

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

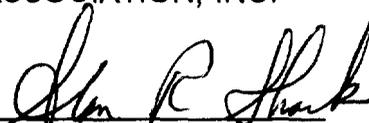
In the Matter of )  
 )  
Implementation of Section 3(n) )  
and 332 of the Communications Act ) GN Docket No. 93-252  
 )  
Regulatory Treatment of )  
Mobile Services )

To: The Commission

**PETITION FOR RECONSIDERATION  
OF THE  
AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.**

Respectfully submitted,

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## SUMMARY

The American Mobile Telecommunications Association, Inc. ("AMTA") respectfully requests that the Commission reconsider its Second Report and Order (the "Order") in the above-captioned proceeding. AMTA is a nationwide, non-profit trade association dedicated to the interests of the private carrier industry. Its members include both large and small entities engaged in providing primarily mobile radio communications services to eligible users.

AMTA respectfully submits that the definition of commercial mobile radio service ("CMRS") as put forth in the Order is more sweeping in scope than is consistent with Congressional intent. AMTA agrees fully with the Order's assessment that Congress's intent was to ensure that similar services are subject to the same regulatory classifications and requirements; however, AMTA believes the Congressional focus was on the prospective functional equivalency of Enhanced Specialized Mobile Radio ("ESMR"), cellular and Personal Communications Services ("PCS"). Under the Commission's current definition of CMRS, smaller entities such as traditional SMR and new 220 MHz licensees, whose services are far more limited, would also be categorized as CMRS.

AMTA urges the Commission to modify its CMRS definition by excluding those service providers that fall within the Small Business Administration's definition of "small entity". In the alternative, AMTA suggests the Commission adopt a definition parallel to that used for rural telephone companies, creating a minimum CMRS service level of 50,000 subscribers. AMTA believes this modification of the CMRS definition would not

only mirror Congressional intent, but would also provide relief to small providers currently faced with a panoply of federal and possibly, state regulations as a result of their new common carrier status. Without this relief, many of these small, highly competitive private carriers may not survive.

The Order's cutoff date of August 10, 1993 for "first licensing" will have the adverse effect of bifurcating the nascent 220 MHz industry, since delays in the frequency allocation process caused some of these licensees to receive their licenses after this date. AMTA submits that it is directly contrary to the goal of regulatory symmetry that some of these licensees will enjoy a three-year transition to CMRS status, while others must face new obligations immediately. It therefore requests the Commission reconsider the cutoff date and transition period.

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**PETITION FOR RECONSIDERATION OF THE  
AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.**

The American Mobile Telecommunications Association, Inc. ("AMTA" or the "Association"), pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, hereby respectfully submits a Petition for Reconsideration of the Federal Communications Commission's ("FCC" or the "Commission") Second Report and Order ("Order" or "R&O") in the above-captioned proceeding.<sup>1</sup> The text of the Order lays a broad framework for the future regulation of various mobile services. However, the definition of commercial mobile radio service ("CMRS") is more sweeping in scope than is demanded by Congressional intent. As adopted, the broad net of CMRS will encompass many small businesses that were not the subject of Congressional concern, and that are without the resources to comply with their new obligations. Moreover, the August 10, 1993 cutoff date for determining which entities will qualify for the three-year

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<sup>1</sup> Second Report and Order, 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, released March 7, 1994.

transition from private mobile radio service ("PMRS") to CMRS status will unintentionally bifurcate one infant industry, a result inconsistent with the "regulatory symmetry" Congress envisioned.

## **I. INTRODUCTION**

AMTA is a nationwide, non-profit trade association dedicated to the interests of the private carrier industry. The Association represents a variety of land mobile licensees engaged in the provision of a broad range of primarily mobile, voice and data services currently classified as private carriage. AMTA's members included trunked and conventional 800 MHz and 900 MHz Specialized Mobile Radio ("SMR") operators, wide-area SMR licensees and 220 MHz commercial licensees.

The private carriage industry has grown to its present size in an environment generally characterized by intense competition and concomitantly minimal regulation. Customers of these systems have typically enjoyed the high service quality and reduced cost which are expected to flow from a competitive marketplace. With the advent of digital technology, one segment of the industry is now prepared to provide wide-area advanced communications services to the public. Other, small providers, however, will continue to provide primarily local services to their customers. It is vital to the well-being of these small entities and the public they serve that they continue to be nurtured in a flexible regulatory environment.

