

ORIGINAL

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION

In the Matter of

DOCKET NO. 93-252 ORIGINAL

Implementation of Sections 3(n)  
and 332 of the Communications Act

) GN Docket No. 93-252

)  
)  
Regulatory Treatment of Mobile  
Services

MCI PETITION FOR CLARIFICATION  
AND PARTIAL RECONSIDERATION

MCI TELECOMMUNICATIONS CORPORATION

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## Summary

MCI's petition for clarification and partial reconsideration seeks reconsideration of two relatively narrow facets of the Commission's "forbearance" analysis and clarification of two aspects of the CMRS Second Report and Order (R&O) dealing with interconnection and mutual compensation.

CMRS End-User Tariffs: MCI urges the Commission, upon reconsideration, to vacate its decision to forbear from requiring or permitting CMRS providers to file tariffs for services provided to end-users. The Commission's analysis of this issue is premised upon two assumptions with respect to CMRS, neither of which is universally true. The first is that all providers of CMRS are today, and will in the future be, "non-dominant carriers" operating in "competitive markets." The second is that "tariffs" are merely rate schedules.

Some current providers of CMRS are dominant carriers, and competition in CMRS is neither universally present today nor assured for the future if a policy of maximum forbearance is adopted. Tariffs serve other valid functions, such as establishing the "terms and conditions" of service. For these reasons, the Commission should reconsider its decision to forbear from tariff regulation of end-user CMRS offerings of all dominant carriers, e.g., LECs and facilities-based cellular carriers.

Dominant carriers should be required to offer CMRS end-user offerings under tariff, pending the outcome of Commission proceed-

ings examining the state of competition in the cellular industry and the need for safeguards for CMRS affiliates of dominant landline carriers. Similarly, given the incompleteness of the Commission's analysis of the costs and benefits of tariffing, non-dominant CMRS providers should not be subject to mandatory detariffing of their end-user offerings, pending further review of all relevant legal and policy factors.

CMRS Access Tariffs: The Commission should reconsider its decision to forbear from requiring or permitting CMRS providers to file tariffs for interstate access service. The Commission's acknowledgment "that there may be other public interest factors that would make forbearance with respect to interstate [CMRS] access service inappropriate" signifies its inability to specifically determine, as required by statute, that the public interest would be served by forbearance from tariffing of CMRS access services. In addition, there are numerous procedural and analytical deficiencies which necessitate a careful reexamination of this portion of the R&O.

Contract Filing Requirements: MCI urges the Commission to reconsider its decision to forbear from requiring the filing of intercarrier contracts, particularly those governing the exchange of traffic between dominant carriers and their CMRS affiliates. Pending reexamination of the issues related to the need for safeguards applicable to dominant carriers and their CMRS affiliates, a requirement that such contracts be filed with the Commission would not impose an unreasonable burden upon carriers or

the Commission.

Clarification: MCI also requests that the Commission clarify the scope of preemption of LEC interconnection offerings to CMRS providers. The Commission should set forth its expectation that the states will not seek to use their authority over LEC interconnection rates or over "other terms and conditions" of CMRS to indirectly erect or maintain barriers to CMRS entry, which are expressly prohibited by statute.

Similarly, the Commission should clarify its policy with respect to mutual compensation. Mutual compensation is an "essential component" in the successful establishment and growth of CMRS offerings, and denial or unreasonable delay in granting full "co-carrier" status -- including mutual compensation -- to CMRS providers is inconsistent with the goals and objectives of the 1993 amendments to the Communications Act.

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Regulatory Treatment of Mobile Services )

MCI PETITION FOR CLARIFICATION  
AND PARTIAL RECONSIDERATION

MCI Telecommunications Corporation (MCI), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 CFR §1.429, hereby petitions the Commission for clarification and partial reconsideration of the Second Report and Order (R&O) in the above-captioned proceeding.

