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

In the Matter of)
)
Petition of Arizona Corporation Commission,) PR Docket No. 94-104
To Extend State Authority Over)
Rate and Entry Regulation of All)
Commercial Mobile Radio Services)

And

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

**REPORT AND ORDER
AND
ORDER ON RECONSIDERATION**

Adopted: May 4, 1995;

Released: May 19, 1995

By the Commission:

I. INTRODUCTION

1. On August 8, 1994, the Arizona Corporation Commission ("Arizona" or "ACC"), on behalf of that State, petitioned to retain state regulatory authority over the rates of intrastate commercial mobile radio services and the entry of commercial mobile radio

service providers, within Arizona.¹ Sixteen parties filed pleadings opposing the petition, and one party, the National Cellular Resellers Association, filed a pleading supporting it.² By this action, we deny the petition because it fails to satisfy the statutory standard Congress established for extending state regulatory authority over CMRS rates.

II. BACKGROUND

2. In 1993, Congress amended the Communications Act ("Act") to revise fundamentally the statutory system of licensing and regulating wireless (*i.e.*, radio) telecommunications services.³ Among other things, Congress: (1) established new classifications of "commercial" and "private" mobile radio services ("CMRS" and "PMRS," respectively) in order to enable similar wireless services to be regulated symmetrically in ways that promote marketplace competition;⁴ (2) reallocated up to 200 megahertz of spectrum from government to private use so as to expand opportunities for innovative utilization of spectrum by the private sector;⁵ and (3) authorized competitive bidding as a means of improving licensing efficiency within the context of the Act's public interest goals, which include promoting investment in new and innovative wireless telecommunications technologies.⁶

3. Congress also provided that, as of August 10, 1994, no state or local government shall have authority to regulate "the entry of or the rates charged" for CMRS and PMRS services, although states are permitted to regulate the "other terms and conditions" of

¹ Petition of the Arizona Corporation Commission To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services, PR Docket No. 94-104, filed Aug. 9, 1994 (hereinafter "Arizona Petition").

² A list of parties that filed pleadings in this proceeding appears at Appendix A.

³ See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 ("OBRA" or "Budget Act"), *codified in principal part at* 47 U.S.C. § 332.

⁴ See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1417-18 (1994) (*CMRS Second Report and Order*), *reconsideration pending*.

⁵ National Telecommunications and Information Administration Organization Act, § 113(b)(1).

⁶ The competitive bidding methodology is to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays" 47 U.S.C. § 309(j)(3)(A). Regulations for the conduct of such auctions, when they prescribe area designations and bandwidth assignments, are required by OBRA to promote "investment in and rapid deployment of new technologies and services." 47 U.S.C. § 309(j)(4)(C)(iii).

CMRS.⁷ As an exception to this general rule, Congress also provided that, if a State had “any regulation” concerning the rates for any commercial mobile radio service in effect as of June 1, 1993, it could retain its rate regulation authority by petitioning the Commission no later than August 9, 1994, and demonstrating that either: (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 land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.”⁸

4. In our proceeding to implement OBRA, we concluded that, since Congress intended generally to preempt state and local rate and entry regulation of CMRS, a state seeking to retain regulatory authority must “clear substantial hurdles” in demonstrating that continued regulation is warranted.⁹ We also determined that the nature of a state’s burden of proof is delineated generally by the statute itself. Specifically, we found that:¹⁰

[I]n implementing the preemption provisions of the new statute, we have provided that states must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers. 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 as [*sic*] 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 regulatory practices that impede our Federal mandate for regulatory parity.

5. We also concluded that, while a state should have discretion to submit whatever evidence it believes is persuasive, a petition to retain regulatory authority must be grounded on demonstrable evidence.¹¹ In that regard, we adopted Section 20.13 of our Rules as a guide to the kinds of evidence and information that we would consider to be pertinent and helpful to our consideration of a state petition.¹² Moreover, in addition to the evidence, information, and analysis that a state must submit, we determined that a petitioning state also is required

⁷ See 47 U.S.C. § 332(c)(3)(A).

⁸ See 47 U.S.C. § 332(c)(3)(B).

⁹ See *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

¹⁰ *Id.*, 9 FCC Rcd at 1421.

¹¹ *Id.*, 9 FCC Rcd at 1504.

¹² 47 C.F.R. § 20.13.

to identify and provide a detailed description of the specific existing or proposed rules that it would continue or establish if we were to grant its petition.¹³ We noted that the standards for preemption established in *Louisiana PSC* do not apply to petitions submitted under Section 332 of the Act, nor to Section 20.13 of our Rules.¹⁴ In *Louisiana PSC* the Supreme Court found that Section 2(b) of the Communications Act prohibits the Commission from exercising Federal jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services."¹⁵ Here, Congress has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile radio services without regard to Section 2(b).

III. DECISIONAL FRAMEWORK

A. Pleadings

6. CTIA asserts that states must prove with evidence of market conditions that rate regulation is necessary to protect against market failure within that state.¹⁶ The Association contends that this burden is difficult, if not impossible, to carry in light of competitive forces in the marketplace.¹⁷ Century asserts that the statute imposes a heavy burden on petitioners.¹⁸ GTE argues that Congress preempted state regulation of rates and market entry except in very limited circumstances.¹⁹ GTE asserts that forbearance from regulation is warranted where the cost of complying with regulatory burdens exceeds the benefit to be derived from

¹³ See *CMRS Second Report and Order*, 9 FCC Rcd at 1505.

¹⁴ Under *Louisiana PSC*, the Commission may preempt state regulation of intrastate service when it is not possible to separate the interstate and intrastate components of the asserted Commission regulation. *Louisiana Pub. Ser. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986). In construing the "inseparability doctrine" recognized by the Supreme Court in *Louisiana PSC*, Federal courts have held that where interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the states, state regulation of the intrastate service that affects interstate service may be preempted where the state regulation thwarts or impedes a valid Federal policy. See *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Illinois Bell Tel. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989); *National Ass'n of Reg. Util. Comm'ners v. FCC*, 880 F.2d 422 (D.C. Cir. 1989).

¹⁵ *Louisiana PSC*, 476 U.S. at 373, quoting Communications Act, § 2(b), 47 U.S.C. § 152(b).

¹⁶ CTIA Opposition at iii, 3-10.

¹⁷ *Id.*

¹⁸ Century Comments at 5.

