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December 5, 1995

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OFFICE OF SECRETARY

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20006

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ATTENTION: **STOP CODE: 1170**

Re: Ex Parte Communication in CC Docket No. 94-54

Dear Mr. Caton:

Pursuant to Section 1.1206(a)(2) of the Commission's Rules, notice is hereby given of an *ex parte* communication regarding the above-referenced proceeding. On the afternoon of December 4, 1995, Leonard J. Kennedy and Laura H. Phillips, on behalf of Comcast Cellular Communications, Inc., met with David Sieradzki and Kathleen L. Franco of the FCC's Policy and Program Planning Division, Common Carrier Bureau. An original and two copies of this notice and enclosure are being filed with the Secretary's office. Due to the lateness of the hour, this notice is being filed on the next business day.

The meeting centered on issues regarding interconnection between local exchange carriers and commercial mobile radio services ("CMRS") providers. The discussion referenced the attached comments previously filed in File No. WTB/POL 95-2.

Respectfully submitted,

Comcast Cellular Communications, Inc.

Laura Phillips

Laura H. Phillips

Its Attorney

cc: David Sieradski
Kathleen Franco

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In the Matter of	)	
	)	
Alaska-3 Cellular LLC	)	
d/b/a Cellular One	)	
	)	
Motion For Declaratory Rulings	)	File No. WTB/POL 95-2
Concerning Preemption of Alaska	)	
Call Routing and Interexchange	)	
Certification Regulations As	)	
Applied To Cellular Carriers	)	

COMMENTS

COMCAST CELLULAR COMMUNICATIONS, INC.
COX ENTERPRISES, INC.

Werner K. Hartenberger
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December 1, 1995

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

In the Matter of	)	
	)	
Alaska-3 Cellular LLC	)	
d/b/a Cellular One	)	
	)	
Motion For Declaratory Rulings	)	File No. WTB/POL 95-2
Concerning Preemption of Alaska	)	
Call Routing and Interexchange	)	
Certification Regulations As	)	
Applied To Cellular Carriers	)	

COMMENTS

Comcast Corporation ("Comcast") and Cox Enterprises, Inc. ("Cox") (collectively "Joint Commenters"), by their attorneys, hereby submit their comments in support of the above-captioned motion for declaratory ruling.[1/]

I. INTRODUCTION

Alaska-3 is the nonwireline cellular licensee in the AK-3 rural service area ("RSA") and provides a "wide-area" service to the cities of Sitka, Juneau and Ketchikan, Alaska. PTI Communications ("PTIC") is the local exchange carrier ("LEC") in Sitka and Juneau and operates an affiliated cellular carrier on the wireline side of the AK-3 RSA. Alaska-3 interconnects to the landline network through PTIC's facilities. Alaska-3 argues that the FCC may preempt the Alaska PUC from requiring certification of cellular carriers or

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1/ *See* Alaska-3 Cellular LLC d/b/a Cellular One, Motion for Declaratory Ruling Concerning Preemption of Alaska Call Routing and Interexchange Certification Regulations as Applied to Cellular Carriers (filed September 22, 1995) ("Motion").

ordering cellular carriers to provide equal access to presubscribed interexchange carriers ("IXCs").

PTIC asserts that Alaska-3 must obtain certification from the Alaska PUC as an intrastate IXC to transmit CMRS calls carried within Alaska-3's RSA that would be intrastate toll calls if carried on the landline network.[2/] PTIC's claims reflect a fundamental misunderstanding of federal and state jurisdiction over CMRS providers.

The Joint Commenters have a vital interest in ensuring that their stake in personal communications services ("PCS") and CMRS ventures be subject to uniform and pro-competitive federal interconnection policies.[3/] In this regard, both Cox and Comcast have filed *ex parte* comments, incorporated herein by reference, that expand on the significance of the Commission's jurisdictional role in the development of a competitive telecommunications marketplace.[4/]

2/ PTIC also claims that, as an intrastate IXC, Alaska-3 is obligated to provide equal access to permit a landline customer to route these CMRS calls to a presubscribed IXC. The Commission is considering whether to impose equal access obligations upon cellular carriers and other CMRS providers in a pending rulemaking proceeding. *See Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, RM 8012, 9 FCC Rcd 5408 (1994).

