

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

RECEIVED

JUN 16 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Sections 3(n))
and 332 of the Communications Act)
)
Regulatory Treatment of Mobile Services)
)

GN Docket No. 93-252

To: The Commission

OPPOSITION TO PETITIONS FOR RECONSIDERATION

McCAW CELLULAR COMMUNICATIONS, INC.

Scott K. Morris
Vice President of External Affairs
McCaw Cellular Communications, Inc.
5400 Carillon Point
Kirkland, Washington 98033
(206) 828-8240

Of Counsel:

Howard J. Symons
Peter Kimm, Jr.
Anthony E. Varona
Mintz, Levin, Cohn, Ferris
Glovsky and Popeo, P.C.
701 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Cathleen A. Massey
Senior Regulatory Counsel
McCaw Cellular Communications, Inc.
1150 Connecticut Avenue, N.W., 4th Floor
Washington, D.C. 20036
(202) 223-9222

June 16, 1994

No. of Copies rec'd
List A B C D E

A 4

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY	1
I. THE COMMISSION WAS CORRECT TO FORBEAR FROM REQUIRING CELLULAR PROVIDERS TO FILE TARIFFS	4
A. The Commission Properly Applied the Three-Part Forbearance Test of Section 332(c)	4
B. The Absence Of A Non-Dominant Classification for Cellular Carriers Does Not Preclude Forbearance	10
II. THE COMMISSION WAS CORRECT TO INITIATE A FURTHER INQUIRY INTO THE INTERCONNECTION OBLIGATIONS OF CMRS PROVIDERS ..	11
A. A Further Inquiry To Explore CMRS Interconnection Is Appropriate, Given The Complexity Of The Issue And The Inadequacy Of The Record On This Matter	11
B. The Statute Did Not Create A New Right To CMRS Interconnection	13
III. THE COMMISSION CORRECTLY DELIMITED STATE AUTHORITY OVER CMRS PROVIDERS	15
A. Congress Clearly Intended To Preempt The States From Regulating CMRS Interconnection Rates	15
B. The Commission's Requirement That States File Detailed Supporting Evidence, Including A Description Of Proposed Rules, Is Reasonable And Consistent With Statutory Intent	17
IV. THE COMMISSION PROPERLY IMPLEMENTED A COMPREHENSIVE DEFINITION OF CMRS	18
V. ENHANCED SERVICES OFFERED BY CMRS PROVIDERS SHOULD NOT BE SUBJECT TO TITLE II REGULATION	19
VI. THE COMMISSION SHOULD REJECT REQUESTS TO MODIFY THE DEADLINES ESTABLISHED IN THIS PROCEEDING	21
CONCLUSION	23

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

RECEIVED
JUN 16 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

To: The Commission

OPPOSITION TO PETITIONS FOR RECONSIDERATION

McCaw Cellular Communications, Inc. ("McCaw"), by its attorneys, hereby responds to certain of the petitions for reconsideration of the Commission's order in the above-captioned proceeding.^{1/}

INTRODUCTION AND SUMMARY

Consistent with legislative intent, the Second Report and Order establishes a comprehensive Federal scheme for commercial mobile radio services ("CMRS") under which like services are subject to consistent regulatory treatment. Several petitioners attempt to vitiate this scheme by recycling arguments that the Commission has already fully considered and properly disposed of in the Order. If adopted, their arguments would significantly undermine the efforts of Congress and the Commission to create a sound regulatory foundation for the continued growth and development of CMRS.

^{1/} Second Report and Order, GN Docket No. 93-252, FCC 94-31, 9 FCC Rcd 1411 (rel. Mar. 7, 1994) ("Order").

First, the Commission should reject requests to reconsider its decision to forbear from requiring cellular providers to file tariffs. Certain petitioners' contentions notwithstanding, the Commission properly applied the three-part statutory test for forbearance. The Commission's conclusion that existing market conditions, together with enforcement of other provisions of Title II, render the enforcement of Section 203's tariffing requirements unnecessary to ensure that rates are just and nondiscriminatory or for the protection of consumers is well-founded in the record. Section 332(c) does not require a finding that a CMRS provider is "non-dominant" in order to justify forbearance. The Commission correctly concluded that enforcing tariffing requirements on cellular and other CMRS providers would harm -- not advance -- the public interest. Petitioners offer no grounds for revisiting this conclusion.

Second, in view of the undisputed complexity of the issues surrounding the question of whether (or under what conditions) the Commission should impose interconnection obligations on CMRS providers, and the inadequacy of the record in this proceeding with respect to these issues, the Commission correctly concluded that these interconnection issues warrant further examination.^{2/} Petitioners adduce no new evidence to justify the imposition of such an obligation on entities that the Commission has found to lack control over bottleneck facilities.

