd*, AT&T v. FCC, No. 92-1628 (D.C. Cir. June 4, 1993), *cert. granted*, 62 U.S.L.W. 3375 (Nov. 29, 1993).

²⁴ Communications Act, § 332(d)(1), 47 U.S.C. § 332(d)(1).

²⁵ *Id.*, § 332(d)(2), 47 U.S.C. § 332(d)(2).

²⁶ *Id.*, § 332(c)(3), 47 U.S.C. § 332(c)(3).

²⁷ See note 4, *supra*.

²⁸ Communications Act, § 332(c)(1)(D), 47 U.S.C. § 332(c)(1)(D).

13. We believe Congress had two principal objectives in amending Section 332. First, Congress saw the need for a new approach to the classification of mobile services to ensure that similar services would be subject to consistent regulatory classification. The Conference Report explains that the intent of Congress is that, "consistent with the public interest, similar services are accorded similar regulatory treatment."²⁹ This objective was accomplished by replacing the common carrier and private carrier classifications that had evolved under the prior statute with the new categories of CMRS and PMRS. By establishing a new class of commercial mobile radio services, Congress has taken a comprehensive and definitive action to achieve regulatory symmetry in the classification of mobile services.

14. The other congressional objective reflected in the statute was to ensure that an appropriate level of regulation be established and administered for CMRS providers. While the statute ensures that all CMRS providers will be subject to certain key requirements of Title II, Congress has given the Commission authority to forbear from applying other Title II provisions if such regulation is not needed to prevent unreasonably discriminatory rates or practices, or to protect consumers, and if such forbearance is consistent with the public interest (e.g., the Commission action, by augmenting competition, promotes better services for consumers at reasonable prices). By taking these steps, Congress acknowledged that neither traditional state regulation, nor conventional regulation under Title II of the Communications Act, may be necessary in all cases to promote competition or protect consumers in the mobile communications marketplace.

15. The decisions we make in this Order thus are driven by these two congressional mandates. We believe the actions we take in this Order establish a symmetrical regulatory structure that will promote competition in the mobile services marketplace and will thus serve the interests of consumers while also benefiting the national economy. Moreover, in striving to adopt an appropriate level of regulation for CMRS providers, we establish, as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees who are classified as CMRS providers by this Order.

16. We have kept this objective in view in exercising the forbearance authority Congress included in the Budget Act. First, we forbear from imposing any tariff filing obligations upon CMRS providers. Second, we also forbear from establishing any market entry or market exit requirements under Section 214 of the Act. Third, although we have decided not to forbear with regard to certain other sections of Title II,³⁰ we also have decided not to invoke our authority under any of these provisions because we find no need to do so and we believe that the

²⁹ H.R. Rep. 103-213, 103rd Cong., 1st Sess. 494 (1993) (Conference Report). See also H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 259-60 (House Report). Although commenters may disagree about the extent to which specific mobile services are similar, they almost unanimously agree that Congress intended these provisions of the Budget Act to create a system of regulatory symmetry. See, e.g., AAR Reply Comments at 2; AMTA Comments at 4-5; American Petroleum Comments at 4; Ameritech Comments at 1-2; Arch Comments at 4; Bell Atlantic Comments at 2 (the "principle of 'regulatory parity' should serve as the polestar for this rulemaking"); CTIA Comments at 3; DC PSC Comments at 3; E.F. Johnson Comments at 3-4; LCRA Comments at 4; McCaw Comments at 1-2; Mtel Comments at 2; Nextel Comments at 5; NYNEX Reply Comments at 2; Pactel Paging Reply Comments at 9; Sprint Reply Comments at 1-2; UTC Comments at 3; Vanguard Comments at 2.

³⁰ We retain our authority under Section 213 (valuation of carrier property), Section 215 (transactions relating to services and equipment), Section 218 (inquiries into management), Section 219 (annual and other reports), Section 220 (accounts, records, and memoranda), and Section 221 (special provisions relating to telephone companies).

imposition of requirements under these provisions³¹ could cause unwarranted burdens for carriers classified as CMRS providers. Fourth, we have vigorously implemented the preemption provisions of the Budget Act to ensure that state rate regulation of CMRS providers will be established only in the case of demonstrated market conditions in which competitive forces are not adequately protecting the interests of CMRS subscribers. Finally, although we have chosen not to forbear from specific provisions of Title II that are designed to protect consumers,³² we do not believe that private carriers reclassified as CMRS providers will face any significant burdens as a result of becoming subject to these provisions. For example, private carriers reclassified as CMRS providers would face potential costs under Section 226 only to the extent they elect to engage in the provision of operator services.

17. We believe, based on the record before us, that private carriers who now will be regulated as CMRS providers will not find themselves confronted by a new set of burdensome regulatory requirements that might impede their provision of service or place them at a competitive disadvantage in the mobile services marketplace.³³ In deciding whether to impose regulatory obligations on service providers under Title II, we must weigh the potential burdens of those obligations against the need to protect consumers and to guard against unreasonably discriminatory rates and practices. In making this comparative assessment, we consider it appropriate to seek to avoid the imposition of unwarranted costs or other burdens upon carriers because consumers and the national economy ultimately benefit from such a course. In that regard, for example, we intend to issue a Further Notice of Proposed Rule Making in this proceeding to examine whether we should adopt further forbearance measures under Title II of the Communications Act (in addition to those taken in this Order) in the case of specified classes of CMRS providers. We conclude that our forbearance actions in this Order strike the proper balance in carrying out the congressional mandate.

2. Impact on National Economy

18. Before turning to our discussion of the specific issues addressed in this rule making, we present here a general economic analysis of the actions taken in the Order. We review the potential effect of our actions on the creation of jobs and the overall health of the national economy, the likelihood that our decisions will help spur investment in the nation's telecommunications infrastructure, and the effectiveness of our actions in enabling all Americans to gain access to the nation's information superhighway.

a. Fostering Economic Growth

³¹ We will, however, consider in a Further Notice requiring cellular licensees to submit information concerning their operations. See para. 194, *infra*.

³² We do not forbear from Section 223 (obscene or harassing telephone calls), Section 225 (telecommunications services for hearing-impaired and speech-impaired individuals), Section 226 (Telephone Operator Consumer Services Improvement Act), Section 227 (restrictions on use of telephone equipment), and Section 228 (regulation of carrier offering of pay-per-call services).

³³ We will, however, shortly be issuing a Further Notice of Proposed Rule Making to gather a more comprehensive record regarding the impact of our decisions on certain classes of entities, and to determine whether further forbearance under Title II may be warranted. It also is significant that existing private mobile radio licensees that were licensed prior to August 10, 1993, and are subject to reclassification are further protected by the three-year transition period established in the Budget Act. In addition, any paging service utilizing frequencies allocated as of January 1, 1993, for private land mobile services is also protected by the Budget Act's three-year transition period. See Part IV.B, paras. 278-284, *infra*.