¹⁹ GTE Comments at 3.

adherence to those requirements.²⁰ GTE states that this Commission found in the *CMRS Second Report and Order* that forbearance from Federal tariffing requirements was warranted because the cellular marketplace is sufficiently competitive to outweigh the benefits of compliance with those rules.²¹ GTE concludes that states seeking to continue regulating CMRS rates must satisfy a heavy burden of proof.²² A state's showing, GTE contends, must be sufficient to overcome this Commission's finding that the CMRS marketplace is competitive and capable of producing just and reasonable rates.²³

B. Discussion

7. In order to prevail on the merits, the ACC must sustain its statutory burden of demonstrating that "market conditions with respect to [commercial mobile radio] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory."²⁴ A question arises as to what showing is necessary to sustain this burden. Although we addressed this issue in the *CMRS Second Report and Order*, we revisit it in view of the parties' debate in this record. As explained more fully below, we do not agree that our decision to forbear from regulating interstate CMRS under certain provisions of Title II makes it impossible to grant a state's petition. At the same time, we conclude that a state must do more than merely show that market conditions for cellular service²⁵ have been less than fully competitive in the past. In order to retain regulatory authority, a state must show that, given the rapidly evolving market structure in which mobile services are provided, the conduct and performance of CMRS providers ill-serve consumer interests by producing rates that are not just and reasonable, or are unreasonably discriminatory.

8. Since the Budget Act does not explicitly construe or elaborate on the phrase "market conditions ... fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory," we look to the "design of

²⁰ *Id.* at 6.

²¹ *Id.* at 9.

²² *Id.* at 12.

²³ *Id.* at 12.

²⁴ 47 U.S.C. § 332(c)(3).

²⁵ Although the provisions of Section 332(c)(3) of the Act apply to rate or entry regulation in the case of any commercial mobile radio service provider, the ACC Petition is oriented to the provision of cellular service.

the statute as a whole and its object and policy” to give that phrase meaning.²⁶ We begin that task by reference to other Sections of the Communications Act, such as Section 201, which also speak of just and reasonable rates.²⁷ We have generally described the measure of reasonableness under these Sections in terms of rates that reflect or emulate competitive market operations.²⁸ The more formal description, however, is whether rates fall within a “zone of reasonableness” that is bounded at one end by the “investor interest in maintaining financial integrity and access to capital markets” and at the other by the “consumer interest in being charged non-exploitative rates.”²⁹ Regardless of how the test is characterized, it is well established that determinations whether rates fall within this zone are not dictated by reference to carriers’ costs and earnings,³⁰ but may take account of non-cost considerations such as whether rates further the public interest by tending to increase the supply of the item being produced and sold.³¹ These principles define basic components of a state’s

²⁶ See *Crandon v. United States*, 494 U.S. 152, 157 (1990); *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991).

²⁷ See 47 U.S.C. § 201; see also 47 U.S.C. §§ 623 (b)-(c) (provisions governing reasonableness of cable television rates).

²⁸ See Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873, 2886 (para. 25), 2889-2900 (1989); see also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nos. 92-266 & 93-215, FCC 94-286, released Nov. 18, 1994, at paras. 24, 34-37, 64-79.

²⁹ See, e.g., *FERC v. Pennzoil Producing*, 439 U.S. 508, 517 (1979); *AT&T v. FCC*, 836 F.2d 1386, 1390 (D.C. Cir. 1988); see also *FPC v. Hope Natural Gas*, 320 U.S. 591, 602 (1944); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989).

³⁰ See *FERC v. Pennzoil Producing*, 439 U.S. 508, 517 (1979) (the zone of reasonableness is not defined by a “rigidly . . . cost-based determination of rates, much less . . . one that bases each [carrier’s] rates on its own costs.”) (citation omitted); see also *Permian Basin Area Rate Cases*, 390 U.S. 747, 769, 797-98, 800-05, *reh’g denied*, *Bass v. FPC*, 392 U.S. 917 (1968) (upholding ratemaking based upon area-wide average costs).

³¹ See, e.g., *Mobil Oil Corp. v. FPC*, 417 U.S. 283 (1974), in which the Supreme Court upheld a Federal Power Commission incentive plan that permitted an increase in rates in order to encourage increased production. In doing so, the Court emphasized that it was permissible for the agency to consider non-cost factors:

Mobil’s argument assumes that there is only one just and reasonable rate possible for each vintage of gas, and that this rate must be based entirely on some concept of cost plus a reasonable rate of return. We rejected this argument in *Permian Basin* and we reject it again here. The Commission explicitly based its additional “non-cost” incentives on the evidence of a need for increased supplies.

demonstration under Section 332. Specifically, a state must show that market conditions fail to produce rates that fall within a “zone of reasonableness,” which is defined by reference to investor and consumer interests viewed in the context of relevant public policy considerations.

9. We also consider the meaning of the relevant language in the statute in the context of the overarching command of Section 332(c)(3), which is: “no State ... shall have any authority to regulate” CMRS rates.³² As we concluded in the *CMRS Second Report and Order*, that provision, as well as the title of Section 332(c)(3) (“State Preemption”), express an unambiguous congressional intent to foreclose state regulation in the first instance.³³ Moreover, OBRA reflects a general preference in favor of reliance on market forces rather than regulation. Section 332(c), for example, empowers the Commission to reduce CMRS regulation,³⁴ and it places on us the burden of demonstrating that continued regulation will promote competitive market conditions.³⁵

10. Unlike some of the opponents of the ACC Petition, we do not view the statutory preference for market forces rather than regulation in absolute terms. If Congress had desired to foreclose state and Federal regulation of CMRS entirely, it could have done so easily. It chose instead to delineate the circumstances in which such regulation might be applied. Tellingly, it did so in the context of a broad statutory framework with several other principal components. Under the OBRA: (1) substantial amounts of spectrum reserved for Federal government use are to be identified and transferred to commercial and public safety uses;³⁶ (2) this and other available spectrum, if allocated to commercial telecommunications uses, are to be licensed “rapidly” through the use of competitive bidding systems to promote the development and deployment of new technologies, products, and services, with the goal of stimulating economic opportunity and competition;³⁷ and (3) in contemplation of the

Id. at 316. *See also* *Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, 1502-03 (D.C. Cir.), *cert. denied*, 469 U.S. 1034 (1984) (acknowledging agency authority to consider non-cost factors in establishing just and reasonable rates); *Public Service Comm’n of New York v. FERC*, 589 F.2d 542, 559 (D.C. Cir. 1978) (stating that agencies have authority to adopt incentive-based regulatory approaches in order to serve the public interest).

³² 47 U.S.C. § 332(c)(3).

³³ *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

³⁴ 47 U.S.C. § 332(c)(1)(A).

³⁵ 47 U.S.C. § 332(c)(1)(C).

³⁶ OBRA § 6001, amending the National Telecommunications and Information Administration Organization Act.

³⁷ *See* OBRA § 6002(a), amending Section 309 of the Communications Act.

deployment of spectrum to commercial wireless services, and to promote regulatory parity, Congress also articulated definitional criteria for determining common carrier status consistently so success in the marketplace will not be determined by regulatory strategies but by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs.³⁸

11. Viewing all three components together, the statutory plan is clear. Congress envisioned an economically vibrant and competitive market for CMRS services. It understood that such a market was still evolving,³⁹ and it provided the resources (*e.g.*, additional spectrum) and administrative authority (*e.g.*, licensing through competitive bidding) to accelerate that process. Finally, Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear-cut need. The public interest goal of this Congressional plan is readily discernable. Congress intended to promote rapid deployment of a wireless telecommunications infrastructure. Robust investment is a prerequisite to achieving that goal.⁴⁰ Thus, in implementing the statute, we have attempted to facilitate the achievement of this goal by ensuring that regulation creates positive incentives for efficient investment -- rather than burdening entrepreneurial activities -- and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.⁴¹

12. We emphasize the important impact on our decisionmaking of these fundamental elements of the OBRA statutory framework, which have no counterparts in other sections of

³⁸ See 47 U.S.C. § 332(d)(1); *CMRS Second Report and Order*, 9 FCC Rcd at 1420.

