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# REGULATORY TREATMENT OF MOBILE SERVICES: THE FCC ATTEMPTS TO CREATE REGULATORY SYMMETRY

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Recent landmark legislation has provided the Federal Communications Commission ("FCC" or "Commission") with a fresh opportunity to define and interpret the regulatory distinction between "common carriers" and "private carriers" of mobile telecommunications services.<sup>1</sup> The Communications Licensing and Spectrum Allocation Improvement Act, Title VI of the Omnibus Budget Reconciliation Act of 1993,<sup>2</sup> amended section 332 of the Communications Act of 1934 ("Communications Act" or "Act")<sup>3</sup> by creating a new regulatory classification designated "commercial mobile services," and by classifying all mobile services<sup>4</sup> as either "commercial mobile service" or "private mobile service."<sup>5</sup>

Apart from these regulatory classifications, the primary significance of revised section 332 lies in its

requirement that the FCC regulate as a common carrier any entity that provides commercial mobile service,<sup>6</sup> and the companion requirement that the FCC regulate as a common carrier any entity that provides private mobile service.<sup>7</sup> These requirements reflect Congress's primary intent that like mobile services be regulated in a like manner.<sup>8</sup>

Revised section 332 defines "commercial mobile service" 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, as specified by regulation by the Commission."<sup>9</sup> Section 332 further defines "interconnected service" as "service that is interconnected with the public switched net-

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<sup>1</sup> Mobile telecommunications services include one-way and two-way voice and data radio (wireless) communications carried between a transmitting station and a receiving station, or mobile unit, or between mobile units. Within the past decade, mobile services have been one of the major growth sectors of the United States and world economies.

<sup>2</sup> Pub. L. No. 103-66, 107 Stat. 312 (to be codified at 47 U.S.C. § 332) [hereinafter "1993 Budget Act"].

<sup>3</sup> 47 U.S.C. §§ 151 *et seq.* (1988 & Supp. 1993). Section 332, previously titled "Private Land Mobile Services," has been retitled "Regulatory Treatment of Mobile Services." 1993 Budget Act § 6002(b)(2)(A)(i), (iii), 107 Stat. at 393 (to be codified at 47 U.S.C. § 332(c)).

<sup>4</sup> Section 3(n) of the Communications Act, also amended by the 1993 Budget Act, defines a "mobile service" as:

A radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (1) both one-way and two-way radio communications services, (2) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible

users over designated areas of operation, and (3) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding.

1993 Budget Act § 6002 (b)(2)(B)(ii)(I), 107 Stat. at 396 (to be codified at 47 U.S.C. § 153(n)). The definition of mobile services previously set forth at 47 U.S.C. § 153(n) (1988 & Supp. 1993) did not include subsections (2) and (3), which now bring traditional private land mobile services and new personal communications services within the definition. The 1993 Budget Act also deleted the definition of "private land mobile service" previously contained in section 3(gg) of the Act, 47 U.S.C. § 153(gg). This definition is now included in section 3(n)(2). See *id.* § 6002(b)(2)(B)(ii)(II), 107 Stat. at 396.

<sup>6</sup> 1993 Budget Act § 6002(b)(2)(A)(iii), 107 Stat. at 393 (to be codified at 47 U.S.C. § 332(c)(1)).

<sup>7</sup> *Id.* § 6002(b)(2)(A)(iii), 107 Stat. at 393 (to be codified at 47 U.S.C. § 332(c)(1)).

<sup>8</sup> *Id.* § 6002(b)(2)(A)(iii), 107 Stat. at 394 (to be codified at 47 U.S.C. § 332(c)(2)).

<sup>9</sup> H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 259 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 586.

<sup>10</sup> 1993 Budget Act § 6002(b)(2)(A)(iii), 107 Stat. at 395-96 (to be codified at 47 U.S.C. § 332(d)(1)).

work (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to [new section 332(c)(1)(B) of the Communications Act, which requires common carriers to establish "physical interconnections" with a commercial mobile service provider upon reasonable request]."<sup>10</sup> Finally, "private mobile service" is defined as "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, as specified by regulation by the Commission."<sup>11</sup>

Although Congress provided the above definitions, it specifically left for the FCC the critical task of further defining them "by regulation."<sup>12</sup> The statute required the FCC to implement rules for revised section 332 by August 10, 1994.<sup>13</sup>

On October 8, 1993, the FCC issued a *Notice of Proposed Rule Making*<sup>14</sup> instituting a proceeding ("Mobile Services Proceeding") to adopt the rules necessary "to create a comprehensive framework for the regulation of mobile radio services."<sup>15</sup> This framework is intended to bring parity to the regulation of mobile services that traditionally have been classified as either public mobile services or private

land mobile services,<sup>16</sup> and that, as a result of such classification, have been subject to different regulatory treatment.<sup>17</sup>

On March 9, 1994, the FCC released its *Second Report and Order*<sup>18</sup> in the Mobile Services Proceeding.<sup>19</sup> Therein, the FCC adopted rules defining "mobile service,"<sup>20</sup> "commercial mobile radio service" ("CMRS"),<sup>21</sup> and "private mobile radio service" ("PMRS"),<sup>22</sup> and classified existing common and private carrier mobile services and new personal communications services as either CMRS or PMRS.<sup>23</sup> The FCC also established transition periods for reclassifying existing carriers and outlined a series of rulemaking proceedings that will be held to resolve remaining issues related to the regulatory treatment of mobile services.<sup>24</sup> The rules adopted in the *Mobile Services Second Report and Order* will be set forth in a new Part 20 of the FCC's rules.<sup>25</sup>

This Article discusses the Mobile Services Proceeding and addresses the principles governing the FCC's deliberations as it implements new rules for regulating mobile services. Part I discusses the origins of common carrier and private carrier regulation, and the difficulties experienced by the FCC in attempting to maintain a bright line distinction be-

<sup>10</sup> *Id.* § 6002(b)(2)(A)(iii), 107 Stat. at 396 (to be codified at 47 U.S.C. § 332(d)(2)).

<sup>11</sup> *Id.* § 6002(b)(2)(A)(iii), 107 Stat. at 396 (to be codified at 47 U.S.C. § 332(d)(3)).

<sup>12</sup> *Id.* § 6002(b)(2)(A)(iii), 107 Stat. at 395-96 (to be codified at 47 U.S.C. § 332(d)(1), (2), (3)).

<sup>13</sup> *Id.*

<sup>14</sup> *In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Notice of Proposed Rule Making*, 8 FCC Rcd. 7988 (1993) [hereinafter *Mobile Services NPRM*].

<sup>15</sup> *Id.* para. 1. Included among the provisions of the 1993 Budget Act is a requirement that the FCC implement revised section 332 with respect to the licensing of a new service classification called personal communications services ("PCS") within six months of enactment. 1993 Budget Act § 6002(b)(2)(A)(iii), 107 Stat. at 394 (to be codified at 47 U.S.C. § 332(c)(1)(D)). Because the FCC also was required to begin licensing PCS by May 7, 1994 (1993 Budget Act § 6002(d)(2), 107 Stat. at 397), and to do so primarily through a competitive bidding process, rules for which were required to be in place by March 7, 1994 (1993 Budget Act § 6002(d)(1), 107 Stat. at 396), the FCC in the Mobile Services Proceeding addressed the definitional issues as they relate to the regulatory classification of both existing common and private mobile services and new PCS. See *Mobile Services NPRM*, *supra* note 14, para. 6 n.6.

<sup>16</sup> See *Mobile Services NPRM*, *supra* note 14, paras. 3-8.

<sup>17</sup> The Mobile Services Proceeding does not eliminate the common carrier and private carrier classifications for mobile communications services. Rather, the purpose of the proceeding is to craft regulations that treat similar services in a similar fashion. *Id.* para. 4.

<sup>18</sup> *In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order*, 9 FCC Rcd. 1411 (1994) [hereinafter *Mobile Services Second Report and Order*].

<sup>19</sup> Earlier, the Commission adopted a *First Report and Order* in the Mobile Services Proceeding, establishing the procedures by which carriers currently classified as private, and thus not subject to alien ownership restrictions, may seek waiver of those restrictions in view of their reclassification as common carriers. *In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, First Report and Order*, 9 FCC Rcd. 1056 (1994) [hereinafter *Mobile Services First Report and Order*].

<sup>20</sup> See *Mobile Services Second Report and Order*, *supra* note 18, paras. 30-38 & App. A (to be codified at 47 C.F.R. § 20.3).

<sup>21</sup> See *id.* paras. 39-70 & App. A (to be codified at 47 C.F.R. § 20.3).

<sup>22</sup> See *id.* paras. 71-80 & App. A (to be codified at 47 C.F.R. § 20.3).

<sup>23</sup> See *id.* paras. 86-123 & App. A (to be codified at 47 C.F.R. §§ 20.7, 20.9).

<sup>24</sup> See *id.* paras. 278-285. The Mobile Services Proceeding addresses several other matters, including interconnection rights of mobile service providers, and preemption of state regulation of interconnection rates and commercial mobile services. See *Mobile Services NPRM*, *supra* note 14, paras. 69-75, 79; *Mobile Services Second Report and Order*, *supra* note 18, paras. 220-239, 240-257. These matters are beyond the scope of this Article.

<sup>25</sup> See *Mobile Services Second Report and Order*, *supra* note 18, App. A (to be codified at 47 C.F.R. § 20.1 *et seq.*).

tween the different classifications of common and private carrier. Part II summarizes the traditional regulatory differences between common and private carriage, and Part III discusses the erosion of these differences and the resulting acknowledgment of the need for a unified approach to regulating mobile services. Part IV reviews the Mobile Services Proceeding to date and the approaches considered, rejected, and adopted by the FCC in its attempt to comply with Congress's mandate to institute regulatory parity for all mobile services. The Article concludes that the rules adopted by the Commission in the *Mobile Services Second Report and Order* represent a significant achievement. The Commission's overall approach to carrying out the goal of regulatory parity for all mobile services reflects the experience of industry and regulators by rejecting artificial distinctions and by relying instead on a flexible approach that carries out both the congressional intent underlying revised section 332 and the Commission's own stated goals. This approach should result in rules inherently adaptable to an industry characterized by continuing technical and market-driven change.

## I. HISTORICAL OVERVIEW OF PRIVATE AND COMMON CARRIER REGULATION

The Communications Act authorizes the FCC to "regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." <sup>26</sup> The FCC administers different regulatory schemes in furtherance of this authority. While Title II <sup>27</sup> and sections of Title III <sup>28</sup> of the Communications Act specifically subject common carriers to numerous regulations, the FCC has invoked other sections of

the Act as authority to regulate non-common carriers, <sup>29</sup> including Title III's general grant of authority to the FCC to "maintain the control of the United States over all the channels of radio transmission . . . ." <sup>30</sup> The Communications Act included no specific reference to private carriers or private services until 1982. <sup>31</sup>

### A. Regulation of Communications Common Carriers

The Communications Act does not set forth a specific test to determine what constitutes common carriage of communications, but defines a "common carrier" as "any person engaged as a common carrier for hire . . . ." <sup>32</sup> In adopting the statutory definition, Congress noted:

[T]hat the definition does not include any person if not a common carrier in the ordinary sense of the term, and therefore does not include press associations or other organizations engaged in the business of collecting and distributing news services which may refuse to furnish to any person service which they are capable of furnishing, and may furnish service under varying arrangements, establishing the service to be rendered, the terms under which rendered, and the charges therefor. <sup>33</sup>

Thus, Congress intended that the provisions of the Communications Act applicable to common carriers should not apply to persons who are not common carriers in the "ordinary sense of the term." Determining the "ordinary" meaning of common carrier in the context of communications carriers, however, has not always been simple.

Congress modeled the original Title II provisions of the Communications Act, which govern common carriers, after the Interstate Commerce Act of 1887. <sup>34</sup> Enacted to create federal regulatory powers over the railroad industry, the Interstate Commerce Act subsequently was extended to regulate communi-

<sup>26</sup> 47 U.S.C. § 151 (1988 & Supp. 1993).

<sup>27</sup> 47 U.S.C. §§ 201-226 (1988 & Supp. 1993).

<sup>28</sup> 47 U.S.C. §§ 301-399 (1988 & Supp. 1993).

