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

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

To the Commission

GN Docket No. 93-252

COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

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SUMMARY

Vanguard supports the efforts of the FCC to ensure that competitors in the mobile services marketplace are subject to comparable regulatory requirements and that inconsistencies in the Commission's regulation of substantially similar services are eliminated. Achieving compatibility in technical, operational and licensing rules is essential to establishing regulatory symmetry and providing fair competition among mobile service providers. Vanguard submits the following principal points for the Commission's consideration.

First, in analyzing whether CMRS services are "substantially similar," Vanguard agrees that the Commission should focus primarily on the services provided to end users and the extent to which such services meet substantially similar customer needs and demands. Based on these and other factors discussed below, Vanguard submits that cellular service and wide-area SMR service are substantially similar for purposes of comparable regulatory treatment; and that traditional SMR services could also be viewed as substantially similar to cellular to the extent traditional SMR operators offer vehicular-mounted or portable voice and/or data mobile communications that are comparable to cellular service. Also, private and common carrier paging should be deemed substantially similar for purposes of their overall regulatory treatment. Second, the technical and operational rules for CMRS providers should be revised in a way that ensures a level regulatory playing field for comparable services. Finally, Vanguard does not oppose, at this time, an overall

CMRS spectrum cap, but suggests that a 50 MHz limit would better serve the public interest than the recommended 40 MHz cap.

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To the Commission

COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

Vanguard Cellular Systems, Inc., by its attorneys, hereby submits its Comments in the above-referenced proceeding regarding the regulatory treatment of mobile services.^{1/} For reasons discussed below, Vanguard urges the Commission to adopt measures that will ensure a level regulatory playing field among the various "substantially similar" commercial mobile radio services.

I. PRELIMINARY STATEMENT

Vanguard began its involvement in cellular communications in 1984 and today ranks as one of the top-20 largest cellular carriers in the United States. As an established, non-wireline licensee, Vanguard operates 22 cellular systems in the eastern half of the country serving more than 175,000 subscribers. The Vanguard systems incorporate approximately 145 fully-constructed cell sites supported by extensive microwave networks. Over the years Vanguard has experienced

^{1/} Regulatory Treatment of Mobile Services, Further Notice of Proposed Rulemaking in GN Docket 93-252, rel. May 20, 1994 ("Further Notice").

considerable expansion and the Company continues to grow at an annual rate in excess of 35 percent.

Vanguard supports the efforts of the FCC to ensure that competitors in the mobile services marketplace are subject to comparable regulatory requirements and that inconsistencies in the Commission's regulation of substantially similar services are eliminated. As a cellular carrier confronted by increasingly competitive marketplace forces, Vanguard believes that achieving comparability in technical, operational and licensing rules is essential to establishing regulatory symmetry and promoting fair competition among mobile service providers. While these comments do not address every issue posed in the Further Notice, Vanguard does wish to submit its views on the principal points discussed below.

First, in analyzing whether CMRS services are "substantially similar," Vanguard agrees that the Commission should focus primarily on the services provided to end users and the extent to which such services meet substantially similar customer needs and demands. Based on these and other factors discussed below, Vanguard submits that cellular service and wide-area SMR service are substantially similar for purposes of comparable regulatory treatment; and that traditional SMR services could also be viewed as substantially similar to cellular to the extent traditional SMR operators offer vehicular-mounted or portable voice and/or data mobile communications that are comparable to cellular service. Also, private and common carrier paging should be deemed substantially similar for purposes of their overall regulatory treatment. Second, the technical and operational rules for CMRS providers

should be revised in a way that ensures a level regulatory playing field for comparable services. Finally, Vanguard does not oppose, at this time, an overall CMRS spectrum cap, but suggests that a 50 MHz limit would better serve the public interest than the recommended 40 MHz cap.

