

Nextel, raised the issue of the transition period for ESMR compliance with commercial mobile services regulations<sup>41/</sup> and Bell Atlantic did not even mention these arguments in its CMS Reply Comments. BAMS is improperly using its untimely filing to reopen a closed record which, if permitted, would require another responsive pleading cycle.

The broad-ranging nature of the regulatory parity Notice and Bell Atlantic's extensive comments and replies on all aspects of the Notice demonstrate that BAMS had every opportunity to raise the transition period issue it presents in its Petition. Instead, it unaccountably now chooses to seek "special relief" in an effort to bypass the relevant proceeding and divert the Commission from its statutory responsibilities.<sup>42/</sup> BAMS Petition is late-filed, unauthorized and should be dismissed.

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<sup>40/</sup> (...continued) particularly telling that Bell Atlantic would take such pains to argue the competitive impact of ESMR systems when, according to BAMS' Petition, ESMR had not existed for more than three months at the time of its filings.

<sup>41/</sup> See e.g., Comments of Nextel at 2-3, 14-16; Comments of AMTA at 14-15.

<sup>42/</sup> The legislative history of the Budget Act indicates that Congress intended that the Commission examine in detail its private mobile services regulatory structure and modify its rules accordingly. BAMS' request to defer action on all applications for new and modified ESMR systems asks the Commission to make hasty decisions without the required review, runs counter to Congress' intent, illustrates a blatant disregard for reasoned rulemaking and is consistent with Bell Atlantic NSI's dilatory negotiating tactics concerning interconnection arrangements.

B. The Commission Should Not Consider BAMS' Rehashed Equal Access Arguments.

Similarly, BAMS makes no case concerning equal access. In fact, Bell Atlantic has raised these same arguments in its comments in the Commercial Mobile Services proceeding, on MCI's equal access rulemaking request and in Bell Atlantic's recent Petition to Impose Conditions on the transfer of control of McCaw Cellular.<sup>43/</sup> In each, Bell Atlantic vehemently argued that because it is required by the Modification of Final Judgment ("MFJ") to provide cellular equal access, all other commercial mobile services providers should be required to offer equal access to long distance services.

For instance, in response to MCI's petition for an equal access rulemaking, Bell Atlantic argued that the public interest would be best served if equal access was provided by all wireless providers. Specifically, it requested that the Commission put an end to "inconsistent equal access rules" found in the cellular industry and refrain from applying them to PCS in the future.<sup>44/</sup> In its AT&T/McCaw filing, Bell Atlantic endorsed a set of equal

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<sup>43/</sup> See CMS Comments of Bell Atlantic at 30-35; Comments of Bell Atlantic, Policies and Rules Pertaining to Equal Access Obligations of Cellular Licensees, RM-8012 at 4 (submitted September 2, 1992) ("Bell Atlantic Equal Access Comments"); Petition to Impose Conditions, Application to Transfer Control of McCaw Cellular Communications, Inc., File No. ENF 93-44, at 10-11 (submitted November 1, 1993).

<sup>44/</sup> Bell Atlantic Equal Access Comments at 4.

access provisions proposed by another Bell Operating Company ("BOC") that would require the merged AT&T/McCaw to provide "meaningful" equal access immediately.<sup>45/</sup> Here BAMS reiterates the same points it or its surrogate has already made to the Commission and the MFJ court ad nauseam.<sup>46/</sup>

BAMS offers absolutely no justification for raising these issues again in its Petition for Special Relief. Its Petition should be dismissed.

**VI. BAMS' EQUAL ACCESS ARGUMENTS ARE POLITICALLY MOTIVATED.**

There is no factual predicate of bottleneck facilities that would support the application of interexchange equal access requirements on ESMR, SMR or nonwireline cellular providers.<sup>47/</sup> Equal access obligations may be properly placed on the BOC parties to the MFJ and their affiliates in light of their bottleneck monopolies, but not on others. To date the Commission has not imposed interLATA equal access requirements on McCaw, the nation's largest cellular service provider, and there is certainly no basis for imposition of these obligations on Nextel.

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<sup>45/</sup> Petition to Impose Conditions at 10-11.

<sup>46/</sup> As a owner of cellular systems, Bell Atlantic has considered the equal access disparity to be "intolerable" and has continued to exert efforts to eliminate equal access altogether or have equal access requirements broadly applied. See e.g. Bell Atlantic Equal Access Comments at 3-4.

<sup>47/</sup> See also Comments of CenCall Communications Corporation, CMS Rulemaking, GN Docket No. 93-252 at 7 and n.12.