<sup>29</sup> These include 47 U.S.C. §§ 1, 4(i), (j), 301, and 303 (1988 & Supp. 1993). See *In re An Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz*; and Amendment of Parts 2, 18, 21, 73, 74, 89, 91, and 93 of the Rules Relative to Operations in the Land Mobile Service Between 809-960 MHz, *Memorandum Opinion and Order*, 51 F.C.C.2d 945, paras. 43-47 (1975), *aff'd sub nom.* National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) [hereinafter *LMRS Memorandum Opinion and Order*].

<sup>30</sup> 47 U.S.C. § 301 (1988 & Supp. 1993). See *LMRS Memorandum Opinion And Order*, *supra* note 29, paras. 43-47.

<sup>31</sup> Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087 (1982) (adopting 47 U.S.C. § 331(c)).

<sup>32</sup> 47 U.S.C. § 153(h) (1988 & Supp. 1993). The Communications Act's definition of common carrier is synonymous with "carrier." *Id.* The FCC's regulations define a "communications common carrier" as "any person engaged in rendering communication services for hire to the public." 47 C.F.R. § 22.2 (1993).

<sup>33</sup> H.R. Conf. Rep. No. 1918, 73d Cong., 2d Sess. 46 (1934), *reprinted in* Rad. Reg. 2d (P & F), at 10:261, 10:262 (1971).

<sup>34</sup> Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (current version at 49 U.S.C. §§ 10101-11917 (1988 & Supp. 1993)).

cations by telegraph and long-distance telephone.<sup>35</sup> Congress based the Interstate Commerce Act on a study of the railroad industry, the Cullom Report,<sup>36</sup> which has been termed "the single most cohesive statement of the underlying theory of the principles of common carrier regulation that came to govern not only the railroad but the communications industry as well."<sup>37</sup> Kenneth A. Cox and William J. Byrnes, analyzing the origins of Title II, summarized this seminal study:

The Cullom Report described the initiation of the Federal regulatory scheme as a logical extension of the "ancient law" of common carriers. This body of law had developed over the previous centuries in the original context, not of railroads, but of such earlier technologies as stage coaches, canal boats, wharves, and warehouses. Central to the body of common law was the principle that no common carrier has the right to discriminate between persons or places, or to give preferences in any manner. The principal concern with relying upon the already established common law was the inadequacy of its remedies. A need for uniformity was also seen. The fundamentals of the governing laws were not regarded as basically dependent upon the changing nature of the various technologies to which they were applied. The 1886 Cullom Report . . . treated railroads as one part of the overall evolution of transportation and

communication as a whole and explicitly discussed telegraph communication in the same general context.<sup>38</sup>

Gradually, the need for separate legislation solely for communications carriers became apparent.<sup>39</sup> Congress intended the Communications Act of 1934 to unify federal regulatory powers over communications under one authority.<sup>40</sup> In doing so, as reported in the legislative history of the Communications Act, Congress relied heavily on the Interstate Commerce Act.

In this bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communication companies doing a common carrier business, but in some paragraphs the language is simplified and clarified. These variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective.<sup>41</sup>

Reflecting this reliance on the existing common law of common carriers, Title II includes specific provisions mandating indiscriminate service to the public and reasonable charges therefor,<sup>42</sup> and forbid-

<sup>35</sup> The "advent of general federal regulation of communications" came in 1910 with passage of the Mann-Elkins Act (Pub. L. No. 61-218, 36 Stat. 539, 544-45 (1910)), which extended the Interstate Commerce Act to telephone, telegraph, and cable companies, and declared such companies to be common carriers. The Mann-Elkins Act was replaced by the Communications Act of 1934. Kenneth A. Cox & William J. Byrnes, *The Common Carrier Provisions -- A Product of Evolutionary Development*, in *A Legislative History of the Communications Act of 1934*, at 25, 29 (Max D. Paglin ed., 1989). See also S. Rep. No. 781, 73d Cong., 2d Sess. 1 (1934), reprinted in Rad. Reg. 2d (P & F) 10:221-222 (1971); H.R. Rep. No. 1850, 73d Cong., 2d Sess. (1934), reprinted in Rad. Reg. 2d (P & F) 10:241-244 (1971).

<sup>36</sup> S. Rep. No. 46, 49th Cong., 1st Sess. (1886).

<sup>37</sup> Cox & Byrnes, *supra* note 35, at 26.

<sup>38</sup> *Id.* at 26-27 (footnotes omitted) (citing Cullom Report, S. Rep. No. 46, 49th Cong., 1st Sess. 3-4, 31-32, 40 (1886)). See also *Munn v. Illinois*, 94 U.S. 113, 129 (1877) (reviewing common law roots of regulation of common carriers); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 640-41 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) (tracing common carrier regulation in the nineteenth century); *In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C.2d 308, paras. 107-114 (1979) (reviewing English common law bases for regulation of common carriers).

<sup>39</sup> See H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3-4 (1934), reprinted in Rad. Reg. 2d (P & F) 10:241, 10:244 (1971). Congress reported that:

[T]he Interstate Commerce Commission . . . functions under an Act of 1887 which has been many times amended . . . [T]he [Interstate Commerce] Act never has

been perfected to encompass adequate regulation of communications, but has really been an adaption [sic] of railroad regulation to the communications field. As a consequence, there are many inconsistencies in the terms of the Act and also many important gaps which hinder effective regulation. In this bill the attempt has been made to preserve the value of court and commission interpretation of that Act, but at the same time modifying the provisions so as to provide adequately for the regulation of communications common carriers.

<sup>40</sup> H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3 (1934), reprinted in Rad. Reg. 2d (P & F) 10:241, 10:243 (1971).

<sup>41</sup> S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934), reprinted in Rad. Reg. 2d (P & F) 10:221 (1971). "Long-distance communications companies had long been held to be subject to the commerce power of Congress . . . The communications companies came to be seen as occupying the same relation to commerce as carriers of messages that railroads do as carriers of goods." Cox & Byrnes, *supra* note 35, at 27 (citing *Western Union Telegraph Co. v. Texas*, 105 U.S. 460, 461 (1882)).

<sup>42</sup> 47 U.S.C. § 201 (1988 & Supp. 1993), entitled "Services and charges," and based upon sections 1(4), (5) and (6) of the original Interstate Commerce Act (see S. Rep. No. 781, 73d Cong., 2d Sess. 4 (1934), reprinted in Rad. Reg. 2d (P & F) 10:224 (1971)), provides that:

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and

ding discriminatory rates or practices.<sup>43</sup> These provisions were based on sections of the Interstate Commerce Act,<sup>44</sup> which in turn were based on the concept "that no common carrier has the right under common law to discriminate between persons or places, or to give preferences in any manner."<sup>45</sup>

The Communications Act provides no explicit guidance on what constitutes the "ordinary sense" of common carriage. Prior to passage of the Communications Act, the Supreme Court instructed that a "common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests."<sup>46</sup> In applying the term to communications carriers, the FCC has stated that:

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charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful . . . .

<sup>43</sup> 47 U.S.C. § 202 (1988 & Supp. 1993), entitled "Discriminations and preferences," and based on sections 2 and 3(1) of the original Interstate Commerce Act, provides:

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

See also S. Rep. No. 781, 73d Cong., 2d Sess. 4 (1934), reprinted in Rad. Reg. 2d (P & F) 10:224 (1971).

The FCC applies the functional equivalency test to determine whether services are "like" under section 202(a).

The focus of the functional equivalency test is whether the services are different in any material functional respect. The test requires the Commission to examine both the nature of the services and customer perception of the functional equivalency test of those services. In fact, customer perception [of functional equivalency is the] linchpin of the functional equivalency test.

*In re AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order on Remand*, 6 FCC Rcd. 7039, para. 9 (1991) (internal punctuation and citation omitted) (quoting Ad Hoc Telecommunications Users Committee v. FCC, 680 F.2d 790, 796 (D.C. Cir. 1982)).

<sup>44</sup> See S. Rep. No. 781, 73d Cong., 2d Sess. 3-4 (1934), reprinted in Rad. Reg. 2d (P & F) 10:223-224 (1971). Former section 2 of the Interstate Commerce Act, entitled "Special Rates and Rebates Prohibited," stated:

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered,

[f]undamental to the concept . . . is that such a carrier holds itself out or makes a public offering to provide facilities by wire or radio whereby all members of the public who cho[]se to employ such facilities and to compensate the carrier therefor may communicate or transmit intelligence of their own design and choosing between points on the system of that carrier and other carriers connecting with it.<sup>47</sup>

More recently, the United States Court of Appeals for the District of Columbia Circuit has found that the fundamental characteristic of common carriers is that they hold themselves out to offer service to the public indiscriminately.<sup>48</sup>

The FCC has used its "broad discretion and authority under the [Communications] Act" to create

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in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

Former section 3(1), entitled "Undue Preferences or Prejudices Prohibited," stated:

It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . .

<sup>45</sup> Cox & Byrnes, *supra* note 35, at 31 (quoting S. Rep. No. 46, 49th Cong., 1st Sess. 40 (1886)).

The provisions of the bill are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations, both by declaring them unlawful and adding to the remedies now available for securing redress and enforcing punishment, and also by requiring the greatest practicable degree of publicity, as to rates, financial operations, and methods of management of the carriers.

*Id.*

<sup>46</sup> *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211-12 (1927) (quoting *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 440 (1889)).

<sup>47</sup> *Frontier Broadcasting Co. v. Collier*, *Memorandum Opinion and Order*, 24 F.C.C. 251, para. 7 (1958) (footnotes omitted).

<sup>48</sup> See *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641-42 (D.C. Cir.), cert. denied, 425 U.S. 992

two classes of common carriers, dominant and non-dominant.<sup>49</sup> In the Competitive Carrier Proceeding,<sup>50</sup> the FCC determined that regulatory burdens should be reduced for non-dominant carriers<sup>51</sup> because these carriers lack market power and the ability to set prices;<sup>52</sup> the FCC would classify specific types of carriers as dominant or non-dominant on a case-by-case basis. The FCC classified common carrier mobile service providers as dominant.<sup>53</sup> Subsequently, the United States Court of Appeals for the District of Columbia Circuit held that the FCC lacks statutory authority to establish either a mandatory or a permissive policy relieving common carriers from express statutory obligations.<sup>54</sup> The 1993 Budget Act amends the Communications Act to give the FCC explicit authority to make certain Title II provisions inapplicable to common carrier service providers under certain conditions.<sup>55</sup>

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(1976). The Court also has stated that the character of the communication, rather than the character of the facilities over which the communication is delivered, determines whether a carrier is a common carrier. *General Telephone Co. v. FCC*, 413 F.2d 390, 401-02 n.19 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969). See also *In re Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor, Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C.2d 308, paras. 114-15 (1979), which states in part:

[T]he 'quasi-public' characteristic found to be the *sine qua non* of common carriage may have been based on a social decision that those who exercise unfettered control of an access point essential to the commercial well being of the nation must be kept under control. If so, there may be an additional element to common carrier which is economic in nature. . . . The question then is whether the common carrier concept may legitimately be understood to contain some element of essentiality or monopoly.

*Id.* (internal citations omitted).

<sup>49</sup> *In re Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor, First Report and Order*, 85 F.C.C.2d 1, paras. 54, 31-55 (1980).

<sup>50</sup> *In re Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor, Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C.2d 308 (1979); *First Report and Order*, 85 F.C.C.2d 1 (1980); *Second Report and Order*, 91 F.C.C.2d 59 (1982); *Order on Reconsideration*, 93 F.C.C.2d 54 (1983); *Policy Statement and Third Report and Order*, 48 Fed. Reg. 46,791 (1983); *Fourth Report and Order*, 95 F.C.C.2d 554 (1983), *vacated and remanded*, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993); *Fifth Report and Order*, 98 F.C.C.2d 1191 (1984); *Sixth Report and Order*, 99 F.C.C.2d 1020 (1985), *vacated and remanded*, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) [hereinafter "Competitive Carrier Proceeding"].

<sup>51</sup> The FCC determined that it had authority to forbear from applying certain Title II provisions to non-dominant carriers.

