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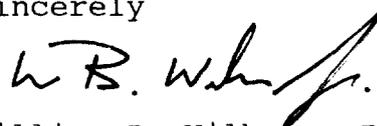
August 9, 1994

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

Dear Mr. Caton

Transmitted herewith is an original and four copies of Comments filed on behalf on the National Cellular Resellers Association in the Second Further Notice of Proposed Rule Making, released July 20, 1994, in In the Matter of the Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, FCC 94-191. Should you have any questions with regard to this pleading please do not hesitate to contact the undersigned.

Sincerely



William B. Wilhelm, Jr.

Enclosure

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

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

To: The Commission

COMMENTS OF THE
NATIONAL CELLULAR RESELLERS ASSOCIATION ON THE
 SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

The National Cellular Resellers Association ("NCRA"), by its attorneys, hereby submits its Comments with respect to the Second Further Notice of Proposed Rulemaking in the above-captioned proceeding.^{1/} NCRA's members comprise resellers of cellular service in major markets across the country. The Association's objectives include supporting the growth and availability of commercial mobile radio services ("CMRS") for individuals and businesses and ensuring a competitive marketplace for such services through the promotion of resale activities.

^{1/} Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Further Notice of Proposed Rule Making, FCC 94-191 (released July 20, 1994) ("Second Further Notice").

The release of the Second Further Notice follows a prior Notice seeking comment on whether to establish a cap on the amount of commercial mobile radio spectrum for which an entity may be licensed in any particular market.^{2/} The Second Further Notice requests comment on whether certain non-equity relationships, including resale, should be considered an attributable interest for the purpose of applying spectrum caps.^{3/} The Commission states that the purpose of the spectrum cap and attribution rules is "to ensure that no CMRS provider will exert market power by controlling large amounts of spectrum in a given geographic market."^{4/} The Commission further states that "in most instances [it] is not concerned that a reseller could exercise effective control over the spectrum on which it provides service or have the ability to reduce the amount of service provided over that spectrum because other resellers could enter into [similar] resale arrangements."^{5/} The Commission tentatively concludes, therefore, that "under these circumstances, [it] see[s] no reason to attribute the spectrum of the underlying service provider to resellers for the purposes of spectrum caps."^{6/}

^{2/} Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Further Notice of Proposed Rulemaking, FCC 94-100 (released May 20, 1994).

^{3/} Second Further Notice at para. 12.

^{4/} Id. at para. 1.

^{5/} Id. at para. 13.

^{6/} Id.

The Commission, however, requests comment from those parties with "competitive concerns."^{7/}

NCRA strongly supports the Commission's tentative conclusion that resale arrangements not be considered attributable interests for purposes of the PCS spectrum aggregation cap, the PCS-cellular cross ownership restrictions or any overall CMRS spectrum cap the Commission may establish. As discussed below, NCRA finds that the attribution of resale activity would be detrimental to the public interest. Furthermore, the Commission is accurate in concluding that, in an environment of unrestricted resale, there is no reason to attribute the spectrum of the underlying service provider to the reseller because the reseller is not engaged in exclusive control of the resold spectrum and no other potential reseller is precluded from entering the marketplace under similar terms and conditions.^{8/} As the Commission is aware, its cellular resale policy "requires that facilities-based cellular carriers not place any restrictions on resale or any services offered to the public."^{9/} NCRA notes, however, that the Commission is currently considering whether to extend the existing prohibition on resale restrictions to all CMRS

^{7/} Id.

^{8/} See id.

^{9/} Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies, 6 F.C.C. Rcd. 1719, para. 54 (1991) ("Cellular Resale Policy NPRM").

providers.^{10/} Insofar as NCRA has a "competitive concern" with the Commission's proposal, it is that the Commission must also apply the current prohibition on resale restrictions across all classes of CMRS. A policy generally prohibiting resale restrictions across all classes of CMRS is legally required, in the public interest and in furtherance of the Commission's goal of achieving a more competitive CMRS marketplace, regardless of whether the Commission adopts its current spectrum cap proposal.

I. Attribution of Resale Activity Would Undermine Public Interest

NCRA believes that the Commission's tentative conclusion regarding the non-attribution of resale activity is correct as a matter of both policy and law. At the outset, NCRA notes that the Commission has long recognized the benefits of unrestricted resale activity.^{11/} Furthermore, the Commission has acknowledged that its current cellular resale policy furthers interbrand competition, service availability, and the efficient allocation of spectrum

^{10/} See Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers, CC Docket No. 94-54, Notice of Proposed Rule Making and Notice of Inquiry, FCC 94-145 (adopted June 9, 1994) ("Equal Access/Interconnection").