19. We believe our decisions in this Order will have a positive effect on job stimulation and economic growth because these decisions continue our efforts to foster competition in the mobile marketplace. This result will be achieved in the following ways. First, we interpret the elements of the commercial mobile radio service definition in a manner that ensures that competitors providing identical or similar services will participate in the marketplace under similar rules and regulations. Success in the marketplace thus should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs — and not by strategies in the regulatory arena. This even-handed regulation, in promoting competition, should help lower prices, generate jobs, and produce economic growth. We find support for our approach in the record of this proceeding.³⁴ To take one example, McCaw argues that:³⁵

Congress recognized that the implementation of original Section 332 had created a cockeyed marketplace in which enhanced specialized mobile radio licensees, 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. . . . It would thwart the intent of Congress . . . to define commercial mobile service 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.

20. Second, competition will be enhanced by the interconnection policies we establish in this Order. By making clear that interconnection obligations currently imposed upon LECs with regard to current Part 22 providers will now apply to all CMRS providers, and that PMRS providers cannot be victimized by unreasonably discriminatory practices of LECs in their provision of interconnection, we ensure that competing mobile services providers all will have a fair opportunity to obtain access to the public switched network. These even-handed interconnection policies will promote competition, job creation, and economic growth.

21. Finally, this Order helps clear the way for the licensing of PCS. In expeditiously deciding regulatory classification issues applicable to PCS, we have taken a major step toward the establishment of PCS providers as participants in the mobile services marketplace. Although estimates vary, there is wide agreement that the development of PCS holds the promise of a significant increase in competition in mobile services and stimulation to the national economy.

³⁴ See note 29, *supra*. Bell Atlantic, in an argument that is illustrative of the position taken by several parties, states that the Commission should:

Adopt a broad definition of "commercial mobile service" (CMS) and its related statutory terms, in order to assure that competing mobile services are classified as CMS and are treated alike. . . . All services which in whole or in part are offered for profit to subscribers and that offer direct or indirect access to the public switched network should be considered CMS. Conversely, only a narrow group of genuinely private services would remain as private mobile services.

Bell Atlantic Comments at 2 (footnote omitted)(emphasis in original).

³⁵ McCaw Comments at 1-2 (footnote omitted)(emphasis in original).

b. Promoting Infrastructure Investment

22. The continued success of the mobile telecommunications industry is significantly linked to the ongoing flow of investment capital into the industry. It thus is essential that our policies promote robust investment in mobile services. In this Order, we try to promote this goal by ensuring that regulation is perceived by the investment community as a positive factor that creates incentives for investment in the development of valuable communications services — rather than as a burden standing in the way of entrepreneurial opportunities — and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.

23. First, in implementing the preemption provisions of the new statute, we have provided that states must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers. While we recognize that states have a legitimate interest in protecting the interests of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become as a burden to the development of this competition. Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our federal mandate for regulatory parity.

24. Second, we have decided to forbear from the application of the most burdensome provisions of Title II common carriage regulation to CMRS providers. Consequently, investors will be able to make funding decisions based upon their assessment of market forces and their analysis of the strengths and weaknesses of the various telecommunications companies competing in the mobile services marketplace.

25. Third, we have engendered a stable and predictable federal regulatory environment, which is conducive to continued investment in the wireless infrastructure. Our definition of CMRS not only represents fidelity to congressional intent, but also establishes clear rules for the classification of mobile services, minimizing regulatory uncertainty and any consequent chilling of investment activity. An example of our objectives in this regard can be seen in the way we have approached the issue of functional equivalence. By refusing to tie the definition of functional equivalence to particular mobile service technologies, we have sought to avoid creating rules that cause mobile radio service providers to be reclassified because of technological changes in the way they deliver essentially the same services. This approach should result in the durability of our regulatory classifications, thus promoting the regulatory predictability that is an important prerequisite for investment.

c. Enabling Access to Information Superhighway

26. Our national economy is strengthened and the public interest is served to the extent we are successful in promoting and achieving the broadest possible access to wireless networks and services by all telecommunications users. The economy can be fortified by a ubiquitous communications web that extends access to a multiplicity of transmission capabilities to a wide community of business and residential users. Therefore, one of our objectives in this proceeding is the creation of a regulatory framework that makes access to the wireless infrastructure available to all Americans, at economically efficient prices.

27. We believe that this objective is served by our decision here. First, in heeding the congressional objective of establishing a broad class of CMRS providers, we have ensured that business customers and individual customers using mobile services are given the benefit of the core protections of Title II of the Communications Act. By classifying many mobile services as commercial, we have taken a strong step toward guaranteeing that all consumers will have non-

discriminatory access to these services. Commenters in this proceeding have recognized the advantages that our approach will have for consumers. CTIA, for example, points out that:³⁶

A broad definition of commercial mobile service, which includes services meeting the statutory definition and their functional equivalents, is necessary to prevent the threat of artificial disparities developing over time among similar services which are subject to differing regulatory regimes. Services falling within this broad classification include all current common carrier services (including cellular), all paging services, all specialized mobile radio ("SMR") services, and most PCS applications. Consistent regulatory treatment will foster the competitive process and, concomitantly, the consumer.

We believe that mobile services will play an increasingly important role in the nation's telecommunications networks, and we believe that non-discriminatory access to mobile services will give all consumers the opportunity to realize the expanding benefits of wireless technologies. For example, mobile technologies are extending the range of telecommunications services available in areas where the provision of conventional wireline services is not economically feasible. This capability is illustrated by the fact that cellular and paging carriers are increasingly serving the communications needs of businesses and residents in rural areas; in many cases these needs had not been adequately met because of the prohibitive costs associated with furnishing conventional wireline service. We believe that this opportunity will translate into consumer demand for a wide variety of mobile services, and that this demand will generate economic growth. Specifically, economic growth will be stimulated by the fact that business operations will be made more efficient and business productivity will be increased as a result of improved business access to the public switched network.

28. Second, although no one can predict with certainty the course that the development of PCS will take, we believe that the family of personal communications services holds the potential of revolutionizing the way in which Americans communicate with each other. In this Order, we establish the regulatory framework for the development of PCS principally as broadly available CMRS offerings.³⁷

29. Third, in addition to playing a role in fostering competition, the decisions we make in this Order regarding interconnection obligations will promote access to the telecommunications infrastructure. Commercial mobile radio services, by definition, make use of the public switched network; the interconnection policies we establish in this Order ensure that providers of mobile services and their customers receive the benefit of the broadest possible access to the switched network.

B. DEFINITIONS

1. Mobile Service

a. Background and Pleadings

30. Section 332 of the Communications Act, as revised by the Budget Act, governs the regulation of all "mobile services" as defined in Section 3(n) of the Act. The *Notice* explained that the definition of "mobile service" under revised Section 3(n) is similar to the prior version

³⁶ CTIA Comments at iii.