## B. Regulation of Private Mobile Service Providers

The FCC has long accorded a special regulatory status to private mobile communications systems. The FCC's original rules distinguished between the Safety and Special Radio Services, regulated as private, and the Common Carrier Services.<sup>56</sup> Private services authorized by the FCC were intended to satisfy the communications needs of specific, defined user groups, such as the government, industry, and land transportation companies (e.g., taxicabs). However, private services traditionally have been subject to user and traffic restrictions.<sup>57</sup>

In 1974, the FCC created a new service, specialized mobile radio ("SMR"), which was authorized to provide commercial service to eligible users on a private carrier basis. In authorizing SMR service, the FCC specifically sought to encourage competitive private land mobile service for eligible users, and to stimulate private service licensees' implementation of

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ers. Competitive Carrier Proceeding, *First Report and Order*, *supra* note 50, para. 25. The FCC noted that this decision did not exempt non-dominant carriers from Title II's affirmative obligations, but "merely modify[ed] the method by which the Commission assures compliance with these requirements." *Id.* at para. 46. In the Competitive Carrier Proceeding, *Fourth Report and Order*, *supra* note 50, paras. 2-5, the FCC relieved non-dominant carriers from the obligation to file tariffs pursuant to section 203 of the Communications Act.

<sup>52</sup> Competitive Carrier Proceeding, *First Report and Order*, *supra* note 50, para. 1.

<sup>53</sup> See Competitive Carrier Proceeding, *Fourth Report and Order*, *supra* note 50, paras. 1-3, 40-46; *Fifth Report and Order*, *supra* note 50, para. 18 n.41. Nonetheless, cellular telephone carriers traditionally have not been required to file tariffs. See *In re Preemption of State Entry Regulation in the Public Land Mobile Service, Report and Order*, 59 Rad. Reg. 2d (P & F) 1518, 1533 (1986) (exempting common carrier paging licensees from tariff filing requirements of Title II), *vacated on other grounds*, National Ass'n of Regulatory Util. Comm'rs v. FCC, No. 86-1205 (D.C. Cir. filed Mar. 30, 1987).

<sup>54</sup> *MCI*, 765 F.2d at 1195-96; *AT&T*, 978 F.2d at 730-36.

<sup>55</sup> 1993 Budget Act § 6002(b)(2)(A)(iii), 107 Stat. 393 (to be codified at 47 U.S.C. § 332(c)(1)). The FCC may not forbear from applying sections 201, 202, or 208 of Title II. *Id.*

<sup>56</sup> See *In re An Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz; and Amendment of Parts 2, 18, 21, 73, 74, 89, 91, and 93 of the Rules Relative to Operations in the Land Mobile Service Between 809-960 MHz, Second Report and Order*, 46 F.C.C.2d 752, paras. 28-31 (1974) [hereinafter *Land Mobile Services Inquiry Second Report and Order*]; *Memorandum Report and Order on Reconsideration*, 51 F.C.C.2d 945 (1975), *aff'd sub nom.* National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir.), *cert. denied sub nom.* National Ass'n of Radiotelephone Systems v. FCC, 425 U.S. 992 (1976) [hereinafter "NARUC I"].

<sup>57</sup> See *Land Mobile Services Inquiry Second Report and Order*, *supra* note 56, paras. 28-33.

spectrum efficient technology.<sup>68</sup>

Following a challenge to the FCC's regulatory scheme for SMR service, the United States Court of Appeals for the District of Columbia Circuit affirmed the FCC's classification of SMR service providers as "non-common carriers."<sup>69</sup> According to the D.C. Circuit, the key factor in determining whether a licensee is a common carrier "is that the operator offer[s] indiscriminate service to whatever public its service may legally and practically be of use."<sup>60</sup> The court noted that because common carriers and private carriers "may . . . be indistinguishable in terms of the clientele actually served,"<sup>61</sup> the distinction between the classifications "turn[s] on the manner and terms by which they approach and deal with their customers."<sup>62</sup>

The *NARUC I* court upheld the FCC's determination that the SMR providers were not common carriers for two reasons.<sup>63</sup> First, they were not legally compelled to hold themselves out to the public indifferently. Second, although SMR providers had not yet begun offering service, they gave no indication that they would hold themselves out indifferently.<sup>64</sup>

In 1982 Congress attempted to respond to the difficulties of regulators and courts in distinguishing common from private carriers by amending the Communications Act.<sup>65</sup> Section 332, entitled "Pri-

vate Land Mobile Services,"<sup>66</sup> was intended to draw a "clear demarcation between private and common carrier land mobile services."<sup>67</sup> The legislation's intended effect, however, was never achieved.<sup>68</sup>

The legislation defined "private land mobile service" as "a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation,"<sup>69</sup> and further provided that:

[P]rivate land mobile service shall include service provided by specialized mobile radio, multiple licensed radio dispatch systems, and all other radio dispatch systems, regardless of whether such service is provided indiscriminately to eligible users on a commercial basis, except that a land station licensed in such service to multiple licensees or otherwise shared by authorized users (other than a nonprofit, cooperative station) shall not be interconnected with a telephone exchange or interexchange service or facility for any purpose, except to the extent that (A) each user obtains such interconnection directly from a duly authorized carrier; or (B) licensees jointly obtain such interconnection directly from a duly authorized carrier.<sup>70</sup>

Congress instructed that "[t]he basic distinction . . . is a functional one, *i.e.*, whether or not a particular entity is engaged functionally in the provision of telephone service or facilities of a common carrier as

<sup>68</sup> See *id.* paras. 28-45. This proceeding, of which creation of the SMR service was only one aspect, has been called "a sweeping reallocation of spectrum to land mobile radio services." *In re* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Notice of Proposed Rule Making*, 8 FCC Rcd. 3950, para. 2 (1993).

<sup>69</sup> *NARUC I*, *supra* note 56, at 647.

<sup>60</sup> *Id.* at 642; *accord In re* Amendment of Parts 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Services, and the Private Operational Fixed Microwave Service, *Report and Order*, 94 F.C.C.2d 1203, para. 126 (1983).

<sup>61</sup> *NARUC I*, *supra* note 56, at 642 & n.62. The Court cited decisions holding that common carriers are not required to serve the entire public, *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 255 (1927), and that private carriers may serve large numbers of customers other than the carrier itself, *Home Ins. Co. v. Riddell*, 252 F.2d 1, 4 (5th Cir. 1958).

<sup>62</sup> *NARUC I*, *supra* note 56, at 642 & n.62.

<sup>63</sup> *Id.* at 642-44. The Court stated that SMR operators could hold themselves out indifferently to serve the public, thereby becoming common carriers, but that this possibility did not require a common carrier classification. See *id.* at 644. Notably, the Court added that the FCC does not have discretion to classify carriers, stating that "[a] particular system is a common carrier by virtue of its functions, rather than because it is de-

clared to be so." *Id.* The Court upheld the FCC's classification, "not because [the FCC] has any significant discretion in determining who is a common carrier, but because we find nothing in the record or the common carrier definition to cast doubt on its conclusions that SMRs are not common carriers." *Id.*

<sup>64</sup> *Id.* at 642.

<sup>65</sup> See H.R. Rep. No. 765, 97th Cong., 2d Sess. 54 (1982), reprinted in 1982 U.S.C.A.N. 2237, 2298-99 [hereinafter "1982 House Report"].

<sup>66</sup> 47 U.S.C. § 332(c) (1988 & Supp. 1993).

<sup>67</sup> 1982 House Report, *supra* note 65, 2d Sess. 54-55, reprinted in 1982 U.S.C.A.N. at 2298. The legislative history indicates that this section "both establishes a clear demarcation between private and common land mobile services, and specifies that only the latter may be regulated on a common carrier basis." *Id.*

<sup>68</sup> The legislation by its terms applies only to land mobile services. Thus, the line drawn by Congress arguably is inapplicable to other services. In any event, disputes over classification continued to arise. See, e.g., *In Re* Request of Fleet Call, Inc. for Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, *Memorandum Opinion and Order*, 6 FCC Rcd. 1533 (1991)[hereinafter *Fleet Call Memorandum Opinion and Order*]; *In re* American Teltronix, *Second Memorandum Opinion and Order*, 5 FCC Rcd. 1955 (1990).

<sup>69</sup> 47 U.S.C. § 153(gg) (1988 & Supp. 1993).

<sup>70</sup> 47 U.S.C. § 332(c)(1) (1988 & Supp. 1993).

part of the entity's service offering. If so, the entity is deemed to be a common carrier."<sup>71</sup> Congress intended that the FCC not permit private land mobile carriers to be "interconnected with common carrier facilities," or to be "interconnected common carrier services."<sup>72</sup> Moreover, Congress specifically stated that "[w]ith respect to the land mobile services, this test supersedes the traditional common law test of indifferently different service to the public established in [NARUC I]."<sup>73</sup>

Following the addition of section 332 to the Communications Act, the FCC stated that the test for determining whether a service is a common carrier or private land mobile service depends on whether the licensee resells interconnection with the public switched telephone network ("PSTN") for a profit.<sup>74</sup> This test has remained the touchstone of FCC analysis of the common carrier/private carrier distinction.<sup>75</sup>

## II. SIGNIFICANCE OF THE REGULATORY DISTINCTION BETWEEN COMMON CARRIER AND PRIVATE CARRIER CLASSIFICATION

Whether the FCC classifies a mobile service provider as a common carrier or private carrier becomes

critically important because of the different statutory and regulatory provisions that attach to each classification. Title II of the Communications Act,<sup>76</sup> and the FCC's regulations implementing Title II,<sup>77</sup> impose numerous obligations on common carriers. Mobile services providers classified as private carriers under former section 332 of the Communications Act, however, typically are exempt from these requirements.

The basic differences with respect to the regulatory requirements imposed on mobile services providers include:

1. Common carriers must hold themselves out to provide service to all customers upon reasonable request.<sup>78</sup> Private carriers are restricted to offering service only to those defined in the FCC's rules as "eligible users."<sup>79</sup>
2. Common carriers' rates, terms and conditions of service offerings must be just and reasonable,<sup>80</sup> and are subject to federal tariff requirements.<sup>81</sup> Because private carriers are not subject to these requirements, they may establish different prices, terms, and conditions of service for different users.
3. While common carriers must provide service on a non-discriminatory basis and may not grant preferences,<sup>82</sup> private carriers have no such obligations.
4. Common carriers generally are subject to state regulation, including regulation of rates and market entry.<sup>83</sup> Private carriers are exempt from such regulation.<sup>84</sup>

<sup>71</sup> 1982 House Report, *supra* note 65, at 2299 (internal citations omitted).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *In re American Teltronix, Second Memorandum Opinion and Order, supra* note 68, para. 9 (1990); *see also Fleet Call Memorandum Opinion and Order, supra* note 68, para. 31 ("[s]o long as a licensee continues to meet th[e] requirement [that interconnected telephone service not be sold for a profit], it remains a private carrier for regulatory purposes.").

<sup>75</sup> *See, e.g., In re Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems, Report and Order, 7 FCC Rcd. 5558, para. 6 (1992); In re Mobile Radio of New England, Memorandum Opinion and Order, 8 FCC Rcd. 349, para. 3 (1993).*

<sup>76</sup> 47 U.S.C. §§ 201-226 (1988 & Supp. 1993).

<sup>77</sup> *E.g., 47 C.F.R. §§ 1.701-1.815 (1993); 47 C.F.R. Parts 22, 32, 34, 36, 42, 43, 61, 62, 63, 64 (1993).*

<sup>78</sup> 47 U.S.C. § 201(a) (1988 & Supp. 1993).

<sup>79</sup> *See, e.g., 47 C.F.R. § 90.603 (1993).* According to the FCC:

an eligible is an entity who, by virtue of its activities, may apply for a license to operate a private land mobile radio system. Eligibility is founded on the premise that similarly situated users have similar communications needs and are more likely to be compatible in terms of their operational requirements.

*In re Amendment of Part 90 of the Commission's Rules to Ex-*

*pand Eligibility and Shared Use Criteria in the Private Land Mobile Services, Notice of Proposed Rule Making, 4 FCC Rcd. 2589, para. 4 (1989)*(internal citations omitted), *Report and Order, 6 FCC Rcd. 542 (1991).* *See infra* Part III, regarding the FCC's recent expansion of the eligible user standard.

<sup>80</sup> 47 U.S.C. § 201(b) (1988 & Supp. 1993).

<sup>81</sup> 47 U.S.C. § 203 (1988 & Supp. 1993).

<sup>82</sup> 47 U.S.C. § 202(a) (1988 & Supp. 1993).

