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November 8, 1993

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Suite 222  
Washington, D.C. 20554

Dear Mr. Caton

Submitted herewith on behalf of National Cellular Resellers Association is an original and four copies of its Comments in GN Docket No. 93-252.

Very truly yours



Joel H. Levy

Enclosure



## SUMMARY

The National Cellular Resellers Association ("NCRA") strongly favors implementation of rules that achieve the goal of a competitive, innovative and reasonably priced mobile services marketplace. These Comments are submitted to urge (1) that the achievement of these goals can be obtained by the adoption of policies that reflect the substantial benefits which resellers of commercial mobile services can provide, (2) that the Commission has the necessary power and authority to implement an appropriate regulatory scheme and (3) that with deft use of its varied powers, the need for burdensome regulation can be minimized.

Although NCRA is hopeful that PCS and ESMR technology will enhance competition in the commercial mobile services industry, evidence supporting the conclusion that the industry is currently competitive is, at best, equivocal. Under these circumstances, the protection of consumer interests requires (1) that cellular resellers have full interconnection rights to other CMS providers and that (2) regulation of wholesale cellular rates be undertaken by the FCC. Continuation of the old forbearance policies, without modification, would be arbitrary and an abuse of the Commission's discretion. Facilities-based cellular carriers should be required to file streamlined tariffs setting forth their wholesale rates, but without supporting cost data. Upon complaint under Section 208, the carriers bear the responsibility to show that the rate is cost-based. Preemption of state regulation should not be imposed unless an effective Federal regulatory scheme is put in place which

gives resellers of CMS access to facilities-based services at reasonable rates.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

BEFORE THE

# Federal Communications Commission

In the Matter of

IMPLEMENTATION OF SECTIONS 3(N) AND  
332 OF THE COMMUNICATIONS ACT

REGULATORY TREATMENT OF MOBILE SERVICES

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GN Docket No. 93-252

## COMMENTS OF NATIONAL CELLULAR RESELLERS ASSOCIATION

The National Cellular Resellers Association ("NCRA"), by its counsel, herewith submits its Comments in response to the Notice of Proposed Rule Making in the above docket, released by the Commission on October 8, 1993. NCRA's members comprise the leading resellers of cellular service in major markets across the country. Its main objectives are, through the promotion and resale of cellular service, to support the growth and availability of radio mobile services for individuals and businesses and to ensure a competitive marketplace for such services. Its interest in this proceeding stems from these commitments and the legal status of its members as common carriers<sup>1</sup> under Title II of the Communications Act of 1934 and in particular Sections 201 and 202 thereof, as well as their status as commercial mobile service ("CMS") providers under Section 332(d)(1), recently added to the Communications Act

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<sup>1</sup> AT&T v. F.C.C., 572 F.2d 17 (2d Cir.); cert. denied, 439 U.S. 875 (1978).

by the Omnibus Budget Reconciliation Act of 1993 ("The Act").<sup>2</sup> While the Commission has raised a large number of questions reflecting the far-ranging impact of the Act, NCRA's Comments are focused on the issues concerning establishment of a competitive mobile services marketplace and the role of cellular resellers therein.

I.

INTRODUCTION AND BACKGROUND

1. Designed to bring order into the regulatory treatment of mobile radio service providers, the Act defines private and commercial mobile providers, extends interconnection rights by any common carrier to the facilities of commercial mobile service providers, and preempts State regulation of entry and rates charged by CMS providers. The Act also sets out specific findings which the Commission must make before it may exempt any CMS provider from the tariff provisions of Title II, thereby addressing for the first time through legislation the Commission's previously unlawful forbearance policies. In paragraphs 49-52 of the NPRM the Commission has recited the background of FCC forbearance of tariff regulation of non-dominant common carriers, the reversal of that

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<sup>2</sup> Section 6002(b). Even though cellular resellers are not facilities-based licensees, they are statutory CMS providers because they make available to the public, for profit, interconnected service to the switched telephone network by the resale of cellular mobile services obtained from the two facilities-based carriers. See *infra* pp. 21-22.

policy in 1992 by the Court of Appeals,<sup>3</sup> and subsequent passage by the Congress of amended Section 332.