³⁹ The Commission's effort to establish new personal communications services (PCS) was initiated in 1989, four years prior to enactment of OBRA, in response to several petitions for rulemaking. During that period we established a formal proceeding to consider PCS issues and adopted major policy decisions that resulted in an allocation to PCS of far more spectrum than is allocated to cellular service. See Notice of Inquiry, GEN Docket No. 90-314, 5 FCC Rcd 3995 (1990); Policy Statement and Order, 6 FCC Rcd 6601 (1991); Notice of Proposed Rulemaking and Tentative Decision, 7 FCC Rcd 5676 (1992); Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794 (1992); Second Report and Order, 8 FCC Rcd 7700 (1993); Memorandum Opinion and Order, 9 FCC Rcd 4957(1994); Third Memorandum Opinion and Order, 9 FCC Rcd 6908 (1994). We also made recommendations and participated, on behalf of the United States Government, in international allocations decision making fora that recognized and permitted the use of such spectrum for PCS and other emerging technologies on a global scale. See Report, GEN Docket No. 89-554, 6 FCC Rcd 3900 (1992). Congress was well aware of such activities, as witnessed by the fact that the Budget Act commanded us to begin granting licenses for such new services no later than May 1994. See OBRA § 6002(d)(2)(B).

⁴⁰ See *CMRS Second Report and Order*, 9 FCC Rcd at 1421; see also 47 U.S.C. §§ 309(j)(4)(B), 309(j)(4)(c)(iii); OBRA Conference Report at 483, 492-93.

⁴¹ *Id.*

the Communications Act. They are devoted exclusively to wireless telecommunications services, and to CMRS in particular. Our analysis of “market conditions” in the context of Section 332(c)(3) necessarily is governed by that framework.

13. Section 332(c)(3) must be interpreted in this context; it is an exception to the general prohibition against state regulation. We conclude that Arizona, or any other state, should not be allowed to continue regulating CMRS overall, or cellular service in particular, merely by demonstrating that the market for cellular service has been less than fully competitive. Such a standard would effectively allow an exception permitting regulation to nullify a general prohibition against it, because it is commonly understood that such conditions have in the past adhered in the cellular marketplace. On numerous occasions since the Commission established the two-carrier cellular market structure in 1982, we have acknowledged that such a structure provided less than optimal competitive opportunities.⁴² Other Federal agencies have taken similar positions.⁴³ One year prior to adoption of the Budget Act, the General Accounting Office (GAO) -- the investigatory arm of Congress -- examined the industry and reported that “[w]hile GAO found no evidence of anticompetitive or collusive behavior in the course of its work, the two-carrier (duopoly) market system that the FCC created may provide only limited competition in cellular telephone markets.”⁴⁴ It strains credulity to assert that Congress was blind to these conditions in 1993 when it broadly prohibited state regulation of CMRS.⁴⁵ Thus, we reject a reading of the statute that allows continued rate regulation merely on a showing of duopoly conditions, because it is not plausible to conclude that Congress adopted a self-defeating statutory scheme.⁴⁶

⁴² See, e.g., *Cellular Communications Systems*, 86 FCC 2d 469, 474 (1981), *modified on reconsideration*, 89 FCC 2d 58, 71-74 (1982), *modified on further reconsideration*, 90 FCC 2d 571 (1982); *Petitions for Rulemaking Concerning Proposed Changes to the Commission’s Cellular Resale Policies*, 6 FCC Rcd 1719, 1725 & n.67 (1991) (*Cellular Resale Order*).

⁴³ See Reply Comments of the United States Department of Justice, CC Docket No. 91-34, filed June 19, 1991, at 4-5 (“[T]here is insufficient evidence to warrant the conclusion that the cellular service market is in fact workably competitive. In each service area there is still a duopoly[.]”); Comment of the Staff of the Bureau of Economics of the Federal Trade Commission, CC Docket No. 91-34, filed July 31, 1991, at 7 (“[T]he staff disagrees with the tentative conclusion that cellular service is produced in a competitively structured market.”), 10-12.

⁴⁴ United States General Accounting Office, “Telecommunications: Concerns About Competition in the Cellular Telephone Service Industry,” GAO/RCED-92-220 (July 1992) (GAO Report).

⁴⁵ Cf. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988) (Court generally presumes Congress is knowledgeable about existing law pertinent to legislation it enacts); *accord Miles v. Apex Marine Corporation*, 489 U.S. 19 (1990); *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979); *Minneapolis & St. Louis Railway Co. v. United States*, 361 U.S. 173 (1959).

⁴⁶ Cf. *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991) (Court generally presumes Congress legislates with knowledge of basic rules of statutory construction).

14. It also is worth noting that this Agency's recognition of imperfect cellular market conditions has been matched by our commitment to rectify those conditions as quickly as possible by strengthening and expanding cellular competition rather than by resorting to heavy-handed regulation.⁴⁷ For example, we have attempted to heighten cellular competition at the retail level by prohibiting restrictions on the resale of cellular services, except in narrow circumstances where we determined that restrictions intensify competition between the two licensees in each local market.⁴⁸ We also have retooled policies initially tailored to promote competition in the wireline market upon determining that they were unlikely to have that effect in the unique setting of wireless telecommunications.⁴⁹ Most especially, we have chosen to address the structural infirmity of the cellular market by vastly expanding the amount of spectrum available for two-way wireless voice communications and other innovative wireless services and technologies.

15. The framework of our CMRS regulatory policy -- moderate regulation, symmetrical regulation of all services as appropriate, and a preference for curing market imperfections by lowering entry barriers in order to encourage competition rather than by regulating existing licensees -- aligns closely with the principal building blocks of OBRA. Indeed, that statute is in a very real sense a validation of our approach.⁵⁰ As the legislative history of OBRA makes plain, Congress intended those building blocks to establish a *national* regulatory policy for CMRS,⁵¹ not a policy that is balkanized state-by-state.

⁴⁷ See, e.g., GAO Report at 3 (The "FCC is relying on the introduction of advanced personal communications services to bring competition to the cellular telephone marketplace."). The Commission policy of avoiding heavy-handed regulation of the cellular market while it was developing also has been determined reasonable in court. See *Cellnet Communication, Inc. v. FCC*, 965 F.2d 1106, 1112 (D.C. Cir 1992) (petitions for review of FCC order declining to initiate rate regulation of cellular denied because "the FCC could reasonably conclude, in light of the novelty of the service and the speed of technological change, to wait and see how the market evolved...").

