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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

In the Matter of	)	
	)	
Petition of the Public Utilities Commission, State of Hawaii, for Authority To Extend Its Rate Regulation of Commercial Mobile Services in the State of Hawaii	)	PR File No. 94-SP1
	)	
Petition To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services of the Arizona Corporation Commission	)	PR File No. 94-SP2
	)	
Petition of the State of California and the Public Utilities Commission of the State of California To Retain State Regulatory Authority Over Intrastate Cellular Service Rates	)	PR File No. 94-SP3 ✓ 94-105
	)	
Petition of the Connecticut Department of Public Utility Control To Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut	)	PR File No. 94-SP4
	)	
Petition on Behalf of the Louisiana Public Service Commission for Authority To Retain Existing Jurisdiction Over Commercial Mobile Radio Services Offered Within the State of Louisiana	)	PR File No. 94-SP5
	)	
Petition To Extend Rate Regulation of the Public Service Commission, State of New York	)	PR File No. 94-SP6
	)	
Statement of the Public Utilities Commission of Ohio's Intention To Preserve Its Right for Future Rate and Market Entry Regulation of Commercial Mobile Services	)	PR File No. 94-SP7
	)	
State Petition for Authority To Maintain Current Regulation of Rates and Market Entry (Sect 20.12) by the State Public Service Commission of Wyoming	)	PR File No. 94-SP8

OPPOSITION OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION TO THE STATE PETITIONS FOR AUTHORITY TO CONTINUE REGULATION OF COMMERCIAL MOBILE RADIO SERVICES

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Dated: September 19, 1994

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SUMMARY

The Personal Communications Industry Association ("PCIA") herewith files its opposition to the Arizona, California, Connecticut, Hawaii, Louisiana, New York, Ohio, and Wyoming petitions under Section 332 of the Communications Act to regulate the rates of Commercial Mobile Radio Services ("CMRS") providers. As detailed in PCIA's opposition, none of the filing states have carried their burden of proof or "clear[ed] [the] substantial hurdles" established by Section 332 in order to justify continued rate regulation of CMRS. Accordingly, PCIA believes the Commission should expeditiously act to deny the states' petitions and clarify that all rate or entry regulation of CMRS has been preempted.

As an initial matter, PCIA notes that none of the state petitions have even attempted to justify continued regulation of paging services. To the extent states have attempted to justify any extension of CMRS regulation in effect as of June 1, 1993, they have done so only with reference to cellular services. Thus, should any state regulations purport, on their face, to apply to paging carriers, such regulations should, at a minimum, be deemed to be preempted as of August 10, 1994.

Furthermore, none of the state petitions have made a persuasive case that existing market conditions for wireless voice services are insufficient, absent state regulation, to protect subscribers from unjust or unreasonably discriminatory rates. The states have in many instances ignored the Commission's guidelines as to what kinds of evidence would be necessary to justify continued regulatory authority. In other instances, the states have attempted to assert a continued right to regulate, but

without even having concluded what regulations would apply. As a result, PCIA submits that the states have failed to meet the strong burden of proof needed to overcome the "clear substantial hurdles" created by the Budget Act. Therefore, the Commission should deny these petitions and allow competition and market forces to dictate the provision of cellular services and substantially similar broadband PCS offerings.

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OPPOSITION OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION TO THE STATE PETITIONS FOR AUTHORITY TO CONTINUE REGULATION OF COMMERCIAL MOBILE RADIO SERVICES

The Personal Communications Industry Association ("PCIA") hereby files its opposition to the state petitions for authority to continue regulation of commercial mobile radio services ("CMRS").[1] Because federal preemption of state CMRS rate and entry regulation will encourage competition among providers by eliminating burdensome and inconsistent state rules, Congress and the FCC have established a substantial threshold burden of proof to be carried by states seeking to continue regulation of CMRS operations. As discussed below, none of the states filing to continue their regulations have met this burden. Accordingly, the Commission should

