

basis, and should be presumptively categorized as CMS. As with those other services, however, cellular carriers should have the opportunity to offer "private" services which, for example, are offered on a nonprofit basis or which do not offer access to the public switched network. The Commission should explicitly state that cellular carriers can offer "private" service on their cellular frequencies as well as on any PCS spectrum which they acquire.<sup>14/</sup>

III. EXISTING BARRIERS TO ENTRY SHOULD BE REPEALED.

The Notice (¶ 42) asks whether the prior prohibition against common carrier offerings of "dispatch" services should be eliminated. This prohibition, as well as the Commission's policy to prohibit entities affiliated with wireline telephone companies from holding SMR licenses, should be eliminated. Both eligibility constraints impair competition by preventing certain mobile service providers from entering additional lines of business, and frustrate regulatory parity by imposing different requirements on different types of providers.

A. All Carriers Should be Free to Offer Dispatch Service.

The prior version of Section 332 prevented most common carriers from providing "dispatch services" as defined in that

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<sup>14/</sup> Section 22.930, as modified in the PCS rulemaking, provides that cellular carriers can offer "auxiliary common carrier services, including personal communications service." This rule should be amended to permit explicitly the offering of "any communications services, including personal communications service."

section. Section 22.911(d) of the Commission's Rules implemented that provision. Section 332(c)(2) now authorizes the Commission to terminate the dispatch prohibition. The Commission should do so in this rulemaking, for the following reasons:

(a) There is no technical justification for continuing the prohibition. It was adopted years ago to ensure that common carriers did not misuse frequencies by devoting them to dispatch use. Even then, that rationale was questionable because a carrier would have had little incentive to provide dispatch service if it interfered with the primary common carrier service it provided. In any event, recent technical developments, including digitalization, have eliminated any conceivable justification for the dispatch provision, because common carriers can offer dispatch service without compromising use of common carrier frequencies. The restriction is therefore unnecessary.

(b) Eliminating the prohibition will enhance competition by permitting a wide range of common carriers to enter the commercial dispatch business. Introduction of new competitors would further the Commission's goals of lowering costs to subscribers while providing increased availability of choice and higher quality service. The present regulations only serve to restrict competition. Cellular and PCS providers may want to offer dispatch services as part of a package of services offered to customers. For example, a customer may use CMS for wireless PBX and want a wireless dispatch system for emergencies. Larger cellular subscribers may want a backup dispatch system to call selected cellular phones in an emergency. Thus dispatch can fill the needs

of customers as an adjunct to cellular or other CMS service. There is no valid reason to deny any CMS licensee the ability to offer whatever services that the public may demand, and this should include dispatch.

(c) Deleting the rule would promote regulatory parity. Today, common carriers cannot engage in a service that private carriers can. That is precisely the sort of artificial distinction that Congress intended to dissolve by revising Section 332.

B. All Carriers Should Be Free to Offer SMR Service.

The Commission should take this opportunity to repeal Section 90.603(c) of its Rules, which makes wireline carriers ineligible to own SMR systems. In 1986 (PR Docket No. 86-3), the Commission proposed to eliminate this rule. It found that Section 90.603(c) had been adopted in 1974 without any grounds for it having been identified, and that whatever plausible grounds may have existed at that time, none continued to exist. Moreover, the Commission found that permitting wireline entry into SMR service "would provide more efficient service to the public by enhancing competition."<sup>15/</sup>

In 1992, however, the Commission terminated the rulemaking, even though it made no findings as to why Section 90.603(c) should be retained.<sup>16/</sup> Numerous parties, including Bell Atlantic, requested the Commission to reconsider its action. Although these

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<sup>15/</sup> Notice of Proposed Rulemaking, PR Docket No. 86-3, 51 Fed. Reg. 2910 (Jan. 22, 1986).

<sup>16/</sup> Order, PR Docket No. 86-3, 7 FCC Rcd. 4398 (1992).

petitions have been on file for well over a year, the Commission has taken no action.

The record developed in PR Docket No. 86-3 provides no basis for retaining Section 90.603(c). To the contrary, it demonstrates that the rule has no validity, and that repealing it would be in the public interest. The rule prevents a large group of carriers from entering the SMR business, violating the cardinal principles of unrestricted entry and free competition. It discriminates against these carriers, violating the precept of parity. And it unjustifiably restricts one type of CMS, SMR systems. To fulfill Congress's intent in passing Section 332 and to promote unfettered competition in provision of SMR service, the Commission should repeal Section 90.603(c).