BAMS and its BOC cellular brethren are engaging in a political campaign to pressure the Commission, the Department of Justice and the MFJ court into either dropping any meaningful interLATA restriction on BOC wireless services or, alternatively, forcing their competitors into costly and duplicative serving arrangements. The Commission must reject BAMS' procedurally improper invitation.

If, despite the evidence, the Commission in its Commercial Mobile Services rulemaking or a subsequent rulemaking determines to impose some form of access obligation on all commercial mobile services providers, the Commission must also adopt a reasonable phase-in of these obligations. Under the MFJ landline equal access requirements, for example, the BOCs were required to implement equal access in the largest end offices over a period of several years.<sup>48/</sup> When the Commission adopted its landline equal access rules for independent telephone companies it recognized the greater degree of diversity present in independent telco networks and adopted a more flexible timeframe for implementation, setting the date of a bona fide request for equal access from an interexchange carrier as the appropriate date for calculation of a three

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<sup>48/</sup> See United States v. AT&T, 552 F. Supp. 131, 232-34 (D.D.C.), aff'd, Maryland v. U.S., 460 U.S. 1001 (1983). The MFJ's Appendix B contains a schedule for phase-in of BOC provision of equal exchange access. The phase-in of equal access generally was to occur over 2 2/3 years after a bona fide request, on an end office-by-end office basis.

year implementation schedule.<sup>49/</sup> Independent telco end offices that could not, for technical reasons, be modified to accommodate equal access were entirely excepted from the requirement. According to Commission precedent, any equal access rule for commercial mobile services providers must reflect the diversity of mobile services technologies and the manner in which the particular services offered are used to avoid expensive, pointless and non-publicly beneficial retrofitting.

**VII. BAMS' MOTIVES AND THOSE OF ITS LANDLINE AFFILIATE ARE TRANSPARENTLY ANTI-COMPETITIVE.**

The relief sought by BAMS in its legally and factually baseless petition is to defer action on pending ESMR applications until the CMS regulatory structure is in place. Alternatively, BAMS seeks that express conditions be placed on licenses issued to ESMR operators to require their compliance with the rules adopted in the Commercial Mobile Services proceeding.<sup>50/</sup>

Requesting the deferral of action on pending ESMR applications is a uniquely anti-competitive position. BAMS' apparent goal of delaying the commencement of improved digital service offerings and potential competition cannot be condoned by the Commission. The Commission's job is not

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<sup>49/</sup> See MTS/WATS Market Structure Phase III, 100 FCC 2d 860, 874-75 (1985).

<sup>50/</sup> Petition at 10.

to protect competitors, but competition.<sup>51/</sup> BAMS' alternative suggestion of conditioning SMR licenses is a superfluous gesture in light of the Budget Act's effective dates and transition periods.

Even more disturbing, however, is the ulterior motive of BAMS' parent that is apparent from the timing and scope of the Petition. Nextel has been attempting to negotiate an interconnection agreement with Bell Atlantic NSI for over one year. Nextel's ESMR interconnection requirements include Type II-A interconnection in the form routinely available from LECs for cellular interconnection. However, despite Nextel's persistence in making contacts and holding meetings with Bell Atlantic's Network Services affiliate, the carrier delayed in even providing a draft interconnection contract for over a year.<sup>52/</sup>

Prior to providing a draft interconnection contract, Bell Atlantic's Network services staff requested Nextel to explain how ESMR fit within the Commercial Mobile

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<sup>51/</sup> See Memorandum and Order, AT&T Communications Tariff, FCC Nos. 1 and 2, CC Docket No. 86-81, 2 FCC Rcd 548, 551 (1987) (Commission's policies are to promote competition in the interexchange marketplace and are not intended to protect competitors from that competition).

<sup>52/</sup> This dilatory behavior is a per se violation of existing interconnection policies. See Memorandum Opinion and Order on Reconsideration, Cellular Interconnection Proceeding, 4 FCC Rcd 2369, 2374 (1989) (finding that "six month time frame was intended to give telephone companies guidance on what constitutes a reasonable length of time in which to provide a cellular carrier with its requested form of interconnection.").

Services framework. In its November 11, 1993 response letter to Bell Atlantic NSI, Nextel explained the Budget Act's regulatory framework as it applies to ESMR. Nextel reiterated its interconnection needs as follows:

Nextel's ESMR interconnection requirements are virtually identical to those of Bell Atlantic's cellular affiliate Bell Atlantic Mobile Systems -- to whom Bell Atlantic has provided standard Type II-A and associated interconnection services for many years, Nextel will be providing "functionally equivalent" services to those of competing cellular carriers and is statutorily entitled to non-discriminatory, comparable interconnection.<sup>53/</sup>

