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May 19, 1994

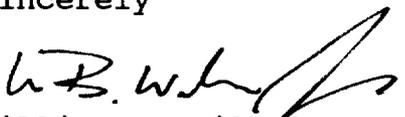
Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Suite 222  
Washington, D.C. 20554

Re: In the Matter of Implementation of Section 3(n) and  
332 of the Communications Act, Regulatory Treatment  
of Mobile Services - GN Docket No. 93-252

Dear Mr. Caton:

Enclosed please find an original and eleven copies of the Petition for Reconsideration of the National Cellular Resellers Association in the above-referenced proceeding.

Sincerely

  
William B. Wilhelm, Jr.

Enclosure

No. of Copies rec'd 0 of 10  
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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 )

GN Docket No. 93-252

**PETITION FOR RECONSIDERATION OF THE  
NATIONAL CELLULAR RESELLERS ASSOCIATION**

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Dated: May 19, 1994

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## SUMMARY

While the Commission's Notice of Proposed Rulemaking instituting this proceeding acknowledged that amended Section 332(c)(1)(B) of the 1993 Budget Act "requires the Commission to order a common carrier to interconnect with a commercial mobile service ("CMRS") provider on reasonable request," the FCC is nonetheless delaying the promulgation of rules governing all CMRS to CMRS interconnection and instead issuing a Notice of Inquiry on the topic. The Commission's inaction will violate the Budget Act's deadlines and needlessly force consumers of cellular services to continue to pay hundreds of millions of dollars in monopoly prices to facilities-based cellular carriers. Prompt reconsideration of these interconnection and timing decisions is therefore required.

In any event, there is no need to delay for further study the questions of how or whether cellular resellers should obtain, through installation of their own switch, interconnection to the facilities of cellular carriers. On the contrary, in order to remove uncertainty and deter obstructive responses to reasonable interconnection requests, the Commission must assert clearly that reasonable requests for unbundled interconnection made by cellular resellers must now be honored.

In addition, Section 6002(b) of the Budget Act permits the Commission to forbear from applying the requirements of certain sections of Title II of the Communications Act upon some or all classes of CMRS providers only if three separate and distinct determinations are made with regard to each section to which forbearance is applied. The Commission's decision to forbear from requiring cellular tariff filings satisfies none of the three tests and is therefore both improper and premature. NCRA requests that the Commission reconsider its forbearance decision in this regard.

BEFORE THE  
**Federal Communications Commission**

In the Matter of: )  
 )  
Implementation of Sections 3(n) ) GN Docket No. 93-252  
and 332 of the Communications Act )  
 )  
Regulatory Treatment of Mobile )  
Services )  
To: The Commission

**PETITION FOR RECONSIDERATION OF THE  
NATIONAL CELLULAR RESELLERS ASSOCIATION**

The National Cellular Resellers Association ("NCRA"), by its attorneys and pursuant to Section 1.429 of the Commission's rules, hereby submits its Petition for Reconsideration of the Federal Communications Commission's ("FCC" or "Commission") Second Report and Order ("Order")<sup>1/</sup> in the above captioned proceeding. Because of the impact of the Commission's Order, and the exigencies of the timing issues addressed in this Petition, the Commission should complete its reconsideration as soon as possible. Prompt changes in the Commission's Order requiring facilities-based cellular carriers to interconnect with cellular resellers on an unbundled basis will set in place today - not some uncertain future date - the

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<sup>1/</sup> Regulatory Treatment of Mobile Services, Second Report and Order, GN Docket 93-252 (released March 7, 1994); 59 Fed Reg. 18493 (1994) (Order).

conditions for a more competitive cellular telephone marketplace, protect consumer interests and thereby comply with Congressional mandates.