## **II. BACKGROUND**

The Commission's objective in this rule making proceeding is Congressionally mandated: to amend its rules to ensure that similar mobile services are subject to

appropriate and consistent regulation pursuant to Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act").<sup>2</sup> The broad statutory framework laid out in the Budget Act reflects a consensus between Congress and representatives of various mobile radio communications interests, including AMTA, that a truly competitive marketplace requires parity in regulation. Systems that are "functionally equivalent" in terms of services provided, customer capacity and geographic scope should be governed by similar regulation. To achieve regulatory symmetry, Congress called for the re-regulation of mobile services under two categories: CMRS and PMRS, with CMRS providers to be treated as common carriers.

In determining which services are to be considered CMRS, the Order reviews the three prongs of the definition of CMRS: services provided 1) for profit 2) which make interconnected service available 3) to the public or a substantial portion of the public. Order at ¶ 11. The Commission defines "for profit" as all mobile services being offered to customers for hire. Id. at ¶ 43. It interprets the "interconnected service" prong as service which allows subscribers to send or receive messages to or from anywhere on the public switched telephone network. Id. at ¶ 55. Finally, it looks to eligibility under the current Rules to provide a definition of availability "to the public", rejecting a provider's service area size or location specificity as a factor in determining whether its service falls under the definition of CMRS. Id. at ¶ 70.

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<sup>2</sup> Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat.312, 392 (1993).

### III. DISCUSSION

#### A. The Definition of CMRS is Overly Broad.

In its Comments in this proceeding, AMTA argued that Congress intended the commercial mobile service definition to be interpreted narrowly by the FCC. In support of that position, the Association described the negotiations between and among various interested parties that culminated in those provisions of the Budget Act which address CMRS. It noted that the impetus for that portion of the legislation was the Congressional desire to ensure that functionally equivalent services would be governed by comparable regulatory schemes, a concept ultimately accepted by all participants to these negotiations. It quoted the Conference Report's clarifying discussion of those factors the Commission might consider in defining which systems should be classified as CMRS, rather than PMRS, a discussion AMTA believes supports the Association's understanding of the legislative intent.<sup>3</sup>

The Order rejects that interpretation. It asserts that an expansive reading of the scope of CMRS is consistent with the language of the statute, the legislative history, and the overall intent of the statute. Order at ¶ 76. It disagrees with AMTA's reading of the relevant Conference Report language, and with the Association's position that the Congressional focus was on ensuring that cellular, ESMR and PCS would be classified as common carriage, and governed by comparable regulatory schemes. It concludes that, "...the language of the statute clearly provides that if a mobile service meets the literal definition of a CMRS or it is found to be the functional equivalent of a service that

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<sup>3</sup> See Comments of AMTA, GN Docket No. 93-252 (November 8, 1993), at 7-11.

does meet the literal definition of CMRS, it cannot be classified as a PMRS." Id.

The Association recognizes that the Commission must interpret a statute in a fashion consistent with the plain meaning of its language. Nonetheless, that interpretation should not contradict the legislative intent, when that intent has been clearly articulated. The position advanced by AMTA would not require a tortured interpretation of the statutory language, but would instead achieve the objective defined by Congress and endorsed by the affected parties, which the FCC now seeks to implement.

Thus, AMTA agrees fully with the Order's assessment that the statute's overriding objective was to ensure that "similar services are subject to the same regulatory classification and requirements." Order at ¶ 78. It agrees that Congress was concerned that private systems not be permitted to escape common carrier regulation when they are providing services indistinguishable from common carriage. Id. The difference is in what services are considered to be "similar" or "indistinguishable" or "functionally equivalent". As described in its Comments, the Association is convinced that the Congressional focus was on the prospective functional equivalency of ESMR, cellular and PCS, systems which unquestionably satisfy the three-prong CMRS test. However, the legislative history supports the Association's understanding that Congress had not reached any comparable conclusion regarding systems of substantially more limited scope in terms of geographic coverage or capacity. Rather, Congress clearly intended to leave the classification of such systems, as well as the detailed meaning of the CMRS definitional prongs, to the FCC. In doing so, Congress provided the FCC with the tools

to reach the broader PMRS definition proposed by AMTA.

