PR 94-105

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
State Petitions To Extend Rate Regulation of Commercial Mobile Services	)	PR File No. 94-SP1
	)	PR File No. 94-SP2
	)	PR File No. 94-SP3
	)	PR File No. 94-SP4
	)	PR File No. 94-SP5
	)	PR File No. 94-SP6
	)	PR File No. 94-SP7
	)	PR File No. 94-SP8
	)	

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COMMENTS OF NEXTEL COMMUNICATIONS, INC.

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SUMMARY

Under Section 332(c)(3)(B) of the Omnibus Budget Reconciliation Act of 1993, any state that had radio common carrier rate regulation in effect as of June 1, 1993 could petition the Commission to extend that rate authority based upon a proper public interest showing. Nextel Communications, Inc. ("Nextel") urges the Commission to find that no state has demonstrated, under the statutory standard, that regulation of the intrastate rates of non-dominant Commercial Mobile Radio Services ("CMRS") providers is necessary to protect subscribers.

On the other hand, continued rate regulation of CMRS providers may be warranted where a state demonstrates in its petition that there is insufficient competition to protect subscribers from unjust or unreasonable rates or unreasonable discrimination. California has provided evidence that meets the test for continued regulation of the intrastate rates of dominant CMRS providers and its Petition to retain rate regulation of dominant CMRS providers should be granted.

The evidence submitted in the pending state petitions does not justify state rate regulation of the intrastate rates of emerging non-dominant CMRS providers. Unlike the duopoly cellular providers that have been operating in the mobile radio market for the last ten years, and have gained market power that permits them to dictate prices and service policies, non-dominant CMRS providers do not pose any competitive threat that would support intrastate rate regulation.

Imposing additional rate regulation on non-dominant CMRS providers will further inhibit the ability of emerging wireless service providers to compete with cellular incumbents. Moreover, permitting states to encumber new service providers with burdensome regulatory obligations, or constrain their ability to react to the marketplace, will only benefit dominant cellular carriers that are better positioned to absorb the costs of state regulatory intervention.

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	2
II.	INTEREST OF NEXTEL	4
III.	DISCUSSION	5
IV.	NON-DOMINANT CMRS PROVIDERS CANNOT BE SUBJECTED TO STATE RATE REGULATION BASED UPON BROAD GENERALIZATIONS REGARDING CELLULAR MARKET CONDITIONS.	8
	A. The Competitive Condition of the Cellular Market Does Not Support Rate Regulation of Non-dominant CMRS.	8
	B. The Commission Must Distinguish Between State Regulation of Dominant Cellular Providers and Other Emerging CMRS Providers.	11
	C. Permitting State Rate Regulation of Non-dominant CMRS Providers Will Reduce Competition.	14
V.	CONCLUSION	16

Before the
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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
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 (Section 20.12) by the State Public Service Commission of Wyoming	)	PR File No. 94-SP8

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. ("Nextel") hereby submits its comments in response to state petitions filed with the Federal Communications Commission (the "Commission") on August 8, 1994 to extend state or local rate regulation of all commercial mobile radio services ("CMRS"). Nextel urges the Commission to find that no state has demonstrated, under the statutory standard, that regulation of the intrastate rates of non-dominant CMRS providers is necessary to protect subscribers. On the other hand, California has provided evidence that meets the test for continued regulation of the intrastate rates of dominant CMRS providers, as discussed below.

I. INTRODUCTION

Pursuant to the Omnibus Budget Reconciliation Act of 1993, Congress preempted the ability of any state or local government to regulate the entry of, or the rates charged by, any CMRS provider as of August 10, 1994. Congress' purpose in preempting state regulation was 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 ...."[1/] Through preemption of potentially burdensome and divergent local regulation, Congress sought to create an environment conducive to increased competition in the CMRS marketplace.

1/ See House Report No. 103-111 at 260.

Nevertheless, recognizing that state and local governments may have a legitimate need to regulate CMRS within their borders under certain circumstances, Congress provided the states an opportunity to continue to regulate the rates of CMRS services if a proper public interest showing could be made.[2/] Thus, under Section 332(c)(3)(B) of the Act, any state that had rate regulation of CMRS services in effect as of June 1, 1993 could petition the Commission to extend that authority based on a showing that:

> (1) "market 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
>
> (2) "such market conditions exist and such service is a replacement for the landline telephone exchange service for a substantial portion of the telephone landline exchange services within such State."[3/]

In adopting rules implementing these provisions, the Commission articulated a presumption against state regulation to ensure that similarly situated services are subject to comparable regulation, and to establish a stable, predictable regulatory

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2/ Private carriers reclassified as CMRS providers cannot be subject to retained state CMRS rate regulation, if any, until the end of the statutory transition period, i.e., August 10, 1996.