⁴⁸ See *Cellular Resale Order*, 7 FCC Rcd at 4006-07. We have recently initiated a review of our resale policies to tailor them to conditions in an emerging wireless telecommunications market that has been expanded to include PCS. See *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, 9 FCC Rcd 5408 (1994) (*Notice of Proposed Rulemaking and Notice of Inquiry*), Second Notice of Proposed Rulemaking, FCC 95-149, released Apr. 20, 1995.

⁴⁹ *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028 (1992).

⁵⁰ If Congress had concluded our approach was deficient, or that we should travel in a different policy direction, it is reasonable to conclude that it would have directed us accordingly.

⁵¹ See Conference Report at 480-81, incorporating the findings set forth in the Senate Amendment, including the following:

16. That intention informs our review of petitions filed by states under Section 332(c)(3). Put simply, Congress intended such petitions to be evaluated in light of a general preference for allowing the policies embodied in OBRA to have an opportunity to work. With regard to the statutory prohibition on state regulation in Section 332(c)(3) in particular, the legislative history leaves no room for doubt on this point by providing that:⁵²

[i]n reviewing [state] petitions . . . the Commission also should be mindful of the Committee's desire to give the policies embodie[d] in section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee.

17. In deference to the states, with whom we have and will continue to share telecommunications jurisdiction under the dual regulatory system of the Communications Act, we have not presumed to establish a rigid blueprint for the demonstration required under Section 332(c)(3). Moreover, unlike many opponents of the petition before us, we do not agree that a state's burden is so great that it is impossible to carry. For example, our decision to forbear from most CMRS regulation is not dispositive of the question whether states may initiate or continue rate regulation of such services. We think it unlikely that Congress would have established two separate statutory procedures -- one to govern our forbearance, and another to govern states' petitions⁵³ -- if it intended our decisions under the former procedure to control automatically the outcomes under both of them. Instead, we conclude that the exemption in Section 332(c)(3) is designed to permit a state to demonstrate that market conditions in that state warrant a departure from national OBRA policies.

18. Such a demonstration begins but does not end with a showing of less than fully competitive market conditions. Almost all markets are imperfectly competitive,⁵⁴ and such

[B]ecause commercial mobile services require a Federal license and the Federal Government is attempting to promote competition for such services, and because providers of such services do not exercise market power vis-a-vis telephone exchange service carriers and State regulation can be a barrier to the development of competition in this market, uniform national policy is necessary and in the public interest.

⁵² H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261-62.

⁵³ See 47 U.S.C. §§ 332(c)(1) (forbearance) and 332(c)(3) (state petitions).

⁵⁴ In general, perfect competition can exist only where goods are homogeneous, and all buyers and sellers have full information and accept price as given (*i.e.*, they do not try to influence price). There are also certain necessary conditions regarding cost of production. See D. Carlton & J. Perloff, *MODERN INDUSTRIAL ORGANIZATION* 87 (1995). Under perfect competition, price equals marginal cost, which is the incremental cost of producing the last unit of a good. Such conditions are theoretical constructs.

conditions can produce good results for consumers.⁵⁵ In particular, as noted previously, Congress was aware of the duopoly cellular structure when it generally proscribed state regulation of CMRS. If a showing of less than perfect competition in the past could justify granting a state petition, regulation might be imposed in a great many circumstances. Nothing on this record convinces us that Congress intended that result.

19. Instead, we believe that a state must establish the existence of an environment of unjust and unreasonable, or unreasonably discriminatory, rates, given the dynamic and evolving structure in which CMRS is provided. When we implemented the Section 332(c)(3) state petition process in the *CMRS Second Report and Order*, we adopted a rule designed to elicit the information needed to make such a showing. Such information permits us to perform a Structure-Conduct-Performance (“SCP”) analysis,⁵⁶ which is a standard paradigm of modern industrial organization analysis.⁵⁷ This paradigm, as applied to the mobile telecommunications industry, holds that market structure is impacted by basic conditions such as the number of licenses issued by the Commission and the state of technology. Conduct, in turn, depends on the structure of the market, *e.g.*, on the number of competitors, the cost structure, and the degree of integration with other wireless providers. Performance, in turn, depends on the conduct of providers and other industry participants with regard to activities such as pricing, inter-firm coordination, and technical standards. Such an analysis permits an evaluation of the degree of rivalry within a particular industry structure and allows us to determine whether and how consumer interests are being served by such activity.

20. Nothing in our rule governing the state petition process suggests that merely showing the existence of a cellular duopoly structure is enough to support a petition. In the first instance, the rule signals our insistence that a petition must be based on demonstrable evidence of anticompetitive activity, or unjust and unreasonable, or unreasonably discriminatory, rates. For example, in order to determine whether an anticompetitive environment presently exists within a state, we requested that a petitioning state produce “specific allegations of fact,” to be supported by a sworn affidavit of an individual with personal knowledge thereof, regarding “anticompetitive or discriminatory practices or

⁵⁵ See, *e.g.*, W. Baumol, J. Panzar & R. Willig, *CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE* 15-46 (1982).

⁵⁶ Section 20.13(a)(1) requires states to include “demonstrative evidence” establishing failed market conditions. See 47 C.F.R. § 20.13(a)(1). Section 20.13(a)(2) provides an extensive, detailed list of the types of information that states are encouraged to supply in order to meet this evidentiary burden. See 47 C.F.R. § 20.13(a)(2)(vi).

⁵⁷ See, *e.g.*, F. Scherer & D. Ross, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE*, 4-7 (3d ed. 1990) (“Scherer and Ross”); D. Carlton & J. Perloff, *MODERN INDUSTRIAL ORGANIZATION*, chs. 1, 9 (2d ed. 1994); J. Tirole, *THE THEORY OF INDUSTRIAL ORGANIZATION* 1-3 (1988).

behavior by commercial mobile radio service providers.”⁵⁸ We also requested “[e]vidence, information and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates ... [or a] pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces,” and we indicated that we would consider such evidence “especially probative.”⁵⁹

21. In order to assess present market conditions so as to predict the future effectiveness of market forces within the state, we requested information on the number and type of CMRS providers in the state as well as their respective customers,⁶⁰ and “an assessment of the extent to which services offered by the commercial mobile radio service providers the state proposes to regulate are substitutable for services offered by other carriers in the state.”⁶¹ We also requested information and complaint statistics revealing customer satisfaction with CMRS providers within the state.⁶² In addition to this information, and as a further aid in projecting CMRS growth rates and other trends within the state, we also requested information on “trends” in each commercial radio provider’s rates and customer base⁶³ and on “opportunities for new providers to enter into the provision of competing services” as well as “an analysis of any barriers to such entry.”⁶⁴ In short, although states have the discretion to adduce such evidence in support of continued rate regulation as they see fit,⁶⁵ the comprehensive list of anticipated documentation in Section 20.13 gives states guidance concerning the evidence of structure, conduct, and performance that we would find persuasive in evaluating their petitions.