3/ Cox sought and was awarded one of three pioneer preferences for development of PCS, and a Cox subsidiary holds the A Block license for the Los-San Diego Metropolitan Trading Area ("MTA). Cox also won the B Block license for the Omaha, Nebraska MTA in a recent auction, and another of Cox's subsidiaries is a partner in WirelessCo, L.P. and PhillieCo, L.P., the licensees of 30 broadband PCS licenses in MTAs including New York, San Francisco-Oakland-San Jose, Detroit and Dallas-Ft. Worth. Comcast's subsidiary is also a partner in the WirelessCo, L.P. joint venture. Another of Comcast's subsidiaries is the A Block cellular licensee in the Philadelphia Metropolitan Statistical Area ("MSA") and surrounding MSAs.

4/ *See Ex Parte* Letter from Comcast Cellular Communications, Inc., to William F. Caton, Federal Communications Commission, filed in GN Docket No. 93-252 & CC Docket No. 94-54 (October 3, 1995); *Ex Parte* Letter from Cox Enterprises, Inc., to William

II. BACKGROUND

The Communications Act contains a dual structure for regulation of interstate and intrastate wireline and wireless common carrier communications. Section 2(a) of the Act confers upon the Commission exclusive jurisdiction over "all interstate and foreign communication by wire or radio . . . ."[5/] Under this jurisdictional mandate, the Commission is empowered to regulate common carriers engaged in interstate communications. Section 2(b) limits Commission jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with "intrastate" communications.[6/]

The Commission's jurisdiction over communications provided by mobile radio is entirely different. The Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") fundamentally realigned the balance of federal/state jurisdiction that existed over mobile radio services prior to 1993. Congress amended Section 2(b) and Section 332 in the Budget Act and reclassified all mobile services as either CMRS or private mobile radio services ("PMRS").[7/] The states no longer enjoy authority to regulate rates and entry of CMRS providers.[8/] Rather, state authority is limited to overseeing the "terms and conditions" [9/]of

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F. Caton, Federal Communications Commission, in CC Docket No. 94-54 (October 16, 1995); *Ex Parte* Letter from Cox Enterprises, Inc., to William F. Caton, Federal Communications Commission, in GN Docket No. 93-252 (November 2, 1995).

5/ *See* 47 U.S.C. § 152(a).

6/ *See* 47 U.S.C. § 152(b).

7/ *See* 47 U.S.C. § 332(d).

8/ *See* 47 U.S.C. § 332(c)(3). The Budget Act provides that states can petition the FCC for authority to reestablish substantive regulation over CMRS providers if they can demonstrate that CMRS has become a substitute for traditional landline telephone service for a substantial portion of the public within the state and competition does not exist. *See*

CMRS and PMRS services provided to end users, as well as traditional authority related to zoning and siting matters. The Budget Act thus eliminated state substantive jurisdiction over wireless common carrier services.[10]

III. THE COMMISSION MUST RULE THAT IT HAS EXCLUSIVE JURISDICTION OVER "INTRASTATE" CMRS INCLUDING LEC INTERCONNECTION ARRANGEMENTS

Congress enacted the Budget Act to establish CMRS as a uniform, federalized service in furtherance of a nationwide "network of networks." The Joint Commenters concur with Alaska-3's conclusion that federal law supersedes state authority over CMRS services. The Joint Commenters further believe, however, that the language of the Budget Act, in particular the amendment to Section 2(b), itself provides a more compelling basis than the preemption analysis advanced in the Alaska-3 Motion that the Commission has exclusive and mandatory jurisdiction over "intrastate" as well as "interstate" aspects of commercial mobile radio services.

Congress amended Sections 2(b) and 332 of the Act to vest this Commission with exclusive jurisdiction over rates, terms and conditions of intrastate CMRS interconnection between CMRS providers and LECs without regard to aspects of the service formerly defined as jurisdictionally "intrastate." The statutory amendments made by the Budget Act

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H.R. Rep. No. 103-213, 103d Cong., 1st Sess., at 493 (1993) ("Conference Report").

9/ *See* discussion at note 17 *infra*.

10/ The Budget Act expands the Commission's jurisdiction to occupy the field, rather than maintaining prior limits on or restricting the Commission's jurisdiction over intrastate rates for mobile services. *See* McCaw Cellular Communications, Inc., Reply Comments, in PR Docket No. 94-105 (filed March 3, 1995) ("McCaw Reply Comments").

support the Commission's grant of Alaska-3's Motion to exercise jurisdiction over the formerly "intrastate" aspects of LEC-to-CMRS interconnection.

