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

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Federal Communications Commission  
Office of Secretary

In the Matter of )  
)  
Amendment of the Commission's Rules )  
To Permit Flexible Service Offerings )  
in the Commercial Mobile Radio Services )

WT Docket No. 96-6

COMMENTS OF  
THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

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THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION**

The Personal Communications Industry Association ("PCIA")<sup>1</sup> respectfully submits its comments regarding the Commission's Further Notice of Proposed Rulemaking in the above-captioned proceeding.<sup>2</sup> In order to promote competition in the provision of a wide variety of telecommunications services, the Commission should exercise its broad jurisdiction over commercial mobile services and declare that both inter- and intrastate fixed CMRS is subject to the same federal regulatory treatment as other commercial mobile services.

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<sup>1</sup> PCIA is the international trade association created to represent the interests of both the commercial and the private mobile radio service communications industries. PCIA's Federation of Councils includes: the Paging and Narrowband PCS Alliance, the Broadband PCS Alliance, the Specialized Mobile Radio Alliance, the Site Owners and Managers Association, the Association of Wireless System Integrators, the Association of Communications Technicians, and the Private System Users Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

<sup>2</sup> *Amendment of the Commission's Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-283, 61 Fed. Reg. 45,336 (Aug. 29, 1996) ("*Report and Order*" and "*Further Notice*").

## I. INTRODUCTION AND SUMMARY

Throughout this proceeding, the Commission has sought comment on whether CMRS providers should be permitted to offer fixed services, and if providers are permitted to offer such services, how these services should be regulated. In its earlier comments, PCIA joined many other commenters in showing "strong support for allowing the provision of fixed wireless services by licensees operating in the CMRS bands."<sup>3</sup> PCIA therefore applauds the Commission's well reasoned conclusion that "allowing service providers to offer all types of fixed, mobile, and hybrid services will allow CMRS providers to better respond to market demand and increase competition in the provision of telecommunications services."<sup>4</sup>

Regarding the regulation of fixed CMRS, PCIA strongly urges the Commission to determine affirmatively that both inter- and intrastate fixed CMRS are subject to federal regulation as commercial mobile service. There are a number of legal and policy reasons for the Commission to take such action. Preliminarily, the Commission has broad jurisdiction over virtually all aspects of CMRS regulation under Section 332(c) of the Communications Act of 1934, as amended ("1934 Act"), the inseverability doctrine, and the Telecommunications Act of 1996 ("1996 Act"). The Commission's Section 332(c) jurisdiction stems from Congress' desire to create a uniform, federal regulatory framework for both interstate and intrastate CMRS service offerings. Such federal preemption was made

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<sup>3</sup> *Report and Order*, ¶ 1.

<sup>4</sup> *Id.*

especially clear by the fact that in passing Section 332(c), Congress also enacted a conforming amendment to Section 2(b) that expressly federalized the regulation of intrastate CMRS.

In addition, the inseverability doctrine, as set forth in *Louisiana Public Service Commission v. FCC*,<sup>5</sup> represents another jurisdictional basis under which the FCC is empowered to regulate both interstate and intrastate fixed CMRS offerings. The inter- and intrastate aspects of fixed CMRS regulation are inseverable because most CMRS networks encompass multistate areas. Therefore, even if technically feasible, it would be inordinately expensive to classify any individual call as either intrastate or interstate, and it would be difficult if not impossible to comply with the possibly inconsistent regulations of a number of different states. Finally, by expressly maintaining federal jurisdiction over CMRS regulation, and failing to classify CMRS providers as local exchange carriers, the 1996 Act reinforces this jurisdictional analysis.

Given this broad jurisdictional mandate, the FCC should follow the command of Sections 332(d) and 3(27) of the Communications Act, and explicitly classify all fixed CMRS -- whether offered on an intra- or interstate basis -- as subject to regulation as commercial mobile service. Such a definitive regulatory classification of fixed CMRS will better serve the public interest than the Commission's proposed rebuttable presumption of mobile service regulation. Without a clear idea of the type of regulation to which they will be subject, businesses will be hesitant to provide fixed CMRS. This likely will lead to reduced

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<sup>5</sup> 476 U.S. 355, 370 (1986) ("*Louisiana PSC*").

innovation in service offerings and inadequately addressed public needs -- a result that is entirely inconsistent with the Commission's goals in this proceeding.

