

regulation of intrastate cellular rates.¹¹⁵ In this regard, several commenters point to the NYPSC's statements, made in its 1989 proceeding to review, on its own motion, its regulatory policies for "Segments of the Telecommunications Industry Subject to Competition," that cellular service "is furnished competitively... [and that] these carriers do not need to be regulated...."¹¹⁶

51. Those opposing the NYPSC's Petition point to various indicia that the cellular market in New York is sufficiently competitive to protect consumers adequately from unreasonable rates. One commenter recites the following litany of developments in the New York cellular market, which it alleges proves that the market is "driven by carriers responding competitively to the needs of the marketplace:"¹¹⁷ decreasing rates (including equipment), larger calling scopes, an increasing variety of ancillary services (including joint service), voice mail and other functionality, as well as extensive customer service organizations, and disparity in financial results and market shares. It contends that customer equipment costs have decreased from \$1000 to \$100 per cellular phone, that there are a greater number of service plans now available, that most Upstate New York MSAs have now been built out, eliminating "holes" previously common to those markets, that roaming rates per airtime minute among most carriers have decreased from \$3 per day and \$.99 per minute in 1985 to \$.50 or less per minute and no daily charge, that customer service is now provided on a 24-hour basis with the assistance of "extremely sophisticated, essentially real time databases," that cumbersome and inaccurate billing systems have been replaced, and

¹¹⁵ CCI Comments at 15, *citing* NYPSC Petition at 3.

¹¹⁶ CCI Comments at 15 n.4; McCaw Comments at 16-17; NYNEX Comments at 5 n.12. *See* Opinion and Order Concerning Regulatory Response to Competition, Case No. 29469, dated May 16, 1989 (*1989 NYPSC Report*), attached to Comments filed by NYNEX, Sept. 19, 1994. The cited text states, in pertinent part, as follows:

We conclude that [cellular] service is furnished competitively, for the market structure is one that has been designed by the FCC to be competitive. Additionally, the existence of resellers -- compounded by the existence of significant excess capacity -- operates to check monopoly abuses of the facilities-based carriers and reduce the potential for a duopoly. Our experience, which shows that these carriers do not need to be regulated, as well as that of more than half the states, which have deregulated or vastly reduced regulation of cellular service, also supports our conclusion that this market is competitive.

We therefore will seek legislation that suspends the application of most aspects of the Public Service Law, including certification and rate regulation, to the provision of cellular service.

1989 NYPSC Report at 9-10.

¹¹⁷ SWB Comments at 6.

that joint services and special services such as voice mail are now available to a significant portion of the customer base.¹¹⁸

52. Supportive of these allegations are the comments of another cellular company, which states that “competitive pressure to expand its coverage area and to improve call quality has required it to invest hundreds of millions of dollars in a network infrastructure that includes almost 600 cell sites.”¹¹⁹ Yet another cellular company comments similarly:¹²⁰

In addition to an increase in the number of providers, since 1989 the industry has experienced significant growth in network capacity and coverage, and in subscribers. In the particular case of Cellular One of New York, the nonwireline carrier owned by McCaw’s LIN Broadcasting subsidiary, capital investment has more than quadrupled since 1990, and cell sites now number more than 300 -- a tenfold increase during the past 8 years. Similarly, subscribership has risen tenfold over the same period. This increase of providers, subscribers and infrastructure investment, coupled with declining service rates, indicates that the NYPSC was correct initially in finding that cellular carriers are vigorously pursuing the market and do not need to be regulated.

53. Several other commenters also point to the growth rate for cellular as indicative of a competitive market. One alleges that cellular is growing domestically at an annual rate of more than 40 percent and that only 16.7 percent of the national market has been tapped.¹²¹ It contends that this growth potential, in combination with high intra-industry and inter-industry “churn” rates and rapid technological development, creates a dynamic and highly competitive cellular market.¹²² Another commenter emphasizes that 73 percent of cellular revenues for New York State are generated in the New York City MSA, which has two facilities-based carriers and approximately 32 resellers.¹²³ Many commenters argue that alternative commercial mobile services already exist, such as wide-area Specialized Mobile

¹¹⁸ *Id.* at 6-7.

¹¹⁹ NYNEX Comments at 6.

¹²⁰ McCaw Comments at 18 (referencing *1989 NYPSC Report* regarding the competitive nature of the cellular industry in New York State).