Contrary to the contentions of one petitioner, Congress did not establish new interconnection rights when it adopted Section 332(c). Rather, those who seek interconnection with CMRS providers must demonstrate that such interconnection is "necessary or desirable in

^{2/} Indeed, the Commission has already adopted a Notice of Inquiry addressed to these issues. See CC Docket 94-54 (Report DC-2612) (June 9, 1994).

the public interest." This they have not shown. Thus, the Commission is under no obligation to issue final rules governing CMRS interconnection by August 1994.

Third, the Commission has properly delineated the boundaries of state authority to regulate CMRS. Petitioners' arguments that, despite the enactment of the express preemption provisions of Section 332(c)(3), the states retain plenary authority to regulate intrastate interconnection rates of CMRS providers (if the Commission ultimately decides to require CMRS interconnection) are based upon a fundamentally flawed preemption analysis that ignores Congress's explicit expansion of the Commission's jurisdiction over mobile radio services. Their arguments are little more than a feeble attempt by the states to cling to regulatory authority over CMRS that Congress has clearly removed. Similarly, in view of Congress' unmistakable purpose to preempt intrastate regulation of CMRS rates except in the most rare and compelling circumstances, it was entirely appropriate for the Commission to adopt of detailed evidentiary requirements for states filing petitions for the establishment or continuation of CMRS rate regulation. The Commission should reject requests to eviscerate these requirements.

Fourth, the Commission correctly adopted a comprehensive definition of CMRS and should reject requests for special treatment by some petitioners who seek exceptions for "small entities" and to establish other class-based disparities. In amending Section 332(c), Congress sought to establish "uniform" rules "to achieve regulatory parity among services that are substantially similar."^{3/} Given this focus on the nature of the service provided -- rather than the nature of the provider -- regulatory distinctions based on size, new-entry status, or other

^{3/} H.R. Rep. No. 213, 103d Cong., 1st Sess. 259 (1993) ("House Report") (emphasis supplied).

provider-oriented classifications simply serve to undermine the statutory objectives. In any case, the question of whether small entities merit additional forbearance is the subject of a separate proceeding recently initiated by the Commission.

Fifth, the Commission should reject efforts to subject enhanced services offered by CMRS providers to Title II regulation. Rather than depart from its long-standing policy of exempting enhanced services from regulation, the Commission should clarify that the states are preempted from regulating any services offered by a CMRS provider, including those that might be characterized as enhanced services.

Finally, the Commission should reject requests to modify the deadline for seeking review of state rate regulation and the cut-off date for determining which private radio licensees are eligible for transitional treatment prior to classification as CMRS providers. Both the deadline and cut-off date adopted by the Commission strike the appropriate balance between competing interests.

I. THE COMMISSION WAS CORRECT TO FORBEAR FROM REQUIRING CELLULAR PROVIDERS TO FILE TARIFFS

A. The Commission Properly Applied the Three-Part Forbearance Test of Section 332(c)

The Commission should reject requests to reconsider its decision to forbear from requiring cellular providers to file tariffs.^{4/} In deciding to forbear, the Commission correctly

^{4/} McCaw agrees with the Personal Communications Industry Association ("PCIA") that the Commission can and should forbear from applying Section 225 of the Communications Act (Telecommunications Relay Services) to providers of messaging and data services. McCaw also concurs with GTE that Section 226 (Telephone Operator Consumer Services Improvement Act (TOCSIA)) is inapposite to the offering of CMRS and should be declared inapplicable to CMRS (continued...)

applied the three-prong test set forth in Section 332(c)(1) of the Communications Act,^{5/} and the Commission's analysis and conclusions are well-founded in the record. No basis exists for revisiting this decision.

Contrary to the assertions of the National Cellular Resellers Association ("NCRA"),^{6/} the Commission properly considered and applied each of the three statutory factors in determining that the objectives of Section 332(c) would be best served by forbearing from requiring cellular and other CMRS providers to file tariffs pursuant to Section 203.^{7/} While NCRA asserts that the Commission merely "balanc[ed] the factors, rather than applying

^{4/}(...continued)

providers. The Commission has called for comment on whether to forbear from applying these provisions to CMRS providers, see Notice of Proposed Rulemaking, GN Docket No. 94-33, FCC 94-101 (rel. May 4, 1994) ("Further Forbearance Notice"), and McCaw will provide a fuller discussion of these issues in that proceeding.

^{5/} Section 332(c)(1), 47 U.S.C. § 332(c)(1), empowers the Commission to specify any provision of Title II (except Sections 201, 202 or 208) as inapplicable to CMRS providers when

(1) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such provision is not necessary for the protection of consumers; and (3) specifying such provision is consistent with the public interest.

^{6/} See National Cellular Resellers Association Petition for Reconsideration, GN Docket No. 93-252, filed May 19, 1994 ("NCRA Petition") at 13-19.