PCIA urges the Commission to clearly determine that fixed CMRS should be federally regulated as a commercial mobile service. However, if the Commission opts instead to regulate any fixed wireless service provided by a CMRS provider as CMRS until such time that the service constitutes a substitute for landline telephone exchange service in a substantial portion of a state, it should proceed cautiously in altering the regulatory treatment of fixed CMRS. Specifically, CMRS is unlikely to become such a substitute for landline service in the near future. Further, when and if CMRS assumes such a role in local telephony, the entire competitive and regulatory landscape is likely to have changed. Therefore, the Commission should defer making any decision on how to regulate fixed CMRS until this service has assumed the required level of substitutability for landline service.

**II. THE COMMISSION HAS PLENARY JURISDICTION OVER VIRTUALLY ALL ASPECTS OF CMRS REGULATION UNDER SECTION 332(c), THE INSEVERABILITY DOCTRINE, AND THE 1996 ACT**

In its comments and reply comments on the initial Notice of Proposed Rulemaking in this proceeding,<sup>6</sup> PCIA noted that, since 1993, the Commission has had plenary jurisdiction

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<sup>6</sup> *Amendment of the Commission's Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, Notice of Proposed Rulemaking, 11 FCC Rcd 2445 (1996).

over virtually all aspects of CMRS regulation under Section 332(c)<sup>7</sup> and the inseverability doctrine,<sup>8</sup> and that the Telecommunications Act of 1996 reinforces this jurisdictional analysis.<sup>9</sup> Pursuant to this broad, three-pronged jurisdictional grant, PCIA urged the Commission to subject both fixed and mobile CMRS, whether offered on an intrastate or interstate basis, to federal regulation comparable to that applied to mobile CMRS.

First, with the 1993 addition of Section 332(c) to the 1934 Act, and its conforming amendment to Section 2(b),<sup>10</sup> Congress deliberately chose a federal regulatory framework to apply to all CMRS. Because CMRS offerings, "by their nature, operate without regard to state lines . . . ,"<sup>11</sup> such services were specially exempted from the dual federal and state regulatory regime originally established to govern interstate and intrastate services. Congress' intent was to create a "[f]ederal regulatory framework governing the offering of all commercial mobile service."<sup>12</sup>

If CMRS carriers nonetheless are subject to multiple layers of regulation based on the make-up and location of their service offerings at any given point in time, Congress' goal of

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<sup>7</sup> See PCIA Comments at 8-9; PCIA Reply Comments at 6-8.

<sup>8</sup> See PCIA Comments at 9-11; PCIA Reply Comments at 8-9.

<sup>9</sup> PCIA Reply Comments at 9-10.

<sup>10</sup> "Except as provided in . . . section 332 . . . nothing in this Act shall be construed to apply or to give the Commission jurisdiction . . . [over] intrastate communication service." 47 U.S.C. § 152(b) (emphasis added).

<sup>11</sup> H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993).

<sup>12</sup> H.R. Rep. No. 213, 103rd Cong., 1st Sess. 490 (1993) ("*Conference Report*") (emphasis added).

achieving regulatory parity and uniformity in rate and entry regulation would be thwarted. Moreover, CMRS carriers' ability to add value to their mobile service offerings by marketing a menu of services, including fixed wireless loop service, would be severely restricted. Such an inability to offer these innovative services would be contrary to the Commission's stated goals in this proceeding.<sup>13</sup>

In attempting to refute this Section 332 argument, several parties in this proceeding have asserted that all local loop services must be subject to comparable regulation, or else the Commission is promoting regulatory discrimination based on technology.<sup>14</sup> Congress, however, has directed in Section 332 that CMRS be subject to federal regulation as described above. Arguments about technology-based discrimination ignore the congressional mandate. In its *First Report and Order* in CC Docket 96-98, the Commission acknowledged that Section 332 differentiates CMRS providers from other carriers.<sup>15</sup> In addition, in other contexts and under other sections of the Communications Act, the Commission has concluded

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<sup>13</sup> See *Report and Order*, ¶ 3 ("By giving CMRS providers greater flexibility to provide these fixed services, whether separately or in combination with mobile services, we establish a framework that will stimulate wireless competition in the local exchange market, encourage innovation and experimentation in development of wireless services, and lead to a greater variety of service offerings to consumers").