**IV. FORBEARANCE FROM TARIFFING MOST COMMERCIAL MOBILE SERVICE IS CLEARLY WARRANTED.**

The Commission has traditionally not required mobile service providers to file tariffs. It has stated that cellular carriers need not file tariffs,<sup>17/</sup> and similarly did not impose tariffing on other wireless services.<sup>18/</sup> While a recent court decision<sup>19/</sup> forced the Commission to reexamine its tariffing policies, the Budget Act empowers the Commission to eliminate the uncertainties

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<sup>17/</sup> Letter from Chief, Common Carrier Bureau to Bell Atlantic Mobile Systems, Inc., Oct. 18, 1988 ("cellular radio service is not now tariffed").

<sup>18/</sup> Preemption of State Entry Regulation in the Public Land Mobile Service, 59 RR 2d 1518, 1533-34 (1986) (subsequent history omitted).

<sup>19/</sup> AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992) (subsequent history omitted).

that decision created, and forbear from tariffing all mobile services. The Commission should do so. The mobile services industry today is characterized by more competition both among current carriers and from new entrants than at any time in the past. Yet in the past the Commission did not require tariffs. There is even less reason to start doing so now.

The Notice (§ 62) proposes to forbear from tariffing commercial mobile service pursuant to Section 203 of the Communications Act, and to forbear from enforcing certain other provisions of Title II. Bell Atlantic generally supports the Commission's approach. Forbearance is clearly justified for most mobile services provided by most CMS providers. Section 332(c)(1)(A) of the Budget Act, however, requires individualized determinations of forbearance. It states that a commercial mobile service provider shall "be treated as a common carrier for purposes of this Act, except for such provisions of title II as the Commission may specify by regulation as inapplicable to that service or person." (Emphasis added.) The Notice (§ 54) asks for comment on these specific determinations.

1. Types of Commercial Mobile Services.

Bell Atlantic submits that there is no basis to apply differing forbearance levels on different types of mobile services. All of the services -- paging, SMR, cellular and others -- are characterized by vigorous and increasing competition. Given that tariff regulation is unnecessary to protect the public and ensure competition in any of these services, all should be exempt from

Section 203 and other Title II provisions identified by the Notice (¶ 62, 66).<sup>20/</sup>

Paging. Six years ago the Commission forbore from tariff regulation of the land mobile services. It described this industry as

a competitive environment in which individual carriers are unable to exercise market power with respect to the offering of interstate paging or conventional two-way services. . . . Thus we conclude that Public Land Mobile Service licensees providing interstate mobile services possess insufficient market power to charge unlawful rates or unjustly discriminate and therefore constitute "nondominant" carriers for purposes of Title II regulation . . . .<sup>21/</sup>

The Commission's findings remain accurate; indeed there has been increasing entry and competition in the land mobile industry as, for example, SMR and other providers expand their capabilities using new technology.

PCS. There is also no basis to apply tariffing to the myriad of emerging PCS technologies, given PCS's status as a new service and the Commission's approach to licensing PCS providers. In creating the service, the Commission stated that its "decision to provide for between three and seven PCS licensees in each area

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<sup>20/</sup> The Notice (¶ 55) tentatively divides CMS into "three basic categories: certain common carrier mobile services; certain PCS services; and certain private mobile services." It does not, however, further utilize this tripartite distinction. Bell Atlantic submits it should not, for this would undercut the entire point of not drawing artificial distinctions based on historical definitions.

<sup>21/</sup> Preemption of State Entry Regulation in the Public Land Mobile Service at 1533.

will ensure that there is a robust and competitive market for PCS services."<sup>22/</sup>

Cellular. The Commission's tentative conclusion (Notice ¶ 63) that there is sufficient competition to permit forbearance from applying Section 203 to cellular service is correct. The cellular industry's record of rapid growth, nationwide expansion of coverage, declining prices, and introduction of new technologies and services, all while carriers were not required to submit tariffs, demonstrate that tariffing is "not necessary" and that forbearance would be "consistent with the public interest." Section 332(c)(1)(A). The arrival of commercial PCS will intensify the competition which already exists among cellular carriers themselves and with SMR and other services.