I. Introduction

MCI has been an active participant in the Commercial Mobile Radio Services (CMRS) rulemaking. MCI has supported, and continues to support, the Commission's efforts to establish a regulatory framework that furthers the congressional objectives of ensuring that similar commercial mobile radio services are subject to consistent regulatory classification and that appropriate levels of regulation be established for CMRS providers.

MCI has no quarrel with the Commission's interpretation of the definitional provisions of the Omnibus Budget Reconciliation Act of 1993 (OBRA) (R&O paras. 30-80), or with the Commission's classification of existing and emerging wireless services (R&O paras. 81-123). MCI's petition, therefore, is limited to requests that the Commission reconsider two relatively narrow facets of its "forbear-

ance" analysis and clarify two aspects of the R&O dealing with interconnection and mutual compensation.

## II. Discussion

- A. The Commission's decision to forbear from imposing a tariffing obligation for CMRS end user services and CMRS access services should be reconsidered.

Section 332(c)(1)(A)(i)-(iii) of OBRA sets forth a three-part test, each element of which must be satisfied in order for the Commission to forbear from application of any Title II provision to a commercial mobile service. The Commission must, in each instance, specifically determine as to each Title II provision that:

1. "enforcement of such provision is not necessary to ensure that 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."

In the majority of instances in which the Commission sought to apply the statutory test, it either demonstrated that the three-prong test was satisfied, or postponed a decision until an adequate record could be compiled. That is not the case with respect to the three issues upon which MCI seeks reconsideration, the tariffing of CMRS end user services and CMRS access services.

1. The Commission should vacate its decision to forbear from requiring or permitting CMRS providers to file tariffs for end-user services.

MCI urges the Commission, upon reconsideration, to vacate its decision (1st sentence of para. 179) to forbear from requiring or permitting CMRS providers to file tariffs for services provided to their customers. The Commission's discussion of this issue, in paras. 177-178, is premised upon two assumptions with respect to CMRS tariffing, neither of which is universally true.

a. Competition among Non-Dominant Carriers. The first of these assumptions is that all providers of CMRS are today, and will in the future be, "non-dominant carriers" operating in "competitive markets." Cellular service, which is far and away the largest existing service within the CMRS category, is currently provided directly by dominant local exchange carriers in some markets,<sup>1/</sup> and there are no provisions in the Commission's rules which prohibit other dominant carriers (e.g., non-BOC LECs) from providing cellular service directly, rather than through separate subsidiaries.<sup>2/</sup>

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<sup>1/</sup> For example, the Puerto Rico Telephone Company is the licensee of the wireline cellular block throughout Puerto Rico, and the Lincoln Telephone & Telegraph Company is the licensee of the wireline cellular block in Lincoln, Nebraska.

<sup>2/</sup> In para. 218 of the R&O, the Commission specifically declined to address the issue of whether to eliminate the cellular structural separation requirement contained in Section 22.901 of the Rules, which applies only to the Bell Operating Companies. Under the Commission's rules, all other dominant common carriers are permitted to offer CMRS on an unseparated basis.

The Commission's conclusion that forbearance is appropriate because all CMRS is offered by "non-dominant carriers" in "competitive markets" is inconsistent with its own finding elsewhere in the R&O that "the record does not support a finding that the cellular marketplace is fully competitive." (para. 175) On the one hand, the Commission expresses confidence that "there is sufficient competition in this marketplace to justify forbearance from tariffing requirements;" (Id.) on the other, the Commission has expressly declined to forbear from exercising authority under other title II provisions, pending completion of a future proceeding, the purpose of which will be to "gather...data...regarding the role that competition will play with regard to cellular service." (para. 194, emphasis added).

Finally, the Commission's assertion that "[t]here are two facilities-based cellular providers in each geographic market segment" (para. 146) is contradicted by the Commission's own licensing records.<sup>3/</sup> The Commission's records indicate that in one Metropolitan Service Area (Portland, ME), and in 33 cellular rural Service Areas, one of the two cellular blocks has a status other than "licensed."<sup>4/</sup> Thus, in a small -- but not insignificant --

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<sup>3/</sup> MCI has obtained a copy of the latest available report on the "Status of Cellular Markets" from the Commission's copy contractor. This report is dated February 18, 1994.