22. The purposes to which such evidence must be put also are straightforward. For example, with regard to industry structure, while a state seeking to regulate two-way mobile voice services may draw attention to the cellular duopoly, it is incumbent on that state to consider factors that have a direct and substantial impact on that structure. In particular, in evaluating a cellular-oriented petition, we will look with disfavor on any petition that fails to consider the immediate and near-term impact of PCS. Given the general statutory purpose of

⁵⁸ 47 C.F.R. § 20.13(a)(2)(vi).

⁵⁹ 47 C.F.R. § 20.13(a)(2)(vii).

⁶⁰ 47 C.F.R. § 20.13(a)(2)(i) and (ii).

⁶¹ 47 C.F.R. § 20.13(a)(2)(iv).

⁶² 47 C.F.R. § 20.13(a)(2)(viii).

⁶³ 47 C.F.R. § 20.13(a)(2)(ii) and (iii).

⁶⁴ 47 C.F.R. § 20.13(a)(2)(v).

⁶⁵ *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

facilitating PCS-type services, it would be difficult to ignore or downplay the importance of fundamental structural changes when considering Section 332(c) petitions.

23. While PCS is not yet available to the public, it is an accepted antitrust principle that a firm may be considered in competitive analysis if it could enter the market in question.⁶⁶ Under the caselaw potential entry must be reasonably prompt, a typical period being two years from the present in order to expect a significant impact on existing competitors,⁶⁷ and there is little doubt that PCS licensees will enter the market for CMRS in competition with cellular providers within this timeframe. We recently concluded an auction designed to license rapidly two additional competitive providers of wireless two-way voice and data communications in every local market in the country. As shown in the table below, the winning bidders in markets encompassing Arizona have committed to pay substantial sums for the right to operate wireless systems in that state. Having done so, it is reasonable to conclude they will deploy the facilities necessary to become operational as quickly as possible so as to begin recouping their investment.

⁶⁶ See, e.g., *McCaw Personal Communications, Inc. v. Pacific Telesis Group*, 645 F.Supp. 1166, 1174 (N.D. Cal. 1986) (“the existence of low barriers to entry may rebut a prima facie showing of illegality, even where the combined market shares of the merged firms is quite high”), citing *United States v. Waste Management, Inc.*, 743 F.2d 976, 982-83 (2d Cir. 1984). See also *American Bar Association, I ANTITRUST LAW DEVELOPMENTS (THIRD)* 307-11 (1992) and cases cited therein.

⁶⁷ See *FTC v. Owens-Illinois, Inc.*, 681 F.Supp. 27, 37 & n.23 (D.D.C. 1988), *vacated on other grounds*, 850 F.2d 694 (D.C. Cir. 1988) (concerning “the extensive present and future intermaterial competition in the glass and other packaging industries,” “[a]n important, but undisputed, assumption of the economic analysis in this case is that the relevant time frame within which to view elasticity is approximately two years. In other words, conversions by purchasers between types of containers must be feasible within this time frame for demand and supply to be considered elastic”); Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (Apr. 2, 1992) (*Merger Guidelines*), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 7, 1992) at 20,573-10 (Entry Analysis, Timeliness of Entry: “In order to deter or counteract the competitive effects of concern, entrants must quickly achieve a significant impact on price in the relevant market. The Agency generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact”) (footnote omitted). The *Merger Guidelines* consider firms to be present competitors if, under certain conditions, they could shift production to a new product within only one year. *Id.* at 20,573-4.

BROADBAND PCS AUCTION RESULTS

Arizona					
MTA #	Freq. Blk.	State	Market	Winning Bidder	Winning Bid
M027	A	Arizona	Phoenix	AT&T Wireless PCS Inc.	\$78,347,000
M027	B	Arizona	Phoenix	WirelessCo, L.P.	\$75,608,434
M039	A	New Mexico	El Paso-Alberquerque	Western PCS Corporation	\$8,634,030
M039	B	New Mexico	El Paso-Alberquerque	Pacific Telesis Mobile Services	\$8,634,000
M002	A	California	Los Angeles-San Diego	Cox Communications, Inc.	\$251,918,526
M002	B	California	Los Angeles-San Diego	Pacific Telesis Mobile Services	\$493,500,000 ⁶⁸

24. The nature of this impending competitive entry bears emphasis. Unlike the typical "ease of entry" case, where entry by new competitors is hypothetical or may occur only at an industry's margin, PCS activity is undeniably real. It is not something that "may" occur, or that will occur only sporadically. It is happening, and it is happening on a nationwide scale. As the recently-completed auction demonstrates, some of this entry is being mounted by large, well-financed entities with long experience and success in the telecommunications business. That field of competitors will be strengthened further upon completion of additional spectrum auctions in the near future. Available evidence indicates that cellular companies, faced with the near-term entry of PCS, have reacted by preparing for impending competition, *i.e.*, by lowering prices and adopting new technologies. For example, there are reports that observable declines in cellular prices are attributable in part to cellular carriers' knowledge

⁶⁸ This figure represents the amount to be paid by the pioneer's preference licensee, as required by Section 309(j)(13) of the Communications Act. See American Personal Communications, Washington-Baltimore MTA #10, Frequency Block A; Cox Cable Communications, Inc., Los-Angeles-San Diego MTA #2, Frequency Block A; Omnipoint Communications, Inc., New York MTA #1, Frequency Block A; For Initial Authorizations in the Broadband Personal Communications Service, Memorandum Opinion and Order, 10 FCC Rcd 1101 (1994).

that reasonably soon they will face new competition from PCS licensees.⁶⁹ The advent of PCS also appears unambiguously to be having an impact on the present marketplace; it is repeatedly cited as a precipitating factor in major mergers and joint ventures in the wireless industry.⁷⁰ Thus, the available evidence indicates strongly that such entry is not speculative. Instead, all evidence suggests that it is empirically real and in the very near term will be substantial and pervasive. This warrants our consideration when evaluating a state petition to regulate rates under Section 332(c)(3).

25. Evidence of industry conduct and performance is also relevant. For example, a state might demonstrate specific instances of collusive behavior on the part of licensees. A state also might demonstrate that the statutory purposes of OBRA were not coming to fruition in that state, or were not likely to do so. We would find highly relevant any evidence that demand for CMRS services in general and cellular service in particular is too low to promote market entry by the number of licensees needed to ensure that facilities-based competition will occur at a level adequate to warrant reliance on market forces, rather than rate regulation, as a means of protecting consumer interests.