^{7/} See Order at ¶ 164 ("[t]he three prongs of the test contained in Section 332(c)(1) must be satisfied before the Commission may exercise its forbearance authority"); id. at ¶ 125 ("before forbearing from applying any section of Title II the Commission must find that each of" the three statutory conditions is met) (listing the three statutory factors) (emphasis supplied).

them,"^{8/} this contention simply cannot be squared with the detailed discussion of each factor as set forth in the Order itself.^{9/}

The Commission determined, correctly, that the first prong of the statute's forbearance test is satisfied through the combination of existing market forces and the continued applicability and enforcement of Sections 201, 202 and 208, which render Section 203's tariffing requirements unnecessary to ensure that cellular "charges . . . are just and reasonable and are not unjustly or unreasonably discriminatory."^{10/} With respect to competitive conditions in the cellular market, the Commission concluded that although the record did not support a finding that the cellular market is "fully competitive," the record did "establish that there is sufficient competition in this marketplace to justify forbearance from tariffing requirements."^{11/} While NCRA baldly refers to "current" purportedly "unreasonable and discriminatory cellular rates,"^{12/} neither NCRA nor any other petitioners offer any evidence suggesting that the

^{8/} See NCRA Petition at 14-15 and n.25.

^{9/} Id. at ¶¶ 173-179.

^{10/} Id. at ¶¶ 173-177. Indeed, NCRA itself explains that "the Commission concluded that the current state of competition in the cellular marketplace does not preclude its exercise of forbearance authority regarding tariffs." NCRA Petition at 16-17.

^{11/} Order at ¶ 175.

^{12/} NCRA Petition at 17.

Commission's conclusions regarding present competitive conditions in the cellular market are unfounded or unreasonable.^{13/}

As to the second factor -- that tariffing is "not necessary for the protection of consumers" -- the Commission properly concluded that enforcement of Sections 201, 202, 206, 207, 208, and 209 will provide adequate protection to consumers "in the event there is a market failure" in the cellular industry,^{14/} and that "forbearance will foster competition which will expand the consumer benefits of a competitive marketplace."^{15/} Congress obviously would not have given the Commission the discretion to forbear from requiring tariffs^{16/} if it had shared NCRA's belief that the absence of filed tariffs would render challenges to rates "virtually impossible" and enforcement of Section 201 "monumentally difficult."^{17/}

^{13/} See MCI Petition for Clarification and Partial Reconsideration, GN Docket No. 93-252, filed May 19, 1994, ("MCI Petition") at 4; NCRA Petition at 16-17. NCRA's contention that forbearance with respect to any of Title II's requirements is permitted only upon a "clear and unequivocal showing" as to each factor (NCRA Petition at 14) has no basis in the statutory language or legislative history. Rather, the statute simply requires the Commission to consider and apply each factor and make its best informed judgment concerning the likely effects of forbearance. That such policy assessments generally involve "predictive" judgments (see *id.* at 15) does not render them unlawful.

^{14/} Order at ¶¶ 175-176.

^{15/} *Id.* at ¶ 177. See *id.*, ¶ 178 (requiring or permitting tariffs could impede carriers' ability "to make rapid, efficient responses to changes in demand and cost," obviously hindering their ability to serve consumer needs).

^{16/} Congress expressly contemplated that the Commission would use its authority under Section 332(c) to forbear from enforcing tariffing requirements. See House Report at 260.

^{17/} NCRA Petition at 18. Maslin Industries v. Primary Steel, 110 S.Ct. 2759 (1990), offers no support for NCRA's arguments. Cf. NCRA Petition at 18. Unlike the Interstate Commerce Act, the Communications Act contains a specific grant of authority to the Commission to forbear from applying the tariffing requirements of Section 203 to CMRS providers, and the Commission has made a reasoned judgment to exercise that authority.

(continued...)

Petitioners offer little basis for quarrelling with the Commission's well-reasoned and well-supported decision that forbearance from tariffing requirements would serve the public interest, the third prong of the statutory test. The Commission concluded that tariffing would stifle competition, and impede the statutory objectives, by, inter alia, removing incentives, imposing unnecessary costs on carriers, encouraging tacit anticompetitive collusion in ratesetting among carriers, and burdening providers in their ability to meet market demands.^{18/} Other than recycling arguments the Commission has now carefully considered and rejected, petitioners fail to offer any new evidence suggesting that the Commission's analysis is incorrect or its conclusions unfounded.

In concluding that the enforcement of tariffing requirements in the CMRS context would disserve the public interest, the Commission correctly noted that tariffing can impede competitive pricing decisions, "since all price changes are public, which can therefore then be quickly matched by competitors."^{19/} Indeed, the Commission concluded that even voluntary filing of tariffs with respect to CMRS is "not in the public interest" and can inhibit competition.^{20/}

^{17/}(...continued)

Ironically, the resellers have opposed efforts by McCaw to reduce its rates in California. The resellers' opposition focused on what they termed a reduction by McCaw in the wholesale-retail price margin (the California Public Utilities Commission has mandated that retail rates must be at least five percent higher than wholesale rates) that guarantees a profit margin for resellers. In fact, McCaw has maintained or reduced its corresponding wholesale prices so that the mandated price margin remained. On the other hand, there is no requirement that the resellers translate any reduction in wholesale prices into lower prices for its resale customers.

