develop in the next few years." OII, pp. 5-6. The CPUC noted with particularity that "[S]pecific opportunities exist for new entrants into the mobile communications market. At least three types of wireless telecommunication services in addition to cellular are expected to begin providing mobile telephone services in California over the next several years." OII, p. 6. Those carriers which will provide services that may be substitutes for cellular service include specialized mobile radio service, personal communications services, and mobile satellite services. OII, pp. 6-8.

The CPUC's failure to meaningfully consider significant competitors is best documented by its treatment of Nextel.[31] The CPUC claims it need not consider Nextel as a competitor because it does not provide stand-alone cellular service. Petition, pp. 65-66. The CPUC's conclusion, however, is incorrect. Nextel has price plans available today for cellular-like service. In addition to its stand-alone cellular-like service, Nextel also currently provides cellular-like mobile telephone service in conjunction with dispatch service.

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[31] Although the CPUC also acknowledged paging and two-way mobile telephone service as substitutes for cellular and recognized their current availability in the marketplace, Petition, pp. 65-67, the CPUC refused to consider them as substitutes for cellular service, seemingly insisting upon exact substitutes prior to including a service in the same "market" with cellular service. Petition, pp. 64-65.

Nextel itself, in a pleading filed with the CPUC, disclosed the magnitude of its already existing system. See, Opening Comments of Nextel Communications, Inc., ("Nextel Comments"), I.93-12-007, Filed February 25, 1994. Specifically, Nextel stated that it has approximately 90,000 mobile units in the State of California, and that its existing SMR service is interconnected with the public switched telephone network. Nextel's Comments, p. 2. Nextel continues on to describe the historical development and planned future expansion of its system:

> Nextel initiated the nation's first wide area SMR service in Los Angeles in August of 1993. The system is currently operational across approximately 18,000 square miles in the Los Angeles area from Santa Barbara to Oceanside and Santa Catalina to Palm Springs. At present, Nextel is completing the Los Angeles wide area SMR system optimization and is offering service primarily to business customers. In the coming months, Nextel's radio coverage will extend to a large part of California, including the San Francisco Bay Area and the Central Valley from Bakersfield to Redding. However, commercial wide area SMR service is not being offered outside the Los Angeles area at this time.

Nextel Comments, pp. 3-4 (emphasis added).

Nextel has been authorized by the FCC[32] to develop and operate a digital wide area SMR system to serve, among others, the State of California. Nextel will offer its subscribers

> a compact, easy-to-use unit to access a cellular-like system with fully integrated private network dispatch, alphanumeric paging

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[32] In re Fleet Call, Inc., 6 FCC Rcd. 1533, recon. dismissed, 6 FCC Rcd. 6989 (1991).

> and wireless data exchange functions....[f]eatures will include call forwarding, speed dialing and voice mail as well as data transmission capabilities.

Fleet Call Changes Its Name to Nextel Communications, Inc., Personal Communications Industry Association Bulletin, March 26, 1993, at p. 9. Nextel is nearing the final stages in the development and testing of its system in Los Angeles now. Nextel will also provide service to the San Francisco Bay area, the San Joaquin Valley, and most of California by January of 1995. When completed, the network will be "one of the country's most comprehensive communications systems." Id. In its evaluation of the effect of the presence of additional competitors and substitutable services in the wireless marketplace, the GAO accepted Nextel's representations that its "telephone mobile services would be competitive with those offered by cellular mobile telephone providers in terms of quality of service, features offered, pricing, and user capacity," GAO Report, p. 38, and the GAO stated its belief that "As technology advances and new services are brought to the market that perform a function similar to the cellular telephone (i.e., Nextel's mobile telephone service), the competitive structure of the cellular telephone industry may improve." GAO Report, p. 41 (parenthetical added); see also, 2nd R&O, 9 FCC Rcd. at 1464.

Clearly, the CPUC's definition of substitutability is so narrowly defined as to be unrealistic. With such a restrictive view of substitutability, one can neither

recognize, nor reasonably evaluate, the impact of cellular competitors.

b. **As A Result of Its Overly-Narrow Relevant Market Definition, the Outcome of the CPUC's Analysis of Market Power is Pre-Determined and Wrong**

In its Petition and in a recent state proceeding with respect to the state's future regulatory role, the CPUC presumed that continued state regulation of cellular rates is necessary to counterbalance the market power of cellular carriers. The CPUC's assertions regarding the market power of cellular licensees are not supported by reliable empirical data or factual evidence of anti-competitive acts or patterns of unjust and unreasonable prices and/or unjustly or unreasonably discriminatory prices for cellular service. The CPUC bases its conclusions almost wholly on its assumption that the FCC's establishment of a duopoly market system for the provision of cellular service has resulted in a bottleneck of cellular facilities. OII, I.93-12-007, pp. 3, 15. The CPUC appears to assume, in contrast to the conclusions reached by Congress and the FCC that cellular carriers have market power due to a presumed control over bottleneck facilities and their semi-exclusive licensing agreements. Petition, p. 25-7; OII, p. 17.