<sup>83</sup> *See 47 U.S.C. § 152(b) (1988 & Supp. 1993)*("[N]othing in [the Communications Act] shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . ."). Many states, however, have chosen not to regulate mobile service common carriers. *But see In re Preemption of State Entry Regulation in the Public Land Mobile Service, Report and Order, 59 Rad. Reg. 2d (P & F) 1518 (1986), remanded on other grounds, National Ass'n of Regulatory Util. Comm'rs v. FCC, No. 86-1205 (D.C. Cir.); clarified, Memorandum Opinion and Order, 2 FCC Rcd. 6434 (1987).*

<sup>84</sup> 47 U.S.C. § 332(c)(3) (1988 & Supp. 1993)("No State or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service, except that nothing in this subsection may be construed to impair such jurisdiction with respect to common carrier stations in the mobile service."). *See also In re Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorization, Memorandum Opinion and Order, 98 F.C.C.2d 792, 797 n.5*



5. Both common carriers and private carriers may provide interconnection<sup>65</sup> to the public switched telephone network; however, the provision of interconnected service by private carriers is subject to numerous restrictions, chiefly that they may not resell such service for profit.<sup>66</sup>

6. Different technical rules apply to common and private carriers. For example, some common carrier paging systems may operate transmitters at up to 3500 watts effective radiated power ("ERP").<sup>67</sup> Most private carrier paging systems traditionally have been subject to lower power limits.<sup>68</sup>

7. Since 1985, most licenses for common carrier mobile services have been awarded pursuant to a statutory random selection, or lottery, procedure.<sup>69</sup> Licenses for private mobile services typically are awarded on a first-come, first-served basis.<sup>70</sup>

8. Applications for common carrier mobile service licenses are subject to statutory public notice and petition to deny

provisions.<sup>71</sup> Private carrier applications are not subject to these provisions,<sup>72</sup> nor are they subject to Title II complaint procedures.<sup>73</sup> This plays a role in the length of time required by the FCC to process and grant applications, which typically is much shorter for private services.<sup>74</sup>

9. The FCC reviews the legal and technical qualifications of both common and private carrier mobile service providers, but does not require that private licensees demonstrate their financial qualifications, as is required of certain common carriers.<sup>75</sup> In place of a financial qualification review, the FCC imposes mandatory construction and loading requirements on private mobile service licensees.<sup>76</sup>

10. Common carrier mobile service providers are licensed on an exclusive basis within a defined geographic area.<sup>77</sup> Private carriers traditionally have shared their frequencies.<sup>78</sup>

11. Common carriers are subject to greater restrictions on foreign ownership than are private carriers.<sup>79</sup>

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(1984)("Once a service is classified as private under the statutory test contained in [former section 332], it is exempt from state and local regulation.").

<sup>65</sup> The FCC's private land mobile services rules define interconnection as:

[C]onnection through automatic or manual means of private land mobile radio stations with the facilities of the public switched telephone network to permit the transmission of messages or signals between points in the wireline or radio network of a public telephone company and persons served by private land mobile radio stations . . .

47 C.F.R. § 90.7 (1993). *Compare In re The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling*, 2 FCC Rcd. 2910 (1987), stating that with respect to common carriers services:

The term 'physical interconnection' refers to the facilities connection (by wire, microwave or other technologies) between the end office of a landline network and the mobile telephone switching office (MTSO) of a cellular network or the hardware or software, located within a carrier's central office, which is necessary to provide interconnection.

*Id.* at 2918 n.27

<sup>66</sup> See 47 U.S.C. § 332(c)(i) (1988 & Supp. 1993); 47 C.F.R. §§ 90.477, 90.483 (1993); *Fleet Call Memorandum Opinion and Order*, *supra* note 68, para. 31.

<sup>67</sup> 47 C.F.R. § 505(c)(2) (1993). A proposal is pending that would make the 3500 watt limit applicable to all common carrier paging transmitters. See *In re Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Land Mobile Service, Notice of Proposed Rule Making and Order Granting Petition for Waiver*, 8 FCC Rcd. 2796 (1993).

<sup>68</sup> See 47 C.F.R. § 90.494 (1993). *But see infra*, note 123 and accompanying text, regarding authorization of comparable operating limits for certain private carriers.

<sup>69</sup> See 47 U.S.C. § 309(i) (1988 & Supp. 1993); 47 C.F.R. §§ 1.821-1.823; 22.33 (1993); see also Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087 (1982)(adding section 309(i) to the Communications Act to authorize the use of lotteries to award licenses). The 1993 Budget Act amended the Communications Act to provide that licenses

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for the new "commercial mobile radio services" generally will be awarded through a competitive bidding, or auction, process. 1993 Budget Act § 6002(a), (b), 107 Stat. at 387-92 (to be codified at 47 U.S.C. § 309(j)).

<sup>70</sup> See 47 C.F.R. §§ 90.143(b), 90.611 (1993); see also *LMRS Memorandum Opinion and Order*, *supra* note 29, para. 38. In adopting the new auction procedures, Congress stated that these provisions "should not affect how the Commission issues licenses for virtually all private services." H.R. Rep. No. 111, 103d Cong., 1st Sess. 245-51, *reprinted in* 1993 U.S.C.C.A.N. 378, 572-78.

<sup>71</sup> See 47 U.S.C. § 309(b), (d)(i) (1988 & Supp. 1993); 47 C.F.R. §§ 22.27, 22.30 (1993).

<sup>72</sup> See 47 U.S.C. § 309(b), (d)(i) (1988 & Supp. 1993); see generally 47 C.F.R. §§ 1.901-1.981 (1993). Private carriers, however, may be subject to informal objections filed pursuant to section 1.41 of the FCC's rules, 47 C.F.R. § 1.41 (1993). See *In re BP Oil Company, Applications for Private Land Mobile and General Mobile Radio Services, Order*, 8 FCC Rcd. 7320 (1993).

<sup>73</sup> 47 U.S.C. §§ 206-208 (1988 & Supp. 1993).

<sup>74</sup> See *Land Mobile Services Inquiry Second Report and Order*, *supra* note 56, paras. 28-44 & n.5.

<sup>75</sup> Compare 47 C.F.R. §§ 90.127, 90.129, 90.607 with 47 C.F.R. § 22.917.

<sup>76</sup> *LMRS Memorandum Opinion and Order*, *supra* note 29, para. 46. See, e.g., 47 C.F.R. § 90.633 (1993).

<sup>77</sup> See, e.g., 47 C.F.R. § 22.501(a)(1) (1993).

<sup>78</sup> See *In re Amendment of Parts 89, 91, 93 and 95 of the Commission's Rules to Adopt New Practices and Procedures for Cooperative Use and Multiple Licensing of Stations in the Private Land Mobile Radio Services, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 24 F.C.C.2d 510, paras. 29-32 (1970), *Report and Order*, 89 F.C.C.2d 766 (1982), *Memorandum Opinion and Order on Reconsideration*, 93 F.C.C.2d 1127 (1983). *But see infra*, note 122 and accompanying text, regarding the authorization of exclusive channel use by certain private carriers.

<sup>79</sup> See 47 U.S.C. § 310(a), (b) (1988 & Supp. 1993); see also *Mobile Services First Report and Order*, *supra* note 19, paras. 12-15 (establishing procedures by which certain entities subject to reclassification as common carriers may seek waiver of the

12. Forfeiture penalties are significantly higher for common carriers than for private carriers: Common carriers may be subject to penalties of \$10,000 to \$80,000 for a single violation and \$100,000 to \$800,000 for continuing violations. Private carriers may be subject to fines of only \$1,000 to \$8,000 for a single violation and \$7,500 to \$60,000 for continuing violations.<sup>100</sup>

13. Common carriers are subject to higher regulatory fees and charges than private carriers.<sup>101</sup>

14. Common carrier and private carrier mobile service providers fall under the jurisdiction of two separate bureaus of the FCC, the Common Carrier Bureau,<sup>102</sup> and the Private Radio Bureau,<sup>103</sup> respectively. Separate sections of the FCC's rules govern the operations of licensees subject to regulation by the respective bureaus.<sup>104</sup>

In sum, the practical effect of the different regulatory schemes applicable to common and private mobile carriers is to provide competitive benefits to both. For example, although private carriers have more flexibility in offering and pricing their services and in obtaining financing, some private carriers, such as those who compete directly with common carriers, may be forced to incur greater costs because of restrictions on transmitter power that require the construction of additional transmitters. In any event, the customer or end-user receiving the mobile service

generally is unaware of regulatory distinctions that ultimately may affect the price and quality of the service.

### III. EROSION OF REGULATORY DISTINCTIONS AND THE NEED FOR A UNIFIED REGULATORY APPROACH

Mobile service providers of all classifications have established viable mobile communications systems as a result of Commission policies intended to spur competition. As competition has increased, however, common carriers and state regulators have asserted that the Commission's rules and policies benefit private carriers.<sup>105</sup> Private carriers typically have responded that the FCC's rules and policies favor common carriers.<sup>106</sup> In truth, the regulatory environment offers advantages to both common and private carriers.<sup>107</sup>

This debate has been going on for decades. In 1970, the FCC rejected requests by common carriers to slow the growth of private mobile systems, offered by what the common carriers termed "pseudo carriers," that were alleged to compete with common carrier systems.<sup>108</sup> More recently, carriers subject to Title II's broad obligations have complained that

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statutory foreign ownership restrictions).

<sup>100</sup> See 47 C.F.R. § 1.80(b) (1993); *In re Standards for Assessing Forfeitures, Policy Statement*, 6 FCC Rcd. 4695 (1991), *recon. denied*, 7 FCC Rcd. 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). See also *In Re The Hinton Telephone Company of Hinton, Oklahoma, Inc., Notice of Apparent Liability for Forfeiture Penalty for Station WQZ687 in the Public Land Mobile Service at Colony, Oklahoma, Memorandum Opinion and Order on Review*, 8 FCC Rcd. 5176, paras. 4-6 & n.3 (1993) (noting that Congress established higher forfeiture amounts for common carriers).

<sup>101</sup> See 47 U.S.C. §§ 158, 159 (1988 & Supp. 1993). For example, the Schedule of Regulatory Fees adopted by Congress in the 1993 Budget Act establishes an annual fee of \$16 per license for providers of exclusive use private land mobile services, and an annual fee of \$60.00 per 1,000 subscribers for common carrier land mobile service providers. See 1993 Budget Act § 6003(a)(1), 107 Stat. at 397-401 (to be codified at 47 U.S.C. § 159(g)).

<sup>102</sup> See 47 C.F.R. § 0.91 (1993).

<sup>103</sup> See 47 C.F.R. § 0.131 (1993).

<sup>104</sup> Most common carrier providers of mobile services are governed by Parts 22 (Public Mobile Services) and 25 (Satellite Communications) of the Commission's rules, 47 C.F.R. §§ 22.0 *et seq.* and §§ 25.101 *et seq.* (1992). Most private carrier mobile service providers are governed by Part 90 of the rules, 47 C.F.R. §§ 90.1 *et seq.* (1992).

<sup>105</sup> See, e.g., *Hearing on Mobile Communications Before the Subcomm. on Comm. of the Senate Comm. on Com.*, 102d Cong., 2d Sess. (1992) (statement of James B. Ramsey, Assistant

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General Counsel, National Association of Regulatory Utilities Commissioners); *In Re Request of Fleet Call, Inc. for Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, Memorandum Opinion and Order*, 6 FCC Rcd. 6989 (1991) [hereinafter *Fleet Call II Memorandum Opinion and Order*].

<sup>106</sup> See *Hearing on Mobile Communications Before the Subcomm. on Comm. of the Senate Comm. on Com.*, 102d Cong., 2d Sess. (1992) (statement of Robert Fossaner, Vice President, Government Relations, Fleet Call, Inc.); Alan R. Shark, President and CEO, American Mobile Telecommunications Association, *The Road Toward Uncommon Carriage*, Address at the American Mobile Telecommunications Association Membership Meeting (May 5, 1993).

<sup>107</sup> Common and private mobile systems are not yet true competitors. Common and private systems operate on different frequency bands, with different technical characteristics. Moreover, common carrier mobile systems typically have access to significantly greater amounts of spectrum, fewer regulatory obstacles to aggregating systems to provide coverage across wide geographic areas, and an established infrastructure and customer base.