^{18/} Order at ¶ 177.

^{19/} Id.

^{20/} Id. at ¶ 178.

MCI's proposal for informational tariffing requirements for "dominant" CMRS providers^{21/} bears out the Commission's concerns. Such a requirement would simply establish a price umbrella that would enable competitors -- like PCS licensees and ESMRs -- to enter mobile markets by barely underselling the tariffed rates of established CMRS providers. As the Commission has recognized, competition is better served when each carrier makes its own pricing decisions.^{22/}

No basis exists for petitioners' claims that cellular detariffing would leave the Commission bereft of a means to ensure just and non-discriminatory rates, particularly in light of the non-waivable nature of Sections 201, 202, and 208.^{23/} The Commission properly found -- consistent with the intent of Section 332 and this proceeding -- that whatever benefits there are from requiring tariffs^{24/} are outweighed by the public interest in removing regulatory burdens and promoting competition in the mobile communications marketplace. The presence of two facilities-based cellular providers, numerous resellers, and the imminent entry of ESMRs and PCS licensees in each market assures competitive conditions sufficient to prevent any single provider from engaging in prohibited practices.

^{21/} MCI Petition at 5-6.

^{22/} This is not the first time that MCI has sought to reverse the Commission's efforts to limit the anticompetitive consequences of tariff filings. See MCI v. FCC, 765 F.2d 1186, 1193-94 (D.C. Cir. 1985) (MCI). While the MCI court invalidated, on statutory grounds, an earlier directive barring tariff filings, the Commission has clear authority under Section 332(c) to forbear from applying tariffing requirements to CMRS providers. See Order at ¶ 178, n.363.

^{23/} See 47 U.S.C. § 332(c)(1).

^{24/} See, e.g., MCI Petition at 5 (claiming that tariffs can be good tools to establish customer service and liability terms).

B. The Absence Of A Non-Dominant Classification for Cellular Carriers Does Not Preclude Forbearance

The Commission should also reject the contention that the absence of a "non-dominant" classification for cellular providers makes it improper for the Commission to forbear from requiring cellular carriers to file tariffs.^{25/} While the Commission chose not to classify cellular carriers as non-dominant in an earlier proceeding, "it did not engage in a market analysis at that time."^{26/} More recently, the Commission found that cellular providers "face sufficient competition" to justify the relaxation of certain rules traditionally applied in non-competitive markets.^{27/} The issue of cellular's classification is currently pending before the Commission.^{28/}

But in any event, Section 332(c) does not require the Commission first to classify a commercial mobile service provider as "non-dominant" to justify forbearance. Congress was well aware of the dominant/non-dominant distinction when it enacted Section 332(c).^{29/} Nonetheless, when House-Senate conferees added the requirement that the Commission evaluate

^{25/} See, e.g., MCI Petition at 16.

^{26/} Order at ¶ 145.

^{27/} Id. at ¶ 145 (citing Cellular CPE Bundling Order, 7 FCC Rcd at 4028-29). See also Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (Fifth Report and Order), 98 FCC 2d 1191, 1204, n.41 (1984) (emphasizing that cellular carriers' "ability to engage in anticompetitive conduct or cost-shifting appears limited").

^{28/} CTIA Request for Declaratory Ruling and Petition for Rulemaking, RM-8179 (filed Jan. 21, 1993).

^{29/} See, e.g., House Report at 260-61 (stating that the Committee was "aware" of the court decision voiding the "Commission's long-standing policy of permissive detariffing, applied to non-dominant carriers").

market conditions before it decided to forbear,^{30/} they did not limit forbearance to carriers that had been declared "non-dominant." Rather, they required only that the Commission determine that forbearance will "promote competition among providers of commercial mobile services."^{31/} The Commission was clearly empowered to forbear from imposing tariffing requirements on cellular providers and should reject any arguments to the contrary.

In light of the increasingly competitive nature of the wireless industry, the record strongly supports the Commission's conclusion that forbearance as to Section 203's tariffing requirements will promote Congress's objectives in amending Section 332(c). Such forbearance will eliminate unnecessary regulatory burdens and further the growth and development of competition in mobile services. In the unlikely event that detariffing is found to result in unexpected harms, the Commission is free, of course, to revisit this issue.

II. THE COMMISSION WAS CORRECT TO INITIATE A FURTHER INQUIRY INTO THE INTERCONNECTION OBLIGATIONS OF CMRS PROVIDERS

A. A Further Inquiry To Explore CMRS Interconnection Is Appropriate, Given The Complexity Of The Issue And The Inadequacy Of The Record On This Matter

The Commission should affirm its decision to institute an inquiry into the appropriate nature and scope of interconnection obligations of CMRS providers. In view of the undisputed "complexity of the issues" and the fact that the comments thereon have been "so conflicting,"

^{30/} See 47 U.S.C. § 332(c)(1)(C).