<sup>14</sup> Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") Comments at 2, 3-6, 9-10; Pacific Telesis Group Comments at 2-3; Worldcom, Inc. Comments at 7-10.

<sup>15</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, ¶ 1025 (Aug. 8, 1996) ("*Local Competition Report and Order*") ("We note that Section 332 generally precludes states from rate and entry regulation of CMRS providers, and thus, differentiates CMRS providers from other carriers").

that different types of carriers providing similar services may warrant different levels of regulation.<sup>16</sup>

Second, the inseverability of intrastate and interstate CMRS offerings supports federal jurisdiction. While Section 332(c)(3)(A) of the Communications Act imposes no prohibition on state regulation of "other terms and conditions" of commercial mobile services, that jurisdiction -- like all state jurisdiction over telecommunications -- remains subject to the "inseverability" doctrine. This doctrine, developed by the Supreme Court in *Louisiana PSC*, grants the FCC authority to preempt conflicting state rules where the Commission could not "separate the interstate and the intrastate components of [its] asserted regulations."<sup>17</sup> Where "compliance with both federal and state law is in effect physically impossible," federal law must prevail.<sup>18</sup>

There are a number of economic and technical reasons why the interstate and intrastate portions of CMRS regulation cannot be severed. Preliminarily, many commercial mobile services are offered over multistate service areas, including Major Trading Areas for broadband PCS<sup>19</sup> and the Department of Commerce's Economic Areas for wide-area SMR.<sup>20</sup>

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<sup>16</sup> See, e.g., 47 U.S.C. § 251's distinctions between the interconnection obligations of incumbent LECs and the interconnection obligations of LECs.

<sup>17</sup> *Louisiana PSC*, 476 U.S. at 376 n.4.

<sup>18</sup> *Id.* at 368.

<sup>19</sup> *Amendment of the Commission's Rules To Establish New Personal Communications Services*, Second Report and Order, 8 FCC Rcd 7700, 7733 (1993) ("*Broadband PCS Order*").

SMR.<sup>20</sup> For example, a site located in one state may provide service to users physically located in another state. Because they utilize multistate service areas, these CMRS carriers do not keep track of whether calls within a service area are intrastate or interstate. Even if it were technically feasible to monitor this data, it would be extremely expensive to do so. Such expenses would raise the retail price of wireless services, thereby making them less competitive with respect to wireline services.

Further, the radio transmitters, backhaul links, and switching equipment for many CMRS networks are spread out over a number of states. This is especially true given the increased use of new, high-capacity tandem switching equipment that routes wireless calls within large multistate areas. Finally, a carrier would incur substantial regulatory costs if it were required to comply with a number of different state regulatory regimes for a single multistate CMRS network.

Third, state regulation of CMRS offerings is impermissible under the 1996 Act. The FCC's proposal to subject fixed services offered by CMRS carriers to the same regulatory scheme as their mobile service offerings is consistent with the competitive policies recently adopted in this Act. Section 253(a) of the 1996 Act states that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." As any state entry or rate regulation would violate Section 253(a) by effectively

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<sup>20</sup> *Amendment of Part 90 of the Commission's Rules To Facilitate Future Development of an SMR System in the 800 MHz Frequency Band*, 11 FCC Rcd 1463 (1995).

prohibiting the provision of fixed services by CMRS carriers, it would be subject to preemption pursuant to Section 253(d). Moreover, the 1996 Act specifically preserved the preemption provisions of Section 332(c)<sup>21</sup> and excluded CMRS providers from the definition of "local exchange carrier."<sup>22</sup> Thus, the Telecommunications Act of 1996 reaffirms Congress' intent that federal regulation supersede state law with respect to CMRS, however defined.