II. COMPARISON OF RECLASSIFIED PART 90 SERVICES AND "SUBSTANTIALLY SIMILAR" COMMON CARRIER SERVICES

The Budget Act directed the Commission to ensure that private land mobile licensees who are reclassified as commercial mobile radio services ("CMRS") providers are subject to regulatory requirements comparable to those that apply to "substantially similar" common carrier services. The Further Notice sought input from the public on the issue of what is meant by "substantially similar" services for this purpose. The Commission proposes to base the determination of substantial similarity primarily on whether the CMRS providers in question compete to meet similar customer demands for services. The Further Notice also sought specific comment regarding the extent to which each reclassified Part 90 service can be viewed as competing against other CMRS offerings.

As for analyzing whether services are "substantially similar," the Commission believes it should focus primarily on the services provided to end users and the extent to which such services meet substantially similar customer needs and demands. Vanguard supports this analysis and agrees with the Commission that services that compete against other to provide similar offerings to customers should be presumed to be substantially similar for purposes of comparing their technical and

operational rules. Thus, as suggested in the Further Notice, where two service providers offer similar services to customers in competition with each other, disparities in the technical and operational rules under which the respective services operate could afford one competitor an unfair advantage over the other, which in turn could have unintended market consequences. Accordingly, as a threshold matter, Vanguard endorses the Commission's approach for determining the competitive relationships between the services.

The Further Notice sought comment on factors the Commission should consider under this approach to determine whether specific CMRS offerings are competitive with other CMRS services. As an example, the Commission suggested it could look to the way various CMRS services are marketed to customers, and it could all consider factors a customer weighs when choosing which mobile service to use. Vanguard believes that the approach suggested by the Commission is reasonable and sound, for both the marketing strategies of service providers and factors considered by customers in choosing between services can provide appropriate evidence as to whether two or more services are substantially similar. In reality, evaluating such factors focuses on the underlying functionality of the respective services and permits a determination of whether such services offer customers essentially similar communications capabilities. Thus, if a service provider markets its service as substitutable for another service, or if customers view two communications offerings as essentially providing the same service (even though there might be certain differences in price and quality), then there is a reasonable basis for concluding that

such services compete with each other in the market. These factors can be applied in analyzing each affected Part 90 service that was reclassified as CMRS to determine the degree to which it is "substantially similar" to any Part 22 mobile service.

Vanguard offers its views below concerning SMR services and paging services.

A. Specialized Mobile Radio

The Commission concluded in the Second Report and Order in this docket that SMR services would be classified as CMRS to the extent they provide for-profit, interconnected service to the public or a substantial portion of the public.^{2/} In the current proceeding, the Commission seeks comment on its conclusion that similarities between wide-area SMR service and cellular service suggest that the two services could be viewed as substantially similar for purposes of applying comparable technical and operational requirements. The Commission also requested comment as whether local SMR service was substantially similar to any other Part 22 service.

Vanguard agrees that wide-area SMR service and cellular service are substantially similar for purposes of the regulatory treatment that should generally apply to them. As the Commission observed in its Fleet Call decision, and reiterated in the Further Notice, licensees are using SMR as a vehicle to develop wide-area multi-channel interconnected systems that potentially offer the public a competitive

^{2/} Regulatory Treatment of Mobile Services, Second Report and Order in GN Docket 93-252, rel. March 7, 1994 ("Second Report and Order").

alternative to cellular service.^{3/} In the Second Report and Order, the Commission noted that the advent of wide-area multichannel SMR was a factor that led Congress to revise Section 332 so that these services would be classified as CMRS.^{4/} Moreover, in discussing wide-area SMR in the Second Report and Order, the Commission specifically referred to "the views of most commenters that SMRs providing interconnected service on a competitive basis with cellular carriers should be regulated similarly to cellular carriers."^{5/} Indeed, it is widely acknowledged from a marketing perspective that wide-area SMR seeks to compete for customers with existing cellular licensees. For example, there has been widespread circulation in the Los Angeles area of Nextel advertising literature for Nextel's Los Angeles wide-area SMR system. These materials show the striking similarity of Nextel's new service to the service offerings of the Los Angeles cellular carriers. For these reasons, wide-area SMR and cellular services should properly be viewed as substantially similar for purposes of applying comparable regulatory requirements.