^{31/} 47 U.S.C. § 332(c)(1)(C); see also H.R. Rep. No. 213, 103d Cong., 1st Sess. 491 (1993)("Conference Report").

the Commission correctly concluded that the questions relating to CMRS interconnection "warrant further examination in the record."^{32/}

The Commission should also affirm its finding that "analysis of [the interconnection] issue must acknowledge that CMRS providers do not have control over bottleneck facilities."^{33/} While certain petitioners continue to assert, without any persuasive supporting evidence, that interconnection with cellular providers is necessary because cellular providers purportedly control "bottleneck" facilities,^{34/} their arguments remain unfounded. The LECs alone possess control over a bottleneck narrow enough to require the provision of interconnection.^{35/} Unlike the LECs, CMRS providers -- including cellular providers -- enjoy neither monopoly control over essential facilities nor the market dominance that would give them the ability to create substantial barriers to entry. Moreover, new entrants into the mobile services marketplace have demonstrated time and time again that it is not necessary to interconnect with an existing mobile

^{32/} Order at ¶ 237. The Commission cannot be faulted for seeking to develop a more thorough record upon which to base whatever conclusions it ultimately may reach regarding whether -- or to what extent -- requiring CMRS interconnection is "necessary or desirable in the public interest" within the meaning of Section 201. Indeed, the APA requires that the agency be able to demonstrate the connection "between the facts found and the choices made," and the reasonableness of the agency's conclusions "is a matter to be tested on the basis of material in the rulemaking record." Home Box Office, Inc. v. FCC, 567 F.2d 9, 35, 42 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977). See also AT&T v. FCC, 974 F.2d 1351, 1354 (D.C. Cir. 1992); City of Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1165 (D.C. Cir. 1987).

^{33/} Order. at ¶ 237.

^{34/} Cellular Service, Inc. and ComTech, Inc. Petition for Reconsideration, GN Docket No. 93-252 ("CSI/ComTech Petition"), filed May 19, 1994, 11-12; NCRA Petition at 2-3.

^{35/} See The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 2 FCC Rcd. 2910, 2912, 2915 (1987) (requiring, inter alia, the LECs to negotiate interconnection arrangements in good faith and to develop cost-based interconnection charges.)

services network in order to offer service. Instead, new entrants have constructed their own networks and tied them into the public switched network by interconnecting with a LEC.^{36/}

B. The Statute Did Not Create A New Right To CMRS Interconnection

The Commission should also reject NCRA's flawed argument that Section 332(c)(1)(B) creates a new right to CMRS interconnection^{37/} and that the Omnibus Budget Reconciliation Act of 1993 ("Budget Act") requires the Commission to promulgate regulations implementing this right by August 10, 1994.^{38/}

^{36/} NCRA and CSI/ComTech suggest that resellers would utilize interconnection rights to install a switch between the mobile telephone switching office and the local exchange carrier's network. NCTA Petition at 10; CSI/ComTech Petition at 8-9. The resellers' switch proposal, however, is untested and raises difficult technical and policy questions that illustrate the appropriateness of the Commission's decision to investigate interconnection issues in a separate Notice of Inquiry.

In proceedings before the California Public Utilities Commission, the resellers have consistently failed to demonstrate the feasibility of their switch proposal. Investigation Into The Regulation Of Cellular Radiotelephone Utilities, I.88-11-040. They have provided no specific technical and engineering information, and their proposal relies upon switch capabilities and software that have not yet been developed. The resellers have, moreover, oversimplified and ignored significant operational problems and added costs that their proposal would cause to cellular carrier systems. At best, the resellers' switch proposal would duplicate functions performed by cellular systems (*e.g.*, retention of collection of call detail information) without relieving cellular carriers of the obligation to perform these functions as well. At the same time, the addition of a reseller switch would degrade the quality of service made available to the resellers' customers by forcing calls to be routed through an additional transmission link and deprive customers of existing roaming capabilities. The resellers have failed to provide any evidence that the addition of their switches would provide subscribers with any services that they cannot already obtain from existing cellular carrier switches.

^{37/} NCRA argues that Congress' use of the word "shall" in amended Section 332(c)(1)(A) is evidence of its intent to command the Commission to use its authority under Section 201 to order CMRS interconnection. NCRA Petition at 6.

^{38/} See Pub. L. No. 103-66, 107 Stat. 397, § 6002(d)(3)(C) (prescribing a one-year deadline for the Commission to "issue such other regulations as are necessary to implement" Section 332(c)). NCRA Petition at 2-5.