<sup>4/</sup> The 33 RSA frequency blocks are either "designated for hearing" or in "construction permit" status.

number of cellular license areas as defined by the Commission, there is today only one facilities-based cellular provider.<sup>5/</sup>

b. The Scope of "Tariffs". The second of the Commission's flawed assumptions is that "tariffs" are merely rate schedules. (See paras. 177, 178). There is no recognition whatsoever of the fact that tariffs serve other valid functions such as establishing "terms and conditions" of service, including, but not limited to, customer deposit and refund provisions, regulations governing the use of services, and carrier liability.

The Commission's determinations with respect to forbearance from imposing end user tariff requirements on CMRS providers are not supported by substantial evidence and, in many instances, are contradicted by the record evidence that does exist. Some current providers of CMRS are dominant carriers, and competition in CMRS is neither universally present today nor assured for the future if a policy of maximum forbearance is adopted. For these reasons, the Commission should, upon reconsideration, vacate its decision to forbear from tariff regulation of end user CMRS offerings of all dominant carriers, e.g., LECs and facilities-based cellular

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<sup>5/</sup> The level of facilities-based cellular competition throughout much of rural America is far lower when one considers the fact that only one "cell site" per license area must be activated in order to convert from "construction permit" to "license" status. In "geographic market segments" smaller than the MSAs and RSAs utilized by the Commission in the cellular licensing process (e.g. counties, towns or highways), a substantial number of predominantly rural "geographic market segments" lack "facilities-based" cellular competition, if they have cellular service at all. The Commission's forthcoming cellular industry monitoring proceeding should enable the Commission, for the first time, to gather accurate and complete information concerning the state of cellular competition.

carriers. These carriers should be required to offer CMRS end-user offerings under tariff, pending the outcome of Commission proceedings examining the state of competition in the cellular industry and the need for safeguards for CMRS affiliates of dominant landline carriers.

2. Non-dominant CMRS providers should not be required to detariff their end-user offerings.

As noted above (II. A. 1. b.), the Commission's discussion of the tariff forbearance issue failed to recognize that tariffs serve functions beyond providing price lists. Given the incompleteness of the Commission's analysis of the costs and benefits of tariffing, non-dominant CMRS providers should not be subject to mandatory detariffing of their end-user offerings, pending further review of all relevant legal and policy factors. Such factors include, but are not limited to determinations of:

- i. the extent to which permissive tariffing of the non-price elements (terms, conditions, classifications and practices) normally contained in an end-user tariff is in the public interest; and
- ii. whether there are market segments in which the public interest would be better served by general tariffing of end-user offerings (on either a permissive or mandatory basis), than by individually negotiated agreements between carriers and their customers.<sup>6/</sup>

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<sup>6/</sup> The Commission should approach the cost-benefit analysis of end user CMRS tariffs with the same openness manifested in para. 235 of the R&O, where the Commission concludes that review and possible replacement of the current system of individually negotiated interconnection agreements with generally tariffed LEC interconnection arrangements is warranted.

- B. The Commission's decision to forbear from requiring or permitting CMRS providers to file access tariffs should be reversed upon reconsideration.

The Commission should, upon reconsideration, vacate its decision to "also...temporarily forbear from requiring or permitting CMRS providers to file tariffs for interstate access service." (R&O, para. 179) The only stated rationale for this decision is contained in the next sentence of para. 179, which reads in its entirety: "At this time, because of the presence of competition in the CMRS market, access tariffs seem unnecessary." This is hardly a basis in record to support a finding that the public interest would be served by non-tariffing.