2. Following the 1992 AT&T decision, Cellular Telecommunications Industry Association ("CTIA") filed a Petition for Rule Making (RM 8179) which essentially requested that the facilities-based cellular carriers be permitted to continue to avoid effective rate regulation of cellular service. NCRA submitted its Comments on March 19, 1993. NCRA's Comments and the record otherwise accumulated in RM 8179 have now been incorporated into this proceeding. Part of the record in RM 8179 continues to be relevant to the disposition of the issues that the Commission has raised in this proceeding<sup>4</sup>. However, a number of developments have transpired since submission of Comments that also have a direct bearing on this proceeding.<sup>5</sup> It is distressing to NCRA,

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<sup>3</sup> AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 3020 (1993) [hereinafter 1992 AT&T].

<sup>4</sup> No longer at issue are such legal questions as whether basic cellular service is interstate or intrastate, how roaming will be treated for rate purposes, allocation and separation issues involving inter-LATA and intra-LATA local and interstate calling, and the like. While these issues readily lent themselves to extended discussion and contention in the comments on RM 8179 on the question of the extent of the Commission's responsibility to engage in tariff regulation in the wake of 1992 AT&T, Congressional preemption of State regulation (to the extent that States do not justify rate regulatory schemes, see Sect. 332(c)(3)(B)) of entry and rates reposes entirely in the FCC disposition and regulation of CMS regardless of the mix of interstate and intrastate services which may be present.

<sup>5</sup> Since the submission of Comments in RM 8179, Congress has passed new Sections 3(n) and 332 of the Communications Act, AT&T have proposed to merge with McCaw Cellular Communications, Inc., Bell Atlantic has reached agreement to acquire cable giant TCI, other large CATV entities appear on the verge of acquisition by other RBOCs, new studies demonstrate the lack of competition in the  
(continued...)

therefore, that the Commission has, in light of that record and subsequent events, even "tentatively" concluded in paragraph 63 that "commercial mobile services may be sufficiently competitive to permit us to forbear from regulating the rates for these [cellular] services." Other than a reference to the newly-established PCS services, and the supposed lack of interest in rate regulation at the State level, the Commission has provided no reasoned or detailed analysis to support this "tentative" conclusion.

3. That "tentative" conclusion is simply not supported by the record in RM 8179 and, in any event, may constitute improper prejudgment of a core issue in this proceeding. A reasoned final decision on these issues must depend upon evaluation of the full record and application of the new statutory standards for exercise of tariff forbearance that are contained in Section 332(C)(1)(i),(ii) and (iii). But the Commission has not revealed that it has made any such analysis and commenting parties should not, therefore, have been placed in the position to guess on what basis they should address such "tentative" conclusions.<sup>6</sup>

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<sup>5</sup>(...continued)  
cellular marketplace, see Hazlett, Market Power in the Cellular Telephone Duopoly, Time Warner Telecommunications, August, 1993 [hereinafter Time Warner Study], and cellular subscriber growth and technological advances increase the pace at which cellular service occupies the cellular and future CMS marketplace.

<sup>6</sup> If the Commission has engaged in some study that would support any "tentative" or final conclusion on these issues, NCRA requests that it be made public and subject to further comment by interested parties.

4. The Commission may not close its mind to the stark reality that the establishment of a competitive commercial mobile services marketplace may inescapably require some degree of Federal rate regulation of certain of its elements (such as wholesale service offerings), at least in the near future. It would be quite arbitrary for the Commission to fail to take account of the substantial showing contained in NCRA's Comments in RM 8179 on the mere prospect that at some distant future date the marketplace may be so competitively structured that rate regulation may be safely avoided.<sup>7</sup> Moreover, the legislative history of Section 332 clearly indicates that the Commission may apply differential treatment to CMS providers based on existing market conditions. The simple fact that cellular is now virtually alone in the mobile voice marketplace is obviously one such factor that would justify continued regulation of that service, or of some of the licensees therein, under Section 203 and until PCS providers have emerged as effective competitors.<sup>8</sup>

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<sup>7</sup> When that date may arrive, if ever, is subject to substantial doubt. See Heard On The Street, Wall Street Journal, November 3, 1993, at C2 (Exhibit 1 hereto) (highlighting the views of some professional investors that profitable nationwide SMR service won't be available for at least five years). No PCS licenses have yet to be awarded. Even the ground-rules for their auction are up in the air. And, after that process is completed, some years hence, PCS licensees will have ten (10) years to build out 90% of their system. The Commission has even given as much as five (5) years to build out just one-third (1/3) of the system.