Were the CPUC to employ a more realistic definition of the relevant marketplace, and the service providers within that market, GTE respectfully submits that the CPUC's conclusion would be far different from the one it reached.

Based upon its unreasonably limited market definition, and the Herfindahl Index ("H Index") which it calculated based upon that market definition, the CPUC concludes that the marketplace is highly concentrated. The CPUC goes on to confuse competition with concentration. The H Index only measures concentration, not competition. Petition, pp. 31-3. The CPUC then takes a similarly grim view as to the market shares which it forecasts cellular, PCS and wide area SMR service providers will have. Petition, pp. 75-9. The CPUC sees cellular as attaining a 12 percent market penetration by the year 1998 and 17.4 percent market penetration by the year 2003. Petition, p. 76. In contrast the CPUC envisions the market penetration rates of PCS and wide area SMR providers to be 3.1 and 1.9 percent in 1998, respectively. Id. The CPUC then utilizes the market share calculations of the Personal Communications Industry Association to estimate what percentage of the market each carrier will control. Under its maximum concentration scenario, where service providers aggregate as much spectrum as is permitted by the FCC's rules, the CPUC believes that the H Index will be 2767 and 2125 in the years 1998 and 2003, respectively, and that cellular carriers will control 72 percent of the market. Under its minimum concentration scenario, the CPUC believes that cellular carriers' control of the market will still be at a level of 68 percent. Petition, p. 78. GTE respectfully submits that the numbers which CPUC has submitted are not

reflective of market concentration. First, the CPUC calculates the H Index based on cellular carriers' market shares combined. Thus, the H Index, as calculated by the CPUC, is almost twice the level that would be obtained if carriers' shares were considered separately. The CPUC's analysis fails to reflect the decrease in market concentration which will result from the introduction of PCS and wide area SMR service providers to the marketplace. The numbers offered by the CPUC do not take into consideration the different weight which must be accorded to different spectrum based upon its capacity. Capacity is a better indicator of a competitor's ability to respond to price changes. Market shares must be distributed with the weighted value of the spectrum, a function of its capacity, in mind. In light of cellular carriers' obligation to continue to provide service to customers still utilizing analog equipment, the market share of the wireless marketplace which is attributed to cellular carriers will be less than their share of assigned bandwidth. CR Study, p. 16. This must be factored in to any analyses of market concentration and market power. Although the current H Index would be 5000 (assuming, for the time being, that the two facilities-based cellular carriers constitute the entire relevant market), once both PCS and wide area SMR service are factored into the H Index formula, under the maximum aggregation scenario, the H Index falls to 2045; under a minimum aggregation scenario, the H Index falls to

only 1370. CR Study, p. 18. Cellular carrier market share is between 10 percent and 17 percent, less than the market share of a new market entrant with a 30MHz license.

Thus, the CR Study finds that in no case does the H Index fall by less than half, and it could decline by more than two-thirds. CR Study, p. 18. Moreover, cellular carriers' share of effective capacity will decrease sharply with the introduction of PCS and wide area SMR service providers which will be employing digital technology in greater proportion than will their cellular counterparts. Id. The CR Study opines that in light of the significant impending changes to concentration within the wireless marketplace, continuing regulation in the name of ensuring competition seems hardly necessary -- clearly the increasingly competitive marketplace will provide the most effective check on carriers' actions.

5. The Opportunities for New Competitors to Enter the Wireless Market Are Vastly Underestimated

In addition to minimizing the number of current competitors to cellular service providers, the CPUC similarly underestimates the opportunities for new competitors to enter the wireless marketplace. Although the CPUC acknowledges that PCS and wide area SMR providers will one day be viable competitors, the CPUC significantly overestimates the structural, technological, marketing and financial hurdles which these competitors must overcome and the amount of time which will elapse during that process. Petition, pp. 64-73. The CPUC's Petition also fails to consider that some of these

providers already have infrastructure in place, such as cable, local landline and interexchange service providers.

a. The CPUC Suggests That Any Anticipated Licensing Dates for PCS Spectrum Are Suspect Due to the FCC's Previous Shifts in Policy