**III. PURSUANT TO THIS JURISDICTION, THE COMMISSION SHOULD DEFINITELY DETERMINE THAT FIXED CMRS IS TO BE REGULATED LIKE ALL OTHER CMRS**

PCIA agrees with the Commission's determination that "ancillary, auxiliary, and incidental services offered by CMRS providers fall within the statutory definition of mobile service, and are subject to CMRS regulation."<sup>23</sup> In addition, however, the Commission should determine that all inter- and intrastate services offered by CMRS providers -- including fixed services -- should be regulated as CMRS. As described in the previous section, such a determination is well within the Commission's general jurisdictional authority under both Section 332(c) and the inseverability doctrine. Further, Sections 3(27) and 332(d)

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<sup>21</sup> See 47 U.S.C. § 253(e) ("Nothing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers").

<sup>22</sup> 47 U.S. § 153(44). See also *Local Competition Report and Order*, ¶ 1004 ("We are not persuaded by those arguing that CMRS providers should be treated as LECs, and decline at this time to treat CMRS providers as LECs").

<sup>23</sup> *Further Notice*, ¶ 48.

of the Communications Act explicitly authorize the FCC to regulate fixed CMRS as commercial mobile service.

Section 332(d)(1) defines "commercial mobile service" as "any mobile service (as defined in section 3) that is provided for profit and makes interconnected service available . . . to the public."<sup>24</sup> Section 3(27) goes on to define "mobile service" as including "any service for which a license is required in a *personal communications service* established pursuant to the proceeding entitled 'Amendment of the Commission's Rules To Establish New Personal Communications Services,' or any successor proceeding."<sup>25</sup>

Taken together, the plain language of these sections defines PCS as a commercial mobile service. Therefore, all fixed and mobile services offered by PCS licensees must be subject to regulatory treatment as CMRS. In addition, this section grants the Commission substantial latitude to define the term "mobile service," given the statute's reference to "any successor proceeding." In the *Broadband PCS Order*, the Commission utilized this regulatory latitude by giving PCS providers permission to offer a wide variety of fixed and mobile services. Specifically, the Commission defined "Personal Communications Services" as "[r]adio communications that encompass mobile and ancillary fixed communication services that provide services to individuals and businesses and can be integrated with a variety of competing networks."<sup>26</sup>

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<sup>24</sup> 47 U.S.C. § 332(d).

<sup>25</sup> 47 U.S.C. § 153(27) (emphasis added).

<sup>26</sup> *Broadband PCS Order*, 8 FCC Rcd at 7713.

Consistent with the Commission's statutory mandate to subject all CMRS licensees to similar regulatory treatment,<sup>27</sup> since PCS is to be regulated as CMRS, then so too should paging and covered SMR services. In particular, the Commission has previously determined that all CMRS is "substantially similar" because of existing inter-service competition or the potential for future inter-service competition.<sup>28</sup> Therefore, messaging and covered SMR providers, like PCS providers, should be permitted to offer fixed services that are regulated as CMRS.

However, instead of definitively determining that all fixed and mobile services offered by CMRS providers will be subject to CMRS regulation, the Commission "propose[d] to establish a rebuttable presumption that any wireless service provided under a CMRS provider's license would be considered to come within the definition of CMRS and consequently regulated as CMRS."<sup>29</sup> Under the Commission's proposal, any interested party could file a challenge to the presumption that a particular offering is CMRS.<sup>30</sup>

Such a regulatory scheme would create substantial uncertainty for service providers, and is therefore not in the public interest. Applicable regulatory and jurisdictional requirements clearly are factors taken into account by a service provider before undertaking a new offering. Carrier decisions to introduce new service offerings are carefully reached after

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<sup>27</sup> See 47 U.S.C. § 332(c)(1)(A).

<sup>28</sup> *Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services*, Third Report and Order, 9 FCC Rcd 7988, 7996 (1994).

<sup>29</sup> *Further Notice*, ¶ 53.

<sup>30</sup> *Id.*, ¶ 54.

weighing all potential costs, including possible regulatory costs and risks. A change in the regulatory structure -- whether at the federal or state level -- after analyses have been made based on a different set of assumptions could render the service no longer feasible.

Moreover, the uncertainty resulting from the Commission's proposed rebuttable presumption may be assessed as setting the risks at too high of a level to justify a carrier launching an innovative fixed service.