Assuming, for the moment, that "CMRS" and "CMRS access" constitute a single product market for analytical purposes, the facts relevant to competition in CMRS, as noted above, belie the conclusion that competition is adequate to permit mandatory detariffing of CMRS access.<sup>7/</sup> Indeed, the next two sentences in the Second Report and Order reveal the Commission's own uncertainty with respect to the adequacy of the record, acknowledging "that there may be other public interest factors that would make forbearance with respect to interstate access service inappropriate" and pledging to look at this question in more detail in future proceedings. This clearly serves to undermine the Commission's dispositive finding and the action taken based thereon.

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<sup>7/</sup> The theory here, of course, is that a multitude of competitive suppliers would result in reasonable pricing and benign effects from discriminatory treatment.

Inasmuch as the Commission acknowledges its own uncertainty as to whether forbearance is "inappropriate" or consistent with the "public interest," it cannot lawfully forbear (even "temporarily") from application of the tariffing provisions of Title II to "CMRS access." Its inability to affirmatively find that tariff forbearance is "consistent with the public interest" means that the crucial "third prong" of the statutory forbearance test (47 U.S.C. §332(c)(1)(A)(iii) has not been satisfied.

Wholly apart from the Commission's acknowledged inability to make the necessary findings to justify forbearance from tariffing of "CMRS access," there are numerous procedural and analytical deficiencies that necessitate reexamination of this portion of the R&O.

The first of these involves the lack of notice that the Commission was even considering forbearance from tariffing of "CMRS access" in this proceeding. The Commission's NPRM framed the tariff forbearance issue as follows:

Our tentative view is that the level of competition in the commercial mobile services market is sufficient to permit us to forbear from tariff regulation of the rates for commercial mobile services provided to end users.

NPRM, 8 FCC Rcd. 7988, 8000 (1993). The vast majority of "inter-state access" services are purchased, not by "end users," but by other common carriers. Failure to give adequate notice to affected parties that the Commission intended to consider detariffing of

CMRS access is a material violation of the Administrative Procedure Act and fundamental principles of due process.<sup>8/</sup>

Wholly apart from the notice issue, the Commission has failed to define "CMRS access" or to distinguish "CMRS access" from similar services. The term "CMRS access" is not used (much less defined) in OBRA. The Commission's rules contain no definition of "CMRS access" and it is discussed in the R&O only in passing.

It is unclear that "CMRS access," if it exists at all, is a unitary "mobile service" subject to the Commission's forbearance power. The few clues available in the cursory discussion of "CMRS access" in the R&O suggest that "CMRS access" may be a bundle of interconnection, transport, switching and wireless loop functions. Each of these elements should be examined in order to determine whether it falls within the statutory definition of "commercial mobile service" and, if so, whether the criteria for forbearance from tariffing are met with respect to some or all providers.

Whatever "CMRS access" is, there is no record evidence at this juncture to support its detariffing. The entire discussion of detariffing issue in the R&O (paras. 173-178) is devoted to end-user tariffs, consistent with the Commission's framing of the issue in the NPRM and the comments filed in this proceeding.

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<sup>8/</sup> McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317 (D.C. Cir. 1988); Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991); Fertilizer Institute v. EPA, 935 F.2d 1303 (D.C. Cir. 1991); National Black Media Coalition v. FCC, 791 F.2d 1016 (2nd Cir. 1986).

Before detariffing "CMRS access," the Commission is obligated to weigh all relevant factors -- a task which it has not yet properly commenced, much less completed.<sup>9/</sup> Such factors include Commission service eligibility rules that today permit dominant local exchange carriers to provide CMRS (cellular, except for BOCs, and PCS) without structural separation. In the absence of fully adequate safeguards, dominant carriers providing CMRS (and their unregulated affiliates) possess both the ability and incentive to shift costs between (detariffed) "CMRS access" and (tariffed) "LEC access" offerings, to the detriment of competition and consumers. The Commission's pledge to examine "other public interest factors" which might warrant tariffing of CMRS access, but only in future proceedings -- possibly after irreparable harm is done to competition -- is wholly inadequate.