26. Moreover, a very strong indication that industry conduct and performance are failing to serve consumer interests adequately would be evidence of a lack of investment on the part of licensees in CMRS facilities, or a failure by licensees to deploy adequately new facilities, technologies, and services. Such a showing might support a conclusion that licensees were restricting the output of a service solely to increase its price, and such activity might warrant an appropriate regulatory response. Of course, a successful showing of this nature requires more than evidence that a licensee is earning economic rents (*i.e.*, pricing above cost). It is readily conceivable that economic rents earned in the cellular industry also might advance important public policies, such as if they were applied in furtherance of the

⁶⁹ See, e.g., COMM. DAILY, Apr. 24, 1995, "*Cellular Industry Eyes Further Cuts, Adjustments to Challenge PCS*" (report on independent researcher's projection of cellular service rate cuts "up to 40%" over next two years); COMM. DAILY, Telephony Section, Mar. 9, 1995 (NYNEX cellular company "said it will begin offering PCS-type services in metro N.Y. under Geographic Option Plan trademark, giving customers greater flexibility in setting rates and using service. Monthly charge is \$24.99, with additional min. at 29 cents in home county, 99 cents elsewhere"); M. Mills, *Wireless: The Next Generation*, WASH. POST, Feb. 20, 1995, Washington Business Section at 1, 14-15; M. Thyfault, *Bell Companies Get Personal - Bell Atlantic, NYNEX Plan to Merge Their Mobile and Cellular Divisions as PCS Players Continue Consolidation*, INFORMATIONWEEK, Communications Section at 33, July 18, 1994 (Bell Atlantic announces a low-priced, low-range offering on its Annapolis, Philadelphia, and Pittsburgh cellular systems, intended to resemble PCS offerings).

⁷⁰ See, e.g., Applications of Bell Atlantic Corp. and NYNEX Corp. for Transfer of Cellular Radio Licenses to Cellco Partnership, Report No. CL-95-17, File Nos. 00762-CL-AL-1-95 *et al.*, filed Oct. 18, 1994, Exhibit 2 ("Description of Transaction and Public Interest Statement") at 12, 14; *Id.*, Attachment D, Affidavit of M. Lowenstein at para. 18; Motorola, Inc., Order, DA 95-890, released Apr. 27, 1995, at para. 17 (Wireless Telecommunications Bureau), *petition for reconsideration pending*; Craig O. McCaw, 9 FCC Rcd at 5862-63.

statutory goal of promoting investment in the cellular infrastructure. In that event, the rates underlying such profits would have been paid by those who ultimately benefit from reinvestment in cellular facilities. Specifically, as a cellular carrier adds large numbers of customers, it must expand capacity so that the quality of service to existing and new customers is not degraded. Thus, an analysis of economic performance must place great weight on reinvestment of profits in this high-growth industry, for, without such reinvestment, consumers might receive less value for their money. In short, the significance of economic rents under our Section 332(c)(3) analysis is found not simply in their existence in the first instance but in their subsequent application.

27. Finally, we note that SCP evidence typically may be segregated into two categories: static factors and dynamic factors.⁷¹ For example, prices or rates of return in a given year are static factors. Growth and investment are dynamic factors. In addition, a dynamic analysis views price and other static factors at a given point in time in their relationship to static factors such as price in the future.⁷² Thus, a rate of return that looks high today may be fair and reasonable when looked at in terms of its impact on future prices.⁷³ Furthermore, static factors are, as the name implies, static, or even temporary, whereas the long-term impact of dynamic factors is more important because their effects are cumulative and more permanent. Thus, we believe that evidence concerning dynamic factors is a more persuasive market indicator than evidence concerning static factors. Given the rapidly changing nature of the market in which wireless services are provided and the statutory purposes of OBRA, we conclude that evidence of where a market is going is more relevant than evidence of where it has been.

28. No single factor, standing alone, necessarily would tip the balance for or against a particular state petition. The statute allows the states flexibility to make their showings in the best manner they see fit, and it is conceivable that we might find a showing based primarily on one factor to be persuasive. Those demonstrations that are tied most closely to the statutory scheme are, of course, the most determinative. Our decisions in this proceeding and similar proceedings are based on the totality of the evidence.

IV. ARIZONA PETITION

29. On August 9, 1994, the Arizona Corporation Commission filed a petition requesting authority to continue regulating the rates and entry of providers offering

⁷¹ See, e.g., J. Tirole, *THE THEORY OF INDUSTRIAL ORGANIZATION* 209-70 (1988).

⁷² *Id.* at 239-70.

⁷³ In particular, consumers may be better off facing somewhat higher prices today in exchange for high levels of investment by existing competitors.

commercial mobile radio services within Arizona.⁷⁴ According to Arizona, its authority to regulate CMRS offerings derives from its state Constitution, which grants the ACC powers including the authority to prescribe just and reasonable classifications, rates and charges, and other reasonable rules governing “public service corporations” for services rendered and business transacted within the State, and to prescribe the forms of contracts and the systems of keeping accounts of such corporations, subject to local supervision including local regulation of rates and charges.⁷⁵ The Arizona Constitution defines “public service corporations” as including “[a]ll corporations other than municipal engaged . . . in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers”⁷⁶

30. The ACC notes that it deregulated mobile radio common carrier services in 1987,⁷⁷ except for cellular services.⁷⁸ The ACC requires that all wholesale rates, services, contracts, and classifications of cellular service offered in Arizona be approved by the ACC prior to implementation.⁷⁹ In addition, Arizona regulates entry of wholesale cellular carriers by conducting an evidentiary hearing and subsequently issuing a certificate authorizing service, and upon occasion establishing conditions to govern special circumstances.⁸⁰

31. Although Arizona does not identify any specific commercial mobile radio service that it seeks to regulate, aside from cellular, its request to retain regulatory authority extends to all CMRS, including cellular.⁸¹

⁷⁴ Arizona Petition at 1.

⁷⁵ Ariz. Const. art. 15, § 3, Arizona Petition App. 2.

⁷⁶ See Arizona Petition App. 2 (Ariz. Const. art. 15, § 2).

⁷⁷ ACC Decision No. 55633 (July 2, 1987).

⁷⁸ ACC Decision No. 56314 (Jan. 12, 1989).

⁷⁹ Ariz.Rev.Stat. Ann. §§ 40-374, 40-365.

⁸⁰ Arizona Petition at 8-9, 12-13.

⁸¹ See Arizona Petition at 1 (“Petition to Extend State Authority over Rate and Entry Regulation of All Commercial Mobile Radio Services”), 22 (“The Arizona Commission urges the FCC to grant this Petition to retain entry and rate regulation over CMRS providers”).