³⁷ We note, of course, that we also have established procedures under which carriers will have an opportunity to offer PCS on a private basis. See para. 119, *infra*.

of Section 3(n).³⁸ The Budget Act, however, amended the definition of "mobile services" under Section 3(n) to include (1) traditional private land mobile services, which were previously defined in Section 3(gg) of the Act (now deleted); and (2) personal communications services, whether licensed in our PCS docket³⁹ or in any future proceeding. We tentatively concluded that this revised definition was intended to bring all existing mobile services within the ambit of Section 332. Therefore, we proposed to include within the mobile services definition public mobile services (Part 22), mobile satellite services (Part 25), mobile marine and aviation services (Parts 80 and 87), private land mobile services (Part 90), personal radio services (Part 95), and all personal communications services licensed or otherwise made available under proposed Part 99.

31. The commenters generally agree with our tentative conclusion that the statute seeks to bring all existing mobile service within the ambit of Section 332. Thus, they agree with our proposal to include within this definition all services regulated under Parts 22, 25, 80, 87, 90, and 95.⁴⁰ While the parties generally agree that PCS and private land mobile services are to be included within the definition of mobile services, Bell Atlantic asserts that the Commission should define mobile services to include all auxiliary services and other mobile services provided by mobile services providers that are authorized by the respective rules of that service.⁴¹ In this regard, MCI maintains that Section 3(n) of the Act should be interpreted broadly to recognize that PCS encompasses the full range of services described in the Commission's *Notice of Proposed Rule Making* in the PCS proceeding, including ancillary fixed services.⁴²

32. Metricom argues that the statutory language in amended Section 3(n) demonstrates that Congress intended to include only licensed PCS services in the definition of mobile service. Thus, it maintains that unlicensed PCS is not a mobile service and therefore not commercial mobile radio service. Likewise, it argues that Part 15 devices are not licensed mobile services and therefore not commercial mobile radio services. It contends that because the Commission has recognized that unlicensed PCS and Part 15 devices are generically identical, Part 15 devices should be treated in a manner similar to the treatment of unlicensed PCS.⁴³ USTA contends that unlicensed PCS devices fall within the mobile service definition because unlicensed PCS should be classified as either commercial or private mobile radio service based on how the service is offered.

33. Rockwell maintains that the definition of mobile services should be further clarified to ensure that communications facilities provided on a transportable platform that do not move when communications services are provided are not included within the term. It believes that

³⁸ "Mobile service" continues to be defined as a "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves." This definition includes "both one-way and two-way radio communications services."

³⁹ See Amendment of the Commission's Rules To Establish New Narrowband Personal Communications Services, GEN Docket No. 90-314, First Report and Order, 8 FCC Rcd 7162 (1993) (*Narrowband PCS Order*), recon., FCC No. 94-30, released Mar. 4, 1994 (*Narrowband PCS Reconsideration Order*); Amendment of the Commission's Rules To Establish New Personal Communications Services, GEN Docket No. 90-314, Second Report and Order, 8 FCC Rcd 7700 (1993) (*Broadband PCS Order*), recon. pending.

⁴⁰ See, e.g., AMTA Comments at 6-7; NYNEX Comments at 4.

⁴¹ Bell Atlantic Comments at 3-4.

⁴² MCI Comments at 3-4.

⁴³ Metricom Comments at 1-5.

"mobile satcom equipment packaged in a briefcase" and dual-use equipment, such as Inmarsat-M terminals, should be considered fixed communications, not mobile services.⁴⁴ In addition, New York points out that the Commission has previously determined in its decisions regarding Basic Exchange Telecommunications Radio Service (BETRS) that merely substituting a radio loop for a wire loop in the provision of basic telephone service does not constitute mobile service under Section 3(n) of the Communications Act.⁴⁵

b. Discussion

34. We agree with the commenters that the purpose of the legislation is to include all existing mobile services within the ambit of Section 332. Thus, we agree with the commenters that all public mobile services,⁴⁶ private land mobile services, and mobile satellite services should be included within the definition. We also agree with the commenters that most marine and aviation services regulated under Parts 80 and 87 meet the statutory definition of "mobile service" to the extent that the licensees do not provide fixed point-to-point service.

35. In addition, we agree with the commenters that all of the services regulated under Part 95, except for Interactive Video and Data Service (IVDS), which is a fixed service, meet the definition of mobile service. Therefore, we adopt the approach that we proposed in the *Notice* and include the services, with the exceptions noted in this Section and in the rules we adopt by our action in this Order, governed by Parts 22, 25, 80, 87, 90, and 95 within the mobile services definition. In accordance with the statute, we will also treat all personal communications services governed by Part 24 as mobile services.

36. In view of the goal of achieving regulatory symmetry by including all existing mobile services within the ambit of Section 332, we agree with Bell Atlantic that all auxiliary services provided by mobile services licensees⁴⁷ should be included within the definition of mobile services. For the same reasons we agree with MCI that all ancillary fixed communications offered by PCS providers should fall within the definition of mobile service.⁴⁸ This is consistent with the approach we have already taken in the PCS rule making proceeding, and we conclude that giving this scope to the definition of mobile service will ensure that mobile services providers will have the flexibility necessary to meet growing consumer demand for a broad range of mobile services.

37. We agree with Metricom that unlicensed Part 15 devices and unlicensed PCS should not be included within the definition of mobile services. Specifically, the Budget Act defined "mobile service" to include "service for which a license is required in a personal communica-

⁴⁴ Rockwell Comments at 1-2.

⁴⁵ New York Comments at 4 n.1.

⁴⁶ This finding does not apply to Rural Radio Service, including BETRS, which is a fixed service. See para. 38; *infra*.

⁴⁷ For example, the Commission's Rules allow cellular service licensees to provide auxiliary common carrier service. Section 22.930 of the Commission's Rules, 47 C.F.R. § 22.930.

⁴⁸ As adopted in *Broadband PCS Order*, the term "Personal Communications Services" is defined as "[r]adio communications that encompass mobile and ancillary fixed communication that provide services to individuals and businesses and can be integrated with a variety of competing networks." 8 FCC Rcd at 7713.

tions service⁴⁹ We agree with Minnesota that this language refers only to licensed services. In addition, we note that in the *Broadband PCS Order*, we allocated the 1890-1930 Mhz band for unlicensed PCS devices⁵⁰ and included these devices under Part 15. In so doing, we indicated that "this unlicensed approach could be expected to foster the rapid introduction of new PCS technologies by permitting manufacturers to introduce new products without the delays associated with the licensing of a radio service."⁵¹ Thus, we reject USTA's suggestion that unlicensed PCS should be classified as a mobile service. Accordingly, unlicensed PCS and Part 15 devices will not be included under the definition of mobile services. Finally, we conclude that mobile resale service is included within the general category of mobile services as defined by Section 3(n) and for purposes of regulation under Section 332, since resale of mobile service can only exist if there is an underlying licensed service. There is no indication in the statute or the legislative history that resellers are not "mobile service" providers or exempt from the Section 332 regulatory classification, and we see no reason to establish such an exemption.⁵²

38. We also agree with Rockwell that satellite services provided to or from a transportable platform that cannot move when the communications service is offered should not be included within the definition of mobile service. These fixed services are used to provide disaster relief, temporary communications for news reporters and expeditions, and temporary communications in remote areas and cannot be used in a mobile mode. Services provided through dual-use equipment, however, such as Inmarsat-M terminals which are capable of transmitting while the platform is moving, are included in the mobile services definition. We also agree with New York that the substitution of a radio loop for a wire loop in the provision of BETRS does not constitute mobile service for purposes of our definition. As the Commission noted in the BETRS proceeding,⁵³ this service was intended to be an extension of intrastate basic exchange telephone service. Thus, the radio loop merely takes the place of wire or cable, which in rural and geophysically rugged areas is often prohibitively expensive to install and maintain.