To the extent local SMR systems are classified as CMRS, they, too, could be viewed as substantially similar to cellular for purposes of comparable regulatory treatment. The Commission stated in the Further Notice that service

3/ See Fleet Call, Inc., Memorandum Opinion and Order, 6 FCC Rcd 1533, recon., discussed, 6 FCC Rcd 6989 (1991); See Further Notice at ¶ 15.

4/ See Second Report and Order at ¶¶ 7, 13; See also Further Notice at ¶ 15.

5/ Second Report and Order at ¶ 91.

offered by local SMR systems is different from cellular service in terms of geographic range, channel capacity, or technical quality. However, in the Second Report and Order, the Commission held that any offering of interconnected service by a traditional SMR licensee will result in CMRS classification, and noted further that -

*** our decision whether to classify SMRs as PMRS or CMRS will not turn on system capacity, frequency reuse, or other technology-dependent aspects of system operations. We agree with Telocator that 'the agency has never relied on system capacity to ascertain regulatory status' and 'to do so now could create disincentives to employ new capacity enhancing technologies...' In addition,... our decision how to classify a service will not turn on the size of the geographic area served.^{6/}

Just as differences in system capacity and geographic coverage were not relevant for purposes of classifying SMR systems as CMRS, such factors should not automatically determine whether local SMR services and cellular services are substantially similar. Vanguard submits that to the extent traditional SMR operators offer vehicular-mounted or portable voice and/or data mobile communications capabilities, then such services effectively compete for customers with cellular licensees and the two services should therefore be viewed as "substantially similar" for purposes of implementing comparable regulatory treatment.

B. Paging

The Commission tentatively concluded that private and common carrier paging should be deemed substantially similar for statutory purposes. Vanguard

^{6/} Second Report and Order at ¶ 92 (footnotes omitted).

agrees with this conclusion and would support the creation of a level regulatory playing field for all Part 90 and Part 22 paging services. As mentioned in the Further Notice, both private and common carrier paging licensees provide one-way messaging service that is essentially interchangeable from the customer's point of view. While wide-area regional and national paging developed earlier on common carrier paging frequencies, the Commission has recently taken certain regulatory steps to license most private paging frequencies above 900 MHz on an exclusive basis, and thereby to stimulate the development of local, regional and national paging on these frequencies.^{7/} There is today very little difference between common carrier and private paging either from a marketing perspective or from the consumer's viewpoint. In the circumstances, the Commission may reasonably conclude that the two types of paging should be deemed "substantially similar" for purposes of regulatory symmetry.

III. Technical and Operating Rule Revisions

The Budget Act requires the Commission to modify its rules as necessary so that CMRS licensees providing substantially similar services will not be subject to inconsistent regulation arising out of their prior regulatory status. The Commission seeks comment on how to ensure that its technical and operating rules for reclassified Part 90 licensees and other service providers offering substantially similar common carrier services are "comparable." Vanguard submits that the task of equalizing the technical and operational rules affecting the provision of similar

^{7/} Report and Order in PR Docket No. 93-35, 8 FCC Rcd 8318 (1993).

services should be approached flexibly and should adhere to the following fundamental principals.

First, in fashioning "comparable" rules, the Further Notice properly focuses on the need, in a clear manner, to identify and conform differences in technical and operational rules in Part 90 and Part 22 that would otherwise lead to arbitrary and inconsistent treatment of substantially similar CMRS licensees. Thus, for example, cellular carriers and SMR licensees providing essentially comparable mobile services should expect to operate in a regulatory environment that is fundamentally fair and avoids favoring one category of provider over another because of historical or other circumstances. Indeed, in an increasingly competitive mobile communications market, fairness demands that there is a level playing field so that mobile service providers can focus their attention and resources toward developing their markets. For this reason, Vanguard supports a broad review of the technical and operational rules in Part 90 and Part 22 in order to fashion new requirements that will ensure a high level of consistency for services that are substantially similar. Moreover, Vanguard agrees that these technical and operational rules should be fashioned to be consistent with the newly-adopted rules for PCS. Indeed, PCS promises to compete with cellular, SMR and other mobile services, and the Commission should therefore harmonize its rules for the respective services in order to achieve an even-handed regulatory environment.

