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

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In the Matter of	)	
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Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services	)	
	)	
Biennial Regulatory Review - Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations	)	
	)	
Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers	)	WT Docket No. 98-100
	)	
Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers	)	GN Docket No. 94-33
	)	
GTE Petition for Reconsideration or Waiver of a Declaratory Ruling	)	MSD-92-14
	)	

To: The Commission

COMMENTS ON THE NOTICE OF PROPOSED RULEMAKING

Respectfully submitted,

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By: _____

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SUMMARY

In its Comments, AMTA asserts that the public interest and the wireless telecommunications industry will be served if the FCC reevaluates the regulatory obligations imposed on wireless providers. The Association explains that traditional Title II common carrier regulation is not needed to protect the interests of consumers in the competitive wireless marketplace. Specifically, AMTA urges the FCC to reconsider the scope of the criterion "to the public" in the definitions of both CMRS and telecommunications carriers, and suggests that the FCC instead rely on the "covered SMR" definition already adopted in the E-911 proceeding to delineate between two-way CMRS and PMRS operators and to define telecommunications carriage.

The Association further recommends that, if the FCC declines to revisit these definitions, then it should exercise the forbearance authority granted by Congress pursuant to Section 10 of the Act. The Comments describe the traditionally competitive two-way communications environment produced by regulatory provisions that favored multiple operators in each geographic area. They also explain that the Association's members historically had been classified as private carriers, not subject to Title II obligations, and that this status was altered by Congress to promote regulatory parity with perceived common carrier competitors rather than to redress any record of unjust or discriminatory practices on the part of the affected operators. To the extent new Section 10 relies for forbearance on a showing that regulation is not needed to prevent such behavior, to protect consumers, or to promote competition, the statutory test for forbearance seemingly has been satisfied.

AMTA also describes the cost to small businesses, and their customers, of complying with these myriad regulatory responsibilities, most of which are appropriate, if at all, only for those wireless carriers capable of providing meaningful competition in local exchange service. The Association explains that the customers on these systems are not general consumers seeking an alternative to or extension of their local telephone service. Rather, they are businesses or government entities with a primary need for relatively low-cost two-way dispatch radio service, with perhaps an ancillary desire for technically unsophisticated mobile telephone service.

Finally, AMTA concludes that FCC actions in recent years already have produced an unprecedented degree of regulatory parity that will not be disturbed by equally judicious Commission use of its forbearance authority. Moreover, the Comments note that Section 10 does not include maintenance of regulatory symmetry as part of its forbearance test. Therefore, unless the FCC were to determine that a diminution in parity would result from targeted forbearance, and that this change further would permit unjust or discriminatory behavior on the part of some class or classes of carriers, or that it would deprive consumers of necessary protection or otherwise reduce competition, it cannot properly form the basis for Commission denial of an otherwise acceptable forbearance request.

The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association"), in accordance with Section 1.415 of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations, respectfully submits its Comments on the Notice of Proposed Rulemaking in the above-identified proceeding.[1] The Notice requests comment on issues relating to legislative directives to the Commission to forbear from applying certain regulations to Commercial Mobile Radio Service ("CMRS") providers generally, or to particular CMRS classes or individual licensees specifically if enumerated conditions have been satisfied. AMTA welcomes this opportunity to examine the intent of Congress in crafting these statutory directives and the potential impact of forbearance on CMRS operators, their customers, and the public interest.

I. INTRODUCTION

1. AMTA is a nationwide, non-profit trade association dedicated to the interests of the specialized wireless communications industry. The Association's members include trunked and conventional 800 MHz and 900 MHz Specialized Mobile Radio ("SMR") service operators, licensees of wide-area SMR systems, and commercial licensees in the 220 MHz and 450-512 MHz bands.

2. AMTA's members had been classified as private carriers prior to the 1993 amendments to the Communications Act and the Commission's subsequent rulemaking defining the scope of the CMRS industry.[2] As such, they were regulated as private, rather than common

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[1] Memorandum Opinion and Order and Notice of Proposed Rulemaking, WT Docket No. 98-100 (rel. July 2, 1998) ("Notice" or "NPR").

[2] See, Omnibus Budget Reconciliation of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312, 392 ("1993 Act") and Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411 (1994)("CMRS 2nd R&O").

carrier, licensees, and were not subject to the panoply of regulations traditionally applied to entities with common carrier status.

