

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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Amendment of the Commission's Rules) WT Docket No. 96-6
To Permit Flexible Service Offerings)
in the Commercial Mobile Radio Services)

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REPLY COMMENTS OF OMNIPOINT CORPORATION

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SUMMARY

Omnipoint strongly supports the Commission's tentative conclusion that PCS licensees should be allowed to offer the full range of mobile and fixed services. The Commission has long been committed to flexible PCS rules, and a vast majority of commenters recognize that PCS operators and other CMRS licensees should be able to offer any type or amount of fixed or mobile service demanded by customers, including fixed wireless local loop service. The Commission should permit the proportion of fixed to mobile wireless services to be determined by technological and market forces, not by regulation. Indeed, some customers already employ their mobile units for fixed uses independent of CMRS licensees. The provision of fixed services in response to market demand should not alter the status of PCS operators as CMRS licensees, nor should the states be allowed to regulate PCS services that otherwise would be outside the scope of their authority merely because those services are fixed.

Fixed wireless services will offer substantial benefits to the public. These services can provide an alternative to landline carriers in the local loop, advancing the goal of competition set by both the Commission and Congress. In many cases, fixed wireless service may offer consumers a cheaper and more reliable alternative to inside wiring. As a number of commenters suggested, fixed wireless can also provide data transport and information services in competition with landline LECs, and CMRS licensees may be able to reach customers not served at all by existing technology.

Omnipoint shares the view expressed by many commenters that consideration of universal service issues in this proceeding would needlessly delay the regulatory reform needed to permit PCS operators to compete effectively with wireline LECs. These issues are best left for the ongoing universal service proceeding, where they can be addressed in a comprehensive fashion.

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Omnipoint Corporation, by its attorneys, files these reply comments in response to the many comments filed in the above-captioned proceeding.

The Commission's tentative conclusion that PCS operators should be permitted to offer fixed wireless services, including local loop service in direct competition with landline local exchange carriers,¹ is amply supported by the comments submitted in this proceeding. Omnipoint urges the Commission to allow PCS operators to establish the mix and type of fixed services offered in response to market demand. The Commission should amend 47 C.F.R. § 24.3 to permit use of PCS spectrum for any mix of fixed and mobile services.

The mix of fixed and wireless services offered should be allowed to fluctuate in response to changes in consumer preferences, operators' marketing and deployment plans, levels of competition in different markets, and technological innovation. Likewise, the types of service offered should be determined by the market, and nothing in any existing statute or regulatory precedent requires the Commission to intervene by subjecting PCS operators to a new set of rules when they provide fixed services. The Commission should forbear from imposing or allowing additional regulation of PCS licensees based on the

¹ Notice of Proposed Rulemaking, WT 96-6, at ¶ 1 (released January 26, 1996) ("NPRM").

kinds of service they offer. The Commission will have more than sufficient opportunity to revisit the issue of appropriate regulatory controls if and when PCS threatens to displace incumbent telecommunications service providers in substantial parts of significant markets.

DISCUSSION

I. PCS Includes Both Fixed and Mobile Services

The current regulatory definition of PCS² has left operators uncertain as to the permissible mix and variety of fixed services they may make available, particularly in the local loop.³ The PCS operators most seriously affected by this uncertainty are small carriers who must adopt a conservative approach for fear of being drawn into expensive disputes over their service offerings. The "chilling effect" of this ambiguity may deter investment in PCS operators and deprive the public of the opportunity to take advantage of cheaper or more convenient alternatives to conventional telecommunications service options.⁴ The Commission should clarify that its rules allow PCS operators to provide the full range of fixed services.

² 47 C.F.R. § 24.3 ("PCS licensees may provide any mobile communications service on their assigned spectrum. Fixed services may be provided only if ancillary to mobile operations. Broadcasting as defined by the Communications Act is prohibited.").

³ NPRM ¶ 5.