The CPUC overestimates structural barriers inherent in the licensing process which PCS providers must overcome prior to offering competition in the marketplace. Despite its recognition of the fact that PCS licenses "are in the process of being issued,"[33] the CPUC maintains that the controversial nature of the previous revisions to spectrum allocation will further delay the introduction of PCS and thus renders the anticipated introduction date of such service speculative. Petition, p. 68. The CPUC, however, offers no concrete evidence in support of its suspicion that further delays will plague the PCS spectrum auction process. In fact, a narrowband auction was held, and 10 narrowband licenses could be granted soon. Another narrowband auction is scheduled for October 26, 1994, to grant an additional 30 licenses. The FCC is proceeding rapidly with plans to commence the PCS broadband auction process by year's end. Thus, the structural impediments which the CPUC equates with additional delay are actually non-existent.

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[33] Petition, p. 68.

b. **The Petition Overestimates the Time It Will Take PCS and Wide Area SMR Service Providers to Provide "Sufficient" Competition to Cellular Providers**

The Petition overestimates the time which will elapse before wireless service providers increase competition in the marketplace by assuming that, in order for them to compete at all with cellular carriers, their service must be provided to at least two-thirds of the population of its service area and be available in all service areas in California. Petition, pp. 64-5 (emphasis added). Such a requirement is not warranted. A PCS or wide area SMR provider who is capable of converting any percentage of a cellular carrier's subscriber base in Los Angeles to PCS or wide area SMR service has posed economic competition to that cellular carrier - regardless of whether the PCS or wide area SMR provider is also operating in San Francisco. The assertion that all competitors within the marketplace must possess a perfectly equal level of market presence, both inside and outside of the relevant geographic market, erects an unrealistic barrier to competition.

c. The CPUC's Concerns That the Cost of Acquisition of PCS Spectrum Will Act as a Barrier to PCS Rollout Are Unfounded

The CPUC claims that the cost of acquiring a PCS license in the auction process is prohibitive. Petition, p. 72. GTE notes that from the spirited bidding and the amounts bid in the narrowband PCS auctions that the bidders did not consider the acquisition costs prohibitive. There is no reason to believe that there will be less interest in the broadband PCS

auctions. To the contrary, the broadband auctions may generate more interest and revenue than did the narrowband auctions.

d. **The Petition Raises A Host of Non-Issues With Respect to the Technological Implementation of PCS and Wide Area SMR Services**

Numerous insignificant or nonexistent technological hurdles which will allegedly delay the time in which PCS and wide area SMR carriers will compete with cellular carriers are proffered in the Petition. Specifically, the CPUC asserts that, even though wide area SMR providers (e.g., Nextel) are currently developing and will soon deploy TDMA digital technology, which should increase spectrum capacity six-fold, the CDMA digital technology being developed by cellular carriers provides even greater increases in capacity. Petition, p. 66. What the CPUC fails to consider, however, is cellular carriers' ongoing obligation to provide service to its subscribers who own analog cellular equipment. Thus, cellular carriers' conversion of spectrum use to digital technology, regardless of the type of technology available, can only be evolutionary.

The CPUC also contends that the inability to provide roaming will prove to be another, short-run, technological barrier. Petition, p. 70. The CPUC's concerns are misplaced. First, it ignores the incentive of PCS and wide area SMR providers to develop the most efficient and effective operating standard so that their independent systems may be

interconnected to form a seamless nationwide service, a goal previously announced by Nextel, among others. In fact, many wide area SMR service providers, in addition to Nextel, have already decided to employ Motorola's MIRS digital technology in their own wide area SMR systems, thus facilitating the anticipated interoperability of these systems as a national network. (Source: Nextel Communications, Inc. 1993 Annual Report). Last year, eight major wide-area SMR carriers formed a consortium to provide nationwide, uniform roaming and network management. Eight Major SMR Operators Announce Their Consortium's Plans for ESMR Service, Personal Communications Industry Association Bulletin (July 2, 1993).