One potential effect of detariffing "CMRS access" -- although surely one not intended by the Commission -- is the effective detariffing of LEC access services. Section 20.15(c) prohibits the filing of tariffs for "interstate access service" by "commercial mobile radio service providers" and further states that the provisions of Sections 1.771-1.773 and Part 61 of this chapter are not applicable to interstate services provided by commercial mobile

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<sup>9/</sup> In para. 64 of the NPRM, the Commission noted that some CMRS providers will be "affiliated with" dominant carriers and asked whether the Commission should impose "safeguard requirements" on dominant carriers with commercial mobile service affiliates. In the R&O, at para. 219, the Commission acknowledged the importance of the decisions it must make with respect to dominant carrier affiliate safeguards, but once again deferred these issues to a separate proceeding.

radio service providers. It further directs commercial mobile radio service providers to cancel tariffs for interstate service to their customers and interstate access service.

Although only a relative handful of LECs currently offer landline telephone and "CMRS" (cellular, paging and conventional mobile radio) through a single corporate entity, there may no longer be any effective regulatory barriers to corporate reorganizations that would achieve that result. OBRA expressly preempts state entry restrictions for CMRS,<sup>10/</sup> and the Commission has declined to mandate structural separation for CMRS services, with the exception of BOC cellular service. In the absence of any demonstrably effective restriction on dominant carrier provision of CMRS on an unseparated basis, the Commission's directive to "CMRS providers" to cancel their interstate access tariffs may result in the detariffing of a substantial portion of LEC interstate access offerings.<sup>11/</sup>

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<sup>10/</sup> One issue which is likely to be litigated is whether the preemption of state entry regulation of CMRS and PRMS providers permits LECs to enter these markets at will, or whether states may require structural separation or other affiliate safeguards as part of their reserved power to regulate "terms and conditions."

<sup>11/</sup> The Commission's mandate to detariff "CMRS access," if not vacated, at least should be clarified and limited to those functions which are uniquely "mobile" in nature (*i.e.*, "access" between the mobile units and the mobile switching center). If, notwithstanding the numerous procedural and substantive deficiencies noted above, the Commission opts to proceed with detariffing of "CMRS access," the term "CMRS access" must be narrowly defined to exclude all network elements beyond the first point of switching, such as LEC end office and tandem switching, LEC transport, and associated signaling facilities and services. Such a limited definition of "CMRS access" would be consistent with Commission  
(continued...)

Finally, the Commission has failed to reconcile the inconsistencies in its treatment in the R&O of "CMRS access," on the one hand, and of a similar -- and arguably "like" -- service, LEC interconnection offerings to CMRS providers, on the other. Whenever a LEC offers CMRS on an unseparated basis, many of the facilities used to provide "CMRS access" may also be used to provide "LEC interconnection."

To the extent that there are differences warranting mandatory detariffing of CMRS access and warranting reexamination of the policy favoring negotiated contracts for interconnection it is incumbent upon the Commission to explain them, or risk having its decision overturned on review as arbitrary and capricious.<sup>12/</sup>

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<sup>11/</sup>(...continued)

initiatives requiring expanded interconnection to LEC facilities, and would not create regulatory disparities between "CMRS access" and other "access services."

The directive contained in the R&O to detariff "CMRS access" allows LECs to reconfigure their operations so as to detariff any service which could arguably be classified as "CMRS access" service. No detariffing of LEC CMRS access services, as so broadly defined, should be permitted before the Commission addresses, in a notice and comment proceeding, the policy and procedural implications of such an action. These include the allocation and recovery of costs incurred in the provision of "access" services between "CMRS access" and "LEC access."

<sup>12/</sup> Recent decisions by state commissions indicate that the costs of providing "LEC access" to IXCs are sufficiently close to the costs of providing "interconnection" to "co-carriers" that local exchange "interconnection charges" can reasonably be set, on at least an interim basis, at levels approximating intrastate interexchange "access charges." See, e.g., the Maryland Public Service Commission's recent decision in Application of MFS Intelenet of Maryland, Inc., Case No. 8584, (Order No. 7155, April 25, 1994, at 56-58.