The Notice (¶ 63) finds that the record of comments submitted in response to the CTIA's January 1993 petition for rulemaking (RM-8179) is sufficient to forbear from cellular tariffing. In addition to those materials, the Commission should also include in the record other materials which illustrate the varied contexts in which cellular service competition has been found to exist.

(a) The Commission stated in a rulemaking last year, "It appears that facilities-based carriers are competing on the basis of market share, technology, service offerings, and service price."<sup>23/</sup> The record in that rulemaking contains extensive

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<sup>22/</sup> Second Report and Order, Amendment of the Commission's Rules to Establish New Personal Communications Services, GN Docket No. 90-314, Oct. 22, 1993, at ¶ 60.

<sup>23/</sup> Bundling of Cellular Customer Premises Equipment and Cellular Service, CC Docket No. 91-34, 7 FCC Rcd. 4028 (1992).

data as to competition in the cellular industry.

(b) The Commission has testified before one state legislature that cellular competition exists and will intensify:<sup>24/</sup>

The cellular industry has seen strong and steady growth, burgeoning demand, competition based on price and service, and continued improvement in service quality and coverage. . . . There are new services driven by new technologies that will play a major role in bringing a greater level of competition to cellular markets. . . . In addition, future competition for cellular is assured by the new technologies . . . .

(c) The vast majority of states have decided not to regulate cellular service, despite the Commission's open invitation for them to do so,<sup>25/</sup> and many states which at one time imposed rate regulation have abandoned it. This supports the Commission's tentative finding that a vast regulatory apparatus needed to enforce tariffing is "not necessary" (Section 332(c)(1)(A)). Two representative examples come from states where Bell Atlantic provides cellular service, North Carolina and Maryland.

(d) In 1992, the North Carolina Utilities Commission repealed rate regulation of cellular service. It found that "the provision of cellular service in North Carolina is competitive" and that tariffing or other rate regulation was unnecessary.<sup>26/</sup>

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24/ Statement of Cheryl A. Tritt, Chief, Common Carrier Bureau, Hearing Before the Senate Committee on Energy and Public Utilities, California Legislature, January 12, 1993.

25/ Cellular Communications Systems, 49 RR 2d 809, 833-34 (1981).

26/ Exemption of Domestic Public Cellular Radio Telecommunications Service Providers from Regulation Under Chapter 62 of the North Carolina General Statutes, Docket No. P-100, February 14, 1992. A copy of the Commission's Order is attached as Appendix 1 to these Comments.

In the proceedings before the Utilities Commission, Dr. Jerry A. Hausman, an economist with extensive experience in studying telecommunications markets, testified to the high level of competition which marked the cellular business both in North Carolina and nationwide.<sup>27/</sup> Dr. Hausman identified numerous indicia of a competitive market in North Carolina, and concluded that free competition was more likely to benefit consumers than continued regulation. He also reported the results of an econometric study of prices in the 30 largest cellular markets in the United States, which demonstrated that price regulation does not lead to lower cellular prices, but may in fact contribute to higher prices.

(e) The Maryland Public Service Commission, after conducting an extensive study of the industry, also found that cellular service is competitive, that its intervention in the market was not justified, and that rate regulation was unnecessary:<sup>28/</sup>

Evidence confirms that the cellular telephone providers operating in Maryland are acting competitively by improving service and lowering prices. Furthermore, a majority of the states have deregulated or vastly reduced regulation of cellular service. This experience supports the conclusion that regulation is not required to protect the public interest.

The Commission should therefore forbear from applying Section 203 to all mobile services. It should, for the same reasons, declare that forbearance applies to all rates for CMS services

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<sup>27/</sup> A copy of Dr. Hausman's written testimony is attached as Appendix 2.

<sup>28/</sup> A Report on Cellular Telephone Service in Maryland, Joint Chairman's Report, September 1990, at 1-2. A copy of this study is attached as Appendix 3.

which are offered on a wholesale or retail basis.<sup>29/</sup> It should make explicit that it will not, except as discussed below, require or permit tariffs to be filed for interstate CMS service,<sup>30/</sup> for CMS access service,<sup>31/</sup> for CMS roaming service, for CMS enhanced or information services, or for any other service offered by CMS providers.

The Notice (¶¶ 65-66) also proposes to forbear from Sections 204, 205, 210, 211, 212, 213, 214, 215, 218, 219, 220 and 221 of the Communications Act. Bell Atlantic concurs with this proposal because none of these provisions are necessary to ensure that service rates are just, reasonable and nondiscriminatory, nor are they needed in order to protect consumers.