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[1] Petition of the Public Utilities Commission, State of Hawaii, for Authority To Extend Its Rate Regulation of Commercial Mobile Services in the State of Hawaii, PR File No. 94-SP1 (filed Aug. 10, 1994) ("*Hawaii Petition*"); Petition To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services of the Arizona Corporation Commission, PR File No. 94-SP2 (filed Aug. 10, 1994) ("*Arizona Petition*"); Petition of the State of California and the Public Utilities Commission of the State of California To Retain State Regulatory Authority Over Intrastate Cellular Service Rates, PR File No. 94-SP3 (filed Aug. 10, 1994) ("*California Petition*"); Petition of the Connecticut Department of Public Utility Control To Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, PR File No. 94-SP4 (filed Aug. 10, 1994) ("*Connecticut Petition*"); Petition on Behalf of the Louisiana Public Service Commission for Authority To Retain Existing Jurisdiction Over Commercial Mobile Radio Services Offered Within the State of Louisiana, PR File No. 94-SP5 (filed Aug. 10, 1994) ("*Louisiana Petition*"); Petition To Extend Rate Regulation of the Public Service Commission, State of New York, PR File No. 94-SP6 (filed Aug. 10, 1994) ("*New York Petition*"); Statement of the Public Utilities Commission of Ohio's Intention To Preserve Its Right for Future Rate and Market Entry Regulation of Commercial Mobile Services, PR File No. 94-SP7 (filed Aug. 10, 1994) ("*Ohio Petition*"); State Petition for Authority To Maintain Current Regulation of Rates and Market Entry (Sect 20.12) by the State Public Service Commission of Wyoming, PR File No. 94-SP8 (filed Aug. 10, 1994) ("*Wyoming Petition*").

expeditiously deny the state petitions and affirmatively preempt state rate and entry regulation of CMRS carriers.

I. INTRODUCTION

On August 10, 1993, Congress enacted Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act"), which amended Section 332(c)(3) of the Communications Act (the "Act").[2] Among other things, the Budget Act replaced the "traditional regulation of mobile services," which involved both state and federal regulation, with a comprehensive federal regulatory framework designed to promote consistent CMRS regulation.[3] Specifically, the Section 332 amendments preempt state and local entry and rate regulation of CMRS providers as of August 10, 1994. The House of Representatives stated that preemption was necessary in order to "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."[4]

The Section 332 amendments, however, provide states with a limited opportunity to preserve their existing CMRS regulations. Any state that regulated

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[2] Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A)&(B), 107 Stat. 312, 393 (1993). These amendments are now codified at 47 U.S.C. § 332(c)(3).

[3] Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1417 (1993) ("*Second Report and Order*").

[4] H.R. Rep. No. 111, 103d Cong., 260 (1993).

CMRS rates as of June 1, 1993,[5] could petition the Federal Communications Commission before August 10, 1994, for permission to continue exercising authority over such rates. The petitioning state has the burden of demonstrating one of the following criteria:

> (i) [M]arket conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
>
> (ii) [S]uch market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.[6]

The Commission has twelve months from the date of submission to consider the state petitions. During this twelve month period, the petitioning states retain their authority to regulate CMRS rates.[7]

If the Commission grants a state petition, it must set a time period after which the state's authority to regulate rates will sunset. This period shall be long enough for the state to ensure that the rates are "just and reasonable and not unjustly or unreasonably discriminatory."[8] Eighteen months[9] after the grant of a state petition,

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[5] States that did not have any CMRS rate regulations in effect as of June 1, 1993, can also petition the Commission after August 10, 1994, to initiate rate regulation based on the same criteria. The Commission has nine months to consider public comment and to act on such petitions.

[6] 47 U.S.C. § 332(c)(3)(A)(i)&(ii).

[7] *Id.* at §332(c)(3)(B).

[8] *Id.* at §332(c)(3)(A).

[9] *Second Report and Order*, 9 FCC Rcd at 1506.

however, any interested party may petition the Commission for an order that "exercise of authority by a State . . . is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory."[10] The Commission is instructed to permit public comment on the interested party's petition and to act within nine months of its submission.[11]

II. THE COMMISSION HAS IMPOSED A SUBSTANTIAL EVIDENTIARY BURDEN ON STATES SEEKING TO CONTINUE TO REGULATE CMRS

Over the last year, the Commission completed an extensive rulemaking proceeding to implement the provisions of the Budget Act, including adopting rules to govern the submission of state petitions to continue rate regulation of CMRS providers. In its *Second Report and Order* in this proceeding, the Commission determined that the Budget Act erected a strong presumption against state regulation and that states must "clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers."[12] In particular, the Commission stated:

> While we recognize that states have a legitimate interest in protecting the interests of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become a burden to the development of this competition. Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state

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[10] 47 U.S.C. §332(c)(3)(B).

[11] *Id.*

[12] *Second Report and Order*, 9 FCC Rcd at 1421.