<sup>8</sup> The Conference Agreement on Section 332(c)(1) provides, in part, . . . "that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services. While this provision does not alter the treatment of all commercial mobile services as common carriers, this provision (continued...)

5. Nonetheless, NCRA wishes to clearly state that it strongly favors implementation of Section 332 in a manner that will minimize, as the circumstances dictate, the need for either Federal or State rate regulation to achieve the goal of an effective nationwide mobile services marketplace: competitive, ubiquitous, seamless, innovative, and reasonably priced, as Commissioner Duggan has emphasized in his Separate Statement to the NPRM. These Comments are submitted to urge (1) that the achievement of these goals can be obtained by the adoption of policies that reflect the substantial benefits which resellers of commercial mobile services can provide, (2) that the Commission has the necessary power and authority -- indeed plenary responsibility -- to implement an appropriate regulatory scheme, and (3) that with deft use of its

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<sup>8</sup>(...continued)

permits the Commission some degree of flexibility to determine which specific regulations should be applied to each carrier. For instance, the Commission may, under the authority of this provision, forbear from regulating some providers of commercial mobile services if it finds that such regulation is not necessary to promote competition or to protect consumers against unjust or unreasonable rates or unjustly or unreasonably discriminatory rates. At the same time, the Commission may determine that it should not specify some provisions as inapplicable to some commercial mobile services providers, or may choose to 'unspecify' certain provisions for certain providers, if it determines, after analyzing the market conditions for commercial mobile services, that application of such provisions would promote competition and protect consumers." 139 Cong. Rec. H5916 (daily ed. August 4, 1993) (emphasis supplied). This language clearly contemplates that for forbearance purposes, the Commission must engage in particularized analysis of segments of the CMS marketplace and/or submarkets and individual carriers. To the extent that the Commission has refused to consider submarkets in determining that there was one nationwide market for interstate inter-exchange communications services, that analytic assumption is no longer available as a tool by which to determine forbearance of regulation of CMS providers.

varied powers, the need for unnecessary tariff regulation can be minimized. In support whereof, the following is shown.

II.

SUCCESSFUL IMPLEMENTATION OF THE COMMERCIAL  
MOBILE SERVICES MARKETPLACE REQUIRES RECOGNITION  
OF AND ESTABLISHMENT OF A VIABLE RESALE INDUSTRY

6. In Cellular Communications Systems, 86 F.C.C.2d 469 (1981), the Commission ruled that AT&T and its underlying cellular affiliate must provide system capacity to non-affiliated retailers or resellers on a non-discriminatory basis and on the same terms and conditions as its own distribution arm. This ruling was expressly designed to prevent cellular system tariffs from restricting resale. The FCC thus recognized that resale is an effective deterrent to price discrimination among cross-elastic services, and noted that it had already ordered that similar tariff provisions be eliminated from interstate WATS and MTS tariffs. The Commission stated its belief that restriction of cellular resale is contrary to the public interest. This basic policy favoring common carrier resale in the emerging cellular industry established that resellers, themselves, were common carriers under Title II of the Communications Act.

7. In Resale and Shared Use, 60 F.C.C.2d 261,265 (1976), recon. granted in part, 62 FCC 2d 588 (1977), aff'd sub nom., AT&T v. FCC, 572 F.2d 17 (2d Cir. 1978), cert. denied, 439 U.S. 875 (1978), the Commission summarized the benefits of resale as follows:

We find that elimination of the restrictions on unlimited resale and sharing of private line service will bring about public benefits which include:

- (a) the provision of communications service at rates more closely related to costs;
- (b) better management of communications networks, and the provision of management expertise by users and intermediaries to the carriers;
- (c) the avoidance of waste of communications capacity; and
- (d) the creation of additional incentives for research and development of ancillary devices to be used with transmission lines.

8. The Commission has consistently followed the course of recognizing the role and place of resellers in delivering to end users facilities-based common carrier service. However, the Commission has not, until now, been so clearly faced with the need to implement these goals with practical policies that do more than just pay lip service to theoretical benefits. The value of resale, as already recognized by the Commission, can emerge as a key component of the commercial mobile services marketplace under the new legislation. In addition to the reasons cited by the Commission in Cellular Communications Systems, supra, unconstrained resale competition with the facilities-based carriers will ameliorate many of the otherwise unacceptable structural anti-competitive circumstances that now exist or may ensue. For example, the opportunity for facilities-based cellular

carriers to engage in predatory pricing in advance of the establishment of PCS services is limited by reseller competition.