Unless we assume that Congress was engaging in some meaningless exercise, the amendment to Section 2(b) to incorporate Section 332 as an exception to state regulation must serve a purpose. With regard to provisions of Title II other than the consumer protection-related Sections 223 through 227, Congress did not amend Section 2(b). The Budget Act amendment of Section 2(b) supersedes *Louisiana PSC* with regard to state jurisdiction over intrastate CMRS.[11/] Congress amended the initial clause introducing Section 2(b) as a *direct limitation* on the main clause of Section 2(b), which *Louisiana PSC* termed a "rule of statutory construction." The adverbial clause limiting the main clause of Section 2(b), as most recently amended by the Budget Act, provides:

> *Except as provided in sections 223 through 227 of this title, inclusive, and Section 332* . . . , nothing in this chapter shall be construed to apply or to give the Commission jurisdiction [over intrastate telecommunications].[12/]

Section 332 grants the Commission sole authority over *all* CMRS rates and entry issues. Accordingly, the plain language of Sections 2(b) and 332, as amended by the Budget Act,

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11/ The Commission in *Louisiana PSC* argued that it had authority under Section 220 of the Act to preempt state depreciation regulations. In rejecting this argument, the Court observed that the main clause in Section 2(b) — ". . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to" intrastate telecommunications — is itself a "rule of statutory construction . . . . [that] presents its own specific instructions regarding the correct approach to the statute which applies to how we should read [Section] 220." *See Louisiana Public Serv. Comm'n v. FCC,* 476 U.S. 355, 373, 376-7 n.5 (1986) ("*Louisiana PSC*").

12/ *See* 47 U.S.C. § 152(b) (1995) (emphasis added).

reserves exclusive jurisdiction over all substantive regulation of CMRS to the Commission, without regard to their former characterization as jurisdictionally bifurcated.

A. The Budget Act Federalized CMRS Services and Formerly "Intrastate" LEC-to CMRS Interconnection by Amending Sections 2(b) and 332 of the Act.

Section 2(b), as amended, dictates that the substantive provisions of Section 332 will determine the extent of the Commission's jurisdiction over CMRS regardless of whether the service provided is jurisdictionally mixed. Section 332, in turn, as amended by the Budget Act, grants the Commission sole authority to regulate all interstate and "intrastate" rate and entry aspects of CMRS.

As the Supreme Court explained in *Louisiana PSC*, "the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency."[13/] The statutory design of Section 332(c)(3)(A), which removes state authority over rate and entry regulation of CMRS "[n]otwithstanding sections 152(b) and 221(b) of this title . . .",[14/] shows that states lack authority to regulate intrastate CMRS rates and entry "notwithstanding" and, therefore, "without regard" to any residual jurisdiction a state may claim under Section 2(b) of the Act. That statutory interpretation is consistent with the amendment of Section 2(b) to exclude CMRS services from any claim of state jurisdiction notwithstanding that CMRS services may have had intrastate characteristics under Section 2(b) prior to the Budget Act amendments.

13/ *See id.*, 476 U.S. at 374.

14/ *See* 47 U.S.C. § 332(c)(3)(A).

Section 332 also authorizes the Commission to approve or reject state petitions to grandfather existing CMRS rate regulation or apply for new CMRS rate regulation authority, thereby lending further support to the Joint Commenters' reading of the Budget Act's jurisdictional provisions.[15/] By preempting state rate and entry authority over CMRS, Section 332 empowered the Commission to "occupy the field" of substantive CMRS regulation.[16/]

The Budget Act's use of the phrase "terms and conditions" to delimit the scope of state authority not otherwise preempted does not encompass the phrase "terms and conditions" of interconnection. In preserving state authority over some but not all "terms and conditions" of CMRS, the Budget Act limits state authority to "such matters as customer billing information and practices and billing disputes and other consumer protection matters."[17/] The Commission retains exclusive jurisdiction to ensure that "terms and

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15/ The Commission has sole authority over CMRS unless and until a state files a petition for rate regulation authority and the Commission approves it. The statute grants the Commission exclusive authority to determine whether a state has sufficiently proven either that market conditions with respect to CMRS fail adequately to protect intrastate CMRS subscribers from discriminatory or unjust and unreasonable rates or that CMRS is a "replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within [a] State." This provision (and the Commission's rules) plainly contemplate that a state must demonstrate that CMRS service has replaced or become a substitute for a substantial number of landline telephone subscribers and there is no competition before a petition could be granted. *See* Conference Report, at 493; 47 C.F.R. §20.13. Even if a state has sufficiently justified grant of a petition for rate regulation authority, the duration of such authority may be limited "as the Commission deems necessary."*See* 47 U.S.C. § 332 (c)(3)(A). In either case it is the Commission that is required to assess state petitions.