On December 20, 1993, Nextel received a response to its renewed request for expeditious conclusion of a interconnection agreement. While Bell Atlantic NSI enclosed a draft interconnection agreement with its letter, the letter presented Nextel with an "either/or" proposition: either Nextel could proceed to execute an interconnection agreement with Bell Atlantic as a commercial mobile services provider on essentially the same terms as cellular carriers, or Nextel could wait until the end of the statutory transition period. Bell Atlantic's threatening letter concludes:

By working to establish interconnection agreements with providers of "commercial mobile services" at this time, rather than awaiting the expiration of the transition period or the FCC's final order in its rulemaking proceeding, Bell Atlantic's

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<sup>53/</sup> Letter to Mr. Kenneth Baranowski, Account Manager, Bell Atlantic Network Services, Inc., from Lawrence R. Krevor, Director - Government Affairs, Nextel, November 11, 1993.

telephone companies are taking a forward looking approach.<sup>54/</sup>

Not coincidentally, only two days after providing Nextel with its "either/or" threat, BAMS, Bell Atlantic's cellular affiliate, filed the instant Petition with the Commission.

The above-described actions appear to constitute a violation of Commission rules requiring structural separation between a BOC and its cellular affiliate and existing Commission policies requiring good faith interconnection negotiations.<sup>55/</sup> The apparent coordinated behavior between Bell Atlantic subsidiaries to competitively disadvantage Nextel by misuse of Bell Atlantic NSI's control over interconnection, and BAMS' simultaneous deliberate misreading of the statute and attempt to delay ESMR implementation, raises serious anti-competitive concerns that the Commission must investigate under Section 403 of the Communications Act. A critical aspect of this investigation must be review of all internal company communications on these issues to determine when and how the coordinated anti-competitive activity took place.<sup>56/</sup>

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<sup>54/</sup> Letter of Kenneth R. Baranowski Bell Atlantic NSI, to Lawrence R. Krevor, Nextel undated.

<sup>55/</sup> See 47 C.F.R. §22.901(b); Cellular Interconnection Proceeding, 4 FCC Rcd at 2371-2372.

<sup>56/</sup> The Commission has full authority to request and review relevant materials under 47 C.F.R. §22.901(c)(3) and Section 403 of the Communications Act. See Report and Order, Amendment of Section 22.901(c)(3), 1 FCC Rcd 1 (1986); see also Second Computer Inquiry, Memorandum Opinion (continued...)

Further, while Nextel recognizes that MFJ enforcement is not within the Commission's bailiwick, the actions of BAMS and its parent also call into question Bell Atlantic's compliance with the MFJ's non-discrimination provisions.<sup>56/</sup>

If, as it appears, Bell Atlantic and its cellular affiliate violated Commission rules and policies requiring good faith negotiation and structural separation, Bell Atlantic should be sanctioned for its anti-competitive behavior.

#### VIII. CONCLUSION

BAMS' Petition highlights the absolute need for Commission vigilance to prevent a monopoly landline provider from disadvantaging others to favor its own wireless affiliate. BAMS' glib, unsupported and self-serving interpretation of relevant statutory transition periods is incorrect. Its views on equal access are already well

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<sup>56/</sup> (...continued)  
and Order on Further Reconsideration, 88 FCC2d 512, 548 (1981) (Commission must stand ready to police compliance with various separation conditions imposed on AT&T, and to respond to and investigate complaints of anticompetitive conduct), aff'd, Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982); Puerto Rico Telephone Authority, 3 FCC Rcd 5675, 5679 n.37 (1988) (Communications Act provides Commission with ample authority to investigate, either on complaint or its own motion, conduct that may raise anticompetitive issues); Stahlman v. FCC, 126 F.2d 124, 127 (1942) (confirming Commission authority to obtain information necessary to discharge its proper functions).

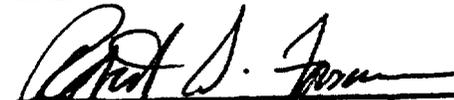
<sup>57/</sup> See U.S. v. AT&T, 552 F. Supp. at 227 (prohibiting BOCs from discriminating between AT&T and its affiliates in the interconnection and use of the BOCs' telecommunications service and facilities).

established and do not gain credibility by their repetition here. The obvious procedural defects of BAMS' Petition require its summary dismissal.

In addition, the Commission must investigate the apparent violation of its existing interconnection and structural separation rules by Bell Atlantic NSI and BAMS and impose appropriate sanctions for such serious violations.

Respectfully submitted,

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**January 13, 1994**

CERTIFICATE OF SERVICE

I, Pamela Marie DuBost, hereby certify that today on this 13th day of January, 1994, I caused a copy of the OPPOSITION OF NEXTEL COMMUNICATIONS, INC. to be served by hand delivery or first-class mail, postage prepaid to the following:

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