¹²¹ CTIA Comments at 14-15.

¹²² CTIA explains that “churn” rates reflect customer switching, among cellular providers in the case of “intra-industry” churn, or to other telecommunications services in the case of “inter-industry” churn. CTIA contends that the inter-industry churn rate approaches 16 percent. *Id.* at 12-13, 20.

¹²³ CCI Comments at 18.

Radio (SMR),¹²⁴ and that they constitute viable competitors to cellular and must be taken into account in assessing the competitiveness of CMRS in New York.¹²⁵ Several commenters remark that this already-competitive market will become more competitive with the advent of PCS and wide-area SMR and that these impending changes affect today's market and must also be taken into account when evaluating its present capacity to protect consumers.¹²⁶

B. Elements of the NYPSC Case

1. Pricing

54. As one element of its case concerning failed market conditions, the NYPSC addresses rates and revenues for the New York State cellular market.¹²⁷

Statewide cellular operating revenues in the six MSAs increased 20% from 1991 to 1992. On average, revenues per access number declined by 8% from 1991 to 1992. Airtime minutes of use increased by 24% and the number of access lines increased almost 30% during this period. Overall revenues per airtime minutes declined by 3% from 1991 to 1992.

The NYPSC contends that “[d]ue to the number of different rate plans . . . and the changes in average customer usage patterns caused by continued growth it is difficult to measure changes in price levels.”¹²⁸ The NYPSC concedes, however, that “overall average prices are declining,” but notes that they “remain considerably higher than comparable land line telephone services.”¹²⁹ The NYPSC argues that its continued regulatory oversight is

¹²⁴ CCI contends that there are 458 SMRs operating in New York at this time. *Id.* at 17 n.6.

¹²⁵ CTIA Comments at 16-19; CCI Comments at 8-12; RCA Reply at 3; SWB Comments at 7 n.5; GTE Reply at 9.

¹²⁶ *See, e.g.*, GTE Reply at 11; CTIA Reply at 5.

¹²⁷ NYPSC Petition at 8. The NYPSC states that cellular carriers must file audited financial statements and annual reports containing data on their operating expenses and revenues, plant investment, and organizational and pricing information, for the purpose of tracking the effectiveness of competition in New York, which is assessed in annual reports issued by NYPSC staff. *Id.* at 7. The NYPSC states that “[s]ince approximately 93% of the 1992 New York State cellular telecommunications revenues were obtained in the five MSAs, the analysis focuses heavily upon the results of the ten carriers [in these markets].” *Id.* at 7 n.1.

¹²⁸ *Id.* at 8.

¹²⁹ *Id.* The NYPSC refers to a 1994 “Merrill Lynch Cellular/Telecommunications Report” stating that the average cellular rate per minute (including the monthly access fee) is “nine times that of local rates.”

necessary “in order to ensure that the affordability of cellular service continues to improve.”¹³⁰

55. Commenters in opposition state that the NYPSC’s concession regarding declining rates undercuts its case for failed market conditions¹³¹ and they interpose a variety of objections to its comparing cellular to landline rates. Several note that residential land line rates are an improper basis for comparison because they are regulated and allegedly priced below cost.¹³² Others contend that higher cellular rates merely reflect the fact that market risks¹³³ and expenses¹³⁴ are greater for cellular service. Still others challenge the comparison as incomplete or inapposite either because it fails to address ancillary services¹³⁵ or because the two services have different service and cost structures that are nowhere addressed by the NYPSC.¹³⁶

56. Both the NYPSC and Nextel address the issue of prices in their replies. Reiterating its concession that rates are declining, the NYPSC attributes the decline to the “presence of regulation” and its deterrent effect on cellular rates.¹³⁷ Nextel, in comments largely addressed to market conditions in California, contends that decreasing cellular prices are not the result of competition but mere market strategies to encourage subscribers to “lock in” to long-term cellular service contracts with substantial termination penalties.¹³⁸

¹³⁰ *Id.*

¹³¹ *See, e.g.*, RTC Comments at 7; SWB Comments at 8; NYNEX Comments at 10. CCI argues that, were inflation taken into account, cellular prices would be found to have declined even further. CCI Comments at 18.

¹³² RTC Comments at 7; SWB Comments at 8-9. McCaw concurs and has submitted affidavit testimony in support of its position. McCaw Comments at 19.