3. Since Congress replaced the heretofore common carrier/private carrier delineation with a CMRS versus Private Mobile Radio Service ("PMRS") distinction in 1993, and, more critically, since the Commission first invited comment on the universe of entities that should be classified as CMRS, AMTA consistently has urged the FCC to focus its analysis on the specific competitive objectives Congress was attempting to foster. AMTA has asked the Commission to reconsider the scope of its CMRS definition. Alternatively, the Association has suggested that the goal of regulatory parity does not dictate a "one size fits all" regulatory framework in light of the multiplicity of service offerings within the commercial mobile wireless community. Fundamental differences in system capacity, operational characteristics, and subscriber orientation, among other factors, should guide the Commission in its assessment of the regulatory environment in which various system types should operate. To the extent that the instant Notice presents an opportunity for the FCC to revisit these core issues, and to consider them in light of the statutory imperatives in the 1996 Act,[3] AMTA is pleased to offer its comments on these matters.

II. BACKGROUND

4. For decades, the commercial telecommunications industry in this country consisted of two, distinctly different components. The wireline side was created as a monopoly provider

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (West Supp. 1997)("1996 Act").

of both local loop and long distance service, for the most part within a single corporate entity.[4] By contrast, the wireless side of telecommunications typically was characterized by a multiplicity of smaller service providers, each of which was authorized to utilize a limited number of frequencies at specific geographic locations. Some were engaged in two-way radio dispatch service, others provided paging, and some offered mobile telephone communications.

5. The genesis of these components is significant. To the extent that universal access to the public telephone network was viewed as a national priority, and service was available only through a single, monopoly provider within each community, a consumer-oriented, protective approach to regulation was appropriate, perhaps essential. The monopoly local telephone company could not be left to its own devices vis-a-vis its captive audience subscribers. A regulatory scheme that mandated reasonable, non-discriminatory service terms and conditions, as well as other obligations and proscriptions, was needed to substitute for the marketplace rigors that are introduced naturally by competition.

6. The same was not true for mobile services which, for the most part, were characterized from the outset by high levels of competition. The regulatory environment for

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[4] See, United States v. AT&T, 552 F. Supp. 131 (D.D.C. Cir. 1982), aff'd sub. nom. Maryland v. United States, 460 U.S. 1001 (1983). The original action was an antitrust suit filed in the U.S. District Court for the District of Columbia in November, 1975. Id. In the suit, the Department of Justice sought an injunction to stop AT&T's monopolistic activities and AT&T's divestiture of the Bell Operating Companies ("BOCs"), Bell Labs, and Western Electric. David A. Irwin, Court Decisions: AT&T/Dept. of Justice Settlement, Telecommunications Reg. Mon., Nov. 1988, at 2-15. The case resulted in a settlement between the DOJ and AT&T known as the 1982 Consent Decree. Id. The 1982 Consent Decree was later modified and affirmed by Judge Harold H. Greene, and became known as the Modified Final Judgment ("MFJ"). The MFJ modified a 1956 consent decree limiting AT&T to regulated common carrier services. United States v. Western Electric Co., Civil Action No. 17-49, C.A. 82-0192 (D.D.C. Cir. 1956); also, MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.D.C. Cir. 1977).

private carrier systems, both those that utilized non-exclusive, shared channels and those in bands where a degree of channel exclusivity was available, was designed to encourage the participation of multiple operators in each area.[5] The FCC's rules dictated that robust competition would result by limiting the number of frequencies entities could acquire in a market and by adhering to strict construction requirements. Traditional common carrier wireless systems, primarily paging providers, also operated in a multi-player marketplace, but because they were labelled common carriers, they were subject to certain regulatory obligations that should have been superfluous in a competitive marketplace environment.

7. The 1993 amendments to the Communications Act, whereby the commercial wireless community became classified as either CMRS or PMRS,[6] represented an effort to