2. Commercial Mobile Radio Service

a. Service Provided for Profit

(1) Background and Pleadings

39. The first prong of the statutory definition of CMRS requires that the service must be one "that is provided for profit."⁵⁴ In the *Notice*, we asked commenters to address four basic issues: (1) whether Special Emergency Radio Services provided to public safety entities on a for-

⁴⁹ Communications Act, § 3(n)(3), 47 U.S.C. § 153(n)(3), as added by Budget Act, § 6002(b)(2)(B)(ii)(I).

⁵⁰ Unlicensed PCS devices are defined in new Section 15.303(g) as "intentional radiators operating in the frequency band 1890-1930 MHz that provide a wide array of mobile and ancillary fixed communication services to individuals and business." Section 15.303(g) of the Commission's Rules, 47 C.F.R. § 15.303(g).

⁵¹ *Broadband PCS Order*, 8 FCC Rcd at 7734 (para. 79).

⁵² See para. 260, *infra*, for a discussion of the classification of FM subcarriers.

⁵³ Basic Exchange Telecommunications Radio Service, Report and Order, 3 FCC Rcd 214, 217 (1988)(*BETRS Order*).

⁵⁴ Communications Act, § 332(d), 47 U.S.C. § 332(d).

profit private carriage basis should be treated as private mobile services; (2) whether a licensee that uses its service strictly for internal use should be deemed to be offering a not-for-profit service; (3) whether licensees that operate systems for internal uses but also make excess capacity available on a for-profit basis should be deemed to be providing for-profit service; and (4) whether shared-use and multiple licensing arrangements may sometimes be for-profit services.

40. Most commenters agree that the "for-profit" prong of the CMRS definition was broadly intended to distinguish licensees who provide for-profit service to customers from licensees who operate systems solely for their own internal use.⁵⁵ Commenters also echo the proposal in the Notice that, in determining whether a particular offering meets the statutory definition of "for profit," we must review the "service as a whole." Commenters also argue that under the "service as a whole" test, a service that meets the "for-profit" definition should be classified as for-profit even if the interconnected portion of the service is offered on a not-for-profit basis.⁵⁶ Many commenters and reply commenters favor treatment of public safety, governmental, and special emergency radio services as non-profit offerings.⁵⁷ Other commenters recommend that such licensees that offer for-profit services with their excess capacity be classified as for-profit CMRS offerings to that extent.⁵⁸

41. Commenters express divergent views, however, on the issue of whether licensees who lease or otherwise make commercial use of excess capacity on an otherwise not-for-profit system should be considered providers of "for-profit" service. Some commenters maintain that any leasing of excess capacity should be treated as for-profit service,⁵⁹ at least to the extent of that activity, regardless of whether the licensee operates the system primarily for internal use.⁶⁰ For example, NARUC contends that sale of excess capacity converts an otherwise private internal-use licensee into a commercial mobile radio service licensee.⁶¹ Other commenters contend that PMRS licensees whose primary operations are not-for-profit should have the flexibility to make commercial use of their excess capacity, subject to certain limitations, without being deemed "for-profit" service providers as a result.⁶² UTC, for example, proposes that the Commission continue to allow non-commercial private radio licensees to lease excess

⁵⁵ See, e.g., AAR Comments at 3; Mtel Comments 5; NABER Comments at 7; Nextel Comments at 9 n.13; NYNEX Comments at 5-6; Pacific Comments at 3; PageNet Comments at 5; Rochester Comments at 3; US West Comments at 16; Vanguard Comments at 3.

⁵⁶ See, e.g., Arch Comments at 4-5 n.11; DC PSC Comments at 4; GTE Comments at 5; NARUC Comments at 14; New York Comments at 4-5; Pacific Comments at 4; Southwestern Comments at 6.

⁵⁷ See, e.g., APCO Comments at 2; NABER Comments at 7; Nextel Comments at 8; Pacific Comments at 3; Southwestern Comments at 5; Telocator Comments at 8; UTC Comments at 5; Vanguard Comments at 3; PA PUC Reply Comments at 5; Securicor Reply Comments at 4. We note that, since the filing of its comments in this proceeding, Telocator has changed its name to "Personal Communications Industry Association." See, e.g., Inside Wireless, Feb. 2, 1994, at 10.

⁵⁸ See, e.g., McCaw Comments at 15-16; TDS Comments at 3-4.

⁵⁹ See, e.g., Bell Atlantic Comments at 7; DC PSC Comments at 4; GTE Comments at 5; Rochester Comments at 4-5; Sprint Comments at 5; TDS Comments at 5.

⁶⁰ See, e.g., NYNEX Comments at 5-6; PageNet Comments at 5; Rockwell Comments at 2-3; Southwestern Comments at 6; Telocator Comments at 9; Vanguard Comments at 3.

⁶¹ NARUC Comments at 15 n.5.

⁶² See, e.g., American Petroleum Reply Comments at 6-8.

capacity without being deemed to be a for-profit service, provided that at least 51 percent of the system is used for the licensee's internal requirements and that none of the leased capacity is used to meet the licensee's basic loading requirements.⁶³

42. In relation to shared-use arrangements, many commenters assert that such arrangements should be designated as not-for-profit because shared-use systems are generally operated on a cost-shared basis by a limited user group and do not serve as a reasonable substitute for commercial mobile radio service.⁶⁴ Several other commenters and reply commenters assert that shared-use arrangements do meet the statutory definition of for-profit services on the grounds that they serve as a substitute for common carrier paging and cellular services, or are otherwise structured with the intent to receive compensation.⁶⁵ Commenters also disagree on the impact of using for-profit managers in a shared-use system. Some commenters contend that these are legitimate non-profit arrangements because the manager's fee is simply a cost shared among the systems' users,⁶⁶ while others conclude that such arrangements should be deemed for-profit to prevent managers from operating *de facto* for-profit systems that masquerade as non-profit operations.⁶⁷

(2) Discussion

43. We conclude that the statutory phrase "for profit" should be interpreted to include any mobile service that is provided with the intent⁶⁸ of receiving compensation or monetary gain. We agree with commenters that this interpretation encompasses all common and private carrier services that our rules define as being offered to customers for hire.⁶⁹ We also agree with commenters that a for-profit service provider may not avoid this prong of the CMRS definition by contending that it is not reselling interconnection for profit, but merely "passing through" the interconnected portion of its service to customers on a not-for-profit basis, as was allowed under our interpretation of the prior version of Section 332. This conclusion is supported by the plain language of the statute, which defines CMRS as "any mobile service . . .