⁴ The continuation of this regulatory uncertainty is contrary to the Commission's goal of promoting small business participation in the development of PCS. As the Chief of the Wireless Bureau recently pointed out, "small businesses play an important role in creating job opportunities and innovation in the marketplace. The U.S. Small Business Administration reports that in 1990, small business accounted for more than 90 percent of all new jobs created. Small businesses also spend more per capita on research and development to develop new products more efficiently than large firms." Opening Remarks by Michele C. Farquhar at "Auctions '96," sponsored by the Office of Communications Business Opportunities, March 15, 1996.

A. The Definition of PCS Should Be Flexible Enough to Give Consumers the Benefit of Competitive Service

The Commission has consistently encouraged PCS operators to provide both fixed and mobile services, including local loop service in competition with the LECs' traditional wireline monopoly.⁵ This willingness to provide flexibility has characterized the Commission's approach even under the current "ancillary to mobile" regime, which purports to limit fixed services offered by CMRS licensees. The commenters in this proceeding are in agreement that the Commission should not put limits on the mix of fixed versus mobile services offered by CMRS licensees.⁶ A consensus in favor of allowing the market to decide the best use of available CMRS spectrum is evident, and this approach seems most consistent with the Telecommunications Act of 1996's ("1996 Act") emphasis on deregulation and competition.⁷

⁵ See, e.g., First Report and Order, ET 92-9, 7 FCC Rcd. 6886, 6886 (1992) (noting with approval PCS experiments in "mobile facsimile, wireless private branch exchange, and wireless area networks"); Second Report and Order, GEN Docket No. 90-314, 8 FCC Rcd. 7700, 7702 (1993) (emphasizing that "[t]he regulatory plan embodied in the new PCS rules will provide licensees . . . the maximum degree of flexibility to introduce a wide variety of new and innovative telecommunications services and equipment"); Notice of Proposed Rulemaking, WT Dkt. No. 96-59, FCC 96-119 at ¶ 26 (released March 20, 1996) (FCC tentatively concludes that rapid auction of PCS D, E, and F licenses will promote competition "at the earliest possible point . . . with wireline service providers.").

⁶ See, e.g., Comments of Bell Atlantic, at 2; Comments of Cellular Telecommunications Industry Association, at 3-4; Comments of Air-Touch Communications and US WEST NewVector Group, at 3; Comments of Personal Communications Industry Association, at 6-7. The few commenters to express any reservations whatsoever about removing all restrictions on the mix of fixed and mobile service do not question the validity of the basic idea that market forces should ordinarily determine the mix. For example, Motorola cautions that noncommercial mobile services, such as public safety, must be maintained, but goes on to say that market allocation is generally a sound approach. Comments of Motorola at 8-9. Omnipoint shares Motorola's concerns about public safety, but believes that it is unnecessary in the commercial context to preserve a share of CMRS spectrum for mobile uses.

⁷ As Omnipoint argued in its initial comments in this proceeding, allowing PCS operators to mix mobile and fixed services as the market demands is consistent with the Commission's

Additionally, as Omnipoint and other commenters have pointed out, the distinction between fixed and mobile service is eroding as customers put mobile technology to fixed uses.⁸ For example, PCS and cellular consumers can use their mobile phones for fixed uses if they decide that traditional wireline telephones are less convenient.⁹ In light of these practical considerations, the Commission should simply make it clear that CMRS licensees can provide any mix of fixed and mobile service.

B. Consumers Would Benefit From the Availability of a Wide Range of Fixed Wireless Services

The Commission and Congress have both made development of effective competition in the provision of telecommunications services, particularly in the local loop, a top priority.¹⁰ Omnipoint notes that a diverse group of commenters recognize the benefits of allowing CMRS licensees to offer fixed wireless services. Service providers and state regulators alike acknowledge the potential for fixed wireless to reduce prices and

overall approach to CMRS. *See Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, First Report*, 10 FCC Rcd. 8844, 8872 (1995). ("The rise of competitive forces . . . has been made possible . . . by the . . . deliberate dismantling of an old regulatory structure, which emphasized service classifications, and the creation of a new structure whose hallmark is flexibility, with regulation focused on . . . stimulating competitive forces").

