

The Commission should end the regulatory asymmetry that exists today by redrafting its interconnection rules to prohibit an SMR operator from offering interconnected service. This would be consistent with Section 332, which distinguishes between private and common carrier service based on interconnection with the public switched telephone network. It would ensure a meaningful, functional distinction between an SMR and a common carrier as long as the public switched telephone network remains a legitimate technological basis for distinguishing them.^{21/} Under this test, the SMR would clearly qualify as a private carrier under the statute if non-interconnected, and a common carrier, providing fully interconnected service, would not. If an SMR provides interconnected service, the Commission should both fine the SMR operator for violating the rules and classify the service as common carriage subject to federal and state regulation.

BellSouth's approach will avoid the D.C. Circuit's admonition that the Commission's discretion to classify services as common carrier or private is narrowly circumscribed:

[W]e reject those part of the orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.^{22/}

Moreover, adopting BellSouth's suggested recodification of the interconnection rules would avoid the constitutional problem of subjecting one service provider to extensive regulation while exempting another, without any rational basis.

^{21/} Technological advances may require a reassessment of this distinction in the future. No distinction based on technological assumptions will retain its validity forever, as technologies change. Section 332's reliance on the public switched telephone network ("PSTN") is an example of this, because it is based on the assumption that interconnection with the PSTN is a unique characteristic for which there is no equivalent. A distinction based on interconnection with the PSTN is somewhat less meaningful now than it may have been in 1982, and it will become even less so in the future.

^{22/} *NARUC v. FCC*, 525 F.2d at 644. The court has also repeatedly held that "the FCC is not at liberty to manipulate the definition of 'common carrier' in such a way as to achieve pre-determined regulatory goals." *AT&T v. FCC*, 572 F.2d 17, 26 (D.C. Cir.), cert. denied, 437 U.S. 875 (1978), citing *NARUC*, 525 F.2d at 644. Moreover, the court has also warned the Commission that its regulations do not insulate land mobile service providers from classification as common carriers by regulatory fiat: "[W]e do not foreclose the possibility of future challenge to the Commission's classification, should the actual operations of SMRS appear to bring them within the common carrier definition." 525 F.2d at 644.

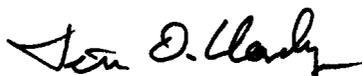
CONCLUSION

For the foregoing reasons, BellSouth urges the Commission not to adopt the proposed rules respecting wireline SMR ineligibility. BellSouth further proposes that the rules regarding interconnection of SMR systems with the telephone network forbid the offering of interconnected SMR service, making clear that an SMR offering interconnected service both violates the rules and subjects its service to common carrier regulation.

Respectfully submitted,

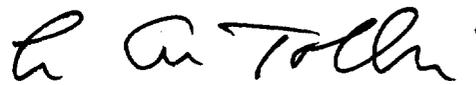
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CERTIFICATE OF SERVICE

I, Donna M. Crichlow, hereby certify that on May 28, 1993, a copy of the foregoing "Comments of BellSouth" in PR Docket 92-235 was served by hand-delivery to the following:

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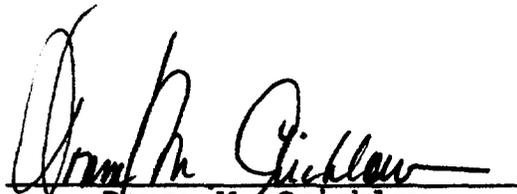
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