⁶³ UTC Comments at 5.

⁶⁴ See, e.g., American Petroleum Comments at 6-7; ARINC Comments at 4; ITA Comments at 5; Motorola Comments at 7; Nextel Comments at 9; Telocator Comments at 9; UTC Comments at 7-8.

⁶⁵ See, e.g., Bell Atlantic Comments at 7; McCaw Comments at 16; Rochester Comments at 3-4; USTA Comments at 3-4; US West Comments at 15; Vanguard Comments at 4; ARINC Reply Comments at 3; McCaw Reply Comments at 19-20; USTA Reply Comments at 2.

⁶⁶ See, e.g., Motorola Comments at 7; Nextel Comments at 9 n.14; UTC Comments at 7-8.

⁶⁷ See, e.g., Bell Atlantic Comments at 7; California Comments at 4-5; NARUC Comments at 15; Rochester Comments at 3-4; but see American Petroleum Reply Comments at 7-8; Securicor Reply Comments at 4-5.

⁶⁸ We believe that Congress intended the meaning of the phrase "for profit" to comport with that which has become common usage in relation to other federal statutes interpreting the phrase to mean an intent to make a profit, rather than requiring the realization of profit in fact. See *North Ridge Country Club v. Commissioner of Revenue*, 877 F.2d 750, 756 (9th Cir. 1989).

⁶⁹ Under our current rules, private carrier services include Specialized Mobile Radio, Private Carrier Paging, and 220-MHz Commercial service. In addition, licensees in the Special Emergency Radio Service may provide service for hire to eligible third-party customers. Licensees in all other Part 90 services may provide for-profit service to eligible users and may also be licensed for internal, non-commercial systems.

that is provided for profit *and* makes interconnected service available'' to the public.⁷⁰ By separating the ''for-profit'' and ''interconnected service'' elements of the CMRS definition, Congress made clear that all licensees who provide mobile service to customers with the intent of receiving compensation are ''for-profit'' service providers, regardless of whether some element of the service is characterized as a pass-through for accounting or other purposes. In reaching this conclusion our action is consistent with the congressional intent of the new Section 332 to regulate similar mobile services under comparable requirements. We note, however, that deeming a service ''for-profit'' under our test does not make it CMRS unless it also meets the other elements of the CMRS definition or is the functional equivalent of a service that meets the definition of CMRS.

44. We also conclude that Congress intended the phrase ''for profit'' to exclude services where the licensee does not seek to receive compensation from operation of a mobile radio system. Under this test, public safety and governmental services, other than private carrier licensees in the Special Emergency Radio Service, are plainly not-for-profit.⁷¹ Similarly, businesses and other private entities who operate mobile systems exclusively for internal use will also be treated as not-for-profit under this test. Part 90 of our Rules currently defines an ''internal system'' as a system in which ''all messages are transmitted between the fixed operating positions located on the premises controlled by the licensee and the associated mobile stations or other transmitting or receiving devices of the licensee.'' ⁷² Such systems are typically operated by licensees who require highly customized mobile radio facilities for their personnel to use in the conduct of the licensee's underlying business. Because such licensees have found their direct operation and control of internal systems to be an advantageous way to meet their internal communications needs, and because internal systems do not create a need for regulation to protect consumers under Title II, we conclude that businesses should continue to have the option to construct and operate internal systems on a private basis. Therefore, where a system is used only to serve the licensee's internal communications requirements rather than offered with the intent of receiving compensation, we conclude that the licensee is not providing service ''for profit'' within the meaning of the statute.

(a) Excess Capacity Activities

45. One of the main issues that arises in applying the for-profit element of the CMRS test is how to treat services in which one portion of the service is offered on a for-profit excess capacity basis while the other portion is not-for-profit. We conclude that any licensee that employs spectrum for not-for-profit service, such as an internal operation, but also uses its

⁷⁰ Communications Act, § 332(d), 47 U.S.C. § 332(d) (emphasis added). We note that the approach taken by Congress in the statutory language precludes us from exploring the question whether Title II regulation should apply in the case of any company utilizing mobile service spectrum in connection with any profit-making venture, regardless of whether the venture involves the provision of mobile services on a for-profit basis. For example, the provisions of Title II would not extend to the operations of a delivery service company using its own mobile network for vehicle communications. Section 332 specifies that Title II regulation extends *only* to those cases in which spectrum is used to provide a *mobile service* on a for-profit basis.

⁷¹ See 47 C.F.R. Part 90, Subparts B and C. As discussed below, private carrier SERS licensees will also be classified as PMRS notwithstanding their for-profit status, because we have concluded that the Special Emergency Radio Service is not ''available to a substantial portion of the public'' within the meaning of the statute. Paras. 67, 82, *infra*.

⁷² Section 90.7 of the Commission's Rules, 47 C.F.R. § 90.7. An internal system shall be construed to include the premises (and associated mobile stations and devices) of the licensee and any other corporate or other business entity that controls, or is controlled by, the licensee.

excess capacity to make available a service that is intended to receive compensation, will be deemed to be offering a "for-profit" service to the extent of such excess capacity activities. For example, if a PMRS licensee makes a for-profit service available with its excess capacity, it would be for-profit to the extent of such activity. Furthermore, if the for-profit portion of the service meets the other elements of the CMRS definition, or is the functional equivalent of services meeting the CMRS definition, it is CMRS to the extent of such service. We agree with those commenters who argue that this rule applies whenever CMRS service is offered as a "hybrid" service, whether it is offered on an excess capacity basis, or as an "ancillary" service.⁷³

46. We conclude that this approach is preferable to the "principal use" approach supported by some commenters, which would allow non-commercial licensees to offer for-profit services with their excess capacity without effect to their not-for-profit status so long as the principal use of the license was not-for-profit internal use. For example, we disagree with UTC's proposal that PMRS licensees should be able to remain private even if they lease up to 49 percent of their "reserve capacity" to other parties. In our view, UTC's approach could defeat the Budget Act's goal of regulatory symmetry by causing similar for-profit services to be classified differently because one happens to be paired with a not-for-profit service, while the other is not. Articulating a definition of what constitutes the "principal use" of a frequency would also be difficult because the nature of a licensee's use may change over time. Finally, adopting a principal use test might invite licensees to circumvent the for-profit test by structuring their services to be "principally" not-for-profit where they nevertheless intended to offer a for-profit service to the public.⁷⁴

⁷³ We believe that Congress contemplated allowing hybrid CMRS-PMRS services. For example, the statute directs the Commission to treat as a common carrier any "person engaged in the provision of service that is a commercial mobile service . . . insofar as such person is so engaged" Communications Act, § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A) (emphasis added). See also *id.*, § 332(c)(2). The plain meaning of the phrase "insofar as such person is so engaged" in these provisions contemplates partial or hybrid CMRS offerings.