> regulatory practices that impede our federal mandate for regulatory parity.[13]

The *Second Report and Order* also outlined the requirements that a state must satisfy before being permitted to initiate or continue rate regulation of CMRS. Initially, the state agency filing the petition must certify that it is the "duly authorized state agency responsible for the regulation of telecommunications services provided in the state."[14] In addition, the state must "identify and provide a detailed description of the specific existing or proposed rules that it would establish if [the Commission] were to grant its petition."[15]

Importantly, the state has the burden of proof that it has met the statutory basis for the initiation or continuation of rate regulation.[16] While the petitioning state has some discretion in the type of evidence that it submits, the Commission outlined the types of informational showings that it would find pertinent to an examination of market conditions and consumer protection:

> (1) The number of CMRS providers in the state, the types of services offered by these providers, and the period of time during which these providers have offered service in the state.
>
> (2) The number of customers of each such provider, and trends in each provider's customer base during the most recent annual period (or other

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[13] *Id.*

[14] *Id.* at 1504. Some states did not even comply with this minimal requirement. *See, e.g., New York Petition*; *Connecticut Petition* at 6.

[15] *Id.* at 1505.

[16] *Id.* at 1504.

reasonable period if annual data is not available), and annual revenues and rates of return for each such provider.

(3) Rate information for each CMRS provider, including trends in each provider's rates during the most recent annual period (or other reasonable period if annual data is not available).

(4) An assessment of the extent to which services offered by the CMRS providers that the state proposes to regulate are substitutable for services offered by other carriers in the state.

(5) Opportunities for new entrants that could offer competing services, and an analysis of existing barriers to such entry.

(6) Specific allegations of fact (supported by an affidavit of a person or persons with personal knowledge) regarding anti-competitive or discriminatory practices or behavior on the part of CMRS providers in the state.

(7) Evidence, information, and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, imposed upon CMRS subscribers. Such evidence should include an examination of the relationship between rates and costs. [The Commission] will consider especially probative the demonstration of a pattern of such rates, if it also is demonstrated that there is a basis for concluding that such a pattern signifies the inability of the CMRS marketplace in the state to produce reasonable rates through competitive forces.

(8) Information regarding customer satisfaction or dissatisfaction with services offered by CMRS providers, including statistics and other information regarding complaints filed with the state regulatory commission.[17]

With respect to petitions that purport to show that the state needs to retain the authority to regulate CMRS rates because CMRS is a replacement for land line telephone exchange service, the state must demonstrate that:

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[17] *Id.* at 1504-05.

> [M]arket conditions are such that they do not protect subscribers adequately from unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, and a substantial portion of the CMRS subscribers in the state or a specified geographic area have no alternative means of obtaining basic telephone service.[18]

In addition to evidence related to market conditions, the state may also provide information related to the range of basic telephone service alternatives available to subscribers in the state.[19]

By August 10, 1994, eight states had filed petitions to continue state regulation of CMRS. These states are Arizona, California, Connecticut, Hawaii, Louisiana, New York, Ohio and Wyoming. As discussed below, PCIA does not believe these states have met the evidentiary burden imposed by the statute and the FCC for continued rate regulation. The petitions have not even attempted to justify continued regulation of paging services. Furthermore, with regard to cellular carriers, the petitions do not provide sufficient proof of harmful market conditions to warrant continued state regulation. Accordingly, PCIA believes that the pending petitions should be denied and that the states should be completely preempted from CMRS regulation.

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[18] *Id.* at 1506.

[19] *Id.*

III. THE STATES HAVE NOT EVEN ATTEMPTED TO JUSTIFY CONTINUED STATE REGULATION OF PAGING CARRIERS

No state has even tried to justify continued regulation of paging services. To the extent states have attempted to justify any extension of existing CMRS regulation, they have done so only with reference to cellular services. Thus, to the extent that any state regulations would on their face apply to paging carriers, such regulations should, at a minimum, be deemed to be preempted as of August 10, 1994.

Any suggestion that paging rates are supracompetitive is flatly contradicted by the record in this proceeding. PCIA has filed extensive documentation that the paging market is, in fact, highly competitive and the Commission itself has noted that "[t]he combination of high capacity, large numbers of service providers, ease of market entry, and ease of changing service providers results in paging being a very competitive segment of the mobile communications market."[20] There are more than 2,400 paging services providers in the United States today. While some of these entities control large paging operations, the vast majority consist of small companies with fewer than 1,000 customers and mid-size companies with no more than a few thousand pagers in service. As a result, no company controls more than 12 percent of the paging marketplace.

The significant competition in the common carrier paging market renders state rate regulation superfluous. As many as 40 common carriers may operate in the 900

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[20] *See* Comments of Telocator, Regulatory Treatment of Mobile Services, GN Docket No. 93-252 (filed June 20, 1994); *Second Report and Order*, 9 FCC Rcd at 1468.