9. Whatever the FCC's hopes for a competitive CMS marketplace, the reality is that entry at the facilities level is governed by limited radio spectrum. There are only two cellular carriers per market. While PCS spectrum allocation will result in a greater number of competitors, it is highly unlikely that there ever will be more than just a handful of facilities-based players in any given market. In the absence of effective regulations, each such licensee will be driven to maximize its economic position that stems from its hold on a particular segment of radio spectrum. Fortunately, Congress has recognized that no party should be able to utilize a radio common carrier license to foreclose competition and that facilities-based carriers are entitled to only a level playing field, not one tilted in their favor by virtue of grant of a common carrier radio license. Together with the reasonable rate requirements of Title II, the mandatory interconnection provisions of Section 332 are intended to achieve the legislative goal. Resellers who are able to interconnect to the cellular or PCS facilities-based carrier by the use of their own switches and to purchase air time at rates which reflect only the cost of that service, are in a position to market their service on a truly even-handed and competitive basis.

10. As the Commission knows, however, resale rates are not based on cost to the carrier to provide the basic service. Such pricing practices exacerbate what is effectively bottleneck

control by giving to facilities-based carriers the ability to set both the "wholesale" and "retail" rates for the service and therefore the number of effective retail competitors they may face. The cost of wholesale service limits reseller flexibility to set up competitive rates below those of the carrier from whom it acquires basic services. Thus, non-cost based rates charged resellers protect carrier retail rates and inevitably tend to non-economic, non-competitive retail markets. Eliminating such impediments to resale competition will facilitate retail rate competition and enlarge the number of service enhancements and choice that consumers may need and wish to have available. Terminating such pricing practices is therefore essential to achieve the benefits of resale in the telecommunications marketplace which the Commission has sought since 1976. Resale and Shared Use, 60 F.C.C.2d 261 (1976).

11. The organizing principle and fundamental public policy for the commercial mobile services must be, as the law requires, one of open entry to the common carrier radio facilities granted to those privileged entities who have been licensed to use the public radio spectrum.

12. Implementation of such mandatory practices is no major departure from or novel application of governing law and policy. Section 332(c)(1)(B) now requires that "Upon reasonable request of any person providing commercial mobile services, the Commission shall order a common carrier to establish physical connections with such services pursuant to the provisions of Section 201 of

this Act."

13. Enactment of this section together with Federal preemption of State rate regulation of any CMS providers (except under certain limited circumstances) eliminates the previous complex issues of how to manage rates for interconnection and cellular service jurisdictionally intertwined between interstate and intrastate elements. The CMS world has now been rendered whole with concomitant responsibility given to the Commission to manage it.

14. Carrying out such a responsibility is clearly within the ambit of the Commission's experience and authority. Thus, the Commission has recently extended expanded interconnection by competitive access providers to the LECs, even in the absence of the kind of specific legislative directive, regarding CMS providers, contained in Section 332(c)(1)(B). In reaching its decision, in September 1992, in re Expanded Interconnection with Local Telephone Company Facilities, 7 F.C.C. Rcd. 7369 (1992) [hereinafter Expanded Interconnection], the Commission enunciated the benefits and public policy upon which such open access to monopoly based common carriers resides.

In this Order, we take a historic step in the process of opening the remaining preserves of monopoly telecommunications service to competition. The measures that we adopt today will promote increased competition in the interstate access market by requiring that the Tier 1 local exchange carriers (LECs) offer expanded interconnection to all interested parties, permitting competitors and high volume users to terminate their own special access transmission facilities at LEC central offices. These LECs are required to offer

physical collocation to all interconnectors that request it, though the parties remain free to negotiate satisfactory virtual collocation arrangements.