⁷⁴ Our decision not to adopt a "principal use" test here is limited to our interpretation of the "for-profit" prong of the CMRS definition. In the Notice in our competitive bidding proceeding we propose to apply a "principal use" test to implement the requirement in Section 309(j)(2)(A) of the Act that, in order to be "auctionable," a particular service must be one that involves the licensee's receiving "compensation from subscribers." Implementation of Section 309(j) of the Communications Act, Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rule Making, FCC 93-455, 8 FCC Rcd 7635, 7639-40 (paras. 30-33) (1993) (*Auction Notice*). Under the proposed "principal use" test, a service is defined as auctionable if its "principal use" is to receive "compensation from subscribers" even if a portion of the service is used for non-compensatory communications. We specifically stated in the *Auction Notice*, however, that:

[t]he distinction between "private mobile service" and "Commercial Mobile Service" in [amended] Section 332 turns on several criteria that are not relevant to Section 309(j), e.g., whether the service is interconnected to the public switched network and provided to a substantial portion of the public Thus, it appears that a service could be classified as a private mobile service for purposes of Section 332 but not be deemed "private" for purposes of Section 309(j).

Id., 8 FCC Rcd at 7638-39 (paras. 25-26). Therefore, our decision not to adopt a "principal use" test here has no effect on our proposals in the auction proceeding.

(b) Shared-Use Systems

47. While we regard any leasing of excess capacity as for-profit service, we conclude that licensees should be able to enter into shared-use arrangements on a not-for-profit basis and not be deemed CMRS, provided that they meet certain requirements. We believe that Congress recognized the benefits of allowing private radio users to enter into legitimate cost-sharing arrangements and did not intend such arrangements to be classified as "for-profit" service.⁷⁵ As commenters note, such arrangements are beneficial because they allow radio users to combine resources to meet compatible needs for specialized internal communications facilities. At the same time, it was not Congress's intent, nor is it ours, to allow licensees to enter into sham "not-for-profit" arrangements in an effort to disguise essentially for-profit activity. To ensure that only legitimate cost-sharing arrangements are treated as not-for-profit, we will continue to require that all parties to cost-sharing arrangements be identified and disclosed in the licensee's records, and that all cost-sharing arrangements be fully documented by a written agreement maintained as part of the licensee's records, as is currently required under Section 90.179 of our Rules.⁷⁶ Licensees who meet these requirements will be deemed to be not-for-profit and presumptively classified as PMRS. We believe these safeguards are sufficient to prevent PMRS licensees from providing *de facto* for-profit service in competition with CMRS providers.⁷⁷ If it is demonstrated that, notwithstanding these safeguards, a licensee is operating a shared system authorized for not-for-profit or cost-shared use to offer a for-profit service, it will be in violation of Section 90.179 of the Commission's Rules,⁷⁸ and subject to enforcement actions. Ultimately, the licensee could be reclassified as CMRS, assuming it meets the other prongs of the test.

48. Because we are imposing these limitations on licensees who wish to enter into cost-sharing arrangements on a not-for-profit or cooperative basis, we consider it unnecessary to take the further step, suggested by some commenters, of prohibiting use of third-party managers to assist in the operation of such systems. Multiple-licensed systems ("community repeaters") that use managers are typically small systems in which all system users are individually licensed. In our view, Congress's concern in adopting the "for-profit" test was whether a radio service is being provided to customers for profit, not whether small groups of licensed users seek the assistance of a manager to operate their shared system. As several commenters note, managers play a beneficial role in the operation of many not-for-profit systems and typically receive compensation for their services. From the licensee's point of view, however, the manager's fee is no different from other shared costs of operation, *e.g.*, purchase of equipment and site rental. We see no indication in the statute or the legislative history that Congress intended to restrict the types of costs that licensees could share, so long as the cost-sharing arrangement among the licensees is *bona fide*. To do so, in our view, could inadvertently inhibit the ability of legitimate private licensees to obtain required technical and operational assistance so as to operate more efficiently.

49. Although we conclude that the hiring of a manager by multiple licensees does not fall within the definition of "for-profit" service, we intend to monitor closely the use of multiple-licensing arrangements to ensure that unlicensed managers do not attempt to provide for-profit service as *de facto* licensees. Our rules clearly state that the ultimate responsibility for operation

⁷⁵ The definition of "mobile service" in Section 3(n) refers to "private" communications systems that may be licensed on an "individual, cooperative, or multiple basis." 47 U.S.C. § 153(n)(2) (emphasis added).

⁷⁶ 47 C.F.R. § 90.179.

⁷⁷ In addition to these safeguards, a violation of our rules could result in the imposition of other sanctions, including license revocation and forfeitures.

⁷⁸ 47 C.F.R. § 90.179.

of the system resides with the licensee and cannot be assumed by an unlicensed third party. Thus, a not-for-profit system structured to give an unlicensed manager sufficient operational control to provide for-profit service to customers would be a violation of Section 310(d) of the Communications Act⁷⁹ and our rules, for which the system license could be revoked. In addition, as noted above,⁸⁰ our decision to allow private shared-use systems to contract with system managers does not preclude our determining, based on an appropriate showing, that the system is a *de facto* for-profit service, and subject to the appropriate enforcement actions. In addition, the licensee may be subject to reclassification because it will meet the definition of CMRS, assuming it meets the other prongs of the test, or because it is the functional equivalent of CMRS.

b. Interconnected Service

(1) Background and Pleadings

50. In order for a mobile service to be defined as a commercial mobile radio service, it must make interconnected service available. The statute defines interconnected service as "service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B)."⁸¹ The *Notice* requested comment on the significance of the phrase "interconnected service," rather than "interconnected," which was used in the original House version of the legislation. We suggested two alternative explanations for this distinction: (1) that in order for a particular service offering to be considered "interconnected service," the service must be offered on an interconnected basis at the end user level, *i.e.*, the service must provide an end user with the ability to directly control access⁸² to the public switched network (PSN) for purposes of sending or receiving messages to or from points on the network; or (2) that Congress crafted the language in order to avoid including private line service within the definition of "interconnected service." The *Notice* also sought comment on how to define the terms "interconnected" and "public switched network." In regard to the definition of "public switched network," commenters were asked to discuss whether the Commission should limit this term to local exchange and interexchange common carrier switched networks, or whether we should interpret this element more expansively.

51. Commenters generally agree that Congress intended by use of the term "interconnected service" to distinguish between those communications systems that are physically interconnected with the network and those systems that are not only interconnected but that also make interconnected service available.⁸³ Therefore, many commenters stress that interconnected

⁷⁹ 47 U.S.C. § 310(d).

⁸⁰ Para. 47, *supra*.

⁸¹ Communications Act, § 332(d)(2), 47 U.S.C. § 332(d)(2).

