BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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Federal Communications Commission
Office of Secretary

In the Matter of	)	DOCKET FILE COPY ORIGINAL
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Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services	)	CC Docket No. 94-54

COMMENTS OF PRIMECO PERSONAL COMMUNICATIONS, L.P TO THIRD NOTICE OF PROPOSED RULE MAKING

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Summary

PrimeCo Personal Communications, L.P. ("PrimeCo") believes that wireless customers with a terminal capable of receiving service from a "foreign" network should have roaming access so long as the subscriber is a valid end user in good standing with his home carrier. The Commission's expansion of the cellular manual roaming requirement to all "covered" CMRS providers ensures that this result will occur. In addition, PrimeCo also recognizes that automatic roaming is an important feature for both wireless customers and their carriers. This notice of proposed rule making proposes the adoption of a rule requiring carriers to enter into agreements for the provision of "automatic" roaming However, notwithstanding the importance of this service, PrimeCo opposes the adoption of such a regulatory requirement for several reasons.

First, PrimeCo knows of no evidence to demonstrate that any carrier has unjustly or unreasonably discriminated against another carrier in the provision of, or charges for, automatic roaming. Indeed, what evidence there is suggests to PrimeCo that the current barriers to automatic roaming for new carriers are technical ones, arising from the lack of dual-mode telephones and a dearth of compatible networks on which to roam.

Second, even though customers and carriers value roaming capability, the early PCS entrants have enjoyed remarkable success without the ability to offer this service. Again, this leads PrimeCo to conclude that the problem the proposed rule is intended to solve has not been shown to exist.

Third, given that no evidence exists of widespread unjust or unreasonable behavior with regard to roaming agreements, the Commission's existing complaint procedure under section 208 remains a sufficient means for resolving any problem that may arise.

Finally, the imposition of an additional regulatory requirement in circumstances lacking any demonstration of either market failure or unreasonable conduct by FCC licensees is contrary to the de-regulatory and pro-competitive policies enacted into law in the 1996 Telecommunications Act. Moreover, mandating an automatic roaming rule as the wireless industry enters a period of profound change courts the risks of creating unwelcome and unintended consequences as well as saddling carriers and customers with unnecessary increased costs.

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PrimeCo Personal Communications, L.P. ("PrimeCo") offers the following comments on the Commission's third notice of proposed rule making[1] ("Third Notice") in the matter captioned above.

I. Background

This proceeding grows out of a broader undertaking by the Commission to evaluate the commercial mobile radio services ("CMRS") market as a result of revisions made to the Communications Act by Congress in the Omnibus Budget Reconciliation Act of 1993. In amending section 332 of the Act, Congress set out to replace the patchwork of regulation that had developed for mobile services over the years with a more uniform system that would still afford the FCC the flexibility to fashion appropriate levels of regulation for mobile providers.[2] Since the 1993 Act and the start of this proceeding,

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[1] *In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services,* CC Docket No. 94-54, *Second Report and Order and Third Notice of Proposed Rule Making* (August 15, 1996).
[2] *See,* 47 U.S.C. ¶¶ 203, 204, 205, 211, 212, 214, 303(n), 332.

Congress has passed a sweeping reform of the Telecommunications Act,[3] which contains additional policy direction to the FCC. Chief among these directives are the promotion of competition and reduction of regulation as a means of producing higher quality telecommunications services at lower prices, and the encouragement of rapid deployment of new telecommunications technologies.

This Third Notice continues the Commission's treatment of issues affecting the offering of CMRS while also soliciting new information to help the FCC fulfill the policy goals of the recent legislation. In earlier decisions, the FCC has considered the interconnection obligations of CMRS providers and the obligation of "covered" CMRS carriers to make resale capacity available.[4] The Third Notice focuses on roaming issues and seeks comment on questions related to the advisability of a proposed rule requiring carriers to enter into agreements for the provision of "automatic" roaming. For the reasons that follow, PrimeCo has concluded that an automatic roaming rule is unnecessary and should not be adopted.

II. Roaming Issues

A "roamer" is defined, under the Commission's rules, as a "mobile station receiving service from a station or system in the Public Mobile Services other than one to which it is a subscriber."[5] The *Second Report and Order* describes manual roaming as

> [T]he only form of roaming that is available when there is no pre-existing contractual relationship between a subscriber, or her home system, and the system on which she wants to roam. In order to make or receive a call, a manual roamer

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat.56 (1996).
[4] "Covered" CMRS carriers include cellular, broadband PCS, and certain specialized mobile radio carriers. *See, Third Notice* at ¶ 2.
[5] 47 C.F.R. § 22.99.