¹³³ NYNEX Comments at 10; SWB Comments at 10.

¹³⁴ SWB Comments at 9.

¹³⁵ *Id.* at 10.

¹³⁶ NYNEX Comments at 10.

¹³⁷ NYPSC Reply at 15.

¹³⁸ Nextel Reply at 11-13.

2. Rate of Return on Common Equity

57. The NYPSC offers the following information concerning return on common equity in the New York cellular market:¹³⁹

In 1991 the return on common equity for those companies which provided information ranged from a high of 142% to a low of -42%. The average return was 47% for this period. In 1992, the returns ranged from 85% to a low of -118%, with an overall average return of 38.60%. In 1993, the returns, based on available data, ranged from a high of 79% to a low of 0% with the average return of approximately 38%. This compares to 10-15% returns on equity for high tech companies from 1991-1993.

The NYPSC states that, while these data are not “dispositive of the competitiveness of the market,”¹⁴⁰ the returns of several companies exceed those for land line companies and “most unregulated high tech companies.”¹⁴¹ In its reply to comments critical of its rate of return analysis, the NYPSC emphasizes that it has adduced this information not to advocate, much less adopt, rate of return regulation for cellular services but as evidence that “cellular carriers could exercise excessive market power, absent regulatory oversight.”¹⁴²

58. Commenters discount completely the use of this rate of return data to suggest failed market conditions. They variously argue that rates of return on landline companies are inapposite because landline companies are subject to cost of service regulation,¹⁴³ that the NYPSC’s computational methodology is unclear,¹⁴⁴ that high returns may be attributable to efficiency and length of investment and time in the market rather than to market power,¹⁴⁵ and that the variety of rates of return among cellular carriers confirms rather than refutes the existence of competition in the New York cellular market.¹⁴⁶ One commenter contends that return on common equity is a misleading ratio when used to measure the operational

¹³⁹ NYPSC Petition at 8-9.

¹⁴⁰ *Id.* at 9.

¹⁴¹ *Id.* The NYPSC has appended to its petition a list of “high technology” companies and their reported “return on average equity” for 1991-1993.

¹⁴² NYPSC Reply at 14.

¹⁴³ RTC Comments at 7. CCI concurs and notes that the NYPSC does not specify whether the comparison is to land line residential, business or intrastate toll rates. CCI Comments at 22 n.10.

¹⁴⁴ McCaw Comments at 19-20.

¹⁴⁵ RTC Comments at 7.

¹⁴⁶ SWB Comments at 11.

performance of an entity because it is significantly influenced by an entity's debt-to-equity ratio and thus is meaningful only to shareholders.¹⁴⁷ It explains that cellular carriers could be very highly leveraged or negligibly leveraged, as a result of which comparing the return on common equity of any two cellular providers would give no indication of the efficiency of operations or of the rates and charges of either. Another commenter claims that more highly leveraged capital structures typify cellular operations as compared to those of local exchange carriers.¹⁴⁸

3. Market Share

59. The NYPSC contends, on the issue of market share, that "there is some evidence of market concentration in three out of the five major MSAs"¹⁴⁹ and provides the following information on cellular market shares within those MSAs:¹⁵⁰

For 1991, market share, as evidenced by total revenues, was roughly equal in two MSAs. In each of three MSAs one company had 80% of the market and the other had 20%.

For 1992, in two MSAs one company had 70% of the market and the other had 30%. In one MSA, one company had 80% of the market and the other had 20%. In the other two MSAs, market shares were split 50/50. This data may indicate that one company had a dominant position and that absent continued oversight could have the incentive and opportunity to engage in anticompetitive pricing.

The NYPSC contends that, "[w]hile a 20% market share may be enough for a competitor to be successful in the telecommunications market, the purpose of market share data is to detect patterns within a market" and concludes that the data adduced, while "not dispositive," "suggest caution."¹⁵¹

60. Several commenters challenge the NYPSC's interpretation and use of this market share data, arguing that market share, standing alone, is insufficient proof of market power,¹⁵² that market share shifts in a fluid industry such as cellular, that factors other than market power, such as operational efficiencies and facility size, could account for differences

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ NYPSC Reply at 14.

¹⁵⁰ NYPSC Petition at 9.

¹⁵¹ NYPSC Reply at 14.