⁸² In referencing the notion of direct end user control in the *Notice* we had in mind services in which the user is able to initiate direct, real time interaction with the network, as opposed to services (such as those using store-and-forward technologies) in which the user does not have such a capability.

⁸³ AAR Reply Comments at 4; Bell Atlantic Comments at 8; GTE Comments at 5; NYNEX Reply Comments at 7; Pagemart Reply Comments at 3; Radiofone Reply Comments at 3; Securicor Reply Comments at 5; TRW Comments at 20 n.41; USTA Comments at 4; UTC Comments at 8; *see also* Geotek Comments at 7-8 (arguing that this distinction allows the Commission to adopt a threshold for determining when the traffic of the interconnected portion of a service reaches sufficient levels to be classified as interconnected service); *but see* Motorola Comments at 7 (arguing that interconnected service should be defined as physical interconnection with the public switched network because it might be

service should not include a service that uses the facilities of the public switched network for internal transmitter control purposes.⁸⁴ Some commenters believe that an interconnected service must provide an end user with the ability to control directly access to the public switched network for purposes of sending or receiving messages to or from points on the network.⁸⁵ The majority of commenters, however, interpret interconnected service as a service that will merely allow the subscriber to send or receive messages over the public switched network.⁸⁶ Several parties emphasize that the Commission should look to the subscriber's perception of whether the subscriber can send or receive messages over the public switched network.⁸⁷ According to TDS, the example of private line type services does not appear to be a useful basis for defining interconnected service. TDS contends that existing and emerging combinations of subscriber controlled switching and terminal devices permit the subscriber to make a coordinated use of multiple networks. These increasingly prevalent arrangements mean that there is realistically no effective limit on the number of points where any particular subscriber communication might ultimately be sent or received.⁸⁸ UTC, on the other hand, notes that utilities and pipeline companies often employ dedicated private lines that use and allow access to only a portion of the public switched telephone network.⁸⁹

52. Many commenters agree that the Commission should follow the precedent of the *International Satellite Systems*⁹⁰ decision for determining whether a mobile service is

difficult to apply the distinction between those systems that are physically interconnected to the public switched network and those that also make interconnected service available).

⁸⁴ DC PSC Comments at 5; NABER Comments at 8; PageNet Comments at 9; PRSG Comments at 2; Roamer Comments at 7; Securicor Reply Comments at 5; Southwestern Comments at 7; TDS Comments at 6; UTC Comments at 9.

⁸⁵ AmP Reply Comments at 3; NYNEX Comments at 7; Pactel Comments at 9; Pagemart Reply Comments at 6; TDS Comments at 6; TRW Reply Comments at 17; UTC Reply Comments at 10.

⁸⁶ Bell Atlantic Comments at 8; CTIA Comments at 8-9; GTE Comments at 5-6; E.F. Johnson Comments at 6; McCaw Comments at 17; NABER Comments at 8; Pacific Comments at 6; PageNet Comments at 6; PA PUC Reply Comments at 6-7; Rochester Comments at 4; Sprint Comments at 5-6; Southwestern Comments at 6-7; Telocator Comments at 9-10; US West Comments at 16-17; USTA Comments at 4; Vanguard Comments at 5; *see also* AMTA Comments at 9 & n.5 (supporting this definition in the context of two-way services, but expressing no opinion on the interpretation of those terms in the context of one-way paging operations).

⁸⁷ Bell Atlantic Comments at 9; NYNEX Comments at 7; Roamer Comments at 6-7; Sprint Comments at 6; US West Comments at 16-17.

⁸⁸ TDS Comments at 6; *but see* Radiofone Reply Comments at 4-5 (arguing that private line service typically may be originated and terminated only within the subscribing company's buildings, even though those buildings may be located in different states).

⁸⁹ UTC Comments at 10.

⁹⁰ Establishment of Satellite Systems Providing International Communications, CC Docket No. 84-1299, Report and Order, 101 FCC 2d 1046 (1985) (*International Satellite Systems*), *recon.*, Memorandum Opinion and Order, 61 Rad. Reg. 2d (P&F) 649 (1986), *further recon.*, Memorandum Opinion and Order, 1 FCC Rcd 439 (1986). In *International Satellite Systems*, the Commission concluded that interconnecting through a data circuit terminating in a computer that can store and process the data and subsequently retransmit it over that network constitutes interconnection to a public switched messaging network. *Id.* at 1101.

interconnected with the public switched network.⁹¹ Several parties caution that making distinctions based on technologies could encourage mobile service providers to design their systems to avoid commercial mobile radio service regulation.⁹² Other commenters encourage the Commission to adopt an approach that interconnection requires real-time access to the public switched network.⁹³ Consequently, commenters disagree about the implications of the definition of interconnection for store and forward services.⁹⁴ Several commenters also mention that Congress specifically contemplated reclassifying private carrier paging to commercial mobile radio service regulation by "grandfathering" private carrier paging services under private regulation for three years.⁹⁵ The parties that responded to our question regarding whether a mobile provider offers interconnected service if it offers service that is interconnected through an intermediary that is interconnected to the public switched network, generally agree that this would constitute interconnected service.⁹⁶

53. Many commenters believe that the Commission should continue to use its traditional definition of public switched telephone network to include only local exchange carriers and interexchange carrier switched networks.⁹⁷ Some parties argue that there is no indication that

⁹¹ Arch Comments at 8; MCI Comments at 6; Mtel Comments at 6; NARUC Comments at 16; PageNet Comments at 7-8; USTA Comments at 5; Vanguard Comments at 5. *But see* Pagemart Reply Comments at 4 (arguing that this precedent bears no relationship to Congress's goal in amending Section 332); TRW Reply Comments at 17 n.37.

⁹² BellSouth Comments at 8; MCI Comments at 6; Mtel Comments at 7; US West Comments at 17-18.

⁹³ Grand Comments at 3-5; Pagemart Comments at 5; RMD Comments at 3-4; TRW Reply Comments at 17.

⁹⁴ Those parties who consider store and forward technology to constitute interconnection include: Arch Comments at 7-8; Bell Atlantic Comments at 9-10; CTIA Comments at 9; DC PSC Comments at 5; E.F. Johnson Comments at 6 & n.7; GTE Reply Comments at 2-3; McCaw Comments at 29-30; MCI Comments at 6; Mtel Comments at 6-7; NABER Comments at 9-10; NARUC Comments at 16-17; New York Comments at 6; PA PUC Reply Comments at 7; Pacific Comments at 6; Pactel Paging Comments at 6; PageNet Comments at 5; Radiofone Reply Comments at 4; Roamer Comments at 7; Rochester Comments at 4; Sprint Comments at 5-6; Southwestern Comments at 7; Telocator Comments at 10 n.11; US West Comments at 17; USTA Comments at 5; Vanguard Comments at 5-6. Those parties who consider store and forward technology not to constitute interconnected service include: AMP Reply Comments at 2-4; Grand Comments at 3-5; NYNEX Comments at 8 n.10; Pagemart Comments at 5; Rockwell Comments at 3; TDS Comments at 7-8.