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29/ At one point in its discussion of tariffing, the Notice (¶ 62) proposes to "forbear from tariff regulation of the rates for commercial mobile services provided to end users." We assume that the Commission did not intend, by this phrasing, to limit forbearance to retail rates, and indeed later (¶ 63) the Notice discusses forbearance more broadly.

To eliminate any uncertainty, however, the Commission should expressly reject wholesale as well as retail rate regulation. There is, as the Commission has found, no basis for separate regulation of wholesale prices in the cellular service. Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies, 6 FCC Rcd. 1719 (1991), aff'd sub. nom. Cellnet Communication, Inc. v. FCC, 965 F.2d 1106 (1992).

30/ Sections 2(b) and 221(b) of the Communications Act exempt intrastate service from federal tariffing.

31/ To eliminate uncertainty as to Decree-constrained mobile carriers' obligations to file equal access tariffs, the Commission should explicitly state that such tariffs will no longer be accepted. Under Decree law, BOC CMS providers would be obligated to continue filing equal access tariffs unless the Commission's rules do not permit such filings.

First, Sections 201, 202 and 208 of the Communications Act, which are required to remain in force by Section 332(c)(1)(A), supply ample regulatory and enforcement authority to protect against unjust or unreasonable rates. It is these provisions which the Commission has in the past invoked to ensure rates are just and nondiscriminatory, and it will remain fully able to discharge that responsibility. Some of the provisions (e.g., Sections 204 and 205) merely duplicate enforcement powers the Commission will retain under Section 208 and its general powers under the Communications Act. Second, many provisions (e.g., Sections 210, 211, 212, 214, 218, 219 and 221) have nothing to do with rates. Third, many (e.g., Sections 211, 212, 219, 220 and 221) impose paperwork burdens on carriers, such as filing of contracts, which would be irrelevant once tariffs are not accepted. Fourth, all of these sections were intended to impose a level of oversight which was deemed appropriate for regulating monopoly local phone companies, but which is simply unwarranted for the competitive, multi-player mobile services market.

## 2. Different CMS Providers.

Section 332(c)(1)(A) permits the Commission to adopt different levels of forbearance for different CMS providers. The Conference Report (at 491) explains:

[T]he purpose of this provision is to recognize that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services. . . . This provision permits the Commission some degree of flexibility to determine which specific regulations should be applied to each carrier.

The Commission also recognizes that the appropriate level of forbearance may vary depending on whether the particular provider is competing in the provision of local exchange service, access service, or interexchange service. (Notice ¶ 59.)

Bell Atlantic sees no basis to distinguish among CMS providers with regard to providing local service. The Commission's findings as to the level of competition among all providers at the local level apply to all carriers. None are in a position to control their markets or set artificially high prices.<sup>32/</sup>

This is not the case, however, with regard to provision of interexchange service. The Commission has repeatedly found that AT&T is dominant in the provision of wireline interexchange service, where it has more than 60% of the traffic overall and more than 70% of the presubscribed traffic, and has imposed tariff regulation on it in order to prevent improper exercise of that market power. AT&T's market share of the interexchange wireless business is even greater. A study of the 120 largest cellular markets showed that 70% of the carriers and 88% of the nonwireline carriers which identified their long distance carrier use AT&T exclusively. AT&T's share of the long distance traffic handed

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In deregulating CMS, the Commission should be cognizant of the parallel need to remove at least some of the regulatory framework long imposed on wireline carriers. There is no question that CMS providers will compete with conventional wireline service at a local level. The longstanding regulatory apparatus for wireline carriers will impede their ability to compete with wireless technologies. Uneven deregulation between wireless and wireline competitors is no more justified than the uneven regulation between types of wireless competitors which Congress and this rulemaking want to remove.

off to it from customers of one BOC cellular carrier pursuant to equal access exceeds 80%.<sup>33/</sup>

Thus, in sharp contrast to the competition which pervades mobile services on a local level, interexchange competition is minimal. The Commission should be doing everything possible to promote competition in the long-distance market. Until competition exists, however, there is simply no basis to forbear from tariffing AT&T's interexchange services.