Our decision in this proceeding represents one of many steps that the Commission is taking to ensure that telecommunications customers obtain the full benefits of new fiber optic and radio networks that compete with existing LEC services. This growing competition will expand service choices for telecommunications users, heighten incentives for efficiency, speed technological innovation, and increase pressure for cost-based prices. Id. at 7372. (Footnotes omitted)

15. Implementation of similar policies with respect to the commercial mobile services market would bring about similar advances and is, in any event, now legally required by Section 332(c)(1)(B), as well as the extension of Sections 201 and 202 to CMS providers. Moreover, the fact that facilities-based CMS providers use radio spectrum that comes conditioned with use in the public interest<sup>9</sup> further requires such open entry and competitive access since the grant of such licenses conveys no right to exclude competitors, engage in monopolistic or anti-competitive practices or extract monopoly rents. Rather, the grant of such licenses, either through lottery, purchase, or spectrum auctions, confers no property rights on the licensee, only a right to operate radio

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<sup>9</sup> "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use such channel, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed by Federal authority, and no such license shall be construed to create any rights, beyond the terms, conditions and periods of the license." 47 U.S.C. 301.

property rights on the licensee, only a right to operate radio facilities for service to the public. Open entry to the underlying facilities of the spectrum licensed carrier, as well as open entry to the local exchange loop and ultimately to the mix of inter-exchange carriers through interconnection by the cellular reseller will thus energize competition in the mobile services market by enhancing competition at the retail level. Expanded Interconnection, 7 F.C.C. Rcd. 7369, supra.

### III.

THE COMMISSION HAS FULL AUTHORITY AND RESPONSIBILITY  
TO DEVELOP A COMPETITIVE CMS INDUSTRY

16. Passage of the Omnibus Budget Reconciliation Act of 1993 has now removed much of the ambiguity that otherwise may be thought to have surrounded the scope of the Commission's authority to regulate commercial mobile services. Adoption of new Section 332 has not, however, reaffirmed or reinstated nunc pro tunc the deregulatory policies which led to the forbearance and detariffing rules which were struck down by the Court of Appeals in the 1992 AT&T case. Rather, the Congressional policy expressed in new Section 332 was intended to establish that the exercise, or forbearance of the exercise of certain regulatory powers is to be driven by the overriding goal of developing a competitive mobile services marketplace. The statute was not a narrow reinstatement of the power to deregulate but a broader expression of the specific public benefits and procedures to be followed by the FCC to

17. To the extent that the forbearance policy was driven by the view that detariffing was appropriate for carriers that did not have a purported ability to control price, new Section 332 has imposed a broader duty upon the Commission. The idea now is to so use Federal regulatory authority that consumer choice is maximized and end user rates are minimized. As Commissioner Duggan has stated in his dissent, in part, to the Commission's Report and Order In The Matter Of Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 F.C.C. Rcd 4028 (1992), the Commission "should be eager to ensure that customers have a full range of options, and that the competitive pressure upon cellular rates is as intense as possible." Id. at 4036. Simply put, forbearing from regulation of non-dominant carriers is not equivalent to establishing those regulatory policies that will create for consumers "a full range of options" and for "competitive pressure on cellular rates . . . as intense as possible."

18. New Section 332(c)(1) allows the Commission to forbear from tariffing of CMS service, only upon a finding that competitive markets exist, that consumers will be protected, and that the public interest would be served. While the interplay of these standards is not entirely clear, they express a mood that provides a sufficient guide for a Commission decision as to how to exercise rate regulation of carrier charges assessed to cellular resellers. First, it must be emphasized that at this stage of the development of the commercial mobile services, the question of when it may be appropriate for the Commission to forbear from rate regulation is

critical. While there is an understandable inclination to conserve scarce Federal resources, Congress has not validated that as a reason upon which the Commission can be allowed to avoid protecting consumer interests. It would be entirely irrational to risk the future development of an emerging commercial CMS marketplace by avoiding the cost of Federal oversight now only to be paid for by unnecessarily higher present consumer prices and non-competitive markets in the future. Secondly, the evidence upon which the Commission decides that the public interest in forbearing from rate regulation of cellular services is justified ought to be indisputable and compelling rather than, at best, equivocal.<sup>10</sup> In