⁹⁵ *See* Budget Act, § 6002(c)(2)(B). NARUC Comments at 17; Nextel Comments at 16; PageNet Comments at 12-13; US West Reply Comments at 4 n.12. *But see* Pagemart Reply Comments at 7-8.

⁹⁶ GTE Comments at 6; NARUC Comments at 16; NYNEX Comments at 8; PA PUC Reply Comments at 6-7; USTA Comments at 4; US West Comments at 17-18; Vanguard Comments at 5. *But see* Geotek Comments at 8 (contending that indirectly connected services should not be deemed to be providing an interconnected service); Roamer Comments at 7 (claiming that it depends whether the service is interconnected as an integral part of the service offering or for the licensee's own internal purposes).

⁹⁷ BellSouth Comments at 9-10; GTE Comments at 6; McCaw Comments at 17; Motorola Comments at 7-8; NABER Comments at 8; PageNet Comments at 10; Roamer Comments at 6; Southwestern Comments at 7 n.4; Telocator Comments at 10; TRW Comments at 20 n.41; UTC Comments at 10.

Congress intended to broaden the scope of the term "public switched network."⁹⁸ Others, however, urge the Commission to adopt a more forward looking definition that acknowledges that the future of telecommunications will encompass many service providers using various technologies to create a "network of networks."⁹⁹ New York, for example, suggests that the definition of public switched network should include all networks — regardless of technology — that are now or in the future will be associated with the provision of switched services to the general public.¹⁰⁰ Nextel proposes a definition that encompasses service that can reach any subscriber or equipment addressable through the North American Numbering Plan.¹⁰¹

(2) Discussion

54. We believe that by using the phrase "interconnected service," Congress intended that mobile services should be classified as commercial services if they make interconnected service broadly available through their use of the public switched network.¹⁰² The purpose underlying the congressional approach, we conclude, is to ensure that a mobile service that gives its customers the capability to communicate to or receive communication from other users of the public switched network should be treated as a common carriage offering (if the other elements of the definition of commercial mobile radio service are also present, or if the service can be deemed the functional equivalent of CMRS). Neither the statute nor the legislative history uses the term "end user control." We believe that it would be infeasible for end users, in any literal sense, to control directly access to the public switched network for sending or receiving messages to or from points on the network. The comments explain that subscribers are concerned only with the ability to transmit and receive messages to and from the public switched network.

55. We believe that Congress used the phrase interconnected service to further the goal of creating regulatory symmetry for similar mobile services. Thus, even a mobile service that is not yet interconnected, but has requested interconnection, is considered an interconnected service.¹⁰³ If Congress was concerned about end user or subscriber control of access to the network, it would not have included in the definition of interconnected service those services awaiting Commission response to interconnection requests. Therefore, we believe it is reasonable to conclude that an interconnected service is any mobile service that is interconnected with the public switched network, or service for which a request for interconnection is pending, that allows subscribers to send or receive messages to or from anywhere on the public switched network.¹⁰⁴ In addition, we will consider a mobile service to be offering interconnected service

⁹⁸ McCaw Comments at 17; BellSouth Comments at 9-10; Southwestern Comments at 7 n.4; Telocator Reply Comments at 5.

⁹⁹ Bell Atlantic Comments at 9 n.9; New York Comments at 6; Nextel Comments at 10-11; NYNEX Comments 8-9; PA PUC Reply Comments at 7-8; Pacific Comments at 5; Sprint Comments at 7.

¹⁰⁰ New York Comments at 6.

¹⁰¹ Nextel Comments at 11 n.18; *see also* NYNEX Reply Comments at 8 n.16; Pacific Comments at 5.

¹⁰² *See* Conference Report at 496 (explaining that the Senate Amendment, adopted by the Conferees, requires an interconnected service to be broadly available).

¹⁰³ Communications Act, § 332(d)(2), 47 U.S.C. § 332(d)(2).

¹⁰⁴ In defining interconnected service in terms of transmissions to or from "anywhere" on the PSN, we note that it is necessary to qualify the scope of the term "anywhere"; if a service that provides general access to points on the PSN also restricts calling in certain limited ways (*e.g.*, calls attempted to

even if the service allows subscribers to send or receive messages to or from anywhere on the public switched network, but only during specified hours of the day. We adopt this position because we do not wish to provide any incentive for a mobile service provider to limit access to the public switched network as a means of avoiding regulation as a CMRS provider. We agree, however, with those commenters who argue that our interpretation of interconnected service should not include interconnection with the public switched network for a licensee's internal control purposes.

56. The statute requires us to define the terms "interconnected" and "public switched network." The Commission has a long history of deciding issues regarding interconnection with the public switched network.¹⁰⁵ For example, concerning cellular service providers, the Commission has explained the term "physical interconnection."¹⁰⁶ Part 90 of our Rules uses similar language to define interconnection.¹⁰⁷ In the CMRS context, we define "interconnected" as a direct or indirect connection through automatic or manual means (either by wire, microwave, or other technologies) to permit the transmission of messages or signals between points in the public switched network and a commercial mobile radio service provider.

57. Although we adopt language similar to that used in Part 90 of our Rules, we intend for this language to encompass mobile service providers using store and forward technology.¹⁰⁸ This approach to interconnection with the public switched network is analogous to the one that we used in determining what restrictions should apply to international communications satellite systems separate from INTELSAT. In *International Satellite Systems*, the Commission addressed whether it should authorize international communications satellites that would compete with INTELSAT. An Executive Branch letter to the Commission stated that certain restrictions must be imposed on these competing international satellite systems prior to final authorization by the Commission. The Commission was directed to prohibit these separate satellite systems from

be made by the subscriber to "900" telephone numbers are blocked), then it is our intention still to include such a service within the definition of "interconnected service" for purposes of our Part 20 rules.

¹⁰⁵ E.g., *Use of the Carterfone Device in Message Toll Telephone Service*, Decision, 13 FCC 2d 420 (1968).

¹⁰⁶ The term "physical interconnection" refers to the facilities connection (by wire, microwave or other technologies) between the end office of a landline network and the mobile telephone switching office (MTSO) of a cellular network or the hardware or software, located within a carrier's central office, which is necessary to provide interconnection.

Need To Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling, 2 FCC Rcd 2910, 2918 n.27 (1987) (*Interconnection Order*).

¹⁰⁷ Connection through automatic or manual means of private land mobile radio stations with the facilities of the public switched telephone network to permit the transmission of messages or signals between points in the wireline or radio network of a public telephone company and persons served by private land mobile radio stations.

47 C.F.R. § 90.7.

¹⁰⁸ We note that the Private Radio Bureau interpreted prior Section 332 of the Act to find that store and forward technology did not constitute interconnection. In light of the amendments to Section 332 contained in the Budget Act, as implemented in this Order, the Private Radio Bureau's prior policy is no longer applicable.