<sup>108</sup> See *In re Amendment of Parts 89, 91, 93 and 95 for Cooperative Use and Multiple Licensing of Stations in the Private Land Mobile Radio Services, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 24 F.C.C.2d 510, para. 3 (1970). The common carriers complained about the sharing of one-way paging systems and the multiple licensing of community repeaters. *Id.* See also *In re Applications of Millicom Corporate Digital Communications, Inc., for a Nationwide Private Carrier Paging System, Memorandum Opinion and Order*,

erosion of regulatory differentiation has left them vulnerable to competition from companies that in fact offer "functionally equivalent" services but face much less restrictive regulation. For example, common carrier cellular telephone licensees and private SMR service<sup>109</sup> providers offer essentially identical services,<sup>110</sup> and common carriers and private carriers offer paging services that are virtually indistinguishable.<sup>111</sup>

Aside from the rhetoric of both common and private carriers that the FCC's policies accord a competitive advantage to the other, different regulatory schemes for common and private carriers have in fact resulted in inconsistent and confusing rules and policies. One clear example of the erosion of the differences between common and private carriers is who may receive service. While communications common carriers are subject to a statutory requirement to hold themselves out to provide service indiscriminately to all customers upon reasonable request,<sup>112</sup> private carriers are restricted to offering service only to those eligible to receive such service.<sup>113</sup>

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65 Rad. Reg. 2d (P & F) 235, 238 (1983) (rejecting arguments against the authorization of a private carrier paging system); *In re* Amendment of Part 90 of the Commission's Rules to Prescribe Policies and Regulations to Govern the Interconnection of Private Land Mobile Systems with the Public Switched Telephone Network in the Bands 806-821 and 851-866 MHz, *Second Report and Order*, 89 F.C.C.2d 741, para. 56 (1982) (finding "speculative" arguments that the provision of interconnection to the public switched telephone network by private systems would adversely affect common carriers); *LMRS Memorandum Opinion and Order*, *supra* note 29, paras. 79-81 (denying arguments that SMRs must be regulated as common carriers and noting that "this issue has become the most controversial one we have had to resolve in this rulemaking.").

<sup>109</sup> Since its creation in 1974, SMR service has become "the preeminent provider of private land mobile communications service, particularly in the nation's largest metropolitan areas." *In re* Amendment of Part 90, Subparts M and S, of the Commission's Rules, *Report and Order*, 3 FCC Rcd. 1838, para. 3 (1988).

<sup>110</sup> In 1991, the FCC approved a proposal to establish "enhanced SMR" systems that would compete with cellular service in several of the largest metropolitan areas in the United States. See *Fleet Call Memorandum Opinion and Order*, *supra* note 68, para. 1. Although challenged on the grounds that the FCC failed to apply the "functional test" for distinguishing private carriers from common carriers, the decision stands. See *Fleet Call II Memorandum Opinion and Order*, *supra* note 105. Since the *Fleet Call* decision, several other enhanced SMR systems have been authorized throughout wide areas of the United States, effectively competing with common carrier cellular systems. See Letter from Ralph A. Haller, Chief, PRB, to David E. Weisman, Esq., 8 FCC Rcd. 143, 143 nn.2-4 (1992).

<sup>111</sup> Indeed, common carriers are not prohibited from holding private service licenses, see *LMRS Memorandum Opinion And*

Over time, however, the FCC has significantly expanded the definition of private carrier eligibility. In the SMR service, for example, the FCC traditionally permitted licensees to provide service only to end users who were themselves qualified to hold private system licenses under various eligibility categories set out in Part 90 of the FCC's rules.<sup>114</sup> The primary function of these private systems was to serve the specialized needs of a particular group, such as taxicabs, doctors, or electricians.<sup>115</sup> Individuals, federal government agencies, and representatives of foreign governments were not eligible to receive service.<sup>116</sup> Now, the FCC places virtually no restrictions on who may be an eligible user,<sup>117</sup> and SMR licensees may offer commercial service to individuals.<sup>118</sup> The FCC also removed a restriction on providing private carrier paging service to individuals.<sup>119</sup> In doing so, the FCC affirmatively sought to encourage competition between common and private carriers.<sup>120</sup>

Relaxation of restrictions on interconnection with the PSTN also blurred the distinction between private and common carrier mobile systems. Original

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*Order*, *supra* note 29, para. 81, and many of the largest providers of commercial paging service hold both common and private carrier licenses.

<sup>112</sup> 47 U.S.C. § 202(a) (1988 & Supp. 1993).

<sup>113</sup> See, e.g., 47 C.F.R. § 90.603 (1993).

<sup>114</sup> See, e.g., 47 C.F.R. Part 90, Subpart B (Public Safety Radio Service, which includes the Police Radio Service and Fire Radio Service); Subpart C (Special Emergency Radio Service, which includes the Medical Services and school buses); Subpart D (Industrial Radio Service, which includes the Petroleum Radio Service and the Business Radio Service); Subpart E (Land Transportation Service, which includes the Railroad Radio Service and the Taxicab Radio Service).

<sup>115</sup> See *In re* Amendment of Part 90, Subparts M and S, of the Commission's Rules, *Report and Order*, 3 FCC Rcd. 1838, paras. 15-17 (1988), *Memorandum Opinion and Order on Reconsideration*, 4 FCC Rcd. 356 (1989).

<sup>116</sup> *Id.* para 15.

<sup>117</sup> Notably, in upholding the FCC's original classification of SMRs as private carriers, the United States Court of Appeals for the District of Columbia Circuit "conclude[d] that nothing in the record indicate[d] any significant likelihood that SMRs [would] hold themselves out indifferently to serve the user public." *NARUC I*, *supra* note 56, at 643-44.

<sup>118</sup> See *In re* Amendment of Part 90, Subparts M and S, of the Commission's Rules, *Report and Order*, 3 FCC Rcd. 1838, paras. 34-35 (1988). The FCC specifically found that expansion of end user eligibility did not affect the status of SMR licensees as private carriers. *Id.* para. 25.

<sup>119</sup> *In re* Amendment of the Commission's Rules to Permit Private Carrier Paging Licensees to Provide Service to Individuals, *Report and Order*, 8 FCC Rcd. 4822 (1993) (to be codified at 47 C.F.R. § 90.494(a)) [hereinafter *Private Paging Report and Order*].

<sup>120</sup> See *id.* paras. 1-4.

limitations on interconnection by private systems were eliminated to give private licensees and users the freedom to interconnect "limited only by the prohibition against 'resale' of telephone service or facilities."<sup>121</sup>

The traditional distinction that only common carriers have exclusive use of their authorized spectrum also is disappearing. Private carrier paging service licensees now may receive exclusive licenses for local, regional, and nationwide paging systems.<sup>122</sup> Technical differences also are eroding. The FCC now authorizes nationwide private carrier paging systems to operate at power limits equal to limits applicable to common carriers.<sup>123</sup>

In passing the amendments to the Communications Act contained in the 1993 Budget Act, Congress found that the FCC's actions had eroded the distinctions between common and private carriers to the extent that "[p]rivate carriers are permitted to offer what are essentially common carrier services . . . while retaining private carrier status."<sup>124</sup> In sum, disparate regulations have resulted in a competitive mobile services marketplace in which functionally equivalent services operate under dissimilar rules and regulations.

Congress sought to remedy this situation by adopting the amendments incorporated in revised section 332 of the Communications Act, and by requiring the FCC to implement rules to execute the "regulatory treatment" provisions of revised section

332.<sup>125</sup> The 1993 Budget Act further requires the FCC to adopt rules to ensure that like services have similar technical rules.<sup>126</sup>

The FCC has conceded that different interpretations of statutory language and its own regulations by the Common Carrier Bureau and Private Land Mobile Bureau led to legislative action to remedy unequal treatment of like services.<sup>127</sup> The Commission's task in the Mobile Services Proceeding was to adopt rules to eliminate such disparate treatment, and to ensure that in the future, like services are regulated in a like manner.

#### IV. THE MOBILE SERVICES PROCEEDING

The FCC's Mobile Services Proceeding<sup>128</sup> responds to Congress's directive to reconcile the disparate regulatory treatment accorded similar mobile services.<sup>129</sup> In its *Notice of Proposed Rule Making* ("*Mobile Services NPRM*"),<sup>130</sup> the FCC requested public comment on issues relating to the definition and classification of mobile services, and also reached tentative conclusions on many key questions. In response, seventy-seven parties filed comments and fifty-two parties filed reply comments.<sup>131</sup> The commenters encompassed private and public companies providing numerous mobile services, including: long-distance carriers,<sup>132</sup> all seven Regional Bell Operating Companies,<sup>133</sup> local exchange carriers,<sup>134</sup> cellular

<sup>121</sup> *In re* Amendment of Part 90 of the Commission's Rules to Prescribe Policies and Regulations to Govern the Interconnection of Private Land Mobile Systems with the Public Switched Telephone Network in the Bands 806-821 and 851-866 MHz, *Memorandum Opinion and Order*, 93 F.C.C.2d 1111, para. 14 (1982). The FCC noted that its relaxation of private system interconnection restrictions was endorsed by the Communications Amendments Act of 1982, which codified the no-interconnection-for-profit principle. See *id.* paras. 11-15.

<sup>122</sup> See *In re* Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz, *Report and Order*, 8 FCC Rcd. 8318, para. 1 (1993), *recon. pending* (to be codified at 47 C.F.R. § 90.494).

<sup>123</sup> See *id.* para. 45. The FCC is reviewing petitions for reconsideration of the *Report and Order* in PR Docket No. 93-35 seeking higher power limits for regional private carrier paging systems as well. See *Petition for Reconsideration of Actions in Rulemaking Proceeding*, *Public Notice* (Feb. 17, 1994).

<sup>124</sup> H.R. Rep. No. 111, 103d Cong., 1st Sess. 259-60, *reprinted in* 1993 U.S.C.C.A.N. 378, 586-87.

<sup>125</sup> See *id.* at 260, *reprinted in* 1993 U.S.C.C.A.N. at 587.

<sup>126</sup> 1993 Budget Act § 6002(d)(3)(B), 107 Stat. at 396.

<sup>127</sup> See *Mobile Services Second Report and Order*, *supra* note 18, para. 7.

<sup>128</sup> *Mobile Services NPRM*, *supra* note 14; *Mobile Services First Report and Order*, *supra* note 19; *Mobile Services Second*

*Report and Order*, *supra* note 18; *In re* Implementation of Sections 3(n) and 332 of the Communications Act, *Regulatory Treatment of Mobile Services*, *Further Notice of Proposed Rule Making* in GN Dkt. No. 93-252, FCC 94-100 (May 23, 1994) [hereinafter *Mobile Services FNPRM*].

<sup>129</sup> Congress provided little explicit guidance on how the FCC should implement this directive, stating generally that revised section 332 "directs the Commission to review its rules and regulations to achieve regulatory parity among services that are substantially similar." H.R. Rep. No. 111, *supra* note 124.

<sup>130</sup> *Mobile Services NPRM*, *supra* note 14.

<sup>131</sup> See *Mobile Services Second Report and Order*, *supra* note 18, App. D.

<sup>132</sup> MCI Telecommunications Corporation ("MCI") and Sprint Corporation ("Sprint").

<sup>133</sup> Ameritech; Bell Atlantic Companies ("Bell Atlantic"); BellSouth Corporation (including its affiliates BellSouth Telecommunications, Inc., BellSouth Cellular Corp., and Mobile Communications Corporation of America) ("BellSouth"); NYNEX Corporation ("NYNEX"); Pacific Bell and Nevada Bell ("Pacific Bell"); Southwestern Bell Corporation ("Southwestern Bell"); and US West.

