

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

JUN 20 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	)	

U S WEST COMMENTS

U S WEST, Inc., on behalf of its subsidiaries providing commercial mobile radio services, submits these comments in response to the Further Notice of Proposed Rulemaking, FCC 94-100 (May 20, 1994) ("Further Notice").

I. Introduction

Congress established a new category of mobile services — commercial mobile radio services ("CMRS") — so that "similar services are accorded similar regulatory treatment": <sup>1/</sup>

[T]he legislation establishes uniform rules to govern the offering of all commercial mobile services. <sup>2/</sup>

<sup>1/</sup> H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 499, reprinted in 1993 U.S.C.C.A.N 1088, 1188.

<sup>2/</sup> H.R. Rep. No. 111, 103d Cong., 1st Sess. 259, reprinted in 1993 U.S.C.C.A.N. 378, 586. In this regard, the Chair of the House Telecommunications Subcommittee made clear that revised Section 332 was intended to ensure that "person[s] providing commercial mobile services . . . should all be treated similarly." Statement of Rep. Edward J. Markey. Mark-up of Budget Reconciliation, Subtitle C, Licensing Improvement Act of 1993, at 3 (May 11, 1993).

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The Commission took a giant step toward implementing this parity directive in its Second Report and Order, where it interpreted CMRS broadly and adopted a basic — and largely uniform — framework for the regulation of such services.<sup>3/</sup> The Commission now proposes in the Further Notice to complete the transition to the new regulatory regime, as required by Section 332 of the Communications Act, by modifying current technical regulations so that the symmetry exists for these rules as well.

Section 332 of the Act, as amended by Section 6002 of the Omnibus Budget Reconciliation Act of 1993,<sup>4/</sup> directs the Commission to establish regulations that will apply to CMRS providers heretofore regulated as private carriers, and to

make such other modifications as may be necessary and practical to assure that licensees are subjected to technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar common carrier services.

The Commission correctly believes that the realization of these objectives requires, at the outset, a determination of what is meant by "substantially similar" services, and it seeks comment on this issue. The Commission also

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<sup>3/</sup> Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order, 9 FCC Rcd 1411 (1994). One exception to parity was the Commission's decision to maintain at this time the prohibition on common carrier provision of dispatch services. Id. at 1455-56, ¶ 105.

<sup>4/</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(d)(3)(B), 107 Stat. 312, 397 (1993).

seeks to determine what technical and operational rule changes are needed to eliminate regulatory inconsistencies among CMRS carriers, recognizing that it need only adopt rules that are "necessary and practical" to achieve this end. U S WEST addresses these issues below.

## II. All Broadband CMRS Offerings Are Substantially Similar

The Commission believes that its analysis of whether services are "substantially similar" should focus primarily on the services provided end users.<sup>5/</sup> Under this approach, services that compete against each other to provide similar services to customers would presumptively be considered substantially similar.<sup>6/</sup>

U S WEST submits that all broadband CMRS are interchangeable from the perspective of the consumer and should therefore be viewed as substantially similar.<sup>7/</sup> Adoption of such an approach would better discharge the Congressional intent of regulatory symmetry, be more reflective of market

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<sup>5/</sup> Further Notice, ¶ 13.

<sup>6/</sup> Id.

<sup>7/</sup> At least at this time there appear to be material distinctions from the consumer's perspective between narrowband CMRS (narrowband PCS and paging) on the one hand, and broadband CMRS on the other that render these classes of service dissimilar from a regulatory standpoint. Due to spectrum limitations, narrowband PCS cannot be used to provide services comparable to broadband services. Moreover, the need to conduct a two-way conversation is not satisfied by the ability to send a message. Accordingly, for the time being narrowband CMRS offerings should not be considered substantially similar to broadband CMRS for purposes of this proceeding.

realities, accommodate technical innovation and changes in the market, and minimize the regulatory burden.

All users of broadband CMRS share a basic characteristic in common: all have a need for telecommunications that cannot be met (or at least met well) with traditional, wireline services. There are, of course, a wide diversity of mobile services, and licensees have (at least historically) often marketed their respective services to different groups of consumers.<sup>8/</sup> Consumers choose one service over another using such criteria as price and the availability of features. But in the final analysis, persons interested in initiating telecommunications while on the move can use any broadband CMRS offering, a fact which makes such services "reasonably interchangeable".<sup>9/</sup>

In addition, an analysis of distinctions between services will necessarily involve a "snap shot" of the market as it exists today. However, the telecommunications market is not a static market, like the sale of glass/plastic

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<sup>8/</sup> In the past, Commission rules have often played a major role in determining who could provide what services to which customers, but it is these very type of restrictions which Congress now wants removed.