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[5] Unless specifically provided for by the Commission, frequencies assigned to land mobile stations are available on a shared basis only and will not be assigned for the exclusive use of any licensee. 47 C.F.R. § 90.173. However, even in bands where channel exclusivity was possible, competition was promoted by FCC Rule. For example, former Rule Section 47 C.F.R. § 90.739(a) provided that no Phase I 220 MHz licensee could be authorized to operate a station in a particular category within 40 miles of an existing system authorized to that licensee in the same category unless the licensee could demonstrate that the additional system was justified on the basis of its communications requirements. The FCC repealed this provision last year. Fourth Report and Order, PR Docket No. 89-552, 12 FCC Rcd 13453 (1997). The Commission had previously eliminated the comparable 40-mile rule for 800 MHz and 900 MHz commercial SMR licenses in the CMRS Third Report and Order. Third Report and Order, 9 RCC Rcd 7988, 8082 ¶ 1992 ("CMRS 3rd R&O"); see also, 47 C.F.R. § 90.627(b). In the 470-512 MHz band, the Commission requires a licensee to demonstrate that an assigned frequency pair is at full capacity before it may be assigned a second or additional frequency pair. 47 C.F.R. § 90.313(c).

[6] Congress replaced the common carrier and private radio definitions with two newly defined categories of mobile services: commercial mobile radio service ("CMRS") and private mobile radio service ("PMRS"). CMRS is defined as "any mobile service (as defined in section 3(n)) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." 1993 Act § 332(d)(1), 47 U.S.C. § 332(d)(1). PMRS means "any mobile service (as defined in section 3(n)) that is not a commercial mobile service or the functional equivalent of a commercial mobile service". Id, § 332(c)(3), 47 U.S.C. § 332(c)(3). See, 47 C.F.R. §§ 20.3,

resolve two developing issues relating to the wireless services. First, Congress recognized that certain private carrier systems were functionally and operationally indistinguishable from their common carrier counterparts, but the two services were governed by different regulatory schemes. This anomaly was particularly striking in the paging context where private commercial and common carrier systems often used identical equipment and competed directly for identical customers. The concept of regulatory parity dictated that these differences be reconciled.[7] The legislation left to the FCC the task of deciding which wireless offerings fell within the statutory definitions of CMRS and PMRS respectively. However, in recognition of the already competitive nature of the wireless industry, Congress also authorized the FCC to forbear from application of many traditional common carrier obligations to entities reclassified as CMRS if

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20.7 and 20.9.

[7] There also was concern on the part of the cellular industry, and the nascent PCS industry, that certain SMR licensees, most notably Nextel Communications, Inc. f/k/a Fleet Call, Inc. ("Nextel"), potentially might pose a competitive threat while retaining private carrier status. Unlike the paging example, Nextel's status as a private carrier was far from the sole regulatory factor that distinguished it from cellular and PCS. At that time, SMR licensees, including Nextel, were subject to site-specific licensing, frequency loading and other requirements not applicable to the cellular or PCS services.

the FCC was able to make the findings required under newly-adopted Section 332(c)(1).[8] As the FCC noted:

> By taking these steps, Congress acknowledged that neither traditional state regulation, nor conventional regulation under Title II of the Communications Act, may be necessary in all cases to promote competition or protect consumers in the mobile communications marketplace.[9]

8. At the same time, it was becoming increasingly apparent that certain wireless services, notably cellular, the incipient Personal Communications Service ("PCS") systems, and enhanced SMR ("ESMR") offerings, had the potential to compete, not only with one another, but with monopoly local telephone providers in satisfying basic telecommunications requirements. Thus, to the extent these systems enjoyed comparable spectrum availability and technical/operational capabilities, regulatory parity required that they have comparable regulatory rights and responsibilities. Additionally, to the extent that they also might provide meaningful competition in the provision of local exchange service, thereby helping to move it from a

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[8] (c) Regulatory Treatment of Mobile Services. --

(1) Common Carrier Treatment of Commercial Mobile Services --

(A) A person engaged in the provision of service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this Act, except for such provision of title II as the Commission may specify by regulations as inapplicable to that service or person. In prescribing or amending any such regulations, the Commission may not specify any provision of section 201, 202, or 208, and may specify any other provision only if the Commission determines that --

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

1993 Act § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A).

[9] CMRS 2nd R&O at ¶ 14.

monopoly to a competitive marketplace, the public interest supported a regulatory environment that would permit them to grow into the obligations appropriate for that environment.