⁸ See, e.g., Comments of American Mobile Telecommunications Association at 4-5; Comments of Telular at 5.

⁹ In addition, Omnipoint agrees with Pacific Telesis that no prior coordination of home base stations should be necessary under the Commission's rules. Comments of Pacific Telesis at 4-5.

¹⁰ *NPRM* at ¶ 8; 47 U.S.C. § 253 (1996). See also, Remarks By Michelle Farquhar, Acting Chief, Wireless Telecommunications Bureau to NARUC Committee on Communications, February 28, 1996 ("[The]Wireless Bureau is placing a special priority on . . . establishing the policy steps to facilitate . . . local exchange competition.").

increase the variety of service choices available to consumers.¹¹ The result, many commenters agreed, will be more efficient use of spectrum and the introduction of competition in markets once thought to be “natural” monopolies, such as the local loop.¹² In some cases, fixed wireless may bring basic telecommunications services to areas not served at all by traditional technologies.¹³

In addition, fixed wireless local loop can offer a more efficient and flexible alternative to inside wiring of houses and buildings. Large office buildings could be provided with access to the PSTN for less than the cost of wiring the entire building for telephone, facsimile and computer access. Older homes with inferior wiring could be more efficiently upgraded with fixed wireless service. Fixed wireless also could give consumers access to high speed data transport capability and other advanced services without the expense of installing a completely new wired local telecommunications backbone.

Given these benefits, providing CMRS licensees more flexibility to offer fixed services is undoubtedly in the public interest.

C. The Commission Should Continue to Regulate PCS Operators Who Offer Wireless Local Loop or Other Fixed Services Under Existing CMRS Rules

Not surprisingly, a number of wireline LECs want the Commission to erect regulatory roadblocks to discourage CMRS licensees from providing fixed wireless local

¹¹ See, e.g., Comments of Rural Cellular Association at 2-3; Comments of Alliance of LEC-Affiliated Wireless Service Providers at 5-6; Comments of Commercial Internet eXchange at 2; Comments of New York State Department of Public Service at 1.

¹² See, e.g., Comments of NYNEX at 3-4; Comments of GO Communications at 4-5.

¹³ See, e.g., Comments of Motorola at 4 (suggesting that fixed wireless services could help broadband CMRS licensees who serve large areas with few population centers provide service to hard-to-reach areas); Comments of American Petroleum Institute at 4-7 (suggesting that fixed wireless technology may be the only way to provide telecommunications service to remote oil and gas exploration and drilling sites).

loop service.¹⁴ While the 1996 Act removes any basis for arguing that providers of fixed wireless services should be flatly prohibited from competing for wireline LEC customers,¹⁵ these LECs seek to accomplish the same end by persuading the Commission that CMRS licensees must be subjected to an elaborate regulatory framework that was designed to protect consumers from the monopoly power of incumbent LECs. The LECs rely principally on the argument that the goal of regulatory parity embodied in the 1996 Act and previous Commission precedents dictates that all local loop service providers be covered by the same set of regulations.¹⁶ This argument seems reasonable on its face, but closer examination reveals that it lacks any foundation in the relevant statutes and is directly contrary to the interests of consumers and the public at large in robust competition.

First, as the RBOCs' own wireless subsidiaries point out, by enacting a separate regulatory regime for CMRS in Section 332(c) of the Communications Act, Congress evinced an intent to allow CMRS to grow unimpeded by burdensome additional regulations.¹⁷ "Congress allowed Section 332(c)'s CMRS regulatory scheme to be replaced by a different scheme, but only where 'market conditions with respect to such

¹⁴ See, e.g., Comments of Bell South at 4 (arguing that wireless local loop service should be subject to state rate and entry regulation); Comments of Ameritech at 7 (arguing that wireless local loop service should be subject to regulations applicable to local exchange carriers); Comments of National Telephone Cooperative Association at 4 (wireless local loop service should be subject to rate regulation).