3/ See Communications Act § 332(c)(3)(A), 47 U.S.C. § 332(c)(3)(A). States with such regulation as of June 1, 1993 were required to file petitions to retain rate regulation by August 10, 1994. In addition, under Section 332(c)(3)(B) of the revised statute, states may also petition the Commission to commence rate regulation, based on the criteria noted above, if no such rate regulation has been in effect in the state involved.

environment that facilitates business planning.[4] The Commission has stated that "competition is a stronger protector" of the public interest than state regulation.[5]

II. INTEREST OF NEXTEL

Nextel, established in 1987 as Fleet Call, Inc., is the largest provider of Enhanced Specialized Mobile Radio ("ESMR") services and traditional Specialized Mobile Radio ("SMR") services in the United States. ESMR services, also known as wide-area SMR services, provide customers with mobile telephone, paging and dispatch services all in a single handset along with improved clarity and reception and a host of enhanced features.

In May of this year, Nextel initiated full commercial operation of its first ESMR service in Los Angeles and soon thereafter expanded into Northern California, including the San Francisco metropolitan area. By the end of 1996, Nextel intends to provide ESMR services to customers in the 50 largest wireless communications markets in the U.S.

ESMR, created and developed by Nextel, involves a reconfiguration of SMR stations, the application of digital technology, and the operation of multiple low-power base stations

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4/ See Second Report and Order Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1421 (1994) (hereafter Second Report) ("Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our federal mandate for regulatory parity").

5/ See Second Report at 1421.

with significant channel reuse. These innovations -- introduced at a cost of over one billion dollars to Nextel -- make possible an advanced mobile communications systems capable of providing mobile telephone service comparable to that currently provided by the cellular industry, as well as private network dispatch, paging and mobile data services. Therefore, as a new entrant that will offer services competitive with existing CMRS offerings, Nextel has a substantial interest in the Commission's consideration of the state petitions to retain jurisdiction over the rates of intrastate CMRS services.

III. DISCUSSION

To continue regulating rates within their jurisdictions, states bear the burden of showing that rate regulation is justified because of significant market failures. Specifically, states are required to show, with the submission of empirical evidence, that prevailing market conditions will not protect CMRS subscribers adequately from unjust or unreasonable rates or rates that are unjustly or unreasonably discriminatory.[6/]

Although states are granted discretion to submit whatever evidence they deem relevant to satisfy Congress' rigorous standard, the Commission outlined the types of evidence, information and analysis that would be pertinent to its

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6/ See Second Report at 1504.

examination of intrastate market conditions and the need for continuing consumer protection. These included:

(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 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. . . . [C]onsidered especially probative is 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.[7]

Eight states have filed petitions with the Commission. Seven request permission to continue intrastate CMRS rate regulation; one seeks merely to preserve its right to regulate the rates of wireless telecommunications providers at some time in the future.[8] While the contents and detail of the various petitions vary substantially, most appear to recognize the differences between the two facilities-based incumbent cellular operators and emerging CMRS competitors in their capability to engage in unreasonable discrimination or unfair pricing.

The evidence presented by the states in these petitions does not justify continued state rate regulation of non-dominant CMRS providers. Based on a review of the Commission's authority to permit continued state or local regulation of CMRS, and an analysis of the ability of non-dominant CMRS providers to charge unjust or unreasonable rates, or to unjustly or unreasonably discriminate in their pricing practices, preemption of state regulation of non-dominant CMRS providers is necessary and fully consistent with the public interest. On the other hand, continued rate regulation of dominant CMRS providers is warranted in those states in which the evidence indicates insufficient

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7/ See Second Report at 1504, 1505.

8/ See Ohio Petition at 2.

competition to protect subscribers from unjust or unreasonable rates or unreasonable discrimination.

IV. NON-DOMINANT CMRS PROVIDERS CANNOT BE SUBJECTED TO STATE RATE REGULATION BASED UPON BROAD GENERALIZATIONS REGARDING CELLULAR MARKET CONDITIONS.

A review of the Petitions demonstrates that the statutory requirements for continued state regulation of the rates of non-dominant CMRS providers cannot be met. It is an irrefutable fact that emerging CMRS providers will be unable to charge unjust or unreasonable rates, or charge rates that are unjustly or unreasonably discriminatory in light of their need to compete with incumbent cellular operators. It is impossible for states to show that market conditions, with respect to such services, fail to protect CMRS customers.

If continued state regulation is permitted at all, Nextel urges that it be narrowly tailored in terms of scope and duration to remedy identified market breakdown and to protect consumers. Consequently, in analyzing each Petition, the Commission must consider individually each class of CMRS providers to determine whether they wield intrastate market power and whether that power has been, or may be, used to dictate pricing, or otherwise injure the public.