9. This issue was addressed directly in the 1996 Act which had as one of its primary objectives the further promotion of competition in the provision of local telephone service whether by wireline or wireless telecommunications providers.[10] The legislation directed that local telephone companies provide competitors with access to their networks under certain conditions, thereby forcing open control over bottleneck facilities. In anticipation of the development of a competitive marketplace, Congress expanded the FCC's Section 332(c)(1) forbearance authority in new Section 10 of the 1996 Act.[11] This provision requires, rather than

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[10] The 1996 Act adopted the following relevant definitions:
- "telecommunications carrier" as "any provider of telecommunications services...A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services..." 1996 Act at § 3(44); 47 U.S.C. § 3(44).
- "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Id. at § 3(46); 47 U.S.C. § 3(46).
- "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Id. at § 3(43); 47 U.S.C. § 3(43).
- "common carrier" or "carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy... Id. at § 3(43); 47 U.S.C. § 3(43).

Thus, both interconnected and non-interconnected providers of communications for hire are classified as "telecommunications carriers"; while only interconnected wireless communication providers for hire are classified as CMRS. In both cases, only entities "that provide service to the public or to such classes of users as to be effectively available to the public" are included in the definition.

[11] Section 10. Competition in Provision of Telecommunications Service

(a) Regulatory flexibility. -- Notwithstanding Section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if

permits, the FCC to forbear from applying any Title II requirement[12] upon a determination that

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the Commission determines that --

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive Effect To Be Weighed. -- In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for Forbearance. -- Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a). The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation. -- Except as provided in Section 251(f), the Commission may not forbear from applying the requirements of Section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State Enforcement After Commission Forbearance. -- A State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying under subsection (a). 1996 Act § 10.

[12] The Commission in the CMRS Notice of Proposed Rulemaking explained:
The Communications Act, as it was adopted in 1934, applied traditional American public utility regulation to communications common carriers. Under Title II, common carriers must offer service generally and upon reasonable request (section 201(a), apply only reasonable rates and charges (Section 201(b)), and make no unreasonable discrimination in service (Section 202). Carriers are required to file tariffs listing their rates and regulations (section 203) and may be subject to requirements to obtain authorizations for extensions of lines or

the test set out in Section 10 has been satisfied, and it extends forbearance authority beyond CMRS carriers to include all telecommunications carriers.[13]

10. The FCC previously solicited comments on its Section 332(c)(1) forbearance authority,[14] but had not finalized its decision in that proceeding prior to enactment of the 1996 Act. The instant Notice requests comment on whether a different forbearance analysis should be applied under Section 10 than the Commission had developed for Section 332(c)(1) evaluations.[15] It also seeks input on particular statutory or regulatory requirements as to which forbearance would be appropriate in light of either the Section 10 or Section 332(c)(1) test, or both.[16] Further, the Notice asks specifically whether there are "types of providers for which application of a particular statutory or regulatory provision will either pose undue costs or yield no benefits to the public."[17] Finally, the Notice queries what impact forbearance might have on efforts to promote regulatory parity.[18] The Association is pleased to comment on each of these issues.

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termination of service (Section 214), file annual reports (Section 219), and conform to Commission prescribed accounting and depreciation requirements (Section 220). Notice of Proposed Rule Making, GN Docket No. 93-252, 8 FCC Rcd 7988 ¶ 50 (1993).

[13] See, n. 10.

[14] Notice of Proposed Rule Making, GN Docket No. 94-33, 9 FCC Rcd 2164 (1994)("Further Forbearance NPRM").

[15] Notice at ¶ 114.

[16] Id. at ¶ 115.

[17] Id. at ¶ 116.

[18] Id. at ¶ 117.

III. THE PUBLIC INTEREST AND THE WIRELESS TELECOMMUNICATIONS INDUSTRY WILL BE SERVED BY A REEVALUATION OF THE REGULATORY OBLIGATIONS IMPOSED ON WIRELESS PROVIDERS.

A. The FCC's Determinations as to CMRS/PMRS Classification Should be Reconsidered.

11. As the Commission is aware, AMTA, from the outset, has expressed its disagreement with the FCC's interpretation of the statutory criteria for CMRS classification.[19] Specifically, the Association has urged the FCC to adopt an interpretation of the phrase "to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public"[20] in a way that, in AMTA's opinion, correctly reflects the Congressional intention underlying that criterion.[21] As discussed below, the problem with the Commission's approach has been heightened because this same criterion has been used in the 1996 Act's definition of "telecommunications carrier", thereby further expanding the number of regulatory obligations imposed on classes of wireless operators that should never have been classified as common carriers.

12. As noted previously, the focus of the 1993 Act was promotion of regulatory parity. More specifically, Congress, and thereafter the FCC, were properly concerned about functionally equivalent systems operating under different regulatory schemes, particularly in the private/common carrier paging and cellular/PCS/ESMR contexts.