16/ *See Louisiana PSC*, 476 U.S. at 369 (emphasis added) (citing *Rice et al. v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)); *see also FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990); *Gade v. Nat'l Solid Wastes Management Ass'n.*, 112 S.Ct.2374, 2384-5 (1992); *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir. 1994).

17/ *See* H.R. Rep. No. 103-111, 103d Cong., 1st Sess., at 260, *reprinted in* 1993 U.S.C.C.A.N. 378, 588 (1993) ("House Report").

conditions" of interconnection between LECs and CMRS providers are just, reasonable and nondiscriminatory.[18]

B. The Budget Act Confers Jurisdiction Upon the Commission To Regulate Rates, Terms and Conditions of LEC-to-CMRS Interconnection

The Commission retains exclusive jurisdiction to ensure the availability of interconnection between LECs and CMRS providers on a just, reasonable and nondiscriminatory basis. Section 332(c)(1)(B), both by its own terms and when read in conjunction with the amendment to Section 2(b), vests the FCC with authority over interconnection between LECs and CMRS providers regardless of their physically "intrastate" nature.[19]

The exception and savings clause in the second sentence of Section 332(c)(1)(B) does not affect the Commission's jurisdiction concerning interconnection. The plain meaning of the second sentence of Section 332(c)(1)(B) is that the FCC's jurisdictional authority to order physical interconnection under Section 201(a) remains the same — neither "limits" nor "expands" — *except* with regard to interconnection requests from CMRS providers; *i.e.*,

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18/ See 47 U.S.C. §§ 151, 154(i), and 201.

19/ Section 332(c)(1)(B) provides:

> Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

See 47 U.S.C. § 332(c)(1)(B). Section 201(a) authorizes the Commission to order common carriers to establish physical interconnections with other carriers, upon request.

with regard to interconnection requests from CMRS providers, the Commission's jurisdiction is expanded as described in Section 332(c)(1)(B).[20] Accordingly, the Budget Act conferred exclusive authority upon the Commission to direct CMRS substantive regulation.

The conclusion that Section 332(c)(1)(B) expands the FCC's authority with regard to CMRS and LEC-to-CMRS interconnection to include formerly "intrastate" concerns is buttressed by the legislative history. The specific jurisdictional provisions of Section 332, according to the House Report, are intended:

> . . . [t]o foster the growth and development of mobile services that, *by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.*[21]

According to the House Report's discussion of Section 332(c)(1)(B), "[t]he Committee considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network."[22] Section 332(c)(1)(B) thus puts CMRS interconnectors and any LECs or other common carriers involved in such interconnection under exclusive federal jurisdiction with regard to interconnection requests.[23]

20/ Section 332(d), moreover, delegates to the Commission authority to define what constitutes "interconnected service." The "public switched network" also is to be "defined by regulation by the Commission." *See* 47 U.S.C. § 332(d).

21/ *See* House Report, at 260 (emphasis added).

22/ *See id.*

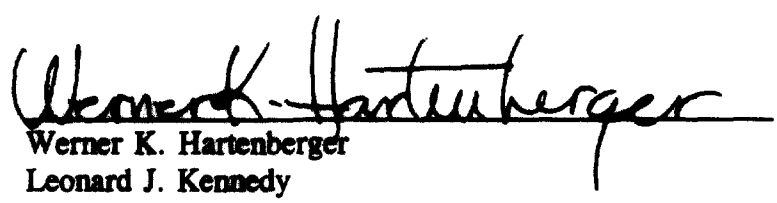
23/ The forbearance provisions of Section 332(c)(1)(A) also confirm that the overall design of the statute is to vest jurisdiction over CMRS with the Commission. By authorizing the Commission to forbear from enforcing any provision of Title II, except Sections 201, 202 and 208, Section 332(c)(1)(A) places with the Commission the responsibility to determine whether enforcement of any common carriage regulation is necessary "to ensure that the charges, practices, classifications, or regulations for or in connection with [CMRS] are just

IV. CONCLUSION

Accordingly, for the reasons stated above, the Joint Commenters support grant of Alaska-3's Motion for Declaratory Ruling. By clarifying that the Budget Act invests jurisdiction over "intrastate" CMRS matters with the Commission, grant of the Alaska-3 Motion is in the public interest. The Commission should therefore order that the Alaska PUC's authority to regulate the rates, terms and conditions of CMRS-to-LEC interconnection has been displaced by federal regulation.

Respectfully submitted,

COMCAST CORPORATION
COX ENTERPRISES, INC.



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December 1, 1995

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and reasonable and are not unjustly or unreasonably discriminatory." *See* 47 U.S.C. § 332(c)(1)(A)(i).

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