NCRA's assertions notwithstanding, the statute does not create any new CMRS interconnection rights. The first sentence of Section 332(c)(1)(B) provides that "[u]pon the reasonable request" of a CMRS provider, the Commission shall order a common carrier to interconnect with such a provider "pursuant to the provisions of Section 201 of the Act." The second sentence of Section 332(c)(1)(B), however, makes clear that nothing in the section "shall be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to the Act." Because Section 201's interconnection provisions have never been applied to mobile services providers, Section 332(c) cannot be interpreted as mandating CMRS interconnection, inasmuch as the statute does not "expand" any existing interconnection obligations to include providers not otherwise affected by Section 201.

NCRA also misconstrues Section 201 of the Communications Act. That provision does not itself mandate interconnection. Rather, Section 201 gives the Commission discretion to order common carriers to provide interconnection where it "finds such action necessary or desirable in the public interest."^{39/} Cellular resellers, such as those NCRA represents, have yet to satisfy this public interest showing. Thus, because Section 332(c)(1)(B) does not create any new substantive rights to interconnection, its interconnection provisions currently apply only to those services found to be subject to interconnection obligations under Section 201 (i.e., the LECs). Further, because Section 332(c)(1)(B) does not create any new interconnection requirements, the promulgation of rules governing such interconnection are not "necessary" under the rulemaking schedule mandated by the Budget Act. Whether the Commission will

^{39/} 47 U.S.C. § 201.

exercise its discretion to require CMRS interconnection, and the promulgation of any necessary rules, must await the conclusion of the Commission's inquiry.^{40/}

III. THE COMMISSION CORRECTLY DELIMITED STATE AUTHORITY OVER CMRS PROVIDERS

A. Congress Clearly Intended To Preempt The States From Regulating CMRS Interconnection Rates

As the Commission correctly noted, Section 332(c)(3)(A) preempts state and local rate and entry regulation of all CMRS services in order to "ensure that similar services are accorded similar regulatory treatment and to avoid undue regulatory burdens, consistent with the public interest."^{41/} The Commission was also correct to conclude that Section 332(c)(3) authorizes it to preempt state regulation of intrastate interconnection rates of CMRS providers, if the Commission ultimately decides to require CMRS interconnection.^{42/} It should therefore reject the claims of petitioners who rely on a faulty analysis of Louisiana Public Service Comm'n v. FCC^{43/} to argue that Congress did not intend to preempt the states from regulating CMRS interconnection rates when it enacted the Budget Act.^{44/}

^{40/} NCRA's attempt to use a letter from Chairman Markey and Representative Fields to Chairman Hundt in support of its interconnection argument is unavailing. NCRA Petition at 7-8. That letter merely paraphrases the statutory language without expressing a view as to when or under what circumstances CMRS providers would be required to offer interconnection. Significantly, the letter does not suggest that interconnection is among the issues that must be addressed during the "three-year transition for the private land mobile services."

^{41/} Order at ¶ 250.

^{42/} Id. at ¶ 237.

^{43/} 476 U.S. 355 (1986) ("Louisiana PSC").

^{44/} See, e.g., New York State Department of Public Services Petition for Reconsideration, GN Docket No. 93-252, filed May 13, 1994 ("NYSDPS Petition"), 2-4.

The New York State Department of Public Service (New York), for example, argues that Louisiana PSC vests the states with "exclusive power over interstate rates regardless of the type of rate until Congress has acted to limit that authority [which] . . . it has not done . . . here."^{45/} New York's reliance on Louisiana PSC is entirely misplaced. The Commission correctly pointed out that Louisiana PSC found that Section 2(b) of the Communications Act prohibits the Commission from exercising jurisdiction over charges, practices, services or regulations for or in connection with intrastate communications services.^{46/} Here, however, "Congress has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile radio services without regard to Section 2(b)."^{47/}

But even if Section 2(b) had not been expressly amended, Section 332(c) would satisfy Louisiana PSC's preemption test. Under Louisiana PSC, federal preemption occurs when Congress in enacting a federal statute, expresses a clear intention to preempt state law; when it has legislated comprehensively, thus occupying an entire field of regulation; or where there is, implicit in federal law, a barrier to state regulation.^{48/} Here, such a "clear intention" to preempt state law is manifested in an explicit statutory directive prescribing that state authority to regulate rates pertaining to CMRS is preempted unless an appropriate state showing is made, as well as from the statute's legislative history.

^{45/} Id. at 4 (emphasis supplied).

^{46/} Order at ¶ 256.

^{47/} Id., citing 47 U.S.C. § 152(b) (establishing that the Commission lacks jurisdiction over intrastate communications "[e]xcept as provided in . . . section 332") (emphasis added).

^{48/} Louisiana PSC, supra, 476 U.S. at 368.

In enacting the state preemption provisions set forth in Section 332(c), Congress sought "[t]o foster the growth and development of mobile services, that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure. . . ."^{49/} Allowing states to regulate intrastate CMRS interconnection rates would frustrate Congress' intent to create a seamless federal regulatory framework for CMRS providers. Indeed, if CMRS providers in different states faced disparate rate regimes for intrastate interconnection services, Congress' goals of achieving regulatory parity and uniformity in rate regulation could be thwarted.