### DISCUSSION

#### **I. THE BUDGET ACT REQUIRES THE COMMISSION TO PROMULGATE REGULATIONS REQUIRING CMRS TO CMRS INTERCONNECTION BY A DATE NO LATER THAN AUGUST 10, 1994**

##### **A. Both the Budget Act and the Public Interest Require the Commission to Promulgate Rules Guaranteeing CMRS to CMRS Interconnection By a Date No Later Than August 10, 1994**

Congress provided the Commission with clear deadlines for the rapid promulgation of rules necessary to implement the interconnection requirements of Section 332(c)(1)(B). The Commission's plan to delay these rules and issue a Notice of Inquiry exploring CMRS to CMRS interconnection is, however, both at odds with the plain language of the Omnibus Budget Reconciliation Act ("Budget Act"), and contrary to the public interest.<sup>2/</sup>

The Budget Act requires that:

Within 1 year after the date of enactment of this Act, the Federal Communications Commission - shall issue such other regulations as are necessary to implement the amendments made by subsection (b)(2).<sup>3/</sup>

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<sup>2/</sup> Congressman Markey and Fields wrote in a recent letter to the Commission that "[i]f [CMRS] services are to succeed, they must obtain interconnection quickly and efficiently. The Commission must take appropriate action, early, to ensure this goal is met." E. Markey & J. Fields, Letter to Chairman Reed Hundt, GN Docket 93-252 (January 28, 1994).

<sup>3/</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(d)(3)(C), 107 Stat. 312 (1993) (Budget Act).

Subsection (b)(2) of the Budget Act contains the interconnection obligations of modified section 332(c)(1)(B).

According to 332(c)(1)(B):

Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of Section 201 of this Act.<sup>4/</sup>

The Commission, however, appears to assume that rules must be in place to effectuate these statutory interconnection requirements. This conclusion is not self-evident and, if true, the Commission has indicated through the issuance of an NOI, which would only some many months or years later be followed by a Notice of Proposed Rulemaking, that it does not consider the clear statutory deadline of Section 332(c)(1)(B) to apply to interconnection.

There is nothing in the language of the Budget Act or the legislative history which supports the conclusion that these statutory deadlines, if rules are needed, may be set aside to accommodate further Commission study of their specific requirements. Nor is there any support for the proposition that an ad hoc CMRS request for interconnection made on cellular or other existing common carriers can or should be delayed because of possible FCC concerns regarding PCS interconnection rights and obligations - a service not yet even in existence.<sup>5/</sup>

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<sup>4/</sup> 47 U.S.C. § 332(c)(1)(B).

<sup>5/</sup> Cellular, unlike PCS, is a mature industry serving over 16 million subscribers in all major metropolitan and rural areas. CTIA, End-of-Year Data Survey (1993).

A recent study of the cellular industry helps quantify the extent of monopoly pricing and, conversely, the public interest benefits of recognizing, without further delay, reseller interconnection rights and bringing greater competition to the cellular marketplace. The study, by Pitsch Communications,<sup>6/</sup> suggests that with the introduction of additional competition in the cellular industry, consumer prices could fall by hundreds of millions of dollars annually.<sup>7/</sup> In other words, the study concludes that a substantial portion of the price consumers pay cellular carriers for service is unrelated to the cost of providing the service. Rather, these charges represent the amount which carriers in a highly-concentrated market such as a cellular duopoly can extract from consumers in the form of monopoly prices.

Consumers have been and will continue to be penalized staggering sums so long as the cellular markets remain closed to additional competition. By acting quickly to require cellular providers to interconnect with cellular resellers, however, the Commission has the ability within a relatively short period of time to bring effective competition to the cellular industry and, in turn, reduce if not eliminate altogether the overcharges consumers will otherwise be forced to pay indefinitely. On the other hand, if the Commission defers action on cellular interconnection in order to complete a study of interconnection's effects on the unrelated and barely nascent PCS industry, it will not only be ignoring its statutory mandate and the

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<sup>6/</sup> Peter K. Pitsch, Estimation of Cellular Industry Cash Flows, Market Valuations, and Profit Levels, RM-8179, (March 17, 1993) (Submitted as Appendix B to NCRA's comments in that proceeding).

<sup>7/</sup> Id., Table 6.

deadlines thereunder, but, in effect, sentencing cellular subscribers to paying additional hundreds of millions of dollars in monopoly prices to the cellular duopolists.