V. CASE ON THE MERITS

A. Rate Regulation

1. Non-Cellular Services

a. Comments

32. AMTA, AMSC, E.F. Johnson, MTel, Nextel, PageMart, PageNet, PCIA, and Pittencrieff contend that Arizona's petition must be denied, at least with regard to the apparent request to regulate services that are not public cellular services. MTel, for example, states that Arizona provides examples of what it calls excessive and anti-competitive rates, but every example involves only cellular rates.⁸² MTel and Pittencrieff assert that Arizona does not provide any evidence which substantiates the need for rate regulation for any CMRS other than cellular.⁸³ MTel asserts that the ACC therefore has failed to sustain the burden of proof required to meet the "market conditions" standard for paging and narrowband PCS.⁸⁴ Moreover, MTel asserts, the paging industry is highly competitive, as evidenced by both the high number of providers and the low rates for services available today. MTel states that competition for paging services in CMRS is increasing even more due to the addition of private paging carriers that were recently authorized to have exclusive use of their frequencies.⁸⁵ The very recent allocation of spectrum for narrowband PCS, MTel contends, is expected to heighten competition for existing paging companies as well as to assure a competitive PCS marketplace from the inception of service.⁸⁶

33. AMTA, describing the high degree of competition among rates of private land mobile systems which have been reclassified as CMRS, opposes any state regulation of the entry or rates of such systems.⁸⁷ AMTA asserts that the petition is silent regarding intent to include reclassified private services within its regulatory framework, and the state provides no evidence that market conditions in this segment of the CMRS industry do not adequately protect subscribers.⁸⁸

⁸² MTel Comments at 5.

⁸³ *Id.*; see also Pittencrieff Comments at 3-4.

⁸⁴ MTel Comments at 6.

⁸⁵ *Id.* at 7.

⁸⁶ *Id.* at 8.

⁸⁷ AMTA Comments at 1, 6-7; accord E.F. Johnson Comments (requesting exemption of "local" SMR and 220 MHz land mobile systems from state rate regulation).

⁸⁸ AMTA Comments at 5-7.

34. Nextel asserts that Arizona has not demonstrated that regulation of intrastate rates of non-dominant CMRS is necessary to protect subscribers. Rate regulation, Nextel states, would further inhibit the ability of emerging wireless providers to compete with cellular incumbents and would only benefit dominant cellular carriers.⁸⁹ Nextel points out that this Commission has recognized that the cellular marketplace is not fully competitive, and has acknowledged that all CMRS providers, other than cellular licensees, currently lack market power. Nextel asserts that these characterizations provide the basis for distinguishing among classes of CMRS providers in preempting state regulation. Continued regulation of cellular service providers may be necessary in order to prevent anticompetitive practices that will stifle development of the wireless market,⁹⁰ according to Nextel, but Arizona makes no showing that regulation of non-dominant carriers is necessary, nor could it, since wide area SMR and PCS are not duopolists, nor do they command a transmission bottleneck.⁹¹ If the potential future CMRS marketplace, with six different competitors, were the reality now, Nextel asserts, there would be no basis for state regulation at all.⁹² PageNet opposes the Arizona Petition to the extent that the state seeks to regulate non-cellular CMRS, and asserts that the statutory standard has not been met.⁹³ PCIA argues that Arizona does not even attempt to justify continued regulation of paging services and, therefore, that the ACC's Petition should be denied with regard to such services.⁹⁴

35. BAMMC, CTIA, GTE, Mohave, the Rural Cellular Association, and US West New Vector contend, on the other hand, that it would be unfair to permit regulation of cellular services but not non-cellular services.⁹⁵ These commenters assert that differential regulation of different services would be inconsistent with the concept of regulatory parity,

⁸⁹ Nextel Comments at i-ii, 2, 7-9.

⁹⁰ *Id.* at 9-10, 12-13.

⁹¹ *Id.* (also asserting that new competitors do not have luxury of spreading costs associated with regulatory compliance across an established customer base, and therefore should be permitted maximum flexibility).

⁹² *Id.* at 9-10.

⁹³ PageNet Comments at 1.

⁹⁴ PCIA Opposition at i, 8-10 & n. 21, 16-17.

⁹⁵ BAMMC Opposition at 7-8; CTIA Reply Comments at 2; GTE Reply at 3-10; Mohave Opposition at i, 1-2, 9-10; Rural Cellular Association Comments at 2-4 & n.2; US West New Vector Opposition at 3-5.

and could permit non-cellular service providers to gain a competitive edge over cellular service providers.⁹⁶

b. Discussion

36. The OBRA provides that a state must have been exercising rate regulation authority as of June 1, 1993, in order to petition this Commission under Section 332 for continuance of that authority.⁹⁷ Arizona apparently deregulated common carrier mobile services other than cellular services in 1987,⁹⁸ based largely on its conclusion that non-cellular CMRS market conditions do not warrant regulation. Thus, Arizona's Petition must be denied with regard to such services because the State has not met the threshold statutory filing requirement. In any event, Arizona has not met the statutory standard for granting a petition on its merits. The Arizona Petition presents no evidence that market conditions concerning non-cellular CMRS fail to adequately protect consumers against unjust, unreasonable, or unreasonably discriminatory rates for such services.

37. Arizona's failure to demonstrate that rate regulation of non-cellular CMRS is warranted does not preclude us from granting the ACC authority to rate regulate cellular services. We have determined in other proceedings that, while regulatory parity is an important policy that can yield important pro-competitive and pro-consumer benefits when appropriately applied, parity for its own sake is not required by any provision of the Act.⁹⁹ Indeed, the Act allows us to adopt a flexible regulatory scheme that treats certain CMRS in a streamlined fashion.¹⁰⁰ Congress recognized that market conditions might warrant differential regulatory treatment of CMRS, and it explicitly granted us the authority to forbear from

⁹⁶ See, e.g., Rural Cellular Association Comments at 2-4; GTE Reply at iv; Mohave Opposition at 1-2.

⁹⁷ See 47 U.S.C. § 332(c)(3).

⁹⁸ See ACC Decision No. 56314 (Jan. 12, 1989) (maintaining regulation of cellular carriers), Arizona Petition App. 1 at 3, 5, 9, citing ACC Decision No. 55733 (Jul. 2, 1987) (deregulating most common carrier mobile services); see also US West New Vector Comments at 4.

⁹⁹ See Applications of Craig O. McCaw, Transferor, and American Telephone and Telegraph Company, Transferee, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, 9 FCC Rcd 5836, 5858 (1994) (para. 32) (*Craig O. McCaw*), appeal pending on other grounds sub nom. BellSouth Corp. v. FCC, D.C.Cir. No. 94-639, filed Sept. 23, 1994; see generally Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd 7988 (1994).

¹⁰⁰ See *CMRS Second Report and Order*, 9 FCC Rcd at 1463.

applying certain provisions of the Act.¹⁰¹ That Congress intended such forbearance might be exercised selectively is not in doubt. As the OBRA Conference Report states in explaining our forbearance authority:¹⁰²

The purpose of this provision is to recognize that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services. While this provision does not alter the treatment of all commercial mobile services as common carriers, this provision permits the Commission some degree of flexibility to determine which specific regulations should be applied to each carrier.

Nothing in the record of this proceeding demonstrates that Congress intended to deny states similar flexibility with regard to the exercise of their CMRS regulatory authority.