AT&T's planned acquisition of McCaw (and AT&T's recent petition to be reclassified as a nondominant carrier) make it essential to retain tariffing on AT&T's provision of CMS. The McCaw acquisition, if completed, will make AT&T the nation's dominant provider of cellular exchange service and long-distance service. The anticompetitive consequences of the merger have been demonstrated in comments submitted to the Commission, and other conditions on the merger have been requested in that proceeding. (See n. 32, supra.) This rulemaking is, however, the proper place for the Commission to determine that AT&T and its affiliates will remain subject to Section 203 when offering interexchange mobile service. A comparison of the statutory prerequisites to forbearance with the situation in the interexchange wireless market makes plain that the Commission cannot make the findings to support forbearance of AT&T required by Section 332(c)(1)(A).

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In Re Applications of American Telephone & Telegraph Co. and McCaw Cellular Communications, Inc., File No. ENF-93-44, Petition of Southwestern Bell Corporation to Impose Conditions or, in the Alternative, to Deny, Nov. 1, 1993, at 18-20 and Affidavit of John T. Stupka at ¶ 43. The serious competitive imbalance in the interexchange wireless market has been demonstrated by the commenters in that proceeding.

To the extent that AT&T or its affiliates engage in local exchange PCS or cellular service, they would be entitled to forbearance for those specific services. But provision of interexchange service must remain on a tariffed basis. In addition, to give force to that requirement, the Commission should require that McCaw or other AT&T affiliates providing local service may not bundle local and long distance wireless service together in a single package to sell to customers. Otherwise the check against anticompetitive conduct which tariff regulation provides would be severely weakened.

V. ALL CMS PROVIDERS SHOULD BE REQUIRED TO OFFER EQUAL ACCESS TO INTEREXCHANGE CARRIERS.

The Notice (§ 71) asks whether equal access should be applied to provision of CMS. It is essential that the Commission adopt a comprehensive equal access plan in this rulemaking. Otherwise the fundamental principle of equal regulation will be seriously undermined.

The Modification of Final Judgment ("MFJ") requires BOCs to offer "equal access" to all interexchange carriers. Traffic which crosses a "LATA" boundary must, with some geographic exceptions permitted by the MFJ court, be handed off to the interexchange carrier selected by the subscriber. Although Bell Atlantic's cellular affiliates provide equal access to their cellular subscribers, their cellular competitors (except for affiliates of other BOCs) do not. Until the MFJ court removes the equal access requirement for BOC cellular carriers, it is demonstrably counter to the public interest for customers of all mobile providers not

to have the choice which customers of BOC carriers have. It is clearly in the public interest that all providers compete under the same rules.<sup>34/</sup>

PCS and cellular providers should therefore be subject to equal access requirements that place them in competitive parity with existing BOC cellular affiliates.<sup>35/</sup> Equal access is the norm in the telecommunications industry. BOC cellular affiliates, which hold a significant number of licenses, offer equal access service between LATAs or waived areas.<sup>36/</sup> Likewise, the BOC and other major landline LEC providers, which will come under increasing competition from PCS and other CMS providers, are subject to equal access requirements, and offer equal access service for long distance calls. The new PCS providers as well as the existing cellular carriers that do not now offer equal access should be brought into parity with their competition.

Therefore, the Commission should adopt the following general rule:

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- <sup>34/</sup> The Commission should accordingly grant, as part of this rulemaking, the June 1992 petition (RM-8012) filed by MCI Communications requesting the imposition of equal access obligations on all cellular carriers. That Petition received nearly universal support for comprehensive equal access.
- <sup>35/</sup> This discussion of equal access does not and should not apply to paging service, which is not subject to equal access requirements.
- <sup>36/</sup> Under the forbearance proposed by the Commission, this equal access service should no longer be tariffed, and the Commission should make clear in its detariffing rules that equal access tariffs will no longer be accepted by the FCC. Therefore, although all PCS and cellular carriers would have an equal access obligation that is identical to the BOCs', all carriers would carry out this obligation by contract or other commercial means instead of tariff.

RULE ONE: Each CMS provider<sup>37/</sup> shall offer to all interexchange carriers exchange access and exchange services for such access on an unbundled basis, that is equal in type, quality, and price to that provided to any interexchange service provided by such CMS provider or an affiliate thereof.