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<sup>10</sup> As recently as last year the Commission acknowledged that "in the absence of any evidence (such as price and cost data), it is difficult to conclude that the cellular service market is fully competitive." In re Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 F.C.C. Rcd. 4028, 4029 (1992) ("Bundling Order"). GAO recently underscored this finding by concluding that the unavailability of cost and revenue data precludes a "determin[ation] [of] whether prices were set at higher than competitive levels." GAO, "Concerns About Competition In The Cellular Telephone Service Industry" at 19 (1992) ("GAO"). Although as early as 1984 the Commission acknowledged the need to evaluate the market conditions and power (and presumably the relevant cost and price data) of commercial mobile service providers, in re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations, Fifth Report and Order, 56 RR.2d 1204, 1214 n.41 (1984), the Commission has nonetheless failed to conduct the relevant investigation. As such, the Commission has not reversed its policy classifying facilities-based cellular providers as dominant carriers. In light of the Commission's classification and in recognition of Congress' recent amendment to Section 332(c)(1)(C) requiring a detailed review of competitive market conditions with respect to commercial mobile services including whether or not there is effective competition, any tentative conclusion with regard to the competitive market conditions in the cellular marketplace without an effort to collect the necessary data would be premature, if not a clear abdication of Congressionally mandated duty. See also GAO at 43 (recommending, "[a]s a first step. . . obtain[ing] revenue, cost, and other financial data needed to assess the profitability of the (continued...)

fact, the present record is clearly supportive of the conclusion that the public does not have access to a competitive cellular marketplace.<sup>11</sup> In these circumstances, at least wholesale rate regulation of the competitive mobile services markets, and in particular the cellular markets, is required for the foreseeable future and until such time that the Commission can clearly and unequivocally find that competition need not be protected by such regulatory oversight.

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<sup>10</sup>(...continued)  
the necessary data would be premature, if not a clear abdication of Congressionally mandated duty. See also GAO at 43 (recommending, "[a]s a first step. . .obtain[ing] revenue, cost, and other financial data needed to assess the profitability of the cellular telephone service licensees operating in the 30 largest markets . . . [to] determin[e] whether further actions may be needed to protect consumers' interests").

<sup>11</sup> See e.g., Comments of National Cellular Resellers Association in RM 8179, 14-29, Appendix B (March 19, 1993); Comments of the Department of Justice in FCC Docket No. 91-34 (June 1991); Comments of Staff of Bureau of Economics, FTC, in FCC Docket No. 91-34 (July 1991); Kwerel & Williams, "Changing Channels: Voluntary Reallocation of UHF Television Spectrum," November 1992; Hazlett, Time Warner Study, supra n.5; Investigation on the Commission's own motion into the regulation of cellular radiotelephone utilities, P.U.C. Decision 92-10-026 (October 6, 1992); GAO, Charges for Itemized Cellular Telephone Bills (September 1993).

See also "AT&T's Opposition To RBOCs' Motion To "Exempt" Wireless Services From Section II Of The Decree," filed with the Department of Justice in the MFJ proceeding, April 30, 1992, p. 36-39, attached hereto as Exhibit 2.

IV.

FEDERAL TARIFFING OF WHOLESALE RATES  
AND OF INTERCONNECTION TO THE EXTENT NECESSARY  
TO ACHIEVE EFFECTIVE COMPETITIVE MARKETS  
IS NOW LEGALLY MANDATED AND CANNOT BE FORBORNE

19. Given the above legal, policy and factual conclusions, the remaining question is how the FCC's responsibility to apply Section 201, 202 and 332 may be carried out with the minimal necessary Federal oversight.

20. NCRA does not take issue with forbearance of retail rate regulation and welcomes such a result if it has (1) access to cost-based rates for only those basic bottleneck services that it is forced to obtain from a facilities-based cellular carrier,<sup>12</sup> and (2) an efficient, timely and effective means of enforcing access

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<sup>12</sup> The point was aptly put by the California PUC in its 1992 Decision to require the unbundling of wholesale facilities-based wholesale rates:

"Our reason for requiring the unbundling of wholesale rates is to promote increased efficiency and innovative use of the cellular network by opening up the network to additional competition. The best method to achieve that goal is to allow competitors to interconnect, on a cost-supported basis, to those facilities that only the facilities-based type carriers are allowed to provide under FCC rules because of the scarcity of radio frequency spectrum. We therefore unbundle into wholesale rate elements only those functions that cannot be provided by competitors, that is, the portion of the network between the mobile unit and the switch, and certain switching functions. It is that portion of the network that should be cost based, not the portion of the network that will be opened up to competition. We see no need to unbundle wholesale rates into rate elements for services that competitors can provide because we want that portion of the network to be market priced (i.e., the existing wholesale and retail rates." Investigation on the Commission's own motion into the regulation of cellular radiotelephone utilities, Decision 93-05-069 (May 19, 1993).

to such rates is available at the FCC. Such means, short of requiring the facilities-based carriers filing tariffs with all supporting data, are within the Commission's arsenal of regulatory powers.