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[19] AMTA, Petition for Reconsideration, GN Docket No. 93-252 (filed May 19, 1994).

[20] Hereafter in these Comments, the phrase "to the public" will be used in lieu of this entire phrase, but is intended to incorporate both alternatives.

[21] AMTA's position herein addresses only two-way radio systems, not paging operations. AMTA takes no position on the applicability of any CMRS criteria to any entity providing one-way or two-way paging service. See, 47 C.F.R. Part 22, Subpart E; 47 C.F.R. Part 90, Subpart P.

13. It was not necessary to classify all functionally equivalent systems as common carriers to achieve parity; a private carrier categorization would have accomplished the same result. However, because those systems were then, or in the case of PCS and ESMR were expected to and have become, primarily service offerings for the general public, the individual telecommunications consumer, it was historically natural, if not practically necessary, for Congress to have determined that these systems were to be classified as common carrier offerings with the attendant regulatory obligations. Doing so also permitted at least a deflection of the concerns that otherwise would have been raised by the states if they were preempted entirely from regulating essentially all mobile wireless services.[22]

14. By contrast, traditional SMR systems, as well as community repeaters and other frequency-limited, site-specific, dispatch-oriented systems, did not then and do not now offer their services to the general consumer. They are not marketed to the public and, if they were, would not be competitively attractive since they do not include the sophisticated features or offer the sleek, lightweight units which today's consumers demand for mobile telephone use.

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[22] The 1993 Act did pre-empt much of what previously had been extensive state jurisdiction over common carrier mobile, now CMRS, systems in favor of a coherent federal regulatory environment. The states did retain the authority to regulate certain CMRS terms and conditions. 47 U.S.C. § 332(c)(3)(A).

> By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions." H.R. Rep. No. 103-111, at 261 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 588.

15. The services and the equipment used by customers of traditional two-way radio systems are designed to serve a defined business function. The equipment is manufactured with a focus on durability and reliability, and with a premium on uncomplicated features that can be easily explained to often unsophisticated vehicle operators and other workers. It is relatively unimportant that the customer unit be small enough to fit in a pocket or that it be Madison Avenue-attractive. The systems are designed to permit low-cost, reasonably reliable communications. They do not have in-system switching capability when interconnected or employ frequency reuse, features included in all cellular, PCS and ESMR systems. Even when they are interconnected with the Public Switched Network ("PSN"), that feature typically is ancillary to dispatch communications, is technically unsophisticated, and is not intended to provide toll-quality mobile telephone service. These systems provide a communications tool for business, industrial, land transportation and public safety customers. They do not offer, and are not designed or marketed to target consumers interested in, a substitute for or an adjunct to the wired telephone instrument.

16. AMTA believes that the legislative history accompanying the 1993 Act supports a determination that Congress did not intend such systems to be classified as CMRS. Specifically, the Conference Report clarified:

> The Commission may determine, for instance, that a mobile service offered to the public and interconnected with the public switched network is not the functional equivalent of a commercial mobile service if it is provided over a system that, either individually or as part of a network of systems or licensees, does not employ frequency or channel reuse or its equivalent (or any other techniques for augmenting the number of channels of communications made available for such

mobile service) and does not make service available throughout a standard metropolitan statistical area or other similar wide geographic area.[23]

17. In AMTA's opinion, the inclusion of the "to the public" criterion in the CMRS definition was designed to ensure that ESMRs, and any comparable, future licensees, did not avoid CMRS status by claiming that the by then virtually non-existent FCC rules restricting private carrier subscriber eligibility meant that the operator was not offering service "to the public". On the other hand, the language above clearly was intended to confirm that the absence of meaningful limitations on private land mobile customer eligibility should not, by itself, dictate CMRS classification. Instead, Congress properly recognized that systems intending to serve the consumer public (as opposed to telecommunications-using businesses) would need to have substantial system capacity, whether achieved through frequency reuse or other techniques, and would need to offer substantially more than single-site coverage to provide a genuinely competitive, consumer-attractive offering. Those without such capacity would be able to target only limited, defined user subsegments.