¹⁵² McCaw Comments at 22.

in market share,¹⁵³ that a 20 percent market share is sufficient to make a telecommunications firm competitive,¹⁵⁴ and that the NYPSC's reliance on the concept of dominance to make a case for noncompetitiveness is misplaced given Congress's and the Commission's explicit rejections of the distinction between dominant and nondominant firms as a conceptual tool for establishing regulatory distinctions among commercial mobile services.¹⁵⁵

4. Consumer Complaints and Anticompetitive Practices

61. The NYPSC proffers the following information concerning consumer complaints and anticompetitive practices in furtherance of its contentions concerning failed market conditions in the New York cellular market. The NYPSC states that over the 12-month period ending May 31, 1994, it received 146 complaints against cellular companies, 66 of which were "rate-related (excessive, erroneous or disputed bills)" and the remaining 80 of which were related to service quality and other nonrate matters.¹⁵⁶ The NYPSC acknowledges that "the complaint rate is low," but, based on the fact that it received only 77 complaints for 1991 and 1992 (undifferentiated by the NYPSC as to content), observes that "the absolute number of complaints has increased significantly, by close to 100%."¹⁵⁷

62. The NYPSC also provides information on two occurrences that it alleges constitute anticompetitive practices. The first involves a special pricing plan proposed for law enforcement organizations which NYPSC staff identified as discriminatory in the course of its routine review of tariff filings and which it successfully prevailed upon the cellular carrier to withdraw.¹⁵⁸ The NYPSC characterizes the second example as a "dispute between two cellular companies regarding roaming rates," in which one company blocked access to 911 and other emergency services when its customers were roaming in another carrier's service territory. The NYPSC resolved this dispute by ordering the two companies to enter into an

¹⁵³ CCI Comments at 20-22.

¹⁵⁴ SWB Comments at 12.

¹⁵⁵ McCaw Comments at 21. *See also* CTIA Reply at 1-2; McCaw Reply at 7-8. Both commenters assert that the concept of dominance is irrelevant and has been explicitly rejected by the Commission in our forbearance analysis in the *CMRS Second Report and Order*.

¹⁵⁶ NYPSC Petition at 9.

¹⁵⁷ *Id.* at 10.

¹⁵⁸ *Id.*

interim roaming agreement, at a compensation schedule proposed by NYPSC staff.¹⁵⁹ The NYPSC concludes that:¹⁶⁰

[w]hile interconnection between carriers is the subject of another proceeding, this problem reflects the importance of state regulators having the authority to step in and resolve disputes which arise out of their rate authority which could have a significant impact on health and safety.

63. Commenters addressing the NYPSC's evidence on the issues of both consumer satisfaction and anticompetitive practices discount it as immaterial or irrelevant, or both. Several call attention to the NYPSC's admission that the complaint rate is "low."¹⁶¹ Others challenge the validity of the data, arguing that it is unclear which of the 66 complaints concerning "excessive, erroneous or disputed bills" are truly related to "rate levels,"¹⁶² that a 100 percent increase in consumer complaints is unimpressive where the original number was so small,¹⁶³ and that any increase in complaints must be measured against the 30 percent per year growth in the number of cellular access lines reported by the NYPSC.¹⁶⁴

64. On the issue of anticompetitive practices, one commenter observes that the special pricing plan for law enforcement organizations "was no more offensive than previously accepted plans for other organizations."¹⁶⁵ Two commenters challenge the validity and significance of the evidence concerning the roaming dispute, arguing that it is insufficiently detailed,¹⁶⁶ that the NYPSC may have lacked jurisdiction to impose an agreement on the carriers,¹⁶⁷ and that the NYPSC's authority to settle these kinds of disputes will not be

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 11 (footnote in original omitted), *citing* Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408 (1994).

¹⁶¹ SWB Comments at 12; McCaw Comments at 24.

¹⁶² RTC Comments at 8.

¹⁶³ NYNEX Comments at 8. NYNEX contends that only 0.15 percent of its own customers have complained to the NYPSC.

¹⁶⁴ SWB Comments at 12, *citing* NYPSC Petition at 8. *See* CCI Comments at 21.

¹⁶⁵ SWB Comments at 14. Similarly, CCI contends that the NYPSC has failed to demonstrate the lack of "reasonableness of the plan." CCI Comments at 8 n.29.

¹⁶⁶ SWB Comments at 14.