B. The Commission's Requirement That States File Detailed Supporting Evidence, Including A Description Of Proposed Rules, Is Reasonable And Consistent With Statutory Intent

In light of Congress' comprehensive preemption of intrastate regulation over mobile services, it was entirely appropriate for the Commission to adopt detailed evidentiary requirements for states petitioning to continue CMRS rate regulation.^{50/} Without the submission of demonstrative evidence showing that the conditions for state regulation are met,^{51/} including a detailed description of the proposed rules if the petition is for prospective authority, the Commission would lack sufficient means to assess whether particular state regulatory proposals are justified by marketplace conditions and consistent with the policies underlying Section 332(c).

^{49/} House Report at 260. Cf. Conference Report at 494 ("[T]he Commission, in considering the scope, duration, or limitation of any State regulation shall ensure that such regulation is consistent with the overall intent of this subsection . . . so that . . . similar services are accorded similar regulatory treatment").

^{50/} See 47 C.F.R. § 20.13.

^{51/} See 47 U.S.C. § 332(c)(3)(A)(i),(ii); 47 C.F.R. § 20.13(a).

The Commission should therefore reject arguments contending that Section 20.13(a)(4) would overburden states by requiring them to "prepare a notice of proposed rulemaking, and, more likely, complete rulemaking proceedings before even filing a petition."^{52/} To the extent states are required "to complete rulemaking proceedings" -- and thereby establish a record justifying the state's proposed regulations -- this requirement is entirely appropriate and consistent with the legislation's intent. Again, Congress expected state rate regulation to be the rare exception, not the rule. As the Commission has explained, Congress sought to "promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede [the] mandate for regulatory parity."^{53/} Excusing the states from submitting and fully justifying the actual rules they seek to impose on CMRS providers at the petition stage would disable the Commission from fulfilling its statutory obligations.

IV. THE COMMISSION PROPERLY IMPLEMENTED A COMPREHENSIVE DEFINITION OF CMRS

The Commission properly adopted a definition of "commercial mobile service" that is sufficiently broad to further the principal legislative goal of ensuring equivalent regulatory treatment of comparable mobile services. It correctly rejected narrow definitions of CMRS that would result in disparate regulation of comparable services and should similarly refuse renewed calls for a divisive definition of CMRS.

^{52/} Petition for Reconsideration and Clarification of the National Association of Regulatory Utility Commissioners, GN Docket No. 93-252, filed May 19, 1994 ("NARUC Petition"), 5; see also Pennsylvania Public Utility Commission Petition for Limited Reconsideration and Clarification, GN Docket No. 93-252, filed May 19, 1994 ("PaPUC Petition"), 4.

^{53/} Order at ¶ 23.

American Mobile Telecommunications Association ("AMTA"), for instance, exhumes its earlier arguments in support of a definition of CMRS that excludes "small" carriers.^{54/} The Commission should again reject AMTA's call for disparate treatment of comparable mobile services based upon the characteristics of the entity providing them.

A "small entity" exception to the definition of CMRS, as with any class-based exception, would thwart the statute's purpose of creating regulatory symmetry among similar mobile services.^{55/} The statute's principal aim was to establish regulatory parity for "similar services." Any effort to divert the regulatory focus away from the type of service provided to some other criteria (such as the size of the provider) would be contrary to statutory intent. In short, the Commission should not enmesh itself in creating regulatory distinctions based on size, new-entry status, geographical scope, or any other classification which would open the way for regulatory disparities among comparable mobile services.^{56/}

V. ENHANCED SERVICES OFFERED BY CMRS PROVIDERS SHOULD NOT BE SUBJECT TO TITLE II REGULATION

GTE requests that the Commission clarify that any service meeting the statutory definition of CMRS is subject to Title II regulation, regardless of whether such services may be considered

^{54/} AMTA Petition at 4-6, citing Comments of AMTA, GN Docket No. 93-252 (Nov. 8, 1993), 7-11.

^{55/} Order at ¶¶ 1, 13.

^{56/} The Commission has specifically requested comment on whether "small" CMRS providers should be entitled to greater regulatory forbearance than other providers. See Further Forbearance Notice at ¶¶ 32, et seq. AMTA's proposal is more appropriately considered in the context of that proceeding. It is worth noting that the Commission there proposes additional forbearance for small entities, rather than a wholesale exemption of such entities from the definition of CMRS.

enhanced services^{57/} under Part 64 of the Commission's rules.^{58/} GTE reasons, in part, that this proposal would "minimize state regulation of innovative, advanced radio services."^{59/} Rather than depart from its long-standing and salutary policy of exempting enhanced services from regulation, however, the Commission should clarify that the states are preempted from regulating any services offered by a CMRS provider, including those that might be characterized as enhanced services.