In addition, even where a CMRS operator prevails in response to a challenge, it will be forced to expend resources to obtain that goal. The Commission also will be required unnecessarily to consume its limited resources in such a proceeding. As a result, if the Commission's proposal is implemented, it can be expected that CMRS licensees will be less likely to engage in some fixed service offerings, the CMRS marketplace will be less responsive to consumer demand, and the Commission's goals in this proceeding will be unfulfilled. Thus, the Commission should promulgate rules that categorically state that all fixed services offered by CMRS providers will be regulated as commercial mobile service.

**IV. ALTERNATIVELY, THE COMMISSION SHOULD DEFER ANY DETERMINATION TO ALTER THE REGULATION OF FIXED CMRS UNTIL SUCH CMRS SERVES AS A SUBSTITUTE FOR LANDLINE TELEPHONE EXCHANGE SERVICE FOR A SUBSTANTIAL PORTION OF THE COMMUNICATIONS WITHIN A STATE**

The Commission also sought comment on its proposal to "regulate any fixed wireless service provided by a CMRS provider as CMRS until such time that the service constitutes a

substitute for land line telephone exchange service in a substantial portion of a state."<sup>31</sup>

Should the Commission give consideration to this approach instead of issuing the clear determination described above, the Commission should bear in mind that CMRS is not likely to reach this level of substitutability for some time to come. Because of the rapidly changing nature of the telecommunications environment, the Commission should defer any action on altering fixed CMRS regulation until such time as CMRS constitutes a substitute for land line telephone exchange service.

Such a regulatory scheme would be consistent with Congress' intent to free CMRS from state regulation under Section 332(c). In discussing the phrase "such [CMRS] service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State,"<sup>32</sup> the portion of the Conference Report associated with the adoption of Section 332(c)(3)(A) stated:

[T]he Conferees intend that the Commission should permit States to regulate radio service provided for basic telephone service if subscribers have *no* alternative means of obtaining basic telephone service. If, however, several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of this service, it is not the intention of the conferees that States should be permitted to regulate these competitive services simply because they employ radio as a transmission means.<sup>33</sup>

Thus, Congress clearly contemplated an extremely limited role for the states in regulating commercial mobile service.

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<sup>31</sup> *Id.*, ¶ 56.

<sup>32</sup> 47 U.S.C. § 332(c)(3)(A)(ii).

<sup>33</sup> *Conference Report* at 493 (emphasis added).

In this context, it is important to note that CMRS will not become a substitute for landline local exchange service in any state for some time to come. As the Department of Justice has pointed out in this proceeding, "wireline local loop competition is only at an incipient stage."<sup>34</sup> Moreover, an examination of the level of CMRS substitutability for local exchange service must be done on a statewide basis. CMRS licensee provision of service to a single high rise office building in a metropolitan area in no way represents the level of substitutability that should raise any questions as to whether states should be permitted to regulate fixed CMRS service. In addition, the terms of the *Conference Report* suggest that if service is available from competing CMRS providers, then the states would continue to be foreclosed from regulating CMRS.

The Telecommunications Act of 1996 dramatically accelerated the pace at which the telecommunications marketplace is changing. By the time (if ever) fixed CMRS becomes a substitute for land line telephone exchange service in a substantial portion of state, the Commission may conclude that the marketplace does not warrant imposition of regulation beyond that applied to mobile CMRS. There certainly is no reason for the Commission to attempt to anticipate a regulatory scheme that may not be relevant for years. Instead, the Commission should defer any action on evaluating whether to alter the regulation of fixed CMRS until CMRS has reached the prescribed level of substitutability.

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<sup>34</sup> United State Department of Justice Comments at 3.

**V. CONCLUSION**

The Commission is to be commended for allowing CMRS providers to offer all types of fixed, mobile and hybrid services. However, in order to encourage a greater number of entities to offer fixed communication services, the Commission should categorically state that fixed inter- and intrastate CMRS is subject to federal regulation as commercial mobile service. Making such a regulatory classification is well within the FCC's jurisdiction under Sections 2 and 332 of the 1934 Act, the inseverability doctrine, and the 1996 Act.

Respectfully submitted,

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