¹⁶⁷ *Id.* at 15.

jeopardized by denial of its petition here because such matters involve interconnection and are subject to the NYPSC's "continuing authority to regulate the terms and conditions under which cellular service is provided."¹⁶⁸

65. As a general matter, commenters also contend that the NYPSC's information concerning alleged improper practices is of marginal utility and evidentiary value because it is unaccompanied by supporting affidavits required under Section 20.13(a)(2)(vi)¹⁶⁹ and that "one dispute between two cellular carriers over the ten-year history of the provision of cellular service within the State dramatically underscores the lack of any need for a continuation of intrastate rate regulation."¹⁷⁰

C. Discussion

66. Section 332(c)(3) provides that a state petition shall be granted if it "demonstrate[s]" that market conditions for the service at issue fail to protect subscribers adequately from unjust, unreasonable, or unreasonably discriminatory rates. On this record we conclude that New York has not made such a demonstration and, accordingly, we deny its petition.

67. Our decision is based in principal part on several factors. First, the NYPSC does not address the direct and fundamental changes to the duopoly cellular market structure that are being realized by PCS and other services, such as wide area SMR. Second, the NYPSC presents no systematic or authenticated evidence of collusive or otherwise anticompetitive practices concerning the provision of any CMRS. Third, the NYPSC does not present evidence showing widespread consumer dissatisfaction with CMRS providers in that state, or discuss what specific rate regulations are needed to address whatever level of dissatisfaction may exist. Fourth, the NYPSC fails to advance any persuasive analysis regarding the critical issue of investment by cellular licensees (or by any other CMRS providers).¹⁷¹

68. Our decision also is based in part on the NYPSC's own statements concerning market conditions. For example, it acknowledges that "overall average prices are declining"¹⁷² and that "the complaint rate is low."¹⁷³ It requests continued rate regulation

¹⁶⁸ NYNEX Comments at 13-14.

¹⁶⁹ Vanguard Comments at 4. See 47 C.F.R. § 20.13(a)(2)(vi).

¹⁷⁰ RTC Comments at 9 (emphasis in original omitted).

¹⁷¹ An important indicator of market failure, in our view, would be evidence that cellular firms are withholding investment in facilities as a means of restricting output and thus boosting price.

¹⁷² NYPSC Petition at 8.

authority in order to "ensure that the affordability of cellular service continues to improve,"¹⁷⁴ and thereby concedes that conditions already are improving. It asserts that this Commission should not "wait until New York can establish that there are major problems,"¹⁷⁵ and thereby acknowledges the absence of any "major problems" today. And, by requesting authority for continued "light" regulation to "ensure that rates do not become discriminatory, unjust or unreasonable,"¹⁷⁶ it essentially admits that cellular rates are not presently unjust, unreasonable, or discriminatory.

69. Although NYPSC views any evidence of market imperfection as proof of a need for continued rate regulation, while it attributes all countervailing evidence to its regulatory oversight, it has not established the factual predicate of that line of reasoning. The NYPSC does not appear to have prescribed any particular CMRS pricing or rate development formula, and with minor exceptions, all currently effective and previously effective cellular rates in New York appear to have been carrier-initiated. On this record, we are not persuaded by the NYPSC's implicit argument that, absent continuation of its rate regulation authority, even for a limited period of time, cellular or other CMRS rates will quickly fall outside the zone of reasonableness. Given the nature of the NYPSC's regulatory system, we think it is reasonable to attribute improving market conditions to the operation of market forces rather than the NYPSC's regulatory system.

70. The rate of return on equity information the NYPSC offers in support of its petition is unconvincing. In general, we do not believe rate of return evidence alone constitutes sufficient ground to support a petition. In this regard, the relevant observation is not how such returns compare with those earned by traditionally regulated public utilities in mature, stable environments. Rather, any such observation must account for the fact that CMRS is a dynamic and relatively infant industry that is still developing. A key element of the study of markets is the recognition that not all industries and markets are at the same stage of development.¹⁷⁷ Thus, the comparison necessary for determining whether prices are just and reasonable is not with a mature industry, but with high growth industries. It has been shown that the rate of growth of output is one of the most important determinates of

¹⁷³ *Id.* at 10.

¹⁷⁴ *Id.* at 8.

¹⁷⁵ *Id.* at 12.

¹⁷⁶ *Id.* at 4.