In fashioning a comprehensive regulatory framework for mobile services in Section 332, Congress established a scheme for CMRS that distinguishes it significantly from traditional landline regulation. While Section 2(b)'s limitation on the Commission's jurisdiction has been held to apply with respect to any intrastate enhanced service offered by landline carriers,^{60/} Congress amended that section to accord the Commission plenary jurisdiction over CMRS services, thereby preempting the states with respect to any such services.^{61/}

The "deliberately structured dualism" reflected in Section 2(b), applicable to the regulation of landline carriers, therefore does not confer upon the States any authority over

^{57/} 47 C.F.R. § 64.702 defines "enhanced service" as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on format, content, code, protocol or similar aspects of the subscriber's information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with store information."

^{58/} Petition for Reconsideration or Clarification of GTE Services Corporation, GN Docket No. 93-252, filed May 19, 1994 ("GTE Petition"), at 12.

^{59/} Id.

^{60/} See California v. FCC, 905 F.2d 1217, 1239-42 (9th Cir. 1990).

^{61/} 47 U.S.C. § 152(b) (Commission lacks jurisdiction over intrastate communications "[e]xcept as provided in . . . section 332").

CMRS, except in specifically delineated circumstances.^{62/} With respect to CMRS providers, Congress has regulated comprehensively and displaced state authority. Rather than declare that enhanced services offered by CMRS providers fall within Title II, in order to "shield" them from state regulation, the Commission can and should affirm that such services are unregulated and beyond the reach of state regulators.

VI. THE COMMISSION SHOULD REJECT REQUESTS TO MODIFY THE DEADLINES ESTABLISHED IN THIS PROCEEDING

The Commission has adopted reasonable deadlines in this proceeding and should reject requests to modify them. First, allowing interested parties to petition the Commission for an order to discontinue state authority for rate regulation after an 18-month period,^{63/} represents a fair balance of interests. Proposals to modify the 18-month rule to permit parties to seek suspension of state authority after 18 months "or the period of time the FCC authorizes state rules to remain in effect, whichever is greater" would only serve to undermine the statutory objectives.^{64/}

Allowing state regulation to remain in effect for whatever amount of time the Commission initially allowed would deprive CMRS providers and other interested parties of a timely opportunity to dispute regulations that become outmoded before the expiration of the initially established regulatory period. The 18-month rule, by contrast, enables parties to challenge state regulation that has become unnecessary or outmoded within a reasonable amount

^{62/} See 47 U.S.C. § 332(c)(3).

^{63/} 47 C.F.R. § 20.13(c).

^{64/} See PaPUC Petition at 5.

of time after the changed conditions arise. The rule represents an appropriate balancing of the states' concern that state regulation must be given an opportunity to work and the interests of CMRS providers and the public in demonstrating that conditions have changed such that outmoded regulation is burdening the growth and development of commercial mobile services.

Second, the Commission should reject requests to change the cutoff date of August 10, 1993 for first licensing and eligibility for transitional relief.^{65/} Cutoff dates, by their nature, exclude some parties while including others in whatever benefit eligibility confers. The Commission should not modify its deadline merely because some licensees in a relatively new service (*i.e.*, 220 MHz) received their licenses after the cutoff.

Grandfathering provisions, such as the one at issue here, are intended to provide relief to long-standing licensees who would suffer considerable harm from a sudden shift in regulation that requires significant adaptation. New licensees, not so wedded to the old regulatory framework, can more easily adapt to new rules. Moreover, changing the cutoff-date to suit the preferences of one particular class of CMRS providers would inevitably lead other providers to petition the Commission for further movement of the cutoff date to accommodate their own timing preferences. Such a result, which would tax the Commission's resources and fragment the regulation of CMRS providers, is inconsistent with the objectives of Section 332(c) and would not serve the public interest.

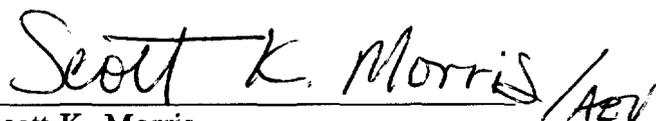
^{65/} 47 C.F.R. § 20.9(c). See AMTA Petition at 11.

CONCLUSION

For the foregoing reasons, the Commission should reject the petitions for reconsideration described herein and generally affirm the Second Report and Order.

Respectfully submitted,

MCCAWE CELLULAR COMMUNICATIONS, INC.



Scott K. Morris
Vice President of External Affairs
McCaw Cellular Communications, Inc.
5400 Carillon Point
Kirkland, Washington 98033
(206) 828-8420

Of Counsel:

Howard J. Symons
Peter Kimm, Jr.
Anthony E. Varona
Mintz, Levin, Cohn, Ferris
Glovsky and Popeo, P.C.
701 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004

Cathleen A. Massey
Senior Regulatory Counsel
McCaw Cellular Communications, Inc.
1150 Connecticut Avenue, N.W., 4th Floor
Washington D.C. 20036
(202) 223-9222

June 16, 1994

D28785.1