> must establish such a relationship. Typically, the roamer accomplishes this in the course of attempting to originate a call by giving a valid credit card number to the carrier providing service.[6]

In the *Second Report and Order*[7] of this proceeding, the Commission found that roaming is a common carrier service[8] and concluded that the public interest would be served by extending the existing cellular manual roaming rule to include "all CMRS licensees competing in the mass market for real-time, two-way voice services."[9]

In reaching this conclusion, the FCC declared that the obligation thus imposed upon these carriers extended no further than the duty to provide manual roaming service to any subscriber of these services who uses a handset technically capable of operating on the licensee's system. Licensees, then, are not required to modify their systems to accommodate any end user whatsoever, and the Commission has imposed no technical specification for roaming.

1. Automatic Roaming

Automatic roaming enables a subscriber to make or receive a call without taking any action other than turning on the telephone.[10] Some carriers whose systems abut one another have agreed to enhance automatic roaming by permitting a call in progress to continue uninterrupted as a subscriber drives from one system into the other.[11]

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[6] *Second Report and Order* at ¶ 5.
[7] *See,* n. 1 above.
[8] *Id. at* ¶ 10.
[9] *Id.* at ¶ 12.
[10] *Id.* at ¶ 6.
[11] Although the Third Notice does not intend for the term "automatic roaming" to include this call continuation enhancement, *see,* Third Notice, n. 12; the notice does seek additional information on this point. *Id.* at ¶ 25.

In the Third Notice, the Commission, in summarizing the two schools of thought regarding the need for an automatic roaming regulation, noted that "relatively few commenters advocated the need for regulation that would promote automatic roaming."[12] This was due in large measure to the lack of information available at that time, which was just after the initial broadband PCS auction but prior to the issuance of the licenses.[13] Nonetheless, some parties had argued then that regulatory intervention was needed to promote competition. Others, including PrimeCo, argued that the regulation of automatic roaming was unnecessary. The FCC now seeks to augment its record with additional comment on whether the adoption of an automatic roaming rule will serve the public interest.

PrimeCo believes that every subscriber with a terminal capable of receiving service from a "foreign" network should have roaming access so long as the subscriber is a valid end user in good standing with his home carrier.[14] Few or no wireless carriers will disagree with this proposition, although there is disagreement over the extent to which the FCC should insert itself into the process by which carriers come to terms among themselves for the provision of automatic roaming services.

Whether they use it or not, roaming, especially automatic roaming, is an important feature to many customers. It is also important to wireless carriers. For although it is not the sole basis upon which they compete, they sometimes rely upon roaming agreements to improve their "footprints." Yet, however important automatic roaming is for both wireless customers and their carriers, its importance is not of itself sufficient reason for

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[12] *Id.* at ¶ 15.
[13] *Ibid.*

imposing a new regulatory requirement mandating its provision. Some showing of harm to the public interest resulting from the failure of an efficient system for roaming to take root is required to justify treading upon the "pro-competitive, de-regulatory" principles[15] only recently enacted into law. That showing has not been made and no regulatory intervention in the market should occur to remedy mere speculative harms.

2. There Is No Need for Commission Action on Automatic Roaming.

It bears noting at the outset that automatic roaming agreements in the cellular world have produced few, if any, disputes. Moreover, there is to date no indication that cellular carriers will refuse such agreements with new carriers whose customers' equipment is capable of receiving service from a cellular network. Nor does any evidence exist that the new PCS carriers will themselves refuse to enter into automatic roaming agreements. Indeed, current indications are to the contrary.[16]

Cellular carriers have an incentive to accommodate new roamer traffic since these arrangements provide them with new sources of revenue. Notwithstanding this incentive, the suspicion remains that incumbent carriers will abusively deny automatic roaming arrangements with the new carriers out of a desire to reduce competition. However, as AT&T has shown, such behavior makes sense, if at all, only when both the A and B

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[14] The FCC's manual roaming rule ensures this result.

[15] Third Notice at ¶ 27.