**B. The Commission is Statutorily Obligated to Issue Regulations Guaranteeing CMRS Providers a Right to Interconnect with Other Common Carriers, Including Other CMRS Providers**

Contrary to the Commission's interpretation,<sup>8/</sup> the plain meaning of Section 332(c)(1)(B) requires the Commission to order all common carriers to interconnect with CMRS providers. According to Section 332(c)(1)(B) "upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical interconnection with such service pursuant to the provisions of Section 201 of this Act."<sup>9/</sup> While Congress made clear that the common carriers subject to this interconnection order include the LEC,<sup>10/</sup> Congress did not exclude any type of common carrier from this obligation and did not draw distinctions among various kinds of common carriers regarding the applicability of this obligation. Instead, Congress stated that CMRS providers are to be considered

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<sup>8/</sup> Order at para. 59 n. 115, para. 220.

<sup>9/</sup> 47 U.S.C. § 332(c)(1)(B) (emphasis added).

<sup>10/</sup> Order at para. 230, 234 (requiring the LECs to provide the type of interconnection reasonably requested by all CMRS providers and that the LEC shall not have authority to deny to a CMRS provider any form of interconnection arrangement that the LEC makes available to any other carrier or customer, unless the LEC meets its burden of demonstrating that the provision is either infeasible or economically unreasonable).

common carriers and, like all other common carriers, are subject to the same interconnection obligations.<sup>11/</sup> Thus, the clear intent of Congress, as evidenced by its use of the command "shall,"<sup>12/</sup> was to command the Commission to use its Section 201 authority to also order CMRS to CMRS interconnection. Had Congress intended the Commission to retain any discretion over the interconnection obligations of common carriers to CMRS providers, it would have simply used the word "may" or omitted 332(c)(1)(B) entirely, relying instead upon the Commission's 201 authority, rather than to command that "the Commission shall order a common carrier to establish physical interconnection" with CMRS providers. In commanding interconnection, "pursuant to the provisions of Section 201," Congress did not contemplate that the Commission exercise any discretion, but rather, simply use the authority of Section 201 to implement the mandated CMRS interconnection arrangements. By commanding interconnection in this instance, Congress removed any discretion that the Commission might otherwise be permitted under 201. As such, Congress was aware, however, that other parties might subsequently claim that the Commission's 201 authority was either expanded (i.e.: the Commission can now

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<sup>11/</sup> Section 332(c)(1)(A) states that "A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is engaged, be treated as a common carrier for purposes of this Act."

<sup>12/</sup> MCI v. FCC, 765 F.2d 1186, 1191 (1985). In this opinion, overturning the Commission's effort to forbear from Title II tariff regulation of landline common carriers, the court noted that "'Shall' . . . 'is the language of command,'" and that "[a]bsent a clearly expressed legislative intention to the contrary, courts ordinarily regard such statutory language as conclusive." Id. (citing Escoe v. Zerbst, 295 U.S. 490, 493 (1935); Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108).

mandate any interconnection arrangement) or limited (i.e.: the Commission's authority to order interconnection arrangements under 201 had, in all cases, now been usurped by Congress) in other circumstances. To avoid this misinterpretation, Congress added to 332(c)(1)(B), the provision that "Except to the extent that the Commission is required [under this provision] to respond to a [CMRS provider's] request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act." This language serves as recognition that 332(c)(1)(B) does act to limit the Commission's discretion under 201 to order common carriers to interconnect to CMRS providers. Congress clearly enacted Section 332(c)(1)(B) to require specific types (CMRS-common carrier) interconnection, and not as an effort to duplicate or reiterate whatever existing discretion the Commission may possess under Section 201.

The legislative history is in full accord with this interpretation of Section 332(c)(1)(B). The House Committee Report states that it "considers the right to interconnection an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network."<sup>13/</sup> Similarly, Congressman Edward J. Markey, Chairman of the House Telecommunications and Finance Subcommittee, and Congressman Jack Fields, ranking Republican member of that same committee, in their recent letter to FCC Chairman Reed Hundt concerning cellular carriers' refusal to provide interconnection, stated "we urge the Commission to aggressively enforce the

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<sup>13/</sup> H. R. Rep. 103-111, 103rd Cong., 2d Sess., pt. 3 (May 25, 1993) (emphasis added).

provisions in section 201 and in section 332(c)(1)(B) requiring carriers to provide interconnection to providers of commercial mobile services."<sup>14/</sup>

It must be noted that although the Act states that interconnection shall be ordered "upon reasonable request," this provision does not give the Commission discretion to circumvent or undermine the general command that the Commission shall order common carriers to interconnect to CMRS providers.<sup>15/</sup> Rather, the reasonableness of an interconnection request depends upon the terms and conditions contained therein. To the extent that the FCC believes that the interconnection request of a CMRS cellular reseller common carrier is unreasonable it should promptly examine such a request on a case-by-case basis and not delay such review because of the pendency of a general rulemaking or inquiry regarding interconnection.