21. Differential regulation of wholesale and retail rate offerings of CMS providers and the terms and conditions of interconnection is the first step in the process.<sup>13</sup> CMS facilities-based carriers must at least file tariffs setting forth precise wholesale rates but need not contain supporting data. In accordance with Sections 201 and 202 such rates must reflect only the cost (including a reasonable rate of return) to provide that service to the reseller. Private Line Cases, 34 F.C.C. 217 (1963); Competitive Carrier Rule Making, 85 F.C.C.2d 1, 19 (1980). The establishment of such a reasonable wholesale rate will enable resellers to offer competitive basic retail rates, and enhance that offering with billing, LEC interconnection, IXC interconnection, auxiliary features (like voice mail), fraud monitoring and control and other options whose costs are determined by market forces and are not necessarily purchased on a bundled basis from facilities-based cellular carriers.

22. The procedures for measuring the lawfulness of such streamlined wholesale tariff filings must not create additional procedural hurdles that would effectively invite evasion from cost-

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<sup>13</sup> We also note that in paragraph 62 of the NPRM, the Commission indicates it now sees that forbearance from tariffing of "end user" rates may be justified, leaving open the question of and need for wholesale rate regulation addressed here.

based pricing. Upon complaint filed under Section 208, carriers must be required to submit full cost justification and bear the burden of proof that such rates are lawful, as Section 204 ultimately requires.

23. Whereas the Commission has held that a presumption of lawfulness may attach to the rates charged by non-dominant carriers, such a presumption is not available when facilities-based carriers have market power in a particular CMS service, as is presently the case with respect to cellular facilities-based carriers relationship with reseller customers. Given that circumstance, the Commission should clearly state that a complaint under Section 208 which presents a reasonable basis to believe that the resale tariff may be unlawful imposes upon the carrier a duty to then make full disclosure of the basis upon which it claims its rates are reasonable and cost-based. Initially, the complaining party ought not to be required to make a prima facie case of unlawfulness since the data is solely within the control and knowledge of the carrier. A showing which reasonably raises bona fide questions of lawfulness should be sufficient to trigger the requirement of a reply and full disclosure by the carrier.

24. The validity of a complaint that a carrier's wholesale rates are unlawful must necessarily be judged by a liberal standard since only the carrier has access to the data to justify its rate. No presumption of lawfulness can attach to a streamlined tariff filing unless the filing is made with sufficient disclosure to indicate that the rate is "prima facie" lawful. Tariffs-Evidence,

25 F.C.C.2d 957, 965 (1970). Presumptions of lawfulness that attended streamlined tariff filings when the Commission believed it had the legal power to forbear, see Competitive Carrier Rulemaking, 85 F.C.C.2d 1, 31 (1980), are no longer viable upon overturn of that policy and Congress' reaffirmation in Section 332 that the Commission must assure the setting of just, fair and reasonable rates under Sections 201 and 202.

25. The Commission need not fear that eliminating the presumption of lawfulness will generate frivolous, or an undue number of, Section 208 complaints. Substantial practical impediments, like cost, time and the probability of substantial, beneficial outcomes, all counsel against use of the complaint process in any but the most egregious cases. Moreover, once the Commission specifically reaffirms what the law now clearly requires, there is no reason to doubt the willingness or ability of CMS licensees to comply with cost-based pricing. The recalcitrant renegade CMS providers ought to be small in number.

26. Interconnection practices have been recently exhaustively examined by the Commission with respect to CAP access to LEC facilities. There is no reason why the policies and procedures adopted in Expanded Interconnection, 7 F.C.C. Rcd 7369 (1992), cannot be utilized to govern interconnection rights of common carriers to CMS providers. To meet the statutory requirements of Section 332 regarding the swift implementation of the legislation, it would appear to be appropriate and timely for the Commission to utilize the Expanded Interconnection proceeding as the framework