18. AMTA has further defined the distinction between systems with the capacity and features to attract and serve the consumer marketplace and those with a narrower customer focus. The Association responded to the FCC's "covered SMR" definition in a variety of relatively recent proceedings involving either consumer protection issues, such as Enhanced 911

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[23] H.R. Rep. cONF. 103-213, 103rd Cong., 1st Sess. at 1107-1108 (1993). The Commission rejected this language as significant in divining Congressional intent on this matter. It claimed that it could not determine from the example whether the system was a for-profit service, although if it were non-commercial it automatically would be defined as PMRS. It further noted that the Conference Report did not specifically direct the FCC to classify such a system as PMRS, but left those matters to the Commission's expertise. 2nd CMRS R&O at ¶ 77. That interpretation of a very specific, unambiguous Congressional statement should be reexamined.

("E-911") and Radio Frequency ("RF") radiation, or competitive initiatives, in particular number portability and roaming/resale.[24] The Association subsequently accepted the FCC's invitation to request a Declaratory Ruling on this subject generally.[25] AMTA's refined definition of "covered SMR" is functionally equivalent to the example in the Conference Report, but more clearly articulates those features that are essential to the provision of consumer-oriented mobile telephone service as such systems have evolved in the intervening years.[26] AMTA urges the FCC to revisit its interpretation of the "to the public" aspect of the CMRS test, and to instead use the "covered SMR" definition recommended by AMTA as the delineation between CMRS and PMRS services.

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[24] Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 94-102, 11 FCC Rcd 18676 (1996) ("E-911 Order") and Memorandum Opinion and Order, 12 FCC Rcd 22665 (1997)("E-911 Reconsideration Order"); Report and Order, ET Docket No. 93-62, 11 FCC Rcd 15123 (1996) ("RF Order"); First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-116, 11 FCC Rcd 8352 (1996) ("Number Portability Order"); and First Report and Order, CC Docket No. 94-54, 11 FCC Rcd 18455 (1996) ("Resale Order").

[25] AMTA, Petition for Declaratory Ruling, In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, RM-1843; Telephone Number Portability, CC Docket No. 95-116, RM-8535; Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, ET Docket No. 93-62 (filed Dec. 16, 1996).

[26] Among the specific modifications suggested by AMTA to the Resale, E-911, RF Radiation and Number Portability rules, AMTA suggested the following modification to Section 20.3 CMRS Definitions:

> Incumbent Wide Area SMR Licensees. Licenses who have obtained extended implementation authorizations in the 800 MHz or 900 MHz service, either by waiver or under Section 90.629 of these rules, and who offer real-time, two-way interconnected voice service ~~that is interconnected with the public switched network~~ using multiple base stations and an intelligent in-network switching facility that permits automatic, seamless interconnected call handoff among base stations. AMTA Declaratory Ruling, Attachment.

19. The importance of correcting this definition has become even more significant since enactment of the 1996 Act. As discussed previously, that legislation focused on promoting competition in the provision of local exchange service. However, it used as its definitional touchstone the term "telecommunications carrier", a term even broader than CMRS and with more encompassing regulatory obligations. Telecommunications carriers include all entities that provide telecommunications services to the public on a commercial basis. Unlike CMRS, telecommunications carriers are not even required to be interconnected with the PSN. Because the FCC has already defined "to the public" to include entities such as single-site, even single-frequency SMRs and community repeaters in the CMRS context, those systems are now classified as "telecommunications carriers" even if their systems are not interconnected with the telephone network at all. Because they are so classified, they are subject to such obligations as helping to fund the North American Numbering Plan Administrator, despite the fact that their systems do not even use telephone numbers.[27] They also may be subjected to Communications Assistance for Law Enforcement Act ("CALEA") obligations even if their communications consist entirely of dispatch messages that can be monitored over-the-air with any scanning receiver.[28] These results cannot be traced to any reasonable interpretation of Congressional intent and must be corrected.

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[27] Report and Order, CC Docket No. 92-237, 11 FCC Rcd 2627 ¶ 94 (1995)("NANPA R&O").

[28] Notice of Proposed Rulemaking, CC Docket No. 97-213, 13 FCC Rcd 3149, ¶ 16 (1997)("CALEA NPRM").