A. The Competitive Condition of the Cellular Market Does Not Support Rate Regulation of Non-dominant CMRS.

Many of the state petitions seek to continue regulating CMRS rates based on the states' view of the competitiveness of

the cellular marketplace. In fact, all the Petitions seeking to continue CMRS regulation focus on the cellular industry, its concentration and alleged market abuses, in demonstrating that continued state regulation is necessary for the protection of the public.[9/]

Although the Commission has recognized that the data and analyses in the record of the Regulatory Parity proceeding support a finding that the cellular marketplace is not "fully competitive," it has also acknowledged that all CMRS providers, other than cellular licensees, currently lack market power.[10/] These characterizations provide the basis for distinguishing between classes of CMRS providers in making state regulation preemption determinations. The fact that the development of competition in the cellular industry may be limited by any number of factors, including the industry's duopoly regulatory structure, cannot form the basis for subjecting non-dominant CMRS providers to burdensome state and local rate regulation.

The future CMRS marketplace is only beginning to develop. It is anticipated, for instance, that approximately six alternative CMRS providers, including PCS, cellular and ESMR, ultimately will provide comparable service in any given geographic area. If this were presently the case, there would be

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9/ See e.g. Hawaii Petition at 3-5; Arizona Petition at 11-17; California Petition at 21-78; Connecticut Petition at 2-5; Louisiana Petition at 6-30; New York Petition at 5-11; Wyoming Petition at 3-5.

10/ See Second Report at 1467, 1468 and 1472.

little doubt that state regulation of all classes of CMRS would be unnecessary to protect the public and, therefore, would be preempted.[11/] However, the current CMRS market is far more limited. Accordingly, the Commission is forced to make its preemption determinations based only on its analysis of a single class of CMRS --- cellular service. Unfortunately, the cellular industry has historically exhibited duopoly market conditions and has been a source of continuing concern of the petitioning states.

Continued regulation of cellular provider rates may be necessary to prevent anti-competitive practices that will stifle the development of the wireless marketplace. The states have failed to demonstrate that rate regulation of emerging non-dominant CMRS providers is necessary to protect the public from anti-competitive practices and other abusive behavior.[12/]

11/ See House Conference Report No. 103-213 at 493 ("If, however, several companies offer radio service as a means of providing basic telephone service in competition with each other such that consumers can choose among alternative providers of this service, it is not [Congress' intention] that states should be permitted to regulate these competitive services simply because they employ radio as a transmission means").

12/ No state has offered any evidence of anti-competitive behavior by any non-dominant CMRS provider. Thus, as a legal matter, the statutory threshold to permit continued state regulation has not been met.

B. The Commission Must Distinguish Between State Regulation of Dominant Cellular Providers and Other Emerging CMRS Providers.

Distinct regulation of various providers of CMRS is not only permissible, it has been recognized as beneficial by Congress, the Commission and the states.[13/] "CMRS" comprises numerous classes of wireless service providers, offering various services subject to various degrees of competition.[14/] Moreover, as acknowledged by the state of California, firms that do not enjoy market power should be free from traditional rate and price regulation.[15/]

Where healthy competition exists, no significant purpose is served by continued government regulation. Likewise, only if the wireless marketplace is structured to encourage the entry of new competitors will robust competition ultimately result. Creating a relaxed regulatory environment for new

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13/ See e.g. Budget Act § 332(c)(1)(C); House Conference Report at 491 (recognizing that "market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services"); Second Report at 1463 ("differential regulation of providers of commercial mobile services is permissible"); California Petition at 9-10 (noting that California has two existing wireless regulatory frameworks in place -- one for the Radiotelephone Utilities ("RTU") industry and the other for the cellular industry).

14/ See California Petition at 23. Some state structures already regulate classes of CMRS differently based on the competitive environment in which they operate. See California Petition at 9-10 (noting that California's two distinct regulatory frameworks reflect the difference in levels of competitiveness of the two wireless industries). Any Commission preemption determination should reflect these varying degrees of market power as well.

15/ See California Petition at 3.

entrants, and providing protection from anti-competitive practices by dominant carriers, will accelerate investment and deployment of new technologies and will guarantee the achievement of Congress' goal of providing greater consumer choice in telecommunications services. Evidence concerning the pricing practices of cellular providers cannot be imputed to all CMRS providers as a basis for imposition of potentially burdensome state rate regulation.