[16] "Pacific Bell Mobile Services announced today that it has signed agreements that will allow subscribers of its new Personal Communications (PCS) to 'roam' onto PCS networks operated by four other carriers across the United States.
The roaming agreements are with APC, BellSouth Mobility DCS, Western Wireless, and Omnipoint. The four carriers won licenses in Federal Communications Commission auctions to provide PCS in markets that cover 80 million people." "Pacific Bell Mobile Service signs roaming agreements with four GSM-based carriers," *M2 Presswire* (19 September 1996). *See also,* "Proponents At PCS '96 Push GSM To Highlight Technology's Growth, Capabilities," *Communications Daily* vol. 16, No. 184; p.3 (20 September1996)

block cellular licensees in a market also hold cellular licenses in a PCS carrier's home market. This occurs but rarely.[17] Moreover, cellular carriers themselves have entered into roaming agreements with carriers whose markets overlap their own.[18]

3. No Evidence Exists To Support The Imposition Of An Automatic Roaming Rule.

The more cogent point is the evidence showing that the lack of any roaming capability whatsoever is not a bar to success for new carriers. The PCS system in Washington, D.C., Sprint Spectrum, was the first PCS system to go on line in the country. Sprint Spectrum currently offers no dual mode telephones[19] and its subscribers are unable to roam on other networks.[20] Notwithstanding these circumstances, Sprint Spectrum has added more than 100,000 subscribers to its system in less than one year of operation,[21] an enviable record of performance.

Indeed, the experience of Sprint Spectrum reveals that the greatest impediment to roaming for the new carriers is technical and not regulatory. PCS telephones, for a variety of reasons, are incompatible with existing cellular and ESMR systems. Until dual-mode phones are available (and accepted by the public), PCS subscribers will have no means of roaming on these networks. Furthermore, until other PCS networks compatible

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[17] Third Notice at ¶ 19.
[18] Such agreements typically exclude intra-system roaming.
[19] That is, a device capable of operating on either a cellular or PCS network.
[20] These comments are based upon a call made to Sprint Spectrum's customer service on 27 September 1996. The lack of roaming capability does not, to PrimeCo's knowledge, result from a denial of roaming by incumbent carriers, but rather from the lack of compatible, nearby systems on which Sprint's customers may roam.
[21] *Communications Daily,* vol. 16 no. 178 (12 September 1996) at p. 5. *See also,* "Did You Say Sprint Was No. 1?," *Business Week* (2 September 1996) (reporting on all of Sprint's results including the Washington network); "Sprint Spectrum Blasts Out of Starting Gate in Washington-Baltimore Market," *PR Newswire* (25 March 1996).

with a subscriber's home network are constructed, PCS customers will be similarly restrained in their ability to roam with a single-mode telephone. The proposed automatic roaming rule can have no effect on these operational and technical barriers to roaming.

A related concern touches upon "the likelihood of discrimination among wireless carriers belonging to partnerships, joint ventures, and other alliances among cellular carriers."[22] In part, this is a fear that such associations will unjustly deny automatic roaming agreements, or unreasonably discriminate in their provisions, to smaller competitors. Preliminarily, we can note that the antitrust laws contain powerful disincentives to combinations in restraint of trade, and additional FCC regulation is unlikely to increase compliance with these statutes. However, lurking behind the fear of blatantly illegal conduct is the worry that large associations created to provide nationwide service will enjoy insurmountable advantages over their smaller competitors. This fear is unfounded.

In the proceeding that created the rules for personal communications services, several parties argued that the FCC should issue nationwide PCS licenses.[23] Although the Commission declined to do so, it did observe that nationwide wireless networks could still be created through purchases made in the auctions, referring to its earlier proposal to allow larger PCS service areas if competitive bidding demonstrated that a larger service area would be a higher valued use.[24] Several entities paid handsome sums to pursue this strategy. They did this, in part, because they believed that broad coverage areas would, as

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[22] Third Notice at ¶ 20.

[23] *See generally, In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services,* GEN Docket No. 90-314, *Second Report and Order* (September 23, 1993) at ¶ 64 *et seq.*

[24] *Id.* at ¶ 78; n. 71.

the Commission had earlier suggested, "facilitate regional or nationwide roaming."[25] By contrast, the FCC saw the BTA markets as locally focused.