<sup>9/</sup> "The outer boundaries of a product market," the Supreme Court has declared, "are determined by the reasonable interchangeability of use or of cross-elasticity of demand between the product itself and substitutes for it." Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962). Perfect substitution among products is not required; even products with considerable differences (whether in quality or price) may be placed in the same market so long as consumers can "reasonably interchange" use of one product for another. For example, in a case challenging a merger between two cable TV companies, the appellate court affirmed the decision to define the product market as encompassing all passive visual entertainment — including cable TV, satellite TV, video cassette records, and broadcast TV — because consumers can "reasonably interchange" one form of entertainment for another. See Cable Holdings of Georgia, Inc. v. Home Video, Inc., 825 F.2d 1559, 1563 (11th Cir. 1987).

containers or athletic goods. Ingenuity, new technology and the convergence of entire industries (e.g., computers, entertainment, communications) make the telecommunications market perhaps the most dynamic product market of any. It is therefore reasonable to assume that existing differences among services will begin to blur as the Commission eliminates remaining use restrictions and as carriers deploy new technologies and roll out personal communication services products. Consequently, any regulations the Commission adopts based on a study of today's market may not be appropriate in tomorrow's market. The Commission must take this factor into account if it is to avoid the very types of regulatory disparities which Congress wants eliminated.

**III. The Commission Should Not Tamper With the Technical Rules At This Time But It Should Adopt The Least Restrictive Operational Rules For All CMRS Providers**

In the Further Notice the Commission observes that Congress "appears to have recognized that some of our existing technical and operational rules may reflect objective differences in the technical configuration and operation of particular services."<sup>10/</sup> Indeed, the Commission acknowledges that it need adopt only such rule changes as are "necessary and practical" to achieve regulatory consistency. According to the Commission,

This language suggests that even where we determine that commercial mobile radio services regulated under Part 90 and Part 22 are substantially similar, we are not compelled to modify our existing rules if such modification is unnecessary to achieve regulatory

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<sup>10/</sup> Further Notice, ¶ 21.

symmetry or is otherwise impractical. Moreover, even where we determine that inconsistencies in Part 90 and Part 22 should be conformed, the statute does not compel the rigid application of a uniform rule but affords us the discretion to fashion "comparable" rules. <sup>11/</sup>

U S WEST submits that this interpretation accurately reflects Congressional intent. <sup>12/</sup> Given this flexibility, the Commission need not and should not overhaul the technical requirements applicable to the various services within the context of this proceeding. Such a task is far too complex to be undertaken within the accelerated time frame in which this proceeding is being conducted. At the same time, however, the Commission should apply the least restrictive operational rules uniformly to all CMRS providers.

**1. Current Technical Rules Applicable to CMRS Should Be Retained For The Time Being**

It must be recognized that while the Commission may be engaged in a reregulation of the mobile services industry, it is not starting from scratch. Many services have developed over the years, some more recently than others, but each service possesses its own unique technical characteristics. The rules applicable to these diverse services are tailored to address these distinctions. Any attempt now to impose technical uniformity among the services,

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<sup>11/</sup> Id.

<sup>12/</sup> The Commission notes that "the final version of the statute appears to have been amended to provide more flexibility in this regard. The House version . . . would have required the Commission to 'equalize' the regulatory treatment of substantially similar mobile services." Id. at 13, n.37.

notwithstanding these distinctions, may cause adverse repercussions throughout the industry.

The Commission acknowledges these problems in its discussion of the various technical rules. The Commission questions, for example, whether revisions to the wide-area SMR rules "should be tailored to minimize disruption to other segments of the SMR industry and the services they provide."<sup>13/</sup> The Commission also recognizes that a revision to the co-channel interference criteria "is a particularly complex issue because changes to our current rules could have a direct impact on the location of stations and selection of equipment in existing systems. Conversely, relaxing existing interference rules could result in licensees facing increased interference from co-channel stations."<sup>14/</sup>

Similar complications must be taken into account before modifications are made to other technical requirements. For example, commenters are asked to "address the nature and extent of costs and other burdens that would be faced by CMRS licensees if we were to modify our existing antenna height and power rules . . . ." <sup>15/</sup> Moreover, the Commission recognizes that "mandating uniform interoperability standards for various classes of CMRS equipment is potentially costly and could result in standards that do not reflect the rapid pace of development in mobile radio technology."<sup>16/</sup>

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<sup>13/</sup> Further Notice, ¶ 30.