Second, Vanguard supports the Commission's proposal to examine the effect that equalizing the rules would have upon ongoing competition between existing

licensees as well as the prospects for entry by new competitors. As a general matter, mobile communications licensees that provide similar services and compete for the same customers should face regulatory requirements that do not favor one category of licensee over another. Thus, the Commission is correct to examine the effect that each potential rule change will have on competition. The overriding objective, however, should be to create a regulatory environment that treats similarly-situated service providers even-handedly so that marketplace forces, and not the Commission, will ultimately regulate the conduct of each carrier's business. Toward this end, the Commission should strive to simplify the technical and operation rules applicable to mobile services, avoid the temptation to overregulate in this area, and acknowledge that ultimately competitive market forces can better serve the public interest.

Finally, in instances where the Commission believes that modification of its rules is required, it seeks comment on (1) whether to extend the Part 22 rule to Part 90 CMRS services; (2) whether to extend the Part 90 rule to Part 22 services; or (3) whether to modify both Part 22 and Part 90. Vanguard will not comment on each of the potential Part 22 or Part 90 rules that may be subject to revision to harmonize the treatment of substantially similar services. However, each of the options presented by the Commission may be appropriate in the context of any specific rule change, especially since the Commission should approach the task of conforming its rules flexibly with the goal of fashioning regulatory requirements that will treat similar services comparably. Vanguard does agree with the Commission, however, that it should incorporate rule changes proposed in the Further Notice into its existing

Part 22 and Part 90 rules rather than attempting a "merger" of the two rule parts at this time. Vanguard also supports the Commission's view that rules that apply uniformly to all CMRS providers should be incorporated into the new Part 20 of the rules established by the Second Report and Order. Such a framework will help to equalize the regulatory treatment of all CMRS providers, leaving service-specific requirements to other parts of the rules where appropriate.

IV. CMRS Spectrum Aggregation Limit

The Further Notice addresses whether the Commission should adopt a cap on the amount of CMRS spectrum that licensees may aggregate in a given geographic area. The Commission specifically seeks comments on whether the potential exists for licensees to exert market power by aggregating CMRS spectrum. To ensure that the CMRS market is fully competitive, the Commission seeks comments on several alternatives for limiting the amount of CMRS spectrum that may be licensed to a single entity.

Based on current and anticipated conditions in the CMRS marketplace, Vanguard, at this time, does not oppose the imposition of a reasonable cap on the award of CMRS spectrum licensed to a single entity in any given geographic area. However, given the amount of CMRS spectrum that is currently available for increasing competition in the mobile services market, Vanguard suggests that the public interest would be better served by a more liberal spectrum allowance than proposed in the Further Notice. Specifically, Vanguard believes that a 40 MHz limit is too restrictive and that 50 MHz would provide a more reasonable and appropriate

basis for calculating an overall CMRS cap. As suggested by the Commission, any such CMRS cap should be adjusted upward slightly to allow reasonable flexibility for PCS licensees and other existing mobile services providers to furnish both broadband and narrowband services. Vanguard believes that a more liberal CMRS spectrum cap is appropriate for the following reasons:

First, as noted in the Further Notice, the mobile services marketplace is currently undergoing a dramatic change in terms of the availability of new spectrum for CMRS offerings. The total spectrum that is now or will soon become available includes (1) 50 MHz of spectrum for cellular service; (2) 120 MHz of spectrum for licensed broadband PCS and 2 MHz of spectrum for narrowband PCS; (3) over 28 MHz of spectrum currently allocated to Part 90 services that are potentially subject to reclassification as CMRS, including 19 MHz allocated to 800 and 900 MHz SMR services; and (4) 8.74 MHz of spectrum for non-cellular mobile services such as common carrier paging and IMTS. In addition, mobile satellite services providing voice and data communications to vehicular and handheld units will soon be operating domestically and globally. Moreover, 200 MHz of additional spectrum will be allocated from government to commercial use, thereby making even more spectrum available for mobile services. Given this abundance of spectrum and greater competition in the commercial mobile services marketplace overall, any CMRS spectrum cap adopted by the Commission should not be so restrictive as to hamper the ability of CMRS providers to offer a broad array of communications services. Indeed, a 50 MHz cap would ensure that no single entity could aggregate a

disproportionate amount of spectrum, yet would permit CMRS providers the flexibility to develop and invest in a broad range of CMRS services.

Second, while an overall spectrum cap may be appropriate to forestall potentially adverse competitive consequences, there is no evidence of anticompetitive conduct in the mobile communications market today, nor is such behavior likely to eventuate given the dramatically increased state of competition that is unfolding. In circumstances where there is an abundance of spectrum, a large number of competitors, and a promising diversity of new service offerings, a spectrum cap that is too restrictive can only fragment the mobile services market and thwart the development of new mobile service offerings by experienced carriers. The Commission retains the right, of course, to react to anticompetitive conduct if and when it occurs, but where anticompetitive behavior is not prevalent or threatened because of the existence of a competitive marketplace, the Commission should resist adopting regulatory restrictions that are unduly stringent. In the context of today's mobile services marketplace, Vanguard believes that imposition of a 40 MHz spectrum cap is unwarranted and that a 50 MHz limit would better balance the need to guard against anticompetitive practices with the need to ensure flexibility and innovation in mobile communications.

Finally, the selection of 40 MHz is somewhat of an arbitrary number as a choice for an overall CMRS spectrum cap. The monitoring and enforcement of any spectrum cap will doubtless be an administrative burden for CMRS licensees and the Commission alike. While a 50 MHz cap, as suggested by Vanguard, will still involve

administrative rules and procedures, Vanguard believes that the more liberal cap will create less of an administrative burden because a higher threshold will not be as routinely encountered as a more restrictive 40 MHz cap. Thus, applying the spectrum cap in the geographic areas to which it relates, dealing with attribution standards involving ownership percentages, service area overlap and other rules, will create a whole new administrative framework where the burdens on licensees and the Commission's staff will include monitoring and enforcing these new rules, addressing interpretive rulings, confronting waiver requests, etc. Presumably such burdens would be less in a context where CMRS licensees have greater flexibility to develop their businesses without the undue restrictions of a 40 MHz cap. Thus, in addition to other factors supporting a 50 MHz cap, the Commission should not overlook the administrative convenience that would attach in the context of a higher overall spectrum allowance.

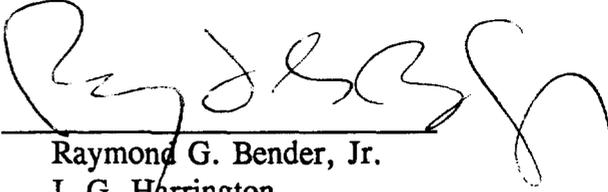
CONCLUSION

Vanguard endorses the Commission's efforts to harmonize the rules applicable to substantially similar mobile communications services. For reasons discussed herein, Vanguard believes that establishment of a level regulatory playing field for comparable services will strengthen competition and serve the public interest.

Vanguard urges the Commission to consider the foregoing comments as it finalizes the regulatory landscape applicable for commercial mobile radio services in the future.

Respectfully submitted,

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June 20, 1994

CERTIFICATE OF SERVICE

I, Deborah E. Buhner, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 20th day of June, 1994, I have had hand delivered the foregoing "COMMENTS" to the following:

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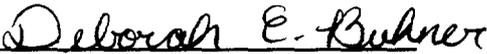
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