NCRA also asks for Commission reconsideration of its apparent determination that "CMRS providers do not have control over bottleneck facilities."<sup>16/</sup> The Commission can reach this conclusion only by inappropriately grouping all CMRS providers within the same product market. CMRS providers offer, however, a variety of services, from paging to mobile satellite communications to cellular. Only in certain instances could one CMRS be considered a good product substitute

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<sup>14/</sup> E. Markey & J. Fields, Letter to Chairman Reed Hundt, (GN Docket 93-252, January 28, 1994). (emphasis added)

<sup>15/</sup> See e.g., In re The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 63rd RR 2d. 7, paras. 27-53 (1987) (Cellular Interconnection Order).

<sup>16/</sup> Order at para. 237.

for another and thus part of the same market. Cellular clearly is a unique and distinct service. Cellular provides two-way, mobile, voice communications with hand-off capability in specific service areas and roaming capability on a nationwide basis -- which currently has no reasonable product substitutes. Facilities based cellular providers operate in a duopoly marketplace and thus clearly have control over bottleneck facilities.<sup>17/</sup> The Commission has previously defined "bottleneck" provider to include not only those carriers that have a monopoly over access, as in the case of the LEC, but in cases "when a firm or group of firms has sufficient command over some essential commodity or facility in its industry or trade to be able to impede new entrants."<sup>18/</sup> Facilities-based cellular carriers clearly meet this standard.

As we explain below, recognizing the right of cellular resellers to interconnect to the networks of the facilities-based cellular carriers and giving resellers access to the carriers' bottleneck facilities on an unbundled basis and at just and reasonable rates will promote competition in the cellular industry and improve consumer services. These measures clearly fall within the Commission's definition of a "reasonable request" for interconnection under both Section 201 and modified Section 332(c)(1)(B).<sup>19/</sup>

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<sup>17/</sup> See id. at para 146.

<sup>18/</sup> In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations, First Report and Order, 85 FCC 2d 1, 21 at para. 59 (1980) (emphasis added).

<sup>19/</sup> See Cellular Interconnection Order at para. 29-30. In requiring the LEC to provide unbundled interconnection to cellular carriers the Commission held that "reasonable interconnection" means a cellular carrier may select Type 1 or Type 2 interconnection . . . and . . . it should be provided . . . within a reasonable time." Id.  
(continued...)

A cellular reseller which exercises its right to interconnect to a cellular system would install a switch between the system's mobile telephone switching office ("MTSO"), the local exchange carrier ("LEC") network and, possibly, the interexchange carrier networks (see diagram in Appendix A) or the networks of competitive access providers ("CAPs"). Switch-based resellers would be capable of providing a number of services currently handled by facilities-based carriers including number administration, caller validation, call recording and routing, and all aspects of customer billing.

A reseller's purpose in connecting a switch between a cellular system and the landline network is to provide retail competition to the licensed carriers by assuming responsibility for performing all elements of cellular service which are not dependent on a license to utilize radio spectrum. A switch-based reseller would need a licensed carrier to perform only two general spectrum-dependent functions on behalf of the reseller's customers: (1) transmit calls from customer handsets over cell towers to the MTSO and (2) route customer calls through the MTSO to the reseller-supplied trunks leading to the reseller switch. A switch-based reseller would perform all spectrum-independent elements of cellular service using its own resources (see Appendix B).

In conjunction with recognizing reseller interconnection rights, the Commission must also require the licensed carriers to unbundle their service

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<sup>19</sup>/(...continued)

at para. 29. Furthermore, the Commission reaffirmed that these charges be cost-based and unbundled. *Id.* at para. 31. These same rights and terms of interconnection should, under 201 and 332(c)(1)(B) now be provided to cellular resellers.

components and to price each of their spectrum-dependent components separately and at just and reasonable rates. Only through unbundling can the Commission help ensure that switch-based resellers are being charged fairly for the remaining services which they must continue to purchase from the licensed carriers. Without unbundling, switch-based resellers, after making a sizable capital investment and assuming even greater responsibility for performing discrete elements of cellular service, would still be forced to purchase unbundled service from the licensed carriers at excessive prices. It would not be necessary to unbundle and price separately spectrum-independent elements of cellular service, which resellers are free to offer. Since these service elements are open to competition, their prices can and should be set by the marketplace.