The MFJ currently requires equal access to be available for all traffic which crosses LATA boundaries. Bell Atlantic and other BOCs have requested the United States Department of Justice to support before the MFJ court a modified equal access plan which would substitute in essential respects the Rand McNally Major Trading Areas ("MTAs") for LATAs. LATAs are far too small to reflect economically integrated wireless service areas, and MTAs would more closely match the markets which have evolved. Moreover, the Commission has decided to license the largest blocks of PCS spectrum on an MTA basis. Bell Atlantic would therefore support equal access rules for the CMS industry which require all providers to offer equal access to customers whose traffic crosses the borders of MTAs or other sensible geographic areas, if and when such areas become the basis for wireless equal access required under the MFJ.

Until that time, however, to assure parity among all CMS providers, the FCC should define the wireless exchange areas (the geographic areas between which PCS and cellular carriers must offer equal access) to be coterminous with the exchange areas established by the MFJ (as modified by any subsequent waivers) applicable to the BOCs. If the MFJ mobile exchange areas are

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<sup>37/</sup> For purposes of these proposed equal access rules, "CMS provider" excludes a provider of paging service.

changed, or if the MFJ is subsequently modified or removed, the Commission should adopt uniform exchange areas for all PCS or cellular carriers offering CMS in a way that is sensible, such as MTAs.

It would be an administrative nightmare, as well as flatly violative of parity, to establish a wholly different map of equal access areas for non-BOC CMS providers and BOC providers. There is no rationale that would support permitting a non-BOC CMS provider to offer integrated and bundled service throughout an MTA, which in many cases comprises several states, while the BOC CMS provider is limited to one of the far smaller and far more numerous LATAs.

**RULE TWO:** For purposes of the equal access requirement imposed in RULE ONE, wireless exchange areas shall be deemed to be coterminous with the exchange areas established in the MFJ as modified in subsequent waivers.

To implement equal access, the Commission must assure that competing interexchange carriers are able to interconnect with PCS and cellular carriers providing CMS on the same terms and conditions as the CMS carriers themselves, that the CMS carriers do not discriminate against unaffiliated IXC's, and that the CMS carriers notify IXC's in advance of any network changes likely to affect their service. The following rules are directed to these concerns.

**RULE THREE:** Each CMS provider must offer unaffiliated IXC's the opportunity to interconnect with the CMS provider either by access tandem connection or by direct connection.

**RULE FOUR:** No CMS provider may discriminate between an interexchange service provided by the

CMS provider itself or an affiliate thereof, and any other interexchange carrier in the:

- (a) establishment and dissemination of technical information and interconnection standards;
- (b) interconnection and use of the CMS providers' service and facilities or in the charges for each element of service;
- (c) provision of new services and planning for an implementation of the construction and modification of facilities used to provide exchange service;

**RULE FIVE:** Each CMS provider must notify all interexchange carriers on a nondiscriminatory basis of planned changes to existing network services or the addition of new services that affect the interexchange carriers' interconnection with the CMS provider's network.

To implement equal access, the Commission should also establish safeguards designed to ensure that customers of CMS are offered a genuine choice among competing interexchange carriers.

**RULE SIX:** All customers of a CMS provider will be free to choose among participating interexchange carriers. All existing and new customers of providers will be sent a ballot and asked to choose an interexchange carrier from among participating interexchange carriers. Each such CMS provider will list those interexchange carriers in a nondiscriminatory manner and will periodically rotate the listing on a nondiscriminatory basis to ensure that each interexchange carrier has a random chance of being listed at the top of the list. Customers who fail to choose an interexchange carrier will be allocated among interexchange carriers in the same proportion as customers who return their ballots.

In addition, joint marketing rules should be imposed to ensure that CMS providers do not steer customers to their own long distance service.

**RULE SEVEN:** Every CMS provider is required to inform each new customer that the customer has a choice of interexchange carriers. Such CMS provider may not, at the time of establishment of service and the initial choice of interexchange carrier by the customer, recommend the CMS' own interexchange service over that of an unaffiliated carrier. If a new customer requests additional information concerning any interexchange service offering, including the CMS carrier's own interexchange service, the CMS provider will provide the customer, on a nondiscriminatory basis, with any literature provided by, or with the phone number of, the interexchange carrier or carriers about which the customer has requested more information. Subject to the limitation on direct marketing to existing customers noted below, however, nothing in this rule will preclude a CMS provider from otherwise advertising and promoting the CMS provider's interexchange service in connection with its local CMS service.

**RULE EIGHT:** After a customer's initial selection of an interexchange carrier, the personnel of a CMS provider may actively market the CMS provider's interexchange services to its customers. However, the CMS provider may use customer names, addresses, and mobile numbers to market its interexchange service only if it provides that information on the same terms and conditions to unaffiliated interexchange carriers, subject to a written agreement by each interexchange carrier that it will use the information only to market that carrier's interexchange services to the CMS provider's customers.