C. The Commission should reconsider its decision to forbear from requiring the filing of intercarrier contracts.

MCI urges the Commission to revisit its decision to forbear from requiring the filing of intercarrier contracts (R&O para. 181), particularly those governing the exchange of traffic between dominant carriers and their CMRS affiliates. In such cases (particularly in the absence of Commission requirements that LECs tariff their "CMRS access" offerings [See Section II. B., supra] or their "interconnection" offerings for CMRS [R&O, para. 235]), the sole remaining safeguard -- the complaint process -- is inadequate to prevent misallocation of costs between monopoly and competitive services and to prevent unjust and unreasonable discrimination. A contract filing requirement, while clearly not a sufficient safeguard by itself, would at least permit regulators and competitors to examine the inter-carrier arrangements. The benefits of a contract filing requirement far outweigh any minor administrative burden on carriers or the Commission.

D. The Commission should clarify the scope of preemption of LEC interconnection obligations.

MCI urges the Commission to clarify the scope of preemption of LEC interconnection obligations. MCI agrees with the Commission's analysis insofar as it leads to the conclusion that the physical aspects of interconnection between LEC networks and CMRS networks are inseverable for jurisdictional purposes (para. 223), and that a state may not limit the type of interconnection to which a CMRS provider is entitled (para. 228).

Although the Commission's decision to refrain from preempting state regulation of the rates that LECs may charge CMRS providers for intrastate interconnection is consistent with precedent and the general preservation of state/federal jurisdiction under OBRA (para. 230), the Commission should take the opportunity to clarify its view that states may not utilize their lawful authority over the interconnection rates charged by landline telephone companies or over the "other terms and conditions" of CMRS offerings to erect or maintain prohibited barriers to CMRS entry. (R&O, para. 226)

- E. The Commission should clarify its intent with respect to mutual compensation.

The Commission established mutual compensation requirements for both LECs (terminating traffic originating on CMRS networks) and CMRS providers (for termination of traffic originating on LEC networks), and stated that these requirements are in keeping with actions the Commission has already taken with regard to Part 22 providers. (R&O, para. 232) The Commission, which elsewhere (para. 235) described the ubiquity of reasonably priced LEC interconnection arrangements as an "essential component" in the successful establishment and growth of CMRS offerings, should clarify that it views mutual compensation as an "essential component" of reasonably priced LEC interconnection arrangements.

The economic impact of a LEC's refusal to negotiate an equitable mutual compensation agreement, or that of a state commission's refusal to require a LEC to establish reasonably priced interconnection for the exchange of intrastate CMRS traffic,

can be just as devastating, from the perspective of a new entrant, as the denial of state certification or the refusal of an incumbent LEC to interconnect. The Commission should utilize the opportunity presented on reconsideration to clarify its intent that the principle of mutual compensation be interpreted broadly, and that it will carefully scrutinize any allegations that mutual compensation is being unreasonably deferred or denied.

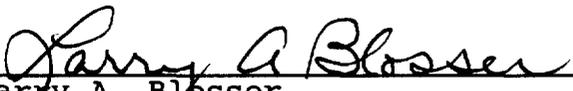
III. Conclusion

WHEREFORE, MCI requests that the Commission, upon reconsideration, modify and clarify the Second Report and Order in the above-captioned proceeding as set forth herein.

Respectfully submitted,

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Dated: May 19, 1994

**CERTIFICATE OF SERVICE**

I Vernell V. Garey, hereby certify that on this 19th day of May, 1994, copies of the foregoing "MCI PETITION FOR CLARIFICATION AND PARTIAL RECONSIDERATION" in GN Docket No. 93-252 were served by first-class mail, postage prepaid upon the parties on list below, except as otherwise indicated.

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