Accordingly, the Commission should reject any petition that would extend state and local rate regulation to emerging non-dominant CMRS carriers, including ESMR and PCS providers.[16/] PCS and ESMR service providers simply are not in a position to charge unjust or unreasonable rates, or to unjustly or unreasonably discriminate among CMRS customers. Unlike cellular providers that have been operating in the mobile radio market for the last ten years, and have built facilities-based operations that permit them to dictate cellular prices and service policies, non-dominant CMRS providers do not pose any competitive threat that would support state regulation of their entry and rates. These carriers are, and never will be, afforded cellular's luxury

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16/ Accord California Petition at 20-21. To further streamline the regulation of the wireless industry, earlier this year the California Public Utilities Commission ("CPUC") supported legislation allowing simply the registration of non-dominant carriers, thereby promoting competitive entry to the cellular markets. The dominant wireless carriers, however, successfully persuaded legislators to defeat their measure, to the detriment of potential cellular competitors. See California Petition at n. 5. The Commission cannot permit dominant cellular carriers to accomplish the same anti-competitive goal in this proceeding.

of operating in a duopoly marketplace. Moreover, they do not command a "transmission bottleneck" that could be used in the marketplace to limit competition or exact supracompetitive profits from the public.[17/]

Potential entrants in the CMRS marketplace also already face formidable regulatory barriers to entry and must overcome technical and economic obstacles before they can become effective cellular competitors. As recognized by the state of California, cellular providers enjoy significant advantages over emerging CMRS providers in regard to the spectrum they utilize, their wide roaming capabilities, their name recognition, their telecommunications experience and their imbedded infrastructure.[18/] Imposing additional rate regulation on non-dominant CMRS providers will further inhibit the ability of emerging wireless service providers to compete with cellular incumbents.

Conversely, given the documented lack of competition and evidence of dominant providers in some states, eliminating all state regulation of dominant carrier intrastate rates would permit predatory practices and anti-competitive behavior intended to thwart competition by emerging CMRS providers. In its

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17/ See California Petition at 25 (noting that access to radio spectrum and switching facilities are deemed bottleneck facilities in the cellular market and that the facilities-based carriers' control of these bottleneck functions is the primary cause of resellers' diminished contributions in the cellular marketplace).

18/ See California Petition at 65-75.

petition, the State of California provides evidence of a comprehensive analysis of the CMRS marketplace in that state. It concludes that regulation of the rates charged by dominant CMRS carriers is necessary for an additional 18 months. California's evidence meets the statutory standard and its petition should be granted. Based on California's own evidence, the state should retain rate jurisdiction over dominant CMRS carriers until the end of the transition period for reclassified carriers to be regulated as CMRS, i.e., August 10, 1996.

C. Permitting State Rate Regulation of Non-dominant CMRS Providers Will Reduce Competition.

If the Commission permits state and local regulation of non-dominant CMRS, the costs of compliance with state requirements will be borne disproportionately by new service providers. To the extent states seek to continue cellular rate regulation, those carriers have already configured their operations and pricing policies to comply. Emerging service providers, however, will not have the luxury of spreading the costs associated with regulatory compliance across an established customer base. Permitting states to encumber new service providers with burdensome regulatory obligations, or constrain their ability to react to the marketplace, will only benefit dominant cellular carriers that are better positioned to absorb the costs of state intervention.

Emerging CMRS providers must be permitted maximum flexibility to structure their service offerings and pricing

mechanisms to correspond to consumer demand. Unless non-dominant CMRS providers can appropriately determine, based on market indicators, the optimal prices that can be charged, and the potential pricing discounts that can be offered, they will not be positioned to compete with knowledgeable cellular incumbents that already have made and implemented these determinations. The capability to charge market rates is invaluable to the success of emerging service providers.

Finally, the state Petitions themselves demonstrate that it would be premature to permit states to engage in state regulation of non-dominant CMRS providers. A number of states seeking to extend their ability to regulate CMRS have recognized that CMRS competition to cellular service has not yet been realized and will demand significant time and resources to accomplish.[19/] In light of this market situation, no genuine public benefit can be discerned in extending intrastate rate regulation to emerging service providers.[20/]

If the Commission's goals of providing increased competition to incumbent service providers (landline and wireless) is to be achieved, intrastate rate regulation should

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19/ See e.g. California Petition at 63-75; Arizona Petition at 5-6, 18; Louisiana Petition at 27-30; Connecticut Petition at 4.

20/ In fact, in some instances, the extension of regulatory authority cannot be granted where the state has not satisfied itself that the CMRS/cellular marketplace can be characterized as being subject to anti-competitive market conditions. Louisiana, for example, requests authority to regulate, pending their own future investigation of the CMRS/cellular marketplace. See Louisiana Petition at 39-41.

not be imposed on emerging non-dominant CMRS providers. Imposing such regulation would permit dominant cellular providers to perpetuate their "duopoly/monopoly" power, and will inhibit the ability of emerging CMRS providers to fulfill the Commission's expectations and projections of robust CMRS competition.

V. CONCLUSION

Review of the Budget Act, prior Commission findings, and the states' own Petitions demonstrate that there is no basis for, and the states do not seek, regulation of the rates of emerging non-dominant CMRS providers that pose no threat of imposing unreasonable or unreasonably discriminatory prices on the American public.

Respectfully submitted,

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