> The BTA area is representative of likely PCS markets in which local communications will take place. BTA service areas also offer important benefits in that they permit broad participation in the PCS market by firms of all sizes. For example, some potential PCS licensees may be interested in serving only their local areas, including smaller communities that are less economic to serve. By permitting broader participation, smaller service areas may produce a greater degree of technical and service innovation than would be expected from a few large firms. Such diversity may be an important benefit during the initial period of PCS implementation when the market and services are still being defined.[26]

None of this is meant to imply that the customers of smaller carriers should not be able to have automatic roaming because the Commission has, on the one hand, regarded large service areas as a potential spur to roaming development and, on the other hand, suggested that smaller areas would have a local focus. Rather, it shows that the Commission recognized the diverse factors influencing successful PCS offerings. Just as the smaller carriers may seek competitive advantage through innovative, local offerings, others may look to the geographic scope of their network as one means of differentiating themselves in the marketplace.[27] An automatic roaming rule will, by its uniform and mandatory nature, remove one of the factors that carriers may choose to rely upon in differentiating their product offerings and, consequently, lessen the technical and service innovation the FCC has tried to encourage.

Reliance upon roaming as a means of product differentiation should not reduce a carrier's incentive to enter into roaming agreements. There are several carriers planning

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[25] *Id.* at ¶ 72.
[26] *Id.* at ¶ 75.
[27] *See,* "AT&T Launching New Wireless Service," *Wall Street Journal* (October 2, 1996) at p.5.

to construct large regional or national wireless networks.[28] However extensive these networks, none of them will be ubiquitous and none of them will appeal to all customers. The refusal of any of these carriers to enter into roaming agreements will create an opportunity for its rivals to increase their revenues at its expense. So long as the wireless market remains competitive, as both the Commission and Congress have determined it should, the risk that any carrier can exert this kind of power in the market is checked by competitive forces.

4. Sufficient Safeguards Exist To Prevent Abuse of Roaming Agreements.

Even in the unusual case in which competitive forces fail to prevent abuse, sufficient regulatory authority exists for the Commission to take corrective action. The Commission has found that roaming is a common carrier service governed by sections 201(b) and 202(a) of the Act.[29] Consequently, a complaint for unjust or unreasonable discrimination in the provision of roaming service or the charges therefor can be lodged with the Commission under section 208.[30] Some carriers have objected to this procedure arguing that after-the-fact adjuducatory proceedings are unsatisfactory in these circumstances. PrimeCo does not agree.

In the first place, and as discussed above, there is no evidence of a widespread refusal among either new or incumbent, big or small carriers to refuse to enter into roaming agreements. What evidence does exist points to the contrary conclusion. In short, the

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[28] Aside from AT&T, Sprint, PrimeCo and its owners, NexTel, and NextWave have plans for national services. Several nationwide wireless services already exist for paging and mobile data. Note that while some of these networks may be sufficiently compatible with others to make voice-based roaming possible, it is not clear that other services offered by these carriers, like paging, messaging, data transmission, and the like, will be compatible and susceptible to automatic roaming arrangements.

problem for which the solution is proposed does not exist. Second, to the extent a problem may arise, existing regulation appears equal to its prompt resolution. There is no ground for supposing that the Commission's complaint procedures will become so clogged with roaming grievances as to be unfit to dispose of a complaint in a timely manner.

III. An Automatic Roaming Rule May Produce Undesirable Consequences.

Fraud is a significant problem in the wireless industry. Historically, criminals have breached the security of wireless networks as roamers. To combat this threat, the industry has spent millions of dollars to develop systems to verify subscribers. Notwithstanding these efforts, fraud continues to grow in its magnitude and in its sophistication. To handle this problem, wireless carriers need flexibility in the way they deal with roamers and with other carriers. The most efficient way to deal with someone who has broken into the network is to deny service. Sometimes this can be done by denying service to the offending caller, but other times it may require suspending service to a particular carrier.[31] Because an automatic roaming rule will establish a regulatory requirement and confer rights on third parties, it will necessarily reduce a carrier's flexibility to take precipitate and unilateral action to protect itself and its customers from fraud.

An automatic roaming rule also courts the risk of locking into place a sub-optimal roaming solution. For the moment, the wireless industry is dominated by the AMPS

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[29] Second Report and Order at ¶ 10.
[30] 47 U.S.C. § 208.
[31] "The Essential Expectation," *Cellular Business* Vol. 12, No. 9 (September 1995), p.76-82

standard, which all domestic cellular carriers adopted when their licenses were originally issued. Because all cellular systems used the same air interface, implementing roaming service became a relatively straightforward affair. However, more recent licensees are deploying digital technologies based upon several modulation schemes, including TDMA, CDMA, and an upbanded GSM standard. At the same time, cellular carriers have begun to convert their networks to digital technology as well, and they too are deploying different modulation technologies. Hence, there is no simple solution to making all of these networks compatible for roaming purposes.[32]