**VI. ALL CMS AFFILIATES OF DOMINANT CARRIERS  
SHOULD BE SUBJECT TO THE SAME RULES.**

**A. Accounting Safeguards**

The Commission requests comment on whether it should impose "safeguard requirements" on dominant common carriers with affiliates engaged in the provision of commercial mobile service. (Notice ¶ 64.) These safeguards are identified as the Part 32 and

Part 64 rules which govern accounting of dominant carriers' costs, require separation of costs incurred by a dominant carrier from those incurred by its nonregulated affiliates, and accounting for dominant carrier transactions with affiliates. These accounting rules are principally intended to ensure that costs for nonregulated affiliates are not passed on to and included as costs of the regulated carriers.<sup>38/</sup>

The Commission has recently decided to apply the existing accounting safeguards to dominant carriers that establish affiliates to provide PCS.<sup>39/</sup> Bell Atlantic believes that the need for and utility of many of these rules should be reexamined, but recognizes that such a reexamination raises issues which are beyond the scope of this rulemaking. Nonetheless, in this docket, the Commission should ensure that the current accounting rules apply to all affiliates of all dominant carriers which provide any type of CMS. Regulatory parity brooks no distinction between dominant carrier affiliates that provide cellular, paging, PCS or other competing commercial mobile services. The same safeguards should apply with regard to all dominant carriers offering CMS.

B. Structural Separation

The Commission should also reexamine the basis for and application of Section 22.901 of its Rules. Because Section

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38/ See, e.g., Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, CC Docket No. 86-111, 2 FCC Rcd. 1298 (1987) (subsequent history omitted).

39/ Second Report and Order, Amendment of the Commission's Rules to Establish New Personal Communications Services, GN Docket No. 90-314, Oct. 22, 1993, at ¶ 126.

22.901 regulates only some but not all CMS services and only some but not all carriers, it is flatly inconsistent with the principle of parity. Section 22.901 requires BOC cellular affiliates to be structurally separate subsidiaries with their own officers, imposes extensive restraints on exchange of information and joint marketing between a cellular subsidiary and its parent or other affiliates, and requires keeping of separate books of account. But Section 22.901 does not apply to cellular affiliates of other dominant carriers, such as AT&T. Nor does it apply to services other than cellular.

In the PCS rulemaking, the Commission did not impose Section 22.901's requirements on PCS affiliates of dominant carriers, because it determined that the cost accounting rules discussed above provided sufficient protection against anticompetitive conduct.<sup>40/</sup> Although commenters, including NTIA, urged it to repeal separation requirements for cellular carriers, the Commission concluded, "We do not believe the record in this proceeding provides enough information for us to eliminate the requirement at this time as advocated by NTIA." *Id.* at n. 98.

At this point, therefore, the Commission's approach to determining when separation safeguards are warranted can fairly be characterized as convoluted and as the antithesis of parity. AT&T can offer either cellular or non-cellular CMS free of structural separations rules. BOCs can offer only non-cellular PCS free from

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<sup>40/</sup> Second Report and Order, Amendment of the Commission's Rules to Establish New Personal Communications Services, GN Docket No. 90-314, Oct. 22, 1993, at ¶ 126.

those rules. BOC cellular carriers and their affiliates are subject to the full range of separation and accounting safeguards.

The current inequitable situation is particularly ironic given that Section 22.901 was originally imposed on AT&T, and particularly essential given AT&T's proposal to acquire McCaw.<sup>41/</sup> Following the divestiture of AT&T's telephone operating companies, the rule was revised to list the BOCs but not AT&T because AT&T had transferred all of its cellular interests to the BOCs. The rule was thus clearly premised on AT&T's withdrawal from cellular service. Now that AT&T seeks to reenter the cellular market, that premise is clearly invalid.