2. Cellular Services

a. Universal Service

(1) Comments

38. Arizona states that it is contemplating streamlining and expediting its regulation governing competitive telecommunications services and companies. To this end, the ACC asserts that it has been examining alternative regulatory frameworks to govern the telecommunications industry. The ACC expects that the standards and rules that it adopts based on this analysis will facilitate ease of market entry and exit and will allow greater pricing flexibility. It also expects to address preservation of universal service in the increasingly competitive telecommunications marketplace.¹⁰³

39. The ACC asserts that one factor contributing to the erosion of local exchange carriers' revenues is the increasing substitution of cellular service for basic land line service. Increasing competition, Arizona claims, thus threatens wireline telephone companies' ability to continue providing basic telephone service at reasonable rates. According to the ACC, industry participants have suggested that it should therefore require all telecommunications service providers, including cellular, to help fund universal service. The ACC says that it is

¹⁰¹ Section 332(c)(1)(A) provides that the Commission may determine that any provision of Title II may be specified as "inapplicable to [any] service or person" otherwise treated as a common carrier. 47 U.S.C. § 332(c)(1)(A).

¹⁰² H.R. Rep. No. 103-213, 103d Cong., 1st Sess. 491 ("Conference Report"). The Conference Report further provides that "[d]ifferential regulation of providers of commercial mobile services is permissible but is not required in order to fulfill the intent of this section." *Id.*

¹⁰³ Arizona Petition at 5-6.

likely that a universal service funding mechanism will be implemented through the rate structures of intrastate providers. Therefore, Arizona asserts, Commission preemption of state rate regulatory authority over CMRS will jeopardize the ACC's ability to ensure that universal service objectives are attained. If state rate regulation is preempted, the ACC believes that there will be no practicable means for it to require that all telecommunications service providers make equitable contributions to universal service funding.¹⁰⁴

40. BAMMC notes that the Budget Act permits states to impose requirements "necessary to ensure the universal availability of telecommunications service at affordable rates" where CMRS is a substitute for wireline service for a substantial portion of the customers within the state.¹⁰⁵ Regardless of rate regulation, BAMMC asserts, a state may require carriers to contribute to universal service funds as long as the obligations are evenhanded.¹⁰⁶ Mohave agrees that the state can require universal service fund payments under Section 332 without rate regulation.¹⁰⁷

(2) Discussion

41. The Arizona Commission's concern centers around its intent to exact universal service funding from wireless telecommunications providers by regulating the rates of intrastate service providers. In this regard, the statute provides that:

Nothing in this subparagraph [preempting State rate regulation of CMRS] shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.

47 U.S.C. § 332(c)(3). Since the statute permits a state to institute universal service requirements under appropriate circumstances notwithstanding the general statutory proscription of CMRS rate regulation, it is not reasonable to conclude that Congress contemplated that a state might demonstrate a need for rate regulation by arguing that such authority is required to ensure universal service. We reject Arizona's attempt to do so here.

¹⁰⁴ *Id.* at 7-8.

¹⁰⁵ BAMMC Opposition at 7 (*citing* 47 U.S.C. § 332(c)(3)).

¹⁰⁶ BAMMC Opposition at 7.

¹⁰⁷ Mohave Opposition at 4, 16; *see also* Century Cellunet Comments at 5; US West Opposition at 16.

b. Market Conditions

(1) Comments

42. Arizona contends that market conditions for CMRS fail to protect subscribers adequately from unjust and unreasonable rates. Arizona asserts first that the potential for monopoly abuses remains strong in the state, and notes that in two of its six Rural Service Areas (RSAs), although two cellular carriers provide cellular roaming service, only the wireline licensee provides basic cellular service through retail affiliates.¹⁰⁸ (Arizona has two MSAs and six RSAs). Thus, the ACC states, there is no effective competition in these RSAs, especially at the retail level.¹⁰⁹ In addition, Arizona emphasizes that the sole operating retailer in each of these two market areas is affiliated with the wireline licensee, which has the advantage of existing network and interconnection facilities and an incumbent customer base.¹¹⁰ Thus, Arizona asserts, effective competition does not exist in these areas.¹¹¹

43. The ACC also asserts that barriers to entry will arise in an unregulated market where the dominant provider exercises monopoly power.¹¹² The state asserts that the potential for discriminatory activity, such as favoring an affiliated retailer or raising other entry barriers to non-affiliates, may be especially acute in less populated states such as Arizona.¹¹³ The ACC notes that in all six of the Arizona RSAs, the wholesalers' only retail customers are their own retail affiliates.¹¹⁴

44. Arizona also describes several allegedly anticompetitive activities that it has deterred in order to provide for a competitive market and ensure just and reasonable rates for consumers. First, it discusses a tariff provision on roaming that allegedly preferred the affiliated retailer over non-affiliates.¹¹⁵ Second, it states that it has prevented cellular carriers from implementing "calling party pays" service, which would require local wireline

¹⁰⁸ Arizona Petition at 15.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 15.

¹¹¹ *Id.*

¹¹² *Id.* at 17-18.

¹¹³ *Id.* at 15.

¹¹⁴ *Id.* at 16.

¹¹⁵ *See id.* at 16.

customers to pay for calls to cellular telephones.¹¹⁶ Finally, Arizona asserts that carriers have attempted to establish excessively large number blocks for resale.¹¹⁷

45. In response to Arizona's claims of a lack of competition for cellular service at the retail level, carriers assert that such arguments are irrelevant even if true. For example, BAMMC argues that the lack of competition among retailers is irrelevant because Arizona regulates only wholesale rates.¹¹⁸ Sharon Megdal, economist and a former Commissioner of the ACC, asserts on behalf of BAMMC that cellular providers set wholesale prices according to general market conditions. Retail rates, Megdal asserts, are set by retail market conditions.¹¹⁹ BAMMC argues that wholesale rate regulation does not help end users, and points out that rates in RSA AZ21 are similar to those in other RSAs.¹²⁰ Mohave contends that in fact there are two cellular carriers providing basic cellular and roaming services in RSA 1, which is one of the markets where Arizona asserted only one provider offers basic cellular service.¹²¹ Furthermore, Mohave and others argue that competition with cellular in such areas is provided by SMR and paging service providers.¹²²

46. BAMMC argues that Arizona's claim of ineffective competition must fail because it is based in part on the existence of the duopoly cellular licensing structure, and such structure is the same in Arizona as in any other state.¹²³ Economist Stanley Besen, on behalf of GTE, asserts that competition occurs within the duopoly cellular market framework¹²⁴ and that competition between cellular operators is, in fact, vigorous.¹²⁵

¹¹⁶ *Id.* at 14.

¹¹⁷ *Id.* at 18-19.

¹¹⁸ BAMMC asserts that wholesale rate regulation does not protect end users. *See* BAMMC Opposition at 9 & App. A.

¹¹⁹ BAMMC App. A (Megdal Affidavit).

¹²⁰ BAMMC Opposition at 22 n. 10.

¹²¹ *Id.* at 3.

¹²² Mohave Opposition at 6-7 & App. 1 (French Affidavit); BAMMC Opposition App. B; CTIA Opposition at 15-16; Century Cellunet Comments at 4; Rural Cellular Association Reply at 3 & n.2.

¹²³ BAMMC Opposition at 20.

¹²⁴ GTE Comments App. at 9.

¹²⁵ GTE Comments App. at 10.