20. Finally, it is critical to remember that neither the CMRS/PMRS classification process nor deriving a definition of telecommunications carriers were ends unto themselves. Regulatory parity is important, as is local loop competition, but the ultimate goal is balancing properly a consumer need for protection from overreaching practices by those with market power over vital services and facilities versus not impeding competition by imposing unnecessary regulatory restraints on a naturally and increasingly competitive marketplace. Congress had recognized already that common carrier obligations might not be appropriate even for entities or services intended by Congress to be classified as CMRS or telecommunications carriers, and provided the FCC with the forbearance tools to address that possibility by enacting, first, Section 332(c)(1) and, subsequently, Section 10. If the FCC fails again to address this matter directly by revising its definitions of the terms CMRS and telecommunications carriers, AMTA urges it to use its forbearance authority in accordance with clear Congressional intent.

B. Both the Section 332(c)(1) and Section 10 Tests Turn on a Determination of Whether Regulation is Needed to Protect Consumers and What the Costs of that Protection Would Be.

21. As explained above, in enacting the 1996 Act, Congress expanded the FCC's Section 332(c)(1) forbearance authority by adopting new Section 10. Unlike Section 332(c)(1), which provides the Commission with discretionary forbearance authority, Section 10 directs the Commission to forbear from applying any regulation or any provision in the Act if the Commission determines that the three-prong test set out in Section 10 is met.

22. Section 10 is the most recent pronouncement from Congress on regulatory forbearance and signifies a shift in the Congressional focus on the imposition of regulatory restraints and the use of the Commission's forbearance authority. The mandate that the

Commission "shall forbear" from applying any regulation if the three part analysis is met clearly indicates that Congress favors deregulation.

23. In the Further Forbearance NPRM, the Commission set forth five criteria to be used in determining whether the FCC should exercise its forbearance authority.[29] The Notice seeks comments on "whether the difference in language between section 332(c) and section 10 necessitates a departure from the criteria [ ] enunciated in the Further Forbearance NPRM".[30] It is AMTA's opinion that the legislative history of Section 10 demonstrates unequivocally a narrow, but encompassing, Congressional focus on protecting the consumer and promoting competition. As noted in the Conference Report:

> Section 303 of the Senate bill adds a new section 260 of the Communications Act, under which the Commission must forbear from regulation of a carrier or a service if it determines that enforcement is not necessary to ensure that charges are just and reasonable and not unjustly or unreasonably discriminatory or to protect consumers, and that forbearance is consistent with the public interest. In making this determination to forbear, the Commission shall consider whether forbearance would promote competition.[31]

AMTA suggests that rather than the five criteria enunciated in the Further Forbearance NPRM, the Commission focus its analysis on the two criteria which form the basis for the more recent Congressional position on permissible forbearance: (1) does the relevant consumer need protection, i.e., does the subject telecommunications provider have the ability to impose unjust and unreasonable charges and/or practices, and (2) what is the cost of imposing the subject regulation(s) on the telecommunications provider and the customers it serves, i.e., what effect

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[29] Notice at ¶ 114.

[30] Id.

[31] H.R. Conf. Rep. No. 104-458, 104th Cong., 2nd Sess. at 184 (1996). The House amendment contains similar language.

does regulation have on the ongoing operations of the subject service. AMTA believes that these two criteria address the issues of consumer protection and the promotion of competition, and, therefore, whether forbearance is in the public interest

24. Application of these two criteria to traditional two-way dispatch-oriented providers clearly demonstrates that forbearance from applying Title II requirements is not only appropriate, but mandated. First, although all telecommunications providers have the theoretical freedom to engage in unjust and unreasonable practices, the highly competitive environment in which commercial mobile systems operate significantly diminishes the likelihood that providers would actually engage in such behavior.[32] Because there are multiple providers in any geographic area, customers have the ability to "shop around" and select the terms and conditions that best suit them. Moreover, as the Commission is aware, the traditional two-way dispatch provider serves the business community. This type of customer is more knowledgeable about the services being offered and better positioned to bargain for a package that meets its individual requirements than is the typical individual communications subscriber. Because of these two factors - a competitive environment and a savvy customer - it would not be a wise or viable business decision to charge excessive prices or impose unreasonable conditions since a customer can, and will, take its business to a more attractive system. Accordingly, the existing

[32] AMTA agrees with Commissioner Michael Powell's remark that "if we define consumer protection so broadly to suggest that we must ensure that every consumer is protected from every speculative or possible harm that we can imagine in our creative minds, we will never feel comfortable deregulating, for no form of competition can guarantee such results (nor do I believe regulators can either)." Notice, Separate Statement of Commissioner Michael Powell, Dissenting in Part at 5 (emphasis in the original).

environment in which two-way providers operate adequately protects their customers, i.e., the "consumer" of their service.