<sup>134</sup> Century Cellunet Inc.; North Pittsburgh Telephone Company; Pioneer Telephone Cooperative, Inc., Pioneer Telecommunications, Inc., and O.T. & T.; and Rochester Telephone Corporation ("Rochester").

telephone carriers,<sup>135</sup> paging companies,<sup>136</sup> specialized mobile radio service operators,<sup>137</sup> mobile satellite service providers,<sup>138</sup> cable television companies,<sup>139</sup> equipment manufacturers,<sup>140</sup> and various common carrier and private carrier service providers.<sup>141</sup> They also included numerous public and government entities,<sup>142</sup> and associations representing the interests of mobile service industries.<sup>143</sup>

In the *Mobile Services Second Report and Order*,<sup>144</sup> the FCC adopted rules defining "mobile service,"<sup>145</sup> "commercial mobile radio service" ("CMRS"),<sup>146</sup> and "private mobile radio service" ("PMRS"),<sup>147</sup> and classifying existing mobile services and new personal communications services as either CMRS or PMRS.<sup>148</sup> The FCC also adopted rules exempting CMRS providers from certain common carrier obligations contained in Title II of the Communications Act.<sup>149</sup> Finally, the FCC adopted

rules establishing the interconnection rights of mobile service providers,<sup>150</sup> and the procedures that states must follow to request authority to regulate CMRS rates.<sup>151</sup>

In addition, the FCC stated that it would institute numerous rulemaking proceedings to address issues that remain unresolved,<sup>152</sup> which include: (1) establishing technical rules for transitioning private service licensees that will be reclassified as CMRS under the new rules;<sup>153</sup> (2) whether the FCC should exempt CMRS from additional Title II provisions;<sup>154</sup> (3) the interconnection rights and obligations of CMRS licensees vis-a-vis other carriers; (4) whether the prohibition on providing dispatch service by common carriers should be removed; and (5) establishing extensive and ongoing monitoring of the cellular market to ensure that regulatory forbearance has no adverse effect on the public interest.<sup>155</sup>

<sup>135</sup> Century Cellnet Inc.; Cox Enterprises, Inc.; General Communications, Inc. ("GCI"); Illinois Valley Cellular RSA 2 Partnerships; Independent Cellular Network, Inc.; Liberty Cellular, Inc.; McCaw Cellular Communications, Inc. ("McCaw"); New Par; Pacific Telecom Cellular, Inc.; PN Cellular, Inc. and affiliates; PTC Cellular; Telephone and Data Systems, Inc. ("TDS"); and Vanguard Cellular Systems, Inc. ("Vanguard").

<sup>136</sup> AllCity Paging, Inc.; Arch Communications Group, Inc. ("Arch"); Mobile Telecommunications Technologies Corp. ("Mtel"); PacTel Paging; Pagemart, Inc. ("Pagemart"); and Paging Network, Inc. ("PageNet").

<sup>137</sup> Advanced MobileComm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc.; CenCall Communications Corporation; Geotek Industries, Inc.; Nextel Communications, Inc. ("Nextel"); and Ram Mobile Data USA Limited Partnership ("Ram Mobile Data").

<sup>138</sup> AMSC Subsidiary Corporation and TRW, Inc.

<sup>139</sup> Cox Enterprises, Inc. and Time Warner Telecommunications.

<sup>140</sup> E.F. Johnson Company ("Johnson"); Metricom, Inc.; Motorola, Inc. ("Motorola"); and Rockwell International Corporation ("Rockwell").

<sup>141</sup> E.g., In-Flight Phone Corporation; GTE Service Corporation ("GTE"); Grand Broadcasting Corporation; Rig Telephones, Inc.; Roamer One, Inc.; and Waterway Communications System, Inc.

<sup>142</sup> People of the State of California and the Public Utilities Commission of the State of California; Public Service Commission of the District of Columbia ("DC PSC"); Lower Colorado River Authority; New York State Department of Public Service ("New York DPS"); National Association of Regulatory Utility Commissioners; and the Association of Public Safety Communications Officials International, Inc.

<sup>143</sup> American Mobile Telecommunications Association, Inc.; American Petroleum Institute ("API"); Association of American Railroads ("AAR"); Cellular Telecommunications Industry Association ("CTIA"); Industrial Telecommunications Association, Inc.; National Association of Business and Educational Radio, Inc. ("NABER"); National Cellular Resellers Association; National Telephone Cooperative Association; Rural Cellular Association;

United States Telephone Association; and Utilities Telecommunications Council ("UTC").

<sup>144</sup> *Mobile Services Second Report and Order*, *supra* note 18.

<sup>145</sup> *Id.* App. A (to be codified at 47 C.F.R. § 20.3).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* App. A (to be codified at 47 C.F.R. § 20.9). The rule changes adopted in the *Mobile Services Second Report and Order* will become effective July 18, 1994. See 59 Fed. Reg. 18,493 (1994). Private carriers who will be reclassified as CMRS, however, will continue to be regulated as private carriers until August 10, 1996. See *id.* para. 280; 1993 Budget Act § 6002(c)(2)(B), 107 Stat. at 396. This transition period applies to all private land mobile licensees licensed as of August 10, 1993, except private paging licensees, who will be treated as private carriers for the entire transition period regardless of whether they were licensed before or after August 10, 1993. See *Mobile Services Second Report and Order*, *supra* note 18, paras. 281, 284. Private land mobile licensees not licensed as of August 10, 1993, will be regulated as CMRSs as soon as new transitional rules for reclassified services are adopted and become effective. See *id.* para. 281.

<sup>149</sup> See *Mobile Services Second Report and Order*, *supra* note 18, para. 285 (to be codified at 47 C.F.R. § 20.17).

<sup>150</sup> See *id.* para. 285 (to be codified at 47 C.F.R. § 20.11).

<sup>151</sup> *Id.* para. 285 (to be codified at 47 C.F.R. § 20.13).

<sup>152</sup> See *id.* para. 285.

<sup>153</sup> On April 20, 1994, the FCC adopted a *Further Notice of Proposed Rule Making* in the Mobile Services Proceeding with regard to these transitional rules. See *Mobile Services FNPRM*, *supra* note 128.

<sup>154</sup> On April 20, 1994, the FCC instituted a new rulemaking for this purpose. *In re Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, Notice of Proposed Rule Making* in GN Dkt. No. 94-33, FCC 94-101 (May 4, 1994).

<sup>155</sup> See *Mobile Services Second Report and Order*, *supra* note 18, para. 285.

## A. Definitions

In accordance with the 1993 Budget Act, the Mobile Services Proceeding defines the discrete terms that comprise the statutory definitions of commercial mobile service and private mobile service. In doing so, the FCC attempted to comply with Congress's goal of regulating like services in a like manner.

### 1. "Mobile services"

In the 1993 Budget Act, Congress amended the prior statutory definition of mobile services to include private land mobile services and new personal communications services.<sup>156</sup> In the *Mobile Services NPRM*, the FCC tentatively concluded that the "revised definition was intended to bring all existing mobile services within the ambit of [revised] Section 332" of the Communications Act, which requires like regulatory treatment of like services.<sup>157</sup>

In light of Congress's express guidance in the revised statutory mobile services definition, the FCC's conclusion was not controversial, and the definition of mobile services adopted in the *Mobile Services Second Report and Order*<sup>158</sup> is consistent with its tentative conclusion. Thus, mobile services include those services governed by Part 22 (public land mobile services, including the cellular, paging, offshore radio, and air-ground services),<sup>159</sup> Part 24 (personal communications services),<sup>160</sup> Part 25 (mobile satellite services),<sup>161</sup> Part 80 (maritime services),<sup>162</sup> Part 87 (aviation services),<sup>163</sup> Part 90 (private land mobile services, including the public safety radio, special emergency radio, industrial radio, land transportation radio, private carrier paging, 220 MHz commercial radio, and specialized mobile radio services),<sup>164</sup> and Part 95 (personal radio services, including the general mobile radio, radio control,

and citizens band radio services)<sup>165</sup> of the FCC's rules. The FCC also defined mobile resale service, and auxiliary and ancillary fixed services offered by mobile services providers, as mobile services.<sup>166</sup>

### 2. Commercial Mobile Radio Service

In amending section 332, Congress defined CMRS as "any mobile service . . . 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 . . ."<sup>167</sup> Congress further defined "interconnected service" as "service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B)."<sup>168</sup> Thus, section 332(d)(1) establishes three criteria for classification as a "commercial mobile service:" (1) the service must be "provided for profit," (2) the service must make "interconnected service available," (3) either "to the public" or "to such classes of eligible users as to be effectively available to a substantial portion of the public."<sup>169</sup>

In the *Mobile Services NPRM*, the FCC did not expressly indicate whether it intended to take an expansive or a narrow approach to defining commercial mobile services. Instead, the FCC separately explored each discrete term of the definition provided by Congress. The rules adopted in the *Mobile Services Second Report and Order*, however, reflect a broad approach to defining the various elements of the statutory definition in an effort to ensure regulatory parity.

The FCC's approach is correct. The Commission could not ignore Congress's intent that the FCC

<sup>156</sup> 1993 Budget Act § 6002(b)(2)(B)(ii)(I), 107 Stat. at 396 (to be codified at 47 U.S.C. § 153(n)).

<sup>157</sup> *Mobile Services NPRM*, *supra* note 14, paras. 53-55.

<sup>158</sup> *Mobile Services Second Report and Order*, *supra* note 18, App. A (to be codified at 47 C.F.R. § 20.7).

<sup>159</sup> See 47 C.F.R. §§ 22.0 - 22.1121 (1993). The rural radio service is not included because it is a fixed service. *Mobile Services Second Report and Order*, *supra* note 18, para. 34 n.46.

<sup>160</sup> Part 24 of the FCC's rules (formerly Part 99) (to be codified at 47 C.F.R. §§ 24.1 *et seq.*), was adopted *In re Amendment of the Commission's Rules to Establish New Personal Communications Services*, *Second Report and Order*, 8 FCC Rcd. 7700, paras. 7801-17 (1993). The FCC defined PCS as "[r]adio communications that encompass mobile and ancillary fixed communications that provide services to individuals and businesses, and can be integrated into a variety of competing networks." *Id.* at 7803.

<sup>161</sup> See 47 C.F.R. §§ 25.101 - 25.531 (1993).

<sup>162</sup> See 47 C.F.R. §§ 80.1 - 80.1201 (1993).

<sup>163</sup> See 47 C.F.R. §§ 87.1 - 87.529 (1993).

<sup>164</sup> See 47 C.F.R. §§ 90.1 - 90.741 (1993).

<sup>165</sup> See 47 C.F.R. §§ 95.1 - 95.669 (1993). The Interactive Video and Data Service ("IVDS"), governed by sections 95.801-95.863 of the FCC's rules, are not included. *Mobile Services Second Report and Order*, *supra* note 18, para. 35.

<sup>166</sup> *Mobile Services Second Report and Order*, *supra* note 18, para. 36.

<sup>167</sup> 1993 Budget Act § 6002(b)(2)(A)(iii), 107 Stat. at 395-96 (to be codified at 47 U.S.C. § 332(d)(1)).

<sup>168</sup> *Id.* § 6002(b)(2)(A)(iii), 107 Stat. at 396 (to be codified at 47 U.S.C. § 332(d)(2)).

<sup>169</sup> *Id.* § 6002(b)(2)(A)(iii), 107 Stat. at 395-96 (to be codified at 47 U.S.C. § 332(d)(1)).

treat mobile services that have few, if any, differences in a similar manner. Such a mandate required the FCC to define commercial mobile services as broadly as possible, rather than limiting the reach of the definition.<sup>170</sup> Notably, in discussing various approaches to defining private mobile services in the *Mobile Services NPRM*, the FCC indicated that the private classification could be expanded if the FCC classifies as private any service that meets the literal definition of a commercial mobile service but that is not the "functional equivalent" of a commercial mobile service.<sup>171</sup> The functional equivalent approach, however, runs contrary to Congress's stated intent of broadening the scope of the commercial mobile services definition, and Congress's corollary instruction that the private mobile services definition "includes neither a commercial mobile service nor the functional equivalent of commercial mobile service . . . ."<sup>172</sup> Congress intended the FCC to interpret "commercial" broadly, and "private" narrowly.<sup>173</sup> Accordingly, the proper approach by the FCC in the Mobile Services Proceeding was to define each element of "commercial mobile services" broadly and restrict "private" services to those that truly are not the functional equivalent of "commercial mobile services."

<sup>170</sup> Several commenters urged the FCC to take an expansive rather than a narrow approach. See, e.g., Mobile Services Proceeding, GN Dkt. No. 93-252, Comments of Bell Atlantic, at 4; BellSouth, at 14-20; CTIA, at 2-5; GCI, at 1; McCaw, at 15; US West, at 14-15; Vanguard, at 2.

<sup>171</sup> *Mobile Services NPRM*, supra note 14, para. 29.

<sup>172</sup> H.R. Rep. No. 111, supra note 124.

<sup>173</sup> Congress noted:

"private" carriers have become [functionally] indistinguishable from common carriers but private land mobile carriers and common carriers are subject to inconsistent regulatory schemes . . . . The Committee finds that the disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services and deny consumers the protection they need if new services such as [personal communications services] were classified as private.

*Id.* at 260, reprinted in 1982 U.S.C.C.A.N. at 587.