**II. THE COMMISSION HAS IMPROPERLY CONCLUDED THAT IT MAY PRESENTLY FORBEAR FROM REQUIRING CELLULAR PROVIDERS TO FILE TARIFFS UNDER SECTION 203 OF THE COMMUNICATIONS ACT<sup>20/</sup>**

**A. Statutory Conditions**

To forbear from applying a provision of Title II to CMRS the Commission must find that:

- (1) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such provision is not necessary for the protection of consumers; and
- (3) specifying such provision is consistent with the public interest.

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<sup>20/</sup> In addition to Section 203, NCRA has similar concerns regarding the Commission's forbearance from Sections 204, 205 and 211.

Section 332(c)(1)(A) therefore requires that the Commission bear the burden of showing that all three conditions are satisfied with regard to each provision of Title II to which forbearance is applied. Congress granted the Commission regulatory flexibility, however, and expressly permitted the Agency to distinguish between the various classes of CMRS. After concluding that "the record does not support a finding that all services should be treated as a single market," the Commission adopted this differential analytical framework in the Second Report and Order.<sup>21/</sup>

In reaching a determination as to whether the forbearance of a Title II statutory provision satisfies each condition of the test, Congress provided the Commission with little guidance. In discussing the first factor, the only factor included in the House version of the test, the House Committee Report noted, that "[t]he Commission may specify, for instance, that commercial mobile services need not be tariffed at all, or it may choose to subject such services to 'permissive detariffing' . . . if [the Commission] finds that such policy is not needed to ensure charges are just and reasonable or otherwise in the public interest."<sup>22/</sup> The conference report, however, completely avoided any discussion of detariffing. Instead, the Conference Committee took action to make the forbearance test substantially more restrictive than the House test by adding the second and third conditions. This action suggests that although each forbearance condition may include some overlapping considerations, they were intended by Congress to be

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<sup>21/</sup> Order at para. 136.

<sup>22/</sup> H. R. Rep. 103-111, 103rd Cong., 2d Sess., pt. 3 (May 25, 1993).

separate and discrete. Each test is designed to compel the Commission to address unique issues and concerns.

Although the Conference Committee did not explain the test's second factor, its inclusion as a separate item forces the conclusion that Congress intended the Commission to address considerations separate from those relevant to a determination of the most general third "public interest" factor.<sup>23/</sup> The consideration of this factor must necessarily include a determination of whether the forbearance of the Title II tariffing provision will restrict or curb the capability of an individual, government or private interest organization from gaining access to essential rate and cost information necessary to insure that service is delivered at nondiscriminatory reasonable rates.

B. The Commission Fundamentally Misapplied the Budget Act's Forbearance Test

As an initial matter, the Commission's analysis in the Second Report and Order compels the conclusion that the FCC fundamentally misapplied the forbearance test in several key respects. The Commission concluded that "[i]n

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<sup>23/</sup> NCRA questions the appropriateness of the Commission's forbearance decision in the absence of any effort to seek comment on the scope of the considerations relevant to the application of each factor. Furthermore, if the Commission reached any conclusion regarding these considerations, it did not clearly articulate them anywhere in the Second Report and Order. For example, although the Commission did seek comment on the definition of "Consumer," as referred to in the second prong of the forbearance test, it never reached a conclusion as to this word's definition. NCRA asserts that the Commission could not have appropriately applied the forbearance factors if, at the outset, it neither sought comment on, or clearly expressed its conclusions regarding the considerations relevant to each factor of the forbearance test.

deciding whether to impose regulatory obligations on service providers under Title II" it was necessary to "weigh the potential burdens of [tariff filing] obligations against the need to protect consumers and to guard against unreasonably discriminatory rates and practices."<sup>24/</sup> The Commission's understanding of its discretion to implement the statute is, however, incorrect.