25. By contrast, the cost of imposing unnecessary obligations is high. As discussed more fully in subsection D below, Title II regulations impose a significant burden on the smaller operator. For example, commercial providers are becoming increasingly aware that being interconnected with the PSN can actually be a hindrance to their business because this feature causes them to be classified as CMRS. Even when their interconnection capability is ancillary to the dispatch service they provide, it places them into the CMRS category, subject to the regulations associated with being a common carrier. Since these operators typically derive insignificant revenue from offering interconnect, removing this feature from their system is increasingly being viewed as a good business decision. Unfortunately, however, reducing the types of services offered does not benefit customers and does not promote the development of new and enhanced services. The ultimate result will be a decrease in competition as providers choose to forgo new service offerings in order to stay out of the category of telecommunication providers subject to extensive regulations. Accordingly, the imposition of Title II regulations will hinder, not promote, competition.[33]

26. Congress has mandated that the Commission forbear from applying any regulation if the three part analysis of Section 10 is met. It is clear from the legislative history that Congress was concerned with protecting the consumer and promoting competition. Accordingly,

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[33] AMTA fully agrees with Commissioner Powell's conclusion that "the 1996 Act mandates, through forbearance or other means, that the Commission move away from the monopoly-oriented, over-regulatory origins of communications policy toward a world in which the market, rather than bureaucracy determines how communications resources should be utilized." Id. at 8.

the proper criteria to be used by the FCC in determining whether it must exercise its forbearance authority is (1) does the relevant consumer need protection, and (2) what is the cost of imposing the subject regulation(s) on the telecommunications provider and the customers it serves. When these two criteria are applied to commercial mobile providers, it is clear that the Commission must forbear from applying Title II regulations. The relevant customer is already adequately protected and the imposition of regulations impedes the development of competition. Accordingly, the public interest is not served by imposing Title II regulation on these entities.

AMTA urges the Commission not to wait to begin deregulation until it determines that competition has arrived. The Commission will never be able to make that determination. As explained by Commissioner Powell:

> Competition is not [a product] at all. It is a dynamic process by which producers and consumers interact to establish prices and output that reflect the value of such goods and services to consumers willing to pay. And, it is the process that drives the introduction of new innovative products and services. Those prices may ebb and flow and products may vary from one market to another, depending on the unique attributes of individual markets and consumers. The interaction of the market determines the outcome. Regulation of competitive markets distort the competitive process, for such regulation attempts to pronounce appropriate conditions rather than letting the process determine those conditions.[34]

C. Title II Obligations are Inappropriate and Unnecessary in a Competitive Marketplace; Other Regulatory Obligations Should be Considered in Light of the Technical and Operational Characteristics of the Service Being Offered.

27. AMTA has already described why it believes that the FCC should revisit its interpretation of the "to the public" component of the CMRS and telecommunications carrier definitions, and revise it consistent with the "covered SMR" definition recommended by AMTA

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[34] Id. at 4.

and already adopted by the FCC for purposes of E-911 requirements. However, in the event the FCC declines to do so, and assuming there is no intervening Congressional clarification of the issue, the Association urges the FCC to use its forbearance authority to promote continued robust competition.

28. In the Notice, the FCC has invited parties seeking forbearance from particular regulatory obligations to describe the genesis and purpose of the requirement, the state of competition at the time the rule was promulgated versus the current competitive situation, and the likely effect of forbearance on consumers. Of course, as explained in detail in previous sections, Title II obligations were never imposed on the services provided by AMTA's members until they suddenly were reclassified as common carriers, first, in 1993, when interconnected systems were recategorized as CMRS, and then, in 1996, when even dispatch-only offerings were labelled telecommunications carriers.

29. More critically, for purposes of the analysis requested in the NPRM, this reclassification was not triggered because of customer, much less consumer, complaints about unfair practices or overreaching on the part of these providers. There was no history of discriminatory practices, excessive charges or other actions that typify behavior in a less than competitive marketplace. In fact, to the best of AMTA's knowledge, the private carrier industry was notable for the lack of such complaints. Rational operators would not engage in such behavior since it would prompt customers to move to an alternative provider; licensees that failed to adhere to this obvious marketplace dictum ultimately would fail.

30. Thus, these systems were reclassified as common carriers, not because of any perceived need to protect consumers, but to achieve greater regulatory parity between at least