MHz band alone, with additional paging channels available in the low band VHF (30-50 MHz), high band VHF (148-174 MHz), UHF (450-512 MHz) and FM subcarrier (88-108 MHz) bands. When private carrier paging companies and shared and individual private radio paging licensees are considered, the competition in paging services is even greater. This competition has led to repeated decreases in paging service rates,[21] as well as the development of new services, such as advanced messaging.

The state petitions, with the exception of Hawaii, do not mention the paging market when they discuss the alleged lack of competition in the CMRS market in their service areas. Hawaii's petition combines its discussion of paging with the cellular market, yet it fails to even attempt to show that the paging marketplace has subjected consumers to unjust or discriminatory rates.[22] Because the states have failed to carry their burden of proof to justify continuing their regulatory authority over the paging industry, state rate and entry regulations purporting, on their face, to apply to paging should be deemed preempted as of August 10, 1994.

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[21] In their petitions the states can not, and do not, claim that paging services constitute a "replacement for a land line telephone exchange service." It is self-evident that such a narrowband service could never satisfy this prong of the Budget Act test.

[22] *Hawaii Petition* at 2.

IV. THE STATES HAVE FAILED TO JUSTIFY CONTINUED REGULATION OF CELLULAR SERVICES

The Budget Act requires that the petitioning states provide evidence that the existing market conditions fail to protect subscribers from unjust or unreasonably discriminatory rates. As discussed earlier, the Commission provided guidelines that the states could follow in making their arguments for the continuation of their regulatory authority.[23] In many instances, the states have ignored these guidelines, resulting in a failure to meet the strong burden of proof needed to overcome the "clear substantial hurdles" created by the Budget Act. Therefore, the Commission should deny these petitions and allow competition and market forces to dictate the provision of cellular services and substantially similar broadband PCS offerings.

A. The States Have Failed To Prove That Market Conditions Require State Regulations in Order To Protect Cellular Subscribers

Most of the petitions submitted to the Commission fail to provide concrete evidence of market conditions demonstrating the need for consumer protection. For example:

- The Hawaii petition asks for permission to continue regulation of CMRS rates and tariffs because "it is *uncertain* whether the initial market driven rates . . . are currently just and reasonable."[24] The purpose of these petitions is to *prove* that the individual state needs to continue to regulate

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[23] *Second Report and Order*, 9 FCC Rcd at 1504-05.

[24] *Hawaii Petition* at 3 (emphasis added).

CMRS in order to protect consumers -- not that it is "uncertain" about the current conditions in the market.

- Similarly, the New York Department of Public Service states that in New York the rates of return of CMRS providers are higher than landline companies and unregulated high tech companies, and argues that "[t]hese findings suggest that there is the *potential* for rates to become unjust and unreasonable absent continued regulatory oversight."[25] The petition continues on to state that, if regulation were removed, cellular carriers would have "increased incentive and opportunity to engage in discriminatory and anticompetitive practices."[26] The petition never provides any empirical evidence regarding the rates of the pertinent cellular carriers that would justify the Commission rendering a determination under the Budget Act that state regulation is necessary. In effect, the petition claims that regulation is necessary to ensure that rates do not *become* discriminatory, unjust or unreasonable -- not that they *are* discriminatory, unjust or unreasonable.[27]

- The Arizona petition argues that the Arizona Corporation Commission ("ACC") needs to continue to regulate CMRS because the market "falls short of effective competition."[28] However, the petition contradicts its claim of inadequate competition by mentioning that the state will need to implement new rules in the near future because of the "increasingly competitive telecommunications industry."[29]

The petitions fail to show how current market conditions would produce unjust and unreasonably discriminatory rates in the absence of active rate regulation. While they may allude to the potential for unjust rates, they provide no concrete proof that the

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[25] *New York Petition* at 9 (emphasis added).

[26] *Id.*

[27] *Id.* at 4.

[28] *Arizona Petition* at 14.

[29] *Id.* at 5-6.

market, particularly with the potential for increased competition by PCS and ESMR providers, cannot protect subscribers.

B. The State Petitions Fail To Recognize the Important Distinction Between "Initiating" and "Continuing" State CMRS Regulation

The Budget Act amendments draw an important distinction between filing a petition to *initiate* regulation of CMRS and a petition to *continue* regulation of CMRS. Under Section 332(c)(3)(B) of the Act, if a state *does* have rate regulations in effect, under Section 332(c)(3)(A) it may petition the Commission to continue the regulations in effect as of June 1, 1993. In the alternative, a state that does not have rate regulation in effect at the time of the Budget Act may petition the Commission for the authority to initiate rate regulation, but such petitions are subject to different timing and other procedural requirements than those applicable to petition to continue existing regulations. Under the guise of filing a Section 332(c)(3)(B) petition to continue regulation, several states in fact have sought authority to initiate regulation. The Commission should deny these petitions and require the states to refile their petitions under Section 332(c)(3)(A).