¹⁷⁷ For example, J. Prescott, A. Kojli, and N. Ven Katraman have shown that the determinants of rates of return on investment vary between mature industries and emerging industries. See J. Prescott, A. Kojli, and N. Ven Katraman, "The Marketshare-Profitability Relationship: An Empirical Assessment of Major Assertions and Contradictions," STRATEGIC MANAGEMENT JOURNAL 377-394 (Spring 1986). They found, for example, that high market share is correlated with high rates of return in mature industries, but not for emerging industries. *Id.* at 386.

profitability, that is, all other things being equal, high growth firms (such as the cellular industry) tend to earn high profits.¹⁷⁸ Furthermore, even if profits are high now, the entry of PCS should contain those profits increasingly forcefully. Thus, evidence that cellular industry profits are higher than that we might allow, for example, for local exchange carriers, is not automatically disturbing.

Against this background, we conclude that the NYPSG's case is unpersuasive. As noted previously, this is largely due to the spare nature of the evidence on which the NYPSG's case is constructed. In addition to the specific evidentiary shortcomings discussed above, we note that the NYPSG submitted no provider-specific information on customers and customer trends for cellular or any other commercial mobile services. Its evidence concerning revenues is limited to the observation that 73 percent of cellular revenues are garnered in the New York City market, a market in which there appear to exist approximately 32 resellers, which suggests substantial competition at the retail level. The information proffered by the NYPSG on rates of return on common equity is unrepresentative because the NYPSG fails to provide accompanying data, such as the debt/equity ratios underlying such returns, that would enable us to assess those data meaningfully. New York also provides no information on infrastructure investment or the deployment of new services, facilities, or technologies in the State of New York. The NYPSG identifies only two instances of anticompetitive behavior by CMRS providers, neither of which is supported by affidavit testimony, as required by our rules. Even if such evidence were supported by affidavit, two examples do not constitute a sufficient showing to support a request to regulate an entire industry. For these reasons, and those discussed previously, we deny the NYPSG's Petition.

VI. REGULATION OF OTHER TERMS AND CONDITIONS

Prior to OBRA, Section 332 prohibited the states from imposing rate regulation upon certain wireless telecommunications carriers.¹⁷⁹ This prohibition was construed broadly to preclude almost all state regulatory activity.¹⁸⁰ As revised by OBRA,

¹⁷⁸ David Ravenscraft, "Structure-Profit Relationship at the Line of Business and Industry Level" REVIEW OF ECONOMIC AND STATISTICS 22-31 (February 1983).

¹⁷⁹ The statute provided in relevant part that "[n]o state or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service . . ." 47 U.S.C. § 332(c)(3) (prior to revisions enacted by OBRA).

¹⁸⁰ See, e.g., *Telelocator Network of America v. FCC* (Million) 761 F.2d 763 (D.C. Cir. 1985) (upholding Commission's interpretation of Section 332(c)(1) and (3) and (c)(6) in determining whether preemption provisions of that section apply to a given communications system). See also, e.g., *American Teltronix (Station WNEH552) v. FCC*, 3 FCC Red 5347 (1988) (Congress did not intend that a private land mobile licensee who either intentionally or inadvertently provides service to ineligible users would thereby subject itself to state regulatory authority, including possible sanctions).

Section 332(c)(3) now prohibits states from regulating “the rates charged” for CMRS, but it expressly reserves to them the authority to regulate the “other terms and conditions of commercial mobile services.” Although there is no definition of the term “the rates charged” in the statute or its legislative history, there is legislative history regarding the “other terms and conditions” language. We believe it is sufficient to allow us to comment in a preliminary manner on what regulatory activities the New York PSC is entitled to continue, despite our denial of its Petition.

73. The House of Representatives Committee on Energy and Commerce, reporting on the House bill that was incorporated into the amended Section 332, noted that even where state rate regulation is preempted, states nonetheless may regulate other terms and conditions of commercial mobile radio services. The Committee stated:¹⁸¹

By “terms and conditions,” the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state’s lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under “terms and conditions.”

74. Establishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions requires a more fully developed record than is presented by the New York Petition and related comments. Thus, we will not expound at any length on this matter. The legislative history largely speaks for itself. It is

for operating as a common carrier.”), *recon. denied*, 5 FCC Rcd 1955, 1956 (1990)(note omitted) (“state entry and rate regulation of a communications service offered by a private land mobile radio system is preempted by statute . . . [A]ccompanying legislative history reveals that Congress recognized the Commission’s broad discretion to dictate which land mobile systems are to be regulated as private.”) The Commission again stated its view of preemptive authority under that provision when it adopted a Notice of Inquiry respecting Personal Communications Services. Amendment of the Commission’s Rules To Establish New Personal Communications Services, Notice of Inquiry, 5 FCC Rcd 3995, 3998 (para. 24 n 19) (1990):

If these services are considered to be, or classified as, radio common carrier telephone exchange services, then the states, under Section 2(b) of the Act, may impose entry and rate regulations upon intrastate operations. If we classify these services as private land mobile, such state regulation would be expressly preempted under Section 332(c)(3).

¹⁸¹ H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261.

possible to extrapolate certain findings from the legislative history, however, and we do so here in the interest of minimizing future proceedings directed at this issue.

75. First, although the NYPSC may not prescribe, set, or fix rates in the future because it has lost authority to regulate “the rates charged” for CMRS, it does not follow that its complaint authority under state law is entirely circumscribed. Complaint proceedings may concern carrier practices, separate and apart from their rates.¹⁸² In consequence, it is conceivable that matters might arise under state complaint procedures that relate to “customer billing information and practices and billing disputes and other consumer matters.” We view the statutory “other terms and conditions” language as sufficiently flexible to permit New York to continue to conduct proceedings on complaints concerning such matters, to the extent that state law provides for such proceedings.

76. Second, under the same logic, we also conclude generally that several other aspects of a state’s existing regulatory system may fall outside the statutory prohibition on rate regulation. For example, a requirement that licensees identify themselves to the public utility commission, or whatever other agency the state decides to designate, does not strike us as rate regulation, so long as nothing more than standard informational filings is involved. Moreover, nothing in OBRA indicates that Congress intended to circumscribe a state’s traditional authority to monitor commercial activities within its borders. Put another way, we believe New York retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS providers in that state. We expect that, to the extent any interested party seeks reconsideration on this issue, it will specify with particularity the provisions of the New York regulatory practice at issue.

VII. ORDERING CLAUSES

77. Accordingly, pursuant to Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), **IT IS ORDERED** that the Petition of the New York State Public Service Commission To Extend Rate Regulation **IS DENIED** for the reasons set forth above.

¹⁸² *E.g.*, Section 208(a) of the Communications Act authorizes complaints by any person “complaining of *anything done or omitted to be done* by any common carrier subject to this Act, in contravention of the provisions thereof.” 47 U.S.C. § 208(a) (emphasis added).

78. IT IS FURTHER ORDERED, pursuant to Sections 1.4(b), 1.4(b)(2), and 1.106(f) of the Commission's Rules, that any petition for reconsideration of this order SHALL BE FILED within thirty days of the day after the day on which public notice of this action is given.¹⁸³

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

¹⁸³ Although we assigned the NYPSC Petition a docket number for administrative convenience, this is an adjudicatory-type proceeding, not a rulemaking.

APPENDIX A

List of Parties Filing Comments

Party (and Short Title)

American Mobile Telecommunications Association, Inc. (AMTA)
Cellular Telecommunications Industry Association (CTIA)
Contel Cellular, Inc. (CCI)
E.F. Johnson Company (E.F. Johnson)
McCaw Cellular Communications, Inc. (McCaw)
Mobile Telecommunication Technologies Corp. (MTel)
National Cellular Resellers Association (NCRA)
Nextel Communications, Inc. (Nextel)
NYNEX Mobile Communications Company (NYNEX)
Paging Network, Inc. (PageNet)
Personal Communications Industry Association (PCIA)
Rochester Tel Cellular Holding Corporation (RTC)
Southwestern Bell Mobile Systems, Inc. (SWB)
Vanguard Cellular Systems, Inc. (Vanguard)

List of Parties Filing Reply Comments

Cellular Telecommunications Industry Association (CTIA)
GTE Service Corporation (GTE)
McCaw Cellular Communications (McCaw)
Mobile Telecommunication Technologies Corp. (MTel)
Nextel Communications, Inc. (Nextel)
NYNEX Mobile Communications Company (NYNEX)
PageMart, Inc. (PageMart)
Rochester Tel Cellular Holding Corporation (RTC)
Rural Cellular Association (RCA)
State of New York, Public Service Commission (NYPSC)