<sup>14/</sup> Id., ¶ 40.

<sup>15/</sup> Id., ¶ 50.

<sup>16/</sup> Id., ¶ 57.

These factors militate against revising the technical rules at this time. This is not to say that some of these proposals do not merit study, but the complex nature of these issues calls for a thorough and deliberate analysis. A review of this scope and import cannot properly be undertaken in this proceeding given the time constraints imposed by Congress. Under these circumstances, modifications to the technical rules applicable to the various CMRS operations would not be "practical" at this time.<sup>17/</sup> Such changes should be made, if at all, in a reasoned, unhurried fashion. Should the Commission decide, however, that changes to the technical rules are warranted at this time, then it must deal with these issues across-the-board so as not to favor one industry participant over another and thereby increase current regulatory disparities.

**2. The Commission Should Adopt Uniform Operational Rules For All CMRS Providers**

The complexities associated with changes to the technical rules are not present with respect to the operational rules applicable to the various services. The Commission, for example, can easily adopt uniform construction periods (although uniform coverage requirements would make little sense in the absence of defined geographic service areas). Moreover, user eligibility and

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<sup>17/</sup> Nor, in fact, should such modifications be considered "necessary", since the rules now applicable to each type of service do not overwhelmingly benefit one type of service over another. For example, while cellular has more spectrum than SMR, adoption of a spectrum cap would negate any advantages. In the meantime, cellular is required to operate at lower power than SMR and it is subject to stricter emission mask and interoperability requirements.

permissible use restrictions should be eliminated across-the-board.<sup>18/</sup> Rules applicable to station identification, general licensee obligations and equal employment requirements can likewise be standardized. In each of these areas all CMRS licensees should be required to operate under the same parameters. The competitive nature of the industry also justifies the adoption of the least intrusive regulatory measures possible.

#### **IV. The Commission Should Not Restrict After-Market Transfers of CMRS Licenses Acquired By Means of Competitive Bidding**

U S WEST agrees with the Commission's proposal to establish uniform licensing standards for all CMRS operators. Such changes make sense in the current regulatory environment and they would be easy to administer.

U S WEST suggests, however, that the Commission consider modifying its proposal respecting the assignment of licenses and transfers of control. Specifically, the Commission proposes "to allow assignment or transfer of most CMRS licenses upon completion of construction and placing of the system in operation, provided that the applicant can demonstrate that the assignment or transfer will serve the public interest, convenience and necessity."<sup>19/</sup> This proposal, which suggests that no pre-construction transfers will be permitted, is inconsistent with the transfer rules adopted in the

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<sup>18/</sup> U S WEST submits that the Commission should eliminate, as soon as possible, the restriction prohibiting Part 22 licensees from providing dispatch services. By addressing permissible use issues in a staggered fashion, additional regulatory disparities are written into the rules. Congress clearly intended the opposite result.

<sup>19/</sup> Further Notice, ¶ 144.

Competitive Bidding proceeding.<sup>20/</sup> Based on the decision in that proceeding, winning bidders may transfer their systems prior to construction, although they will be required to make detailed disclosures regarding the nature of the transaction so that the Commission can make determinations respecting unjust enrichment. U S WEST submits that this policy should be applied to all CMRS licenses for purposes of consistency and because it is well reasoned.

Respectfully submitted,

U S WEST, Inc.

A handwritten signature in black ink, appearing to read "Donald M. Mukai", with a stylized flourish at the end.

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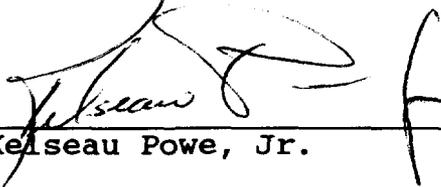
June 20, 1994

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<sup>20/</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), ¶ 214 ("we will give particular scrutiny to auction winners who have not yet begun commercial service and who seek approval for a transfer of control or assignment of their licenses within three years after the initial license grant, in order to determine if any unforeseen problems relating to unjust enrichment have arisen outside the designated entity context.").

**CERTIFICATE OF SERVICE**

I, Kelseau Powe, Jr., do hereby certify that on this 20th day of June, 1994, I have caused a copy of the foregoing **U S WEST COMMENTS** to be served via hand-delivery upon the persons listed on the attached service list.

  
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