The solution most often proposed - dual mode telephones permitting operation on one system in the home market and on an AMPS system while roaming - is as yet untested in the market. Thus, while dual mode phones appear technically achievable, it remains to be seen if they will meet customers' needs and expectations. Dual mode phones may indeed be the solution customers want; but if they are not, adoption of an automatic roaming rule could have the adverse consequence of creating an artificial market for a product that a less regulated market might reject. Furthermore, should dual mode phones prove to be only a stop-gap rather than a permanent solution to the roaming problem, the existence of a regulatory requirement may unnaturally prolong the life cycle of the product. This would entail the spectrally inefficient maintenance of low-capacity analog AMPS channels in an environment dominated by high-capacity digital radio links.

Finally, an automatic roaming rule could frustrate policies that the Commission sought to promote in the PCS rules. In developing these rules, the FCC created a mix of

[32] Aside from the differences in the air interfaces, PCS, cellular, and ESMR each operate in different frequency bands and use different bandwidths for their channels.

license sizes, both in terms of the licenses' geographic extent and their spectrum allocation. The Commission felt that the smaller licenses would attract a diverse group of non-traditional carriers who would bring technical and service innovations to the industry.[33] An automatic roaming rule could subvert this policy if a new licensee were to construct a marginal system and then demand roaming on the overlapping MTA licensee's network as a means of providing network services to its customers. While PrimeCo does not believe that the newer carriers are any more disposed to shirk their responsibilities than are the incumbents, it does strike PrimeCo as counterproductive to establish an incentive that discourages new and improved services by allowing a licensee to become a "free rider" on the research and development of another carrier. It is for this reason that intra-system roaming agreements are disfavored among cellular carriers, and PrimeCo urges the Commission not to disturb this practice.

IV. The Disadvantages of an Automatic Roaming Rule Outweigh Its Benefits.

As the Third Notice observes, there are more than 1400 cellular systems. By the conclusion of the broadband PCS auctions, more than 2000 additional markets will have been licensed. When the ESMR markets potentially subject to an automatic roaming rule are added to this total, it becomes clear that the administrative burden associated with such a requirement is substantial. This burden will involve the increased legal and management expense involved in negotiating these agreements and resolving disputes arising under them. Extensive call detail and audit procedures will be needed to track the reve-

[33] *In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications*

nue due the serving carrier. All of these additional burdens, plus the necessary switch enhancements, will increase the settlement costs between carriers and more than likely overburden the industry's real time roamer exchange system.

More fundamentally, however, the proposed rule is at odds with the direction of telecommunications regulation. Beginning with the regulation of cellular service, the FCC has pursued a wireless communications policy marked by reliance upon competition and market forces as the key to effective development of new services and their widespread availability. This policy, which has now been enacted as the telecommunications public policy of the federal government,[34] has succeeded beyond what anyone could have expected when cellular service was first inaugurated more than a decade ago. To interfere in the roaming market now, especially when no evidence supports regulatory intervention, not only goes against the grain of long established Commission policy for wireless service, but also of the national policy for telecommunications. As the Third Notice itself points out:

> [I]mposing such a [roaming] requirement is inconsistent with our general policy of allowing market forces, rather than regulation, to shape the development of wireless services. Similarly, it could be viewed as at odds with Congress' goal in adopting the Telecommunications Act of 1996 of creating a "pro-competitive, deregulatory national policy framework" for the United States telecommunications industry.[35]

The Commission cannot rely upon the theoretical possibility of abuse or market failure as ground for regulatory action, since to do so creates a precedent justifying regulatory intervention in the market for any issue deemed of sufficient importance. Such a

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Services, GEN Docket No. 90-314, *Second Report and Order* (September 23, 1993) at ¶ 75.

[34] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat.56 (1996).

[35] Third Notice at ¶ 27.

philosophy justifies more - not less - regulation and is fundamentally at odds with the assumptions underlying the regulatory policy expressed in the Telecommunications Act of 1996.

V. Conclusion

PrimeCo strongly encourages the Federal Communications Commission not to adopt the proposed rule for automatic roaming. No demonstration of a failure of the market place to establish an efficient roaming system has been made. Indeed, what evidence is available for examination shows that the problems inhibiting new carriers from offering roaming service are technical ones and not the consequence of unjust or unreasonable discrimination by any group of FCC licensees. Furthermore, to create a regulatory requirement in circumstances lacking proof of market failure is contrary to the deregulatory and pro-competitive policy of the Telecommunications Act of 1996.

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