The Commission should not perpetuate a situation which is so unequal. It should apply Section 22.901 to all cellular affiliates of dominant carriers, particularly AT&T. Congress' intention and the requirements of Section 332 cannot be met if the nation's dominant interexchange carrier were to remain free of these restrictions while its BOC competitors are burdened by them. Moreover, in the Budget Act, Congress explicitly directed the Commission to consider whether regulations "will enhance competition among providers of commercial mobile services." A rule that is found to promote such competition may be found to be "in the public interest." Section 332(c)(1)(C). Imposing Section

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<sup>41/</sup> For this and other reasons set forth in Bell Atlantic's Petition to Impose Conditions on the AT&T/McCaw transaction (File No. ENF-93-44, supra n. 33), AT&T's acquisition of McCaw should not be approved until Section 22.901 is imposed in full on AT&T. And AT&T should remain obligated to comply with that rule until it can no longer leverage its status as the leading supplier of cellular equipment and the dominant provider of long distance service.

22.901 on all cellular carriers affiliated with dominant carriers will promote unfettered competition by making the rules equal for all. A result consistent with parity can be achieved simply by adding AT&T and other dominant carriers to the list of companies identified in Section 22.901(b).<sup>42/</sup>

Alternatively, the Commission should repeal Section 22.901 and the discriminatory burdens it places on certain cellular carriers.<sup>43/</sup> The fundamental regulatory concerns which were derived from affiliation with a dominant carrier in a different time and under different market conditions -- to the extent they are still valid -- are satisfied by existing accounting rules. At a minimum, the joint marketing provisions of Section 22.901 should be deleted. They serve no useful purpose and, among other evils, restrict consumer choice by frustrating customers' ability to obtain services from a single supplier.

**VII. ALL CMS PROVIDERS SHOULD HAVE EQUAL  
INTERCONNECTION RIGHTS AND OBLIGATIONS.**

The Notice (¶¶ 69-75) seeks comment on the rules that should govern interconnection by and among mobile service providers.

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<sup>42/</sup> In view of the large number of well-financed and powerful entities which will enter the CMS market, such as MCI/British Telecom, the Commission ought to consider applying appropriate affiliation rules to all competitors of strategic significance in the CMS business. It disserves the concept of parity to impose structural or nonstructural impediments on some but not all large competitors.

<sup>43/</sup> However, separation requirements to be imposed on AT&T and McCaw in connection with their merger should not be repealed. These arise in a different context -- as a specific condition to a proposed merger, and not as a general rule -- so that there is no inequity in continuing their application to AT&T.

While the Act does not give the Commission new authority or responsibility in this area, it would be good policy for the Commission to establish the basic ground rules at this time rather than on a case-by-case basis as issues arise.

As a general matter, consumers are best served when all service providers design their networks to facilitate interconnection among them. Only where the costs of interconnection outweigh the benefits to consumers should a type of interconnection be excused. This goal is most readily accomplished by providers of new services, which can design their networks to be "open" from the beginning. Providers with substantial embedded facilities will, at the very least, need more time to reach this goal. Of course, the company seeking interconnection must pay a price that covers the reasonable cost of providing it.

Interconnection obligations should not be one way, running only from the landline exchange carrier to the mobile services provider. If mobile services providers are to be treated like "co-carriers" and receive the benefits of carrier status, they must undertake the obligations of that status as well. Therefore, any regulations adopted by the Commission should impose comparable interconnection requirements on CMS providers as on landline exchange carriers.

There is, however, good reason not to extend automatically the interconnection rules to providers of purely private services. Commercial mobile services are, by definition, offered to, and presumably benefit, significant portions of the public at large. Broad interconnection rights are granted to CMS providers because

they will ultimately benefit a broad class of consumers. Private services, again by definition, do not benefit the public generally and, therefore, their providers should not automatically have the same right to interconnect with, and burden, other carriers.

**VIII. RULES FOR THE STATE PETITION PROCESS SHOULD REFLECT CONGRESS' CONDITIONS FOR PERMITTING STATES TO REGULATE CMS RATES.**

New Section 332(c)(3) provides that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service." To address concerns raised during the legislative process by representatives of state interests, Congress added limited exemptions to this provision which allow states to retain or initiate regulation of rates. The states may not, however, impose any entry requirements or restrictions. Congress also imposed specific requirements which a state must meet to be granted authority to regulate rates. Section 332(c)(3) reflects a careful balancing of Congress' belief that mobile services should principally be regulated on a federal level, while acknowledging a role for the states.<sup>44/</sup> The Notice (¶ 79) asks for comment on rules to implement the petition process. Those rules should track Congress' objectives.

1. A petition to retain or impose rate regulation should be filed by or on behalf of the state itself. Section 332(c)(3)

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<sup>44/</sup> House Report at 260 (Preemption intended "to foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.").