First, contrary to the Commission's interpretation, it is not engaged in a determination of "whether to impose" regulation, but rather, whether to forbear. Under Section 332(c)(1)(A), Congress intended that absent a clear and unequivocal showing, the CMRS regulatory status quo remains full Title II regulation. To the extent that the Commission makes a decision to forbear, it must bear the burden of showing that all three conditions for forbearance are satisfied. This fundamental misconstruction requires reconsideration of the issue. The Commission's perspective is clearly inconsistent with the directives of Congress and appears to be an effort to retain its previously adopted forbearance policy with respect to common carrier cellular services under Title II as if Section 332 had never been adopted.

Secondly, that mindset has led the Commission to misread the purpose of Section 332(c)(1)(A) by assuming it could weigh the "potential burdens of [tariff filing] obligations against the need to protect consumers and to guard against unreasonably discriminatory rates and practices." Congress did not, explicitly or implicitly, authorize the Commission the discretion under the first two tests to

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<sup>24/</sup> Order at para. 17. (emphasis added).

engage in a balancing test of this sort.<sup>25/</sup> Additionally, NCRA notes that the statutory forbearance tests are met only if the Commission can "ensure that the charges . . . are just and reasonable and are not unjustly discriminatory." If tariff forbearance is allowed, it must rest upon a finding sufficiently certain to "ensure" protection of the public. Predictive speculation as to how competitive markets may evolve is simply insufficient.<sup>26/</sup>

Lastly, NCRA notes that the Commission justifies its forbearance of tariff regulation, in part, upon the Commission's desire to reduce its own regulatory burden.<sup>27/</sup> Consideration of such a factor however, is not only impermissible, but bad public policy. As NCRA cautioned in its Comments:

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 it 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

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<sup>25/</sup> A balancing test clearly permits more discretion than the Budget Act's forbearance test allows. Balancing the factors, rather than applying them has, as in this case, the potential for the Commission to elevate its own convenience (cost and burden of reviewing tariff filing) over a demonstrated need to protect consumers (the second test) or avoid unreasonable rates (the first test). If Congress intended such a result, it need only have extended the power to forebear upon a generalized public interest finding by the Commission in which balancing of all relevant factors would have been permissible.

<sup>26/</sup> And, as noted, further herein, given the Commission's own conclusions about the lack of competition in the cellular marketplace and, it's inability to conclude that facilities-based cellular providers either lack dominance or market-power cellular tariff forbearance has no factual underpinning. Moreover, the 208 complaint process alone is an unwieldy and uncertain vehicle to "ensure" reasonable and non-discriminatory rates in the absence of filed tariffs.

<sup>27/</sup> Order at para. 178 n. 362.

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 noncompetitive markets in the future.<sup>28/</sup>

C. In Light of Current Market Conditions and the Continued Classification of Cellular Carriers as Dominant, the Commission May Not Yet Exercise Forbearance of Tariff Filing Requirements in the Cellular Marketplace

In concluding that the forbearance of cellular tariffs was appropriate, the Commission first engaged in an examination of the competitive state of the cellular marketplace.<sup>29/</sup> In the process of this examination, the Commission determined that "the record does not support a conclusion that cellular services are fully competitive."<sup>30/</sup> The Commission noted that cellular providers operate in a duopoly marketplace whereby they can tacitly agree to noncompetitive pricing.<sup>31/</sup> Furthermore, the Commission indicated that PCS services "will not be a reality for some time" and therefore "impose no direct constraint on current [cellular] pricing"<sup>32/</sup> Nonetheless, the Commission concluded that the current state of competition in the cellular marketplace does not preclude its exercise of forbearance

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<sup>28/</sup> Comments of National Cellular Resellers Association, GN Docket 93-252, para. 18 (November 8, 1993).

<sup>29/</sup> Order at para. 145-154.

<sup>30/</sup> Id. at para. 138.

<sup>31/</sup> Id. at para. 146.