¹⁵ 47 U.S.C. § 253(a) (prohibiting barriers to entry into local exchange markets).

¹⁶ See, e.g., Comments of Bell South at 3-4; Comments of National Telephone Cooperative Association at 3; Comments of NYNEX at 6-9.

¹⁷ See, e.g., Comments of Bell Atlantic NYNEX Mobile at 6-7 (arguing that 47 U.S.C. § 332 requires the Commission to forbear from regulation of CMRS licensees as LECs until they become viable competitors in the market for local telephone service); see also, Comments of Airtouch Communications/US WEST New Vector Group at 7-8 (arguing that § 401(a) of the 1996 Act requires the Commission to eliminate restrictions on the provision of fixed services by CMRS licensees on the grounds that continued limits are not in the public interest).

services fail to protect subscribers . . . from . . . unreasonable rates,' or where such services are 'a replacement for land line telephone exchange service for a substantial portion' of such service in a state."¹⁸ The LECs provide no evidence that fixed wireless providers would threaten the ability of consumers to obtain service at reasonable rates or that CMRS has effectively replaced wireline service; indeed, as more PCS operators provide services comparable to those offered by wireline LECs, consumers' rates are likely to become more competitive.

Second, the Commission's existing policy establishes that fixed wireless services offered by CMRS licensees are to be regulated under the same rules as mobile services offered by those licensees. As the NPRM acknowledges, "[w]e established in the CMRS Second Report and Order that all auxiliary services provided by mobile service licensees would be considered in the definition of mobile services."¹⁹

Third, the 1996 Act specifically excludes CMRS licensees from the definition of local exchange carriers,²⁰ indicating that Congress intended not to subject CMRS operators who want to compete in the local loop to the same regulatory treatment as wireline LECs until such time as CMRS operators displace a significant part of local wireline service.²¹ The Act also expressly directs the Commission not to apply "any regulation or . . . provision of [the Act] to a telecommunications carrier or telecommunications service, or

¹⁸ *Id.* at 6-7 (quoting 47 U.S.C. § 332(c)(3)(A)).

¹⁹ NPRM at 19; *see also*, Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd. 1411, 1424-25 (1994); Second Report and Order, GN Docket No. 90-314, 8 FCC Rcd. 7700, 7747 (including local loop in description of PCS service).

²⁰ 47 U.S.C. § 3(44) ("local exchange carrier' . . . does not include a person . . . [who] is engaged in the provision of commercial radio service"); *cf.* 47 U.S.C. § 401(b).

²¹ *See* Comments of Bell Atlantic NYNEX Mobile at 6 ("there is no basis to consider changing the CMRS regulatory status of fixed service [C]hanging the regulatory status of fixed CMRS services would undermine both Congressional and Commission policy").

class of telecommunications carriers or telecommunications services” where forbearance from regulation would serve the public interest.²² Taken together, these provisions are convincing proof that Congress did not intend to elevate the principle of regulatory parity to the level of unquestioned dogma.²³ To the contrary, they show that Congress weighed the merits of regulating CMRS licensees in the same way as LECs when offering local loop service and decided against it. Regulatory parity is a means to ensure vigorous competition with incumbent providers of telecommunications service, and it must be applied with that end in mind.

Consequently, even if a presumption in favor of parity would otherwise require the Commission to apply Title II regulation to CMRS licensees who offer fixed wireless local loop service, the 1996 Act authorizes -- indeed, obligates -- the Commission to forebear if regulation is not necessary to protect consumers and forbearance would be consistent with the public interest. In the context of the RBOCs’ virtual monopoly over local telephone service, forbearance from regulating CMRS providers as LECs is not just a reasonable exception to the general principle of regulatory parity, it is absolutely necessary to achieve the 1996 Act’s overarching goal of robust competition.

As Omnipoint noted in its initial comments, the statutory definition of mobile services includes any service that is commercial, interconnected with the public switched network, available to the public, and requires a license under the Commission's PCS

22 47 U.S.C. § 401(a).