There is no question that cellular, ESMR and PCS are intended to be made available to the public in the sense contemplated by Congress in the CMRS definition. All three are systems of broad geographic scope and substantial spectrum resources, whether by FCC allocation or technical advances. All three are being or will be marketed to the widest possible customer base, reaching out to virtually every potential user of wireless, mobile service. The same is not true for the typical, capacity-limited private carrier such as the traditional SMR operator or the newly created 220 MHz local, commercial licensee. It is that distinction that Congress articulated in its Conference Report example, and that the FCC should recognize in its definition of the "provision of service to the public" prong of the CMRS definition.

AMTA urges the Commission to modify this portion of its definition to maintain PRMS status for those smaller carriers whose licensed spectrum cannot support service to "a substantial portion of the public." To make this delineation, the Association suggests the FCC turn to one or more small business descriptions already relied upon in other proceedings.

AMTA recommends that the Commission adopt Small Business Administration's ("SBA") definition of a "small entity" in this context; i.e., one with a net worth not in excess of \$6 million with average net income after federal income taxes for the two preceding years not in excess of \$2 million.<sup>4</sup> The Commission has already adopted this definition for small businesses entitled to preferences in its competitive bidding rule, finding it the

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<sup>4</sup> 13 C.F.R. § 121.601.

"appropriate threshold" for delineation of small communications companies.<sup>5</sup> The Association submits that the same definition would be appropriate in determining which current and future licensees should qualify for exclusion from CMRS status.

Should the Commission require a more direct link between CMRS status and the portion of the public which can be served by small carriers, AMTA again suggests the FCC look to a definition already adopted elsewhere. In its competitive bidding proceeding, the Commission provides bidding preferences to rural telephone companies.<sup>6</sup> To qualify for this type of preference, an entity is limited to a total of 50,000 access lines, or, in essence, a maximum of 50,000 total "customers". AMTA submits that the same limitation would provide an alternative definition of a small carrier: one with no more than 50,000 subscribers to its various wireless communications services.

In the Association's opinion, adoption of either of these definitions would reconcile the FCC's CMRS/PMRS delineation with the Congressional objective of achieving regulatory symmetry, without violating the plain meaning of the statute.

**B. CMRS Status Includes the Possibility of Unnecessary and Unforeseen Regulatory Burdens.**

The FCC establishes as one goal in this proceeding the laudable objective "of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio

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<sup>5</sup> See Implementation of Section 309(j) of the Communications Act, Competitive Bidding, Second Report and Order, PP Docket No. 93-253, FCC 94-61, (April 20, 1994), at ¶ 271.

<sup>6</sup> Id. at ¶¶ 279-282.

licensees who are classified as CMRS providers by this Order." Order at ¶ 15. AMTA is confident that the Commission will endeavor to honor that commitment, as evidenced by its positions in the recently-released Notice of Proposed Rule Making regarding the extent of FCC forbearance appropriate for various types of CMRS licensees.<sup>7</sup> The Association intends to participate actively in that proceeding, and is encouraged by the initial proposals advanced by the Commission.

Nonetheless, even a preliminary review of the possible Title II obligations which could be imposed on a small CMRS licensee supports the Association's position that CMRS status was intended only for those systems with the actual or potential capability of providing a service broadly available to the public. The list of requirements is formidable. While AMTA will describe in greater detail in that proceeding why those requirements should not be imposed on carriers incapable of providing service functionally equivalent to cellular, i.e. ESMR and PCS, it is clear that substantial resources would be required to achieve compliance with a number of them. These resources are beyond the capability of numerous smaller operators, operators that, in AMTA's opinion, were never intended to be swept into the CMRS category. Some impose technical requirements simply beyond the capability of the equipment used by or even available to these licensees. Unless the FCC narrows the scope of its CMRS classification, these carriers will potentially be subject to any and all Title II obligations, subject only to whatever forbearance provisions are deemed appropriate at a particular

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<sup>7</sup> Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Service Providers, Notice of Proposed Rule Making, GN Docket No. 94-33, FCC 94-101 (May 4, 1994).

time. They will be left in a position of substantial regulatory uncertainty despite the current FCC's efforts to the contrary.