<sup>174</sup> *Mobile Services Second Report and Order*, supra note 18, para. 43 & n.68. Thus, all common and private carrier services that are permitted to provide commercial service, that is, the offering of service to customers for hire, are considered for profit. *Id.* para. 43. The FCC correctly rejected proposals that it engage in factual determinations in order to gauge a licensee's intent to profit. For example, one commenter suggested that receipt of compensation is proof of intent to provide commercial service. Mobile Services Proceeding, GN Dkt. No. 93-252, Comments of GCI, at 1. Similarly, NYNEX proposed applying the "primary motive" test used by the Internal Revenue Service to analyze requests for tax-exempt status. Comments of NYNEX, at 5 (citing I.R.C. §551(c)(3)). Under Section

a. "Service provided for-profit"

Congress provided no explicit guidance on interpreting the "for-profit" prong of the commercial mobile service definition. In the *Mobile Services Second Report and Order*, the FCC concluded that a mobile service is provided "for-profit" if there is an intent to receive compensation or monetary gain, regardless of whether the licensee in fact realizes a profit, and regardless of whether the licensee resells interconnection for profit or "passes through" the interconnected portion of its service on a not-for-profit basis.<sup>174</sup> Government, non-profit public safety services, businesses and other private entities that operate mobile systems solely for their internal use are not considered to provide "for-profit" service.<sup>175</sup>

The key question with respect to the for-profit prong of the CMRS definition was how to classify systems providing service on both a for-profit and not-for-profit basis. For example, private land mobile service regulations permit private carriers to sell excess capacity on a for-profit basis.<sup>176</sup> The regulations also permit "shared"<sup>177</sup> and "multiple-licensed" systems<sup>178</sup> on either a for-profit or not-for-profit basis, subject to certain conditions.

In the *Mobile Services Second Report and Order*,

551(c)(3), an entity is defined as tax exempt based on the presence or absence of profit-making motive. Compare Comments of CTIA, at 7-8 (suggesting that a licensee's status as a non-profit company should be irrelevant to the question of whether it is providing commercial service).

<sup>175</sup> *Mobile Services Second Report and Order*, supra note 18, para. 44. This conclusion, tentatively announced in the *Mobile Services NPRM*, aroused no controversy. See, e.g., Mobile Services Proceeding, GN Dkt. No. 93-252, Comments of UTC, at 5 (traditional private land mobile service licensees, such as utilities, pipelines, state and local governments, and public safety entities, operate systems solely for their own internal use), AAR, at 3; Mtel, at 5; Nextel, at 7-9; NYNEX, at 4; US West, at 14.

<sup>176</sup> 47 C.F.R. § 90.179(a) (1993). These private carriers may sell excess capacity only to users who are eligible to hold a license in that service. See also *In re Amendment of Part 90 of the Commission's Rules to Expand Eligibility and Shared Use Criteria in the Private Land Mobile Services, Report and Order*, 6 FCC Rcd. 542 (1991).

<sup>177</sup> 47 C.F.R. § 90.179(a) (1993) ("A station is shared when persons not licensed for the station control the station for their own purposes pursuant to the licensee's authorization."); see generally *In re Amendment of Parts 89, 91 and 93 of the Commission's Rules and Regulations to Adopt New Practices and Procedures for Cooperative Use and Multiple Licensing of Stations in the Private Land Mobile Radio Services, Memorandum Opinion and Order on Reconsideration*, 93 F.C.C.2d 1127 (1983).

<sup>178</sup> See 47 C.F.R. § 90.185 (1993). In such systems each user of the licensed facilities is individually licensed. Multiple-licensed systems may be not-for-profit cooperatives, with each

the FCC ruled that "to the extent" that any licensee uses excess capacity to make available a service for which it intends to receive compensation, it satisfies the for-profit element of the CMRS definition.<sup>179</sup> In doing so, the FCC properly rejected a suggested approach that would have classified as not-for-profit those carriers whose "principal use" of the license was not-for-profit.<sup>180</sup>

With respect to shared use systems operated under the FCC's private carrier rules, the FCC determined that licensees may enter into legitimate cost-sharing arrangements on a not-for-profit basis and not be deemed CMRS, provided that all parties to such arrangements are identified and disclosed in the licensee's records, and that the arrangement is fully documented by a written agreement maintained as part of the licensee's records.<sup>181</sup>

The *Mobile Services Second Report and Order* followed the FCC's tentative conclusion in the *Mobile Services NPRM* that the for-profit test should be based on whether the "service as a whole" is offered on a commercial basis. That is, service is considered to be "for-profit" even if the interconnected portion of the service is offered on a not-for-profit basis. The FCC noted that this approach could result in a commercial service provider being classified as "for-profit" even if the provider contended that the interconnected portion of its service was not-for-profit.<sup>182</sup> The service-as-a-whole approach gives the FCC appropriate flexibility, allowing the FCC to classify a service as commercial regardless of whether that service offered the interconnected portion either for profit or with eligibility restrictions.<sup>183</sup>

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user sharing system costs equally; or, one of the licensees, or a non-licensee third party, may manage the system on behalf of the licensees.

<sup>179</sup> *Mobile Services Second Report and Order*, *supra* note 18, para. 45.

<sup>180</sup> *Id.* para. 46. See *Mobile Services Proceeding*, GN Dkt. No. 93-252, Comments of NABER, at 7 (systems operated "substantially" on a non-profit basis, or that are not "principally engaged in" for-profit service to third parties, should not be classified as commercial); UTC, at 5 (private licensees should be permitted to lease excess capacity without being deemed for profit, provided at least 51% of the system is used to meet the internal needs of the licensee). See also Comments of API, at 6; Lower Colorado River Authority, at 5; Johnson, at 6; Motorola, at 7; Nextel, at 7-9.

<sup>181</sup> *Mobile Services Second Report and Order*, *supra* note 18, para. 47.

<sup>182</sup> *Id.*

<sup>183</sup> Many commenters favored the broad "service as a whole" approach. See *Mobile Services Proceeding*, GN Dkt. No. 93-252, Comments of Arch, at 4 (base for-profit test on whether the service as a whole is offered on a commercial basis); CTIA, at 7; GTE, at 5 (service is for-profit if the service as a whole is

As the FCC noted, this interpretation is supported by the statutory definition of CMRS, which makes clear that "for-profit" and "interconnected service" are separate and distinct elements.<sup>184</sup>

b. "Interconnected service available"

The second prong of the statutory CMRS definition is that the service "makes interconnected service available . . ."<sup>185</sup> Congress provided some guidance to the FCC by defining "interconnected service" as "service that is interconnected with the public switched network" or "service for which an interconnection request is pending."<sup>186</sup> Congress, however, left the task of further defining "interconnected" and "public switched network" to the FCC.

In the *Mobile Services NPRM*, the FCC set forth two alternative approaches for determining whether "interconnected service" is available.<sup>187</sup> The first alternative focused on whether the service is "offered at the end user level," that is, whether the customer is able "to directly control access to the public switched network for purposes of sending or receiving messages to or from points on the network."<sup>188</sup> The second alternative defined an interconnected service as one that provides a customer with the ability to send or receive messages over the public switched network.<sup>189</sup>

In the *Mobile Services Second Report and Order*, the FCC adopted a definition of "interconnected service" consistent with the second alternative outlined in the *Mobile Services NPRM*. Thus, "intercon-

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priced to earn a return for the licensee); New York DPS, at 4; NYNEX, at 5 (classification should not be based on the identity or character of the service provider, but on the service itself, because some providers will offer both profit and non-profit services); Pacific Bell, at 4 (if any part of the service is for-profit, then the entire service should be classified as for-profit); Southwestern Bell, at 5 (look at the licensee's intent to profit, as evidenced by its provision of any service for which compensation is received, including sale of excess capacity, regardless of whether some element of the service is provided not-for-profit); TDS, at 4-5 (if any aspect of the service offering is for-profit, then the for-profit test has been satisfied); US West, at 14 (actual profit is irrelevant; the test should not be applied solely to the interconnected portion of a service).

<sup>184</sup> *Mobile Services Second Report and Order*, *supra* note 18, para. 47.

<sup>185</sup> 1993 Budget Act § 6002(b)(2)(A)(iii), 107 Stat. at 395-96 (to be codified at 47 U.S.C. § 332(d)(1)).

<sup>186</sup> *Id.* 107 Stat. at 396 (to be codified at 47 U.S.C. § 332(d)(2)).

<sup>187</sup> *Mobile Services NPRM*, *supra* note 14, paras. 15-17.

<sup>188</sup> *Id.* para. 16.

<sup>189</sup> *Id.*



nected service" is:

A service (1) that is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate or receive communication from all other users on the public switched network; or (2) for which a request for such interconnection is pending pursuant to Section 332(c)(1)(B) of the Communications Act, 47 U.S.C. § 332(c)(1)(B). A mobile service offers interconnected service even if the service allows subscribers to access the public switched network only during specified hours of the day, or if the service provides general access to points on the public switched network but also restricts access in certain limited ways. Interconnected service does not include any interface between a licensee's facilities and the public switched network exclusively for a licensee's internal control purposes.<sup>190</sup>

The expansive definition adopted by the FCC comports with congressional intent by taking into account the statutory concept of "availability" to interconnection with the public switched network. Unlike the first alternative posited in the *Mobile Services NPRM*, which focuses on whether a subscriber has direct technological control over the sending of communications over the public switched network, the more fluid "availability" test asks whether the subscriber has access, directly or indirectly, to the public switched network for the purpose of either sending or receiving messages to or from any point on the network.<sup>191</sup>

Applying the "availability" test, the FCC need not engage in an examination of the means by which a user accesses, or has the means available to access, the public switched network. Such an examination would not be useful because it would focus on technology that certainly will not remain static over time. A mobile service customer presently has the ability to use numerous alternative means of accessing the public switched network, including an operator, a

computer, a cellular telephone system, a private branch exchange, or "store-and-forward" operator service. Significantly, the FCC specifically ruled that store-and-forward communications systems are interconnected.<sup>192</sup> The FCC should in the future continue to interpret consistently the availability prong as encompassing technology that provides access to the public switched network.

Finally, the FCC broadly interpreted the term "public switched network" as "[a]ny common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services."<sup>193</sup> This definition also contemplates technological change and thus is preferable to a definition that would have interpreted a public switched network as limited to the public switched telephone network.<sup>194</sup>

c. "Available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public"

Consistent with its approach to the first two elements of the CMRS definition, the FCC also broadly defined the final element of the CMRS definition. Under the statutory CMRS definition, a service is a CMRS if it is offered 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."<sup>195</sup> In the *Mobile Services Second Report and Order*, the FCC concluded that a service satisfies the third prong of the CMRS definition if it either is offered to the public without restriction on who may receive it,<sup>196</sup> is not dedicated exclusively to internal use, or is offered to users other than eligible user groups.<sup>197</sup>

<sup>190</sup> *Mobile Services Second Report and Order*, *supra* note 18, App. A (to be codified at 47 C.F.R. § 20.3); *see id.* para. 55.

<sup>191</sup> *See* *Mobile Services Proceeding*, GN Dkt. No. 93-252, Comments of AMTA, at 9; Bell Atlantic, at 8-9; DC PSC, at 5; McCaw, at 17; New York DPS, at 5; NYNEX, at 8; PacTel Paging, at 6; PageNet, at 7; Rochester, at 4.

<sup>192</sup> *Mobile Services Second Report and Order*, *supra* note 18, para. 57. Such systems, widely utilized by one-way communications systems, including private paging services, do not deliver the message in "real time" over the network. Instead, the message is delivered over the network to an operator, who stores the information, and subsequently "forwards" it, either manually or by computer. *See Mobile Services NPRM*, *supra* note 14, paras. 39-42. Many commenters argued that service is not interconnected in the absence of a real-time link, because the cus-

tomers lack direct control over delivery of the message. *See Mobile Services Proceeding*, GN Dkt. No. 93-252, Comments of Nextel, at 10; PageMart, at 5; RAM Mobile Data, at 4; Rockwell, at 3; TDS, at 6-8. The FCC correctly rejected this narrow approach.

<sup>193</sup> *Mobile Services Second Report and Order*, *supra* note 18, App. A (to be codified at 47 C.F.R. § 20.3); and *see id.* paras. 59-60.

<sup>194</sup> *Id.* para. 59.

<sup>195</sup> 1993 Budget Act § 6002(b)(2)(A)(iii), 107 Stat. at 396 (to be codified at 47 U.S.C. § 332(d)(1)).

<sup>196</sup> *Mobile Services Second Report and Order*, *supra* note 18, para. 65.

<sup>197</sup> *Id.* paras. 67-68.