23 The 1996 Act contains no provision requiring regulatory parity, and the LECs have not pointed out any language in the statute that could be construed to create such a requirement. If anything, the 1996 Act establishes a scheme of regulation tilted against the incumbent local monopoly and in favor of local competitors. While Section 332 envisioned parity among CMRS licensees, this has nothing to do with differences in the regulatory treatment of LECs, who are dominant carriers in the local loop, and regulation of CMRS operators, who are not. The repeated reference to a principle of regulatory parity in the 1996 Act, *see, e.g.*, Comments of National Telephone Cooperative Association at 12, amounts to wishful thinking on the part of incumbent LECs who would prefer to preserve their monopoly position.

rulemaking.²⁴ Fixed wireless services meet this definition, so they are properly deemed CMRS offerings.

Of course, as several commenters noted, the Commission is always free to revisit the issue of what regulatory scheme is appropriate for fixed wireless local loop service if and when CMRS licensees become effective competitors to LECs providing the same service over wireline networks. Some of the RBOCs seem to concede, at least implicitly, that additional regulation of fixed wireless services would be unjustified unless and until CMRS becomes a genuine competitive threat in the local loop, as opposed to merely representing a theoretically feasible alternative to landline LECs with few actual offerings in the market.²⁵

Several commenters cautioned that the Commission must take care to avoid unnecessary regulations that might prevent fixed wireless service from emerging as a viable competitor in the local loop.²⁶ Allowing PCS operators to compete in the local loop without assuming a new set of regulatory burdens is entirely consistent with the Commission's specific statutory obligations as well as its general duty to protect the public interest.

D. State Regulation of Fixed Wireless Service Provided by CMRS Licensees Should Be Preempted

State regulators and wireline LECs maintain that PCS operators who provide fixed wireless service should be subject to state regulation. This issue is largely subsumed in the discussion above about whether fixed services should be covered by existing CMRS rules,

24 47 U.S.C. § 153(n)(3).

25 *See, e.g.*, Comments of Bell Atlantic at 3.

26 Comments of Ad Hoc Rural Cellular Coalition at 6.

because Section 332(c)(3) provides for preemption of state and local CMRS rules.²⁷ As long as fixed wireless services remain within the definition of CMRS, then state regulation is presumptively barred.²⁸ Under Section 332(c)(3)(A), a state must first petition the Commission for permission to assert regulatory authority before attempting to regulate CMRS operators, requiring a showing that CMRS has achieved significant market penetration.²⁹ The record contains no evidence indicating that such a showing could be made.

II. PCS Operators Should Be Allowed to Offer Any Fixed or Wireless Services

Omnipoint contends that PCS licensees should be allowed to provide any local telecommunications and information services the market demands, including Internet access, electronic funds transfers, remote monitoring, and other services that become available as technological innovation occurs. The deployment of fixed wireless services, including information services, will benefit consumers enormously. It will allow much-needed competition for local voice telephony services and provide data and information

²⁷ 47 U.S.C. § 332(c)(3)(A) (providing that states may regulate CMRS operators only where CMRS substitute for wireline LECs in substantial portions of the state).

²⁸ See Comments of Celpage at 7-8. To the extent any ambiguity exists with respect to state authority to place additional burdens on CMRS operators, the Commission should exercise its preemption authority under Section 253 of the 1996 Act. This provision bars state regulation that prohibits or has the effect of preventing any entity from providing any telecommunications service. The Commission has the power to preempt any state or local law that amounts to an entry barrier in violation of Sections 253(a) and (b), and if it concludes that some fixed services are not within the statutory definition of CMRS, it should use this authority to ensure that state regulation does not prevent PCS operators from making new fixed services available to their customers.