Further, reclassification as CMRS will subject these licensees to state, as well as federal, regulatory jurisdiction. The statute does preempt specifically state regulation of CMRS rate and entry requirements, at least unless a waiver is granted in a particular instance, but this provides less than complete protection. The very CMRS, common carrier, status will expose providers to a panoply of other types of regulation in certain states. While perhaps less onerous than direct rate or entry restrictions, these laws will still have a direct and, most probably, financially disadvantageous impact on a significant number of small businesses that currently provide a highly cost-efficient service to discrete segments of the communications-using public. To the extent that these state regulations, plus whatever federal requirements are retained, impose additional economic burdens on these many small companies, it is inevitable that some will not survive, and the jobs they currently provide may be lost forever. That result would be antithetical to the Congressional and Commission mandate to promote job creation in all segments of the American economy.

**C. The August 10, 1993 Cutoff Date Will Bifurcate the Nascent 220 MHz Industry.**

The Order notes that the Budget Act established a three-year period for the orderly transition of currently private systems to CMRS status. Order at ¶ 278. The Commission has interpreted that statutory provision to extend to those private land mobile licensees who were licensed, and thus authorized to provide service, as of August 10, 1993. *Id.* at ¶ 281. Those who qualify will be permitted to modify and

expand existing systems, as well as to acquire additional stations in the same service. By contrast, licensees which are not entitled to the transition period, i.e. those whose licenses were not issued until after August 10, 1993 will be subject to the new CMRS rules upon their effective date which will be as early as August 10, 1994 for certain aspects. Id. ¶ 282.

AMTA does not disagree that the FCC's interpretation of the applicability of the three-year transition period is reasonable. Congress clearly did intend heretofore private licensees to have adequate notice of the regulations which will govern them in the future and to prepare for the significant adjustments which will be required, including equipment modifications. However, AMTA remains concerned that the interpretation adopted will have the unintended result of bifurcating, at the outset, the newly-authorized 220 MHz local service, a result totally inconsistent with the overriding objective of the legislation and the FCC's implementation of CMRS.

The test defined in the Order is a licensee-by-licensee analysis which relies on the date of initial authorization in a particular private land mobile service to determine whether the entity is entitled to the transition period. This approach may be reasonable in most contexts, but creates what AMTA assumes must be an unintentionally disruptive environment in the nascent 220 MHz industry.

As the FCC is aware, the 220 MHz band has had an unusually difficult infancy. The allocation process itself was lengthy. Industry development was then delayed significantly while the Commission's application processes were challenged in court.<sup>8</sup>

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<sup>8</sup> See Evans v. FCC, Case No. 92-1317 (D.C. Cir., dismissed March 18, 1994).

That appeal was subsequently withdrawn pursuant to an industry-negotiated settlement, and the industry is finally poised to proceed with implementation. However, because the FCC was completing its 220 MHz licensing process without a great sense of urgency while the proceeding was under appeal, some number of initial licenses in this new service were granted after the August 10, 1993 cutoff date. It appears that at least ten percent (10%) of the local licenses in this band were not issued until after the deadline. They would not be entitled to the three-year transition under the FCC's interpretation.

This result is inconsistent with the very essence of regulatory symmetry. The local 220 MHz service will be the home for a variety of new narrowband, two-way communications systems. The FCC has already determined that this service will be classified as CMRS to the extent that it is interconnected. Order at ¶ 95. Thus, parties whose licenses were issued on or before August 10, 1993 will enjoy the benefit of the three-year transition, while those unlucky enough to have had their applications processed after that date will be subject to CMRS requirements immediately. Licensees in this entirely new service will, from its inception, be subject to inconsistent regulatory schemes.

The Association does not believe that this result could have been intended by Congress or the Commission. It urges the FCC to reconsider its transition period interpretation in light of the extraordinary circumstances relating to this particular service to determine whether a more publicly beneficial delineation could be supported.

#### **IV. CONCLUSION**

For the foregoing reasons, AMTA requests that the Commission reconsider its

definition of CMRS, and narrow the definition to exclude small carriers who provide mobile communications services to a limited portion of the public. AMTA further requests that the Commission reconsider its licensing cutoff date of August 10, 1993 and resulting three-year transition period to the CMRS regulatory scheme.

## CERTIFICATE OF SERVICE

I, Jennifer Marshall, administrative assistant at the American Mobile Telecommunications Association, Inc., hereby certify that I have, on this 19th day of May, 1994, caused to have hand-delivered a copy of the foregoing Petition for Reconsideration to the following:

Reed E. Hundt, Chairman  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554

James H. Quello, Commissioner  
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1919 M Street, N.W., Room 802  
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Andrew C. Barrett, Commissioner  
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Jennifer Marshall

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