The FCC properly rejected proposals to artificially narrow the scope of the public availability element of the CMRS definition. For example, restrictions on eligibility as to who may receive service will not be dispositive of whether the service is effectively available to a "substantial" portion of the public. Instead, the FCC will look to whether users other than narrowly defined user groups are eligible to receive service. The effect of this interpretation is to include in the CMRS definition, for-profit services that previously have been classified as private with little or no limitation on eligibility criteria.<sup>198</sup>

Similarly, the FCC rejected suggestions to exclude from the public availability element of the CMRS definition services that have limited spectrum capacity or that cover a limited geographic area.<sup>199</sup> As the FCC noted, these interpretations would require it to ignore the impact of technological advances in efficient spectrum use. In addition, a broad interpretation is supported by the statutory CMRS definition, which does not contemplate such limitations.<sup>200</sup>

### 3. "Private Mobile Radio Service"

Congress defined PMRS as "any mobile service that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission."<sup>201</sup> The FCC considered both a broad and a narrow approach to interpreting the statutory definition of PMRS. The broad approach would interpret PMRS to include any service that does not satisfy the CMRS definition and any service that, although it satisfies the CMRS definition is not the functional equivalent of a CMRS.<sup>202</sup> In contrast, the narrow approach would result in the interpretation of PMRS as including any service that is neither a CMRS nor the functional equivalent of a CMRS.<sup>203</sup>

Thus, the narrow approach would not permit any service that satisfies the CMRS definition to be classified as private. The FCC noted that comments filed in support of each approach cited favorably the legislative history and agreed that the definition should reflect Congress's goal of regulatory symmetry.<sup>204</sup>

In the *Mobile Services Second Report and Order*, the FCC adopted the narrow approach, relying principally on the plain statutory language.<sup>205</sup> The FCC stated, "[o]nce we have concluded that a mobile service falls within the literal statutory definition of a CMRS, it is logically impossible, under the statute, to conclude that the service could be classified as a [PMRS]."<sup>206</sup> Consequently, once a mobile service is deemed to satisfy the definition of CMRS, it cannot be classified as PMRS, and, conversely, a mobile service that does not meet the CMRS definition is presumed to be a PMRS.<sup>207</sup>

The FCC's narrow interpretation of PMRS is consistent with its broad interpretation of the various elements of the statutory CMRS definition. As the FCC noted, these interpretations further the goal of regulatory symmetry,<sup>208</sup> and are sufficiently flexible to adapt to changes in technology and service offerings.

### B. Classification of Services

Applying the definitions adopted in the *Mobile Services Second Report and Order*, the FCC concluded that the following existing common carrier services are CMRS and thus subject to regulation as common carriers: cellular service,<sup>209</sup> public land mobile services, including paging, mobile telephone service, improved mobile telephone service, and trunked mobile service;<sup>210</sup> 454 MHz and 800 MHz air-ground services;<sup>211</sup> offshore radio service;<sup>212</sup> and cer-

<sup>198</sup> *Id.* para. 68.

<sup>199</sup> *Id.* paras. 69-70.

<sup>200</sup> *Id.* See *supra* note 167 and accompanying text.

<sup>201</sup> 1993 Budget Act § 6002(b)(2)(A)(iii), 107 Stat. at 396 (to be codified at 47 U.S.C. § 332(d)(3)).

<sup>202</sup> *Mobile Services Second Report and Order*, *supra* note 18, para. 72.

<sup>203</sup> *Id.* para. 73.

<sup>204</sup> *Id.* paras. 72, 73.

<sup>205</sup> *Id.* para. 76 & App. A (to be codified at 47 C.F.R. § 20.3). The PMRS definition that will be included in the FCC's rules repeats the statutory definition, and classifies individual services as PMRS.

<sup>206</sup> *Id.* para. 76.

<sup>207</sup> *Id.* App. A (to be codified at 47 C.F.R. § 20.9(13)(i)). The rules provide, however, that a party may challenge the pre-

sumption. The burden is on the challenging party to show that the particular service is either a CMRS or the functional equivalent of a CMRS. See *id.* App. A (to be codified at 47 C.F.R. § 20.9(13)(ii)(A)(1),(2)). In reviewing such a challenge, the FCC's primary focus will be an evaluation of consumer demand for the service to determine if it is "closely substitutable" for CMRS. See *id.* (to be codified at 47 C.F.R. § 20.9(13)(ii)(B)). See also *id.* paras. 79-80.

<sup>208</sup> *Id.* para. 78.

<sup>209</sup> *Id.* para. 102 & App. A (to be codified at 47 C.F.R. § 20.9(a)(7)).

<sup>210</sup> *Id.* para. 102 & App. A (to be codified at 47 C.F.R. § 20.9(a)(6)).

<sup>211</sup> *Id.* para. 102 & App. A (to be codified at 47 C.F.R. § 20.9(a)(6), (8)).

<sup>212</sup> *Id.* para. 102 & App. A (to be codified at 47 C.F.R.

tain mobile satellite service.<sup>213</sup>

In addition, the FCC concluded that several private services satisfy the CMRS definition, and thus will be regulated as common carriers. These include specialized mobile radio service,<sup>214</sup> 220-222 MHz private land mobile service,<sup>215</sup> private paging service,<sup>216</sup> and business radio service.<sup>217</sup> However, these services will be classified as CMRS only if they provide interconnected service.<sup>218</sup>

All personal communications services ("PCS") spectrum will be presumed to be licensed for CMRS.<sup>219</sup> To overcome this presumption, an applicant or licensee must certify that it intends to offer PCS on a private basis and must demonstrate that the service is not a CMRS.<sup>220</sup>

The FCC determined that the following services do not meet the CMRS definition, and therefore, will be classified as PMRS: automatic vehicle monitoring systems and 220-222 MHz land mobile systems that do not offer interconnected service or are not-for-profit;<sup>221</sup> government, public safety, and special emergency radio services;<sup>222</sup> marine services;<sup>223</sup> aviation services (except public coast station licensees);<sup>224</sup> personal mobile radio services;<sup>225</sup> industrial and land transportation services;<sup>226</sup> and radiolocation and non-geostationary mobile satellite services.<sup>227</sup>

The FCC's codification of the classifications of mobile services as either CMRS or PMRS is a significant achievement in furtherance of its goal of reg-

ulating like services in a like manner. By interpreting CMRS broadly and PMRS narrowly, the FCC has announced that it will seek to avoid artificial definitions that do not take into account changes in technology or system design. Following this reasoning, the FCC stated that system capacity, frequency reuse, or other technology dependent factors will not affect how it classifies a particular service.<sup>228</sup> In addition, regulatory classification will not be frequency specific; both CMRS and PMRS may be provided on the same frequency.<sup>229</sup>

## V. CONCLUSION

In adopting the new regulatory treatment rules in the Mobile Services Proceeding, the FCC established the foundation of a lasting regulatory structure to govern all mobile services. This new regulatory structure appears to be solid enough to withstand challenges from carriers seeking to avoid its effects,<sup>230</sup> and yet sufficiently flexible to incorporate and adapt to market and technological changes. The new scheme also does not unduly disrupt existing services. The FCC achieved these results by promoting the principle of regulatory parity for mobile services. The broad definitional approach to CMRS, the decision to forbear from applying Title II tariff filing requirements to CMRS providers,<sup>231</sup> and congressional preemption of state regulation of CMRS,

§ 20.9(a)(9)).

<sup>213</sup> *Id.* para. 109 & App. A (to be codified at 47 C.F.R.

§ 20.9(a)(10)).

<sup>214</sup> *Id.* paras. 90-93 & App. A (to be codified at 47 C.F.R.

§ 20.9(a)(4)).

<sup>215</sup> *Id.* para. 95 & App. A (to be codified at 47 C.F.R.

§ 20.9(a)(3)).

<sup>216</sup> *Id.* para. 97 & App. A (to be codified at 47 C.F.R.

§ 20.9(a)(1)). The FCC noted that "this classification is justified in part by the fact that there are no longer any real differences between private carrier and common carrier paging systems." *Id.*

<sup>217</sup> *Id.* para. 86 & App. A (to be codified at 47 C.F.R.

§ 20.9(a)(2)).

<sup>218</sup> *Id.* paras. 87, 90, 95, 97 & App. A (to be codified at 47 C.F.R. § 20.9(a)(1), (2), (3), (4)).

<sup>219</sup> *Id.* para. 119 & App. A (to be codified at 47 C.F.R.

§ 20.9(a)(11)).

<sup>220</sup> *Id.* para. 119 & App. A (to be codified at 47 C.F.R.

§ 20.9(b)).

<sup>221</sup> *Id.* para. 99 & App. A (to be codified at 47 C.F.R.

§ 20.3).

<sup>222</sup> *Id.* para. 82 & App. A (to be codified at 47 C.F.R.

§ 20.3).

<sup>223</sup> *Id.* para. 83 & App. A (to be codified at 47 C.F.R.

§ 20.3).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* para. 86 & App. A (to be codified at 47 C.F.R. § 20.3).

<sup>227</sup> *Id.* para. 109 & App. A (to be codified at 47 C.F.R. § 20.3). In addition, the operational fixed services, interactive video and data service, and rural radio service, including BETRS, were not affected by the Mobile Services Proceeding. *Id.* para. 83. Dispatch service will be classified in a future rulemaking proceeding. *Id.* para. 105.

<sup>228</sup> *Id.* para. 92.

<sup>229</sup> *Id.* para. 113.

<sup>230</sup> The rules and classifications adopted to date in the Mobile Services Proceeding, and in subsequent proceedings, undoubtedly will become the subject of appeals before both the Commission and the courts challenging the classification of particular services as commercial or private. These rules and classifications, however, have been shaped by the realities of the mobile services market. Thus, the approach of Congress and the FCC appears to be consistent with the Supreme Court's admonishments that "a private carrier cannot be converted into a common carrier by mere legislative command," and that a carrier is a common carrier "not because of legislative fiat, but because of the character of the business [it carries] on." *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 210-11 (1927).

<sup>231</sup> In the *Mobile Services Second Report and Order*, the FCC found that all CMRS providers other than cellular service licensees lack market power, and that the markets for paging,

are all actions that promote competition by regulating competitive services in a similar manner.

The new mobile services regulatory scheme is in its infancy. The FCC still has many issues to consider in additional rulemaking proceedings. In its deliberations, the FCC should continue to be guided by the principles of regulatory parity and economic competition set forth in the *Mobile Services Second Report and Order*. Existing technical rules should be revised so that competitive services operate under the same standards. Other rules that will be adopted and

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SMR, and air-ground services are fully competitive, while the market for cellular service is less competitive. Based on these findings, and pursuant to authority contained in the 1993 Budget Act, Pub. L. No. 103-66, § 6002(b)(2)(A)(iii) (to be codified at 47 U.S.C. § 332(c)(1)(A)), the FCC concluded that, with respect to all CMRS licensees, including cellular, it would forbear from enforcing certain Title II provisions that impose burdens on licensees without yielding any significant consumer benefits. The most important of these provisions is the tariff filing requirement of section 203 of the Communications Act. The FCC ordered carriers to cancel their tariffs within 90 days of publication of the *Mobile Services Second Report and Order* in the Federal Register. *Mobile Services Second Report and Order*, *supra* note 18, para. 289. The FCC also decided not to enforce

modified in the transition phase of the Mobile Services Proceeding, including application and processing requirements, also should be uniform for similar services. The FCC should heed the suggestion of former Commissioner Ervin Duggan<sup>282</sup> and others<sup>283</sup> to create a single Mobile Services Division with regulatory authority over both common and private carrier services. Although the FCC rejected an invitation to do so in the context of the Mobile Services Proceeding,<sup>284</sup> ultimately both regulated carriers and their customers would benefit from streamlined oversight.

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other Title II provisions, including section 214, which requires certification for new facilities and for discontinuing existing facilities, and section 212, which requires disclosure of interlocking directorates. *Id.* paras. 180, 182, 197. In a future proceeding, the FCC will consider whether it should forbear from applying additional Title II provisions. *Id.* para. 285.

<sup>282</sup> *Mobile Services NPRM*, *supra* note 14, at 8005 (concurring statement of Ervin S. Duggan).

<sup>283</sup> See *Mobile Services Proceeding*, GN Dkt. No. 93-252, Comments of UTC, *Mobile Services Proceeding*, at 19; AMTA, at 16.

<sup>284</sup> *Mobile Services Second Report and Order*, *supra* note 18, para. 258.