The state of Ohio, for example, has incorrectly filed a petition to continue regulation when it should have filed a petition to initiate regulation. As it states in its petition, the Ohio Public Utilities Commission ("OPUC") does not currently set rates

for, or limit market entry into, CMRS.[30] Nonetheless, the OPUC filed a petition in order to retain the ability to regulate CMRS in the future if it so desires:

> [T]he filing is submitted to ensure that federal law does not prevent the Public Utilities Commission of Ohio from deciding to assert jurisdiction over matters relating to the above-described statutory authority at some point in the future should that action become necessary in order to protect the interests of Ohio citizens.[31]

When -- and if -- the state of Ohio seeks to regulate CMRS rates, the OPUC should refile its petition as a petition to initiate regulation of CMRS. Filing at this time without existing specific regulations should not be permitted.

In a related matter, the *Second Report and Order* also requires that the states petitioning to continue existing regulations identify the regulations they seek authority to continue enforcing. Similarly, states petitioning to initiate regulation of CMRS must "identify and provide a detailed description of the specific . . . rules that it would establish if [the Commission] were to grant its petition."[32] Despite this clear provision, many states failed to provide any specifics with regard to their present rules or proposed rules.[33] Absent specific regulations, commenters have no means for

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[30] *Ohio Petition* at 1.

[31] *Id.* at 6.

[32] *Second Report and Order*, 9 FCC Rcd at 1505.

[33] *See, e.g.*, *Arizona Petition* at 5-7; *Louisiana Petition* at 41-43, 49-50; *New York Petition* at 6-7; *Ohio Petition* at 1.

addressing whether or not a state regulatory regime would be permissible under the Budget Act.

For example, the Louisiana Public Service Commission ("LPSC"), attempts to obtain authority to continue to regulate CMRS rates and to initiate new regulations. The petition describes the current regulatory practices in Louisiana, but fails to provide the Commission with the "detailed description" of the new regulations required in this proceeding. In fact, the petition indicates that the LPSC has yet to complete development of any new regulations:

> While the Louisiana Commission intends to retain those rules that are currently in effect, at least until the conclusion of its investigation of the cellular industry, it is unable, at this time, to determine what additional or different rules may be required in the future. Moreover, . . . we believe that it would be inappropriate for the Louisiana Commission to specify, at this time, the rules that will be in effect in the future.[34]

The LPSC is in effect attempting to increase its regulatory authority beyond the regulations that are currently in effect, but without including a specific proposal for its such extended authority.

As another example, although the Arizona petition alludes to the fact that it will be contemplating new regulations in the near future, it does not include a proposal for the new rules. The petition mentions that, "[c]learly, a change in Arizona's regulatory structure is both necessary and imminent as new providers enter markets that were

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[34] *Louisiana Petition* at 49.

previously dominated by a single provider."[35] The only description provided of the potential changes is that the new rules are expected to "facilitate ease of market entry and exit" and to permit "greater pricing flexibility."[36] However, absent specific regulations for evaluation, it would be neither appropriate nor within the Commission's discretion to grant the Arizona request for blanket authority to modify its regulations without further FCC proceedings.

If the Commission grants any state petition, the Budget Act provides for the current regulations to remain in effect for a specified period of time. It did not provide for a grant of blanket authority to institute new regulations in the future. Essentially, the LPSC petition and others are requests to initiate new regulations, but they have not provided any information about how those regulations would operate. The Commission should deny these petitions because the future of the regulatory structure of these states is unclear and certainly does not meet the burden of providing a detailed description of the CMRS rate regulations.

V. CONCLUSION

As discussed herein, Congress and the Commission have erected a substantial hurdle for states seeking to justify continued regulation. The states have not even attempted to make this showing with respect to paging services and, accordingly, the FCC should clarify that all state rate and entry regulations purporting to apply to

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[35] *Arizona Petition* at n.5.

[36] *Id.* at 6.

paging services are deemed preempted as of August 10, 1994. Moreover, PCIA has shown that none of the filing states have satisfied the threshold requirements for continued regulation of cellular services. Under the circumstances, the FCC should deny the state petitions and allow market forces and competition to dictate the pricing of cellular services.

Respectfully submitted,

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