<sup>32/</sup> Id. at para. 148.

authority regarding tariffs.<sup>33/</sup> The Commission justified its forbearance action by stating, first, that cellular providers do face some competition today, and that the strength of competition will increase in the near future, and secondly by finding that "continued applicability of sections 201 202 and 208 [of the Communications Act] will provide an important protection in the event there is a market failure."<sup>34/</sup>

The Commission's vision of a future competitive cellular marketplace cannot justify current unreasonable and discriminatory cellular rates. In light of current market conditions, the Commission can not ensure just and non-discriminatory rates without direct oversight of, instead of monitoring, cellular carriers' rates.<sup>35/</sup> The Second Report and Order did not overturn the Commission's earlier determination that cellular carriers are dominant.<sup>36/</sup> Thus, as dominant carriers, cellular rates and charges may not be presumed to be lawful and non-discriminatory.<sup>37/</sup> In the

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<sup>33/</sup> Id. at para. 138.

<sup>34/</sup> Id. at para. 175.

<sup>35/</sup> New Section 332(c)(3) preempts states from regulating the rates cellular carriers charge. In light of the current non-competitive marketplace, federal tariff forbearance of cellular rates would leave consumers bereft of any practical remedy for challenging rates while permitting the dominant cellular carriers to set even higher rates. The Commission must recognize that the 208 complaint remedy is lengthy, costly and burdensome and that under current market conditions and in the absence of state oversight and regulation of rates, federal tariffing of cellular is even more important to the protection of consumers' right to reasonable and non-discriminatory rates.

<sup>36/</sup> In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations, Fifth Report and Order, 98 FCC 2d. 1191, 1204 n. 41.

<sup>37/</sup> Id. at para. 51.

absence of a finding that cellular providers are no longer dominant and that their charges may be presumed lawful and non-discriminatory, the Commission can not rely simply upon the 208 complaint process to, as the first prong of the forbearance test requires, "ensure" that rates are just and nondiscriminatory.<sup>38/</sup> As the United States Supreme Court has acknowledged, without filed rates "it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory . . . and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates."<sup>39/</sup> Furthermore, without tariffs, both consumers and other carriers "can not know if they should challenge a carrier's rates as discriminatory when many of the carrier's rates are privately negotiated and never disclosed."<sup>40/</sup> Indeed, without filed tariffs resellers cannot determine whether a carrier's pricing, terms and conditions amount to a violation of the Commission's existing resale policy prohibiting unreasonable restrictions on resale, since the determination of comparable and non-discriminatory rates rests largely on the ability to examine a carrier's arrangements with other customers. As

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<sup>38/</sup> Furthermore, in light of cellular carriers' continued dominant status, the Commission can not satisfy the forbearance test's second prong which requires that forbearance from a provision is not necessary for the protection of consumers. Clearly, in the cellular marketplace where the rates of these dominant carriers are not presumed lawful or nondiscriminatory, the Commission can not protect consumers by removing the tariffing requirement and imposing upon the consumer both the burden of proof and the related costs of filing complaints at the Federal level.

<sup>39/</sup> Maslin Industries v. Primary Steel, 110 S. Ct. 2759, 2769 (1990) (quoting Regular Common Carrier Conference v. US, 793 F.2d 376, 379 (1986)) (emphasis added).

<sup>40/</sup> Id.

the Commission has previously acknowledged, "[tariffs] serve as a kind of 'tripwire' enabling the Commission to monitor the activities of carriers subject to its jurisdiction and thereby insure that the charges, practices, classifications, and regulations of those carriers are just and reasonable and nondiscriminatory within the meaning of Sections 201 and 202"<sup>41/</sup>

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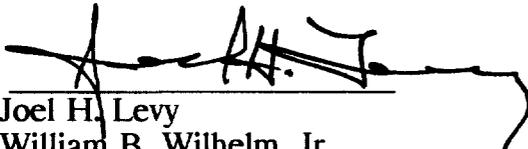
<sup>41/</sup> In re Western Union Telegraph Co., 75 FCC 2d 461, para. 47 (1979).

**CONCLUSION**

The major issues raised in this Petition are interrelated although they have been set forth as discrete items. Delay in the implementation of interconnection obligations while forbearance from tariff regulation persists is a severe blow to the establishment of competitive rates, protection of consumer interests and carrying out Congressional policy. The extension of interconnection rights to all CMRS providers (including resellers) would alleviate the monopolistic pricing power of facilities based cellular carriers. Delay in implementing interconnection and refusing to require the carriers to tariff and justify their existing rate structures simply perpetuates an intolerable and illegal exercise of the FCC's authority.

Respectfully submitted

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