^{11/} See e.g., Resale and Shared Use of Common Carrier Services and Facilities, 60 F.C.C.2d 261 (1976), recon. denied, 62 F.C.C.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); Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 F.C.C.2d 167 (1980); Cellular Communications Systems, 86 F.C.C.2d 469 (1981), modified, 89 F.C.C.2d 58 (1982), further modified, 90 F.C.C.2d 571 (1982), appeal dismissed sub. nom., United States v. FCC, No. 82-1526 (D.C. Cir. Mar. 3, 1983).

resources.^{12/} The attribution of an underlying carrier's spectrum to a reseller would, however, undermine the recognized benefits of resale activity. For example, many cellular resellers resell the services of both cellular licensees in their markets. Non-exclusive resale arrangements permit customers of resellers to consider their particular needs when the choice of which carrier's services must be made. Since cellular carriers currently control 25 MHz of spectrum in their license area, making the spectrum of the underlying carrier attributable to a reseller for the purpose of spectrum caps may, depending upon how the Commission attributes such activities under the proposed 40 MHz cap, preclude cellular resellers from reselling the services of more than one cellular licensee and would substantially curtail the ability of any reseller to enhance customer choice through the competitive offering of several CMRS services. As such, the implications of attributing spectrum to resale activity would be detrimental to consumers and would undermine a reseller's ability to enhance competition and choice in the current and future marketplace.

^{12/} See Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies, 7 F.C.C. Rcd. 4006, para. 6, 7 (1992). (recognizing that general resale restrictions are unreasonable, but adopting narrow restriction on resale between facilities-based licenses after build-out period has concluded) ("Cellular Resale Policy Order").

II. The Commission Should Apply its Existing Resale Policy to the Entire CMRS Marketplace

The Commission has separately raised the question of whether it should prohibit resale restrictions throughout all classes of CMRS. The Commission has further stated that, in considering any proposed resale restrictions, the Commission must show that under both Section 201(b) and 202(a) of the Communications Act the potential benefits of any restrictions outweigh the harm to the public.^{13/} NCRA maintains that a general prohibition on resale restrictions is legally and statutorily required, necessary, and in the public interest.^{14/} Furthermore, regardless of whether the Commission adopts the spectrum cap proposal, the prohibition of resale restrictions throughout CMRS will help advance the Commission's goal of ensuring that no mobile service provider gains exclusive control of large blocks of spectrum.^{15/}

Lastly, it is critical to note that absent a uniform CMRS prohibition on resale restrictions, the underlying policy objective of spectrum caps could be easily circumvented. For example, in the

^{13/} Equal Access/Interconnection at para. 141; see also Cellular Resale Policy NPRM, 6 F.C.C. Rcd. 1719, para. 19 (1991) (stating that "because restrictions on resale are facially discriminatory, the burden of proving that restrictions are just and reasonable rests on parties seeking to uphold, retain or impose those restrictions").

^{14/} See e.g., 47 U.S.C. § 332; Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order, 9 F.C.C. Rcd. 1411, para. 13, n.29 (1994); Cellular Resale Policy NPRM, 6 F.C.C. Rcd. at para. 22, 6; Equal Access/Interconnection at para. 138.

^{15/} See supra notes 11, 12.

absence of an overall prohibition on resale restrictions, facilities-based cellular carriers could enter into exclusive resale agreements with one or more PCS or other CMRS providers. Such exclusionary arrangements could circumvent the spectrum caps, while effectively reducing competition and locking other carriers and non-facility-based resellers out of similar resale arrangements.^{16/} Therefore, although NCRA supports the Commission's tentative conclusions regarding the non-attribution of resale arrangements for the purposes of spectrum caps, to ensure a vigorously competitive marketplace, the Commission must also ensure that resale restrictions which would permit exclusive access to

^{16/} See e.g., Cellular Resale Policy Order, 7 F.C.C. Rcd. at para. 14 (concluding that "a permanent resale relationship increases opportunities to engage in joint anticompetitive agreements and to obtain competitively sensitive information).

discrete portions of CMRS spectrum under exclusive resale arrangements are prohibited in all classes of CMRS service.

Respectfully submitted

NATIONAL CELLULAR RESELLERS
ASSOCIATION

A handwritten signature in black ink, appearing to read "W.B. Wilhelm, Jr.", written over a horizontal line.

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Dated: August 9, 1994