²⁹ 47 C.F.R. § 20.13(a) (rules specifying standards for state petition to re-regulate intrastate rates); See *Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers*, **Report and Order**, PR Dkt. No. 94-106, 10 FCC Rcd. 7025 (1995) (denying state's request for authority to regulate CMRS operators; in passing § 332, Congress evinced clear preference for market forces -- not state regulation -- to shape development of CMRS).

services to businesses and individuals who previously had limited choices of local access providers.

The Commission should clarify that its existing rules allow CMRS licensees to provide fixed services.³⁰ As the NPRM noted, the Communications Act gives the Commission the authority to “[p]rescribe the nature of service to be offered by each class of licensed stations,”³¹ and to “encourage the larger and more effective use of radio in the public interest.”³² Nothing in the Communications Act limits the Commission’s power to assign spectrum for more than one type of use, and the statute directs the Commission to encourage carriers to provide new services to the public.³³

The commenters in this proceeding overwhelmingly endorse the proposition that CMRS licensees should not be excluded from offering any particular type of fixed service,³⁴ and Omnipoint strongly agrees.

III. Universal Service Issues Should Be Addressed in a Separate Proceeding

Omnipoint notes that a wide range of commenters agree that the Commission should defer consideration of universal service issues. Any attempt to address universal service in this proceeding would only serve to frustrate rapid deployment of PCS networks.

³⁰ Omnipoint opposes the suggestion of Orion Telecom for the Commission apply 47 C.F.R. § 22.323 to all CMRS operators providing fixed services. Comments of Orion Telecom at 2. The safeguards embodied in that rule, *e.g.*, notice requirements and cross-subsidy prohibition, are unnecessary in the context of competitive fixed services offered by PCS operators. Further, for PCS operators, adoption of section 22.323 requirements would only substitute one vague term ("incidental") for another ("ancillary").

³¹ 47 U.S.C. § 303(b).

³² 47 U.S.C. § 303(g).

³³ 47 U.S.C. §157(a).

³⁴ *See, e.g.*, Comments of Pacific Telesis at 4; Comments of Century Cellnet at 2; Comments of SBC Communications at 3.

The Commission's rulemaking entitled "In the Matter of Federal-State Joint Board on Universal Service"³⁵ and related proceedings will amply address these matters. There is simply no reason for redundant treatment of universal service issues in this rulemaking.

IV. Wireline LECs Are Not Entitled to Regulatory Relief Based on the Commission's Forbearance From Regulating Fixed Wireless Services

A number of commenters warned that incumbent LECs may attempt to take advantage of any forbearance in regulating fixed wireless services by claiming that their "integrated" wireless and wireline networks are no longer subject to regulation under Title II or by the states on the grounds that they are CMRS operators.³⁶ Omnipoint agrees that the Commission should be careful to distinguish between CMRS licensees who have established wireline networks and those who do not so as to prevent the RBOCs who hold CMRS licenses from evading their regulatory obligations. The distinction between incumbent LECs and new competitors is recognized by the 1996 Act's special provisions,³⁷ and it is amply justified by the need to maintain existing rules on dominant carriers while avoiding undue burdens on new entrants in the market for local loop service.

CONCLUSION

A substantial majority of the commenters in this proceeding agree that the Commission should act quickly to clarify that PCS operators may offer fixed wireless service. The Commission should not limit the range or mix of fixed and mobile services, but instead should allow PCS operators to respond to market conditions. Because

³⁵ CC Docket No. 96-45, FCC 96-93 (released March 8, 1996).

³⁶ *See, e.g.*, Comments of Comcast at 5-7.

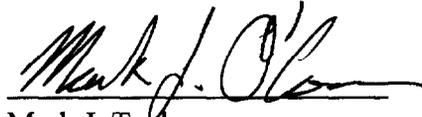
³⁷ *See, e.g.*, 47 U.S.C. §§ 251(c), 271 - 276 (imposing additional obligations on Regional Bell Operating Companies not imposed on non-incumbent local exchange carriers).

universal service involves complicated and controversial issues that will soon be addressed in a comprehensive rulemaking, the Commission should not let those issues stand in the way of a new era in the delivery of wireless services.

Respectfully submitted,

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