Moreover, even if roaming is not initially available in PCS markets, the consequences of such unavailability are far less significant than if this unavailability existed in a cellular MSA or RSA. The reason for the difference in the value to be accorded roaming service is due to the fact that the "home area" of a PCS provider will be vastly larger than that of a cellular carrier. For example, a Southern California PCS MTA licensee will have a market which encompasses portions of Arizona and Nevada and four California cellular MSAs: San Diego, Los Angeles, Santa Barbara and Bakersfield. Thus, an inability to roam outside the MTA is far less significant than the inability to roam outside of a single California cellular MSA. The CPUC also contends that the technological impediments facing the wireless service

providers have and will continue to result in high prices for necessary customer equipment which will place a limit on the market share these providers will obtain. As this allegation lacks factual support and empirical evidence, GTE must respond to it with a statement of: a) fundamental economic and business principles; and b) the history of cellular CPE costs. Typically, as manufacturers establish and refine their production systems, prices for increasingly complex and functional equipment tend to decrease over time. This, in fact, is precisely what occurred in the cellular equipment marketplace.

A review of the trend in equipment costs reveals that:

> The monthly cost of a mobile cellular telephone has declined by even more than carrier charges, from $79 in 1983 to $7 in 1991. During the same time, the quality of mobile telephone service was enhanced by improvements in functions and features. When adjusted for inflation, the total cost of owning and using a cellular telephone in 1991 was only 44 percent of its cost in 1983.

CR Study, p. 7 (citation omitted).

This industry-wide trend of falling CPE prices has also been experienced in GTE's markets. Between 1991 and 1994, the average retail prices for portable and transportable phones fell to less than half of their original price, decreasing from $699.10 to $316.88 and from $442.03 to $184.29, respectively; and the average retail price for a mobile phone

dropped by more than one-third of its original value, falling from $334.88 to $194.92.[34]

e. The Petition Makes an Unsupported Allegation that Marketing Costs Will Prevent Other Wireless Service Providers from Attracting a Sufficient Portion of the Subscriber Base

In a further effort to minimize the competitive impact of PCS and wide area SMR providers, the CPUC contends that these carriers will not be able to market themselves successfully enough to capture a meaningful portion of the subscriber base. This general allegation is not supported by analysis of any proposed business plans of PCS or wide area SMR service providers. Petition, p. 67. To lend support to its claim that excessive marketing costs will prevent these carriers from competing effectively with cellular carriers, the CPUC notes that "as of December 1993, SMR's nationwide share was only 1.5 million customers compared to 13 million customers for cellular." Petition, p. 67, n. 57. However, this statistic fails to take into account recent SMR developments. As a result of its purchase of OneComm Corp., Nextel would expand its coverage to 47 of the 50 largest U.S. markets and "could sell wireless service to much of the nation, or 210 million potential customers," which is more than three times

[34] Lower CPE prices should also be experienced in PCS in light of the FCC's determination that the broadband PCS spectrum blocks should be contiguous, Amendment of the Commission's Rules to Establish New Personal Communications Services, (Memorandum Opinion and Order), ("PCS MO&O") GEN Docket No. 90-314 (FCC 94-144), 1, 17 (June 13, 1994), reducing the need for PCS carriers to provide costly dual-frequency equipment.

the size of the potential customer base of McCaw Cellular Communications Corp., the largest cellular provider in the United States. Nextel to Acquire OneComm, a Rival, For $650 Million, Wall St. J., July 15, 1994 at p. A2. In addition, as a result of its merger with DisCom:

> ... the two combined companies will be able to offer digital mobile communications service (mobile telephone, dispatch, paging and data services) in about 70 MSAs, including nine of the 10 largest MSAs covering 95 million people. Service will extend from Maine through Virginia in its east coast markets and cover most of California and Arizona in its western markets as well as other U.S. markets.

Fleet Call Merges With DisCom; Transaction is Valued at $320 Million, Telocator Bulletin, December 24, 1992, at p.2.

f. The Petition Erects a Final Hurdle: the State Siting Process

The CPUC raises the concern that PCS providers may find it difficult to obtain state/local approval for proposed sites, thus preventing them from constructing the facilities necessary to compete with cellular carriers. Petition, p. 69. A close reading of the Petition leads one to conclude that this will not be a real hurdle. The CPUC acknowledges that the sites required by PCS carriers will be smaller than those required by cellular carriers. Id. Candidly, the CPUC admits that this is a "lesser regulatory hurdle". Id. GTE believes that this is even a less significant barrier than does the CPUC, as cellular carriers, whose sites the CPUC states are

bigger than those of PCS carriers, have been able to build out their systems aggressively over the last ten years.

g. The Allocation of Additional Spectrum for the Provision of Wireless Services Will Cause the Introduction of New Service Providers to the Marketplace

Recent FCC policy decisions will result in increased numbers of wireless service providers within each market and an increase in already substantial extant competition. The FCC's vision of the mobile telecommunications services market as a broad and growing market is reflected in four policy decisions rendered in its implementation of the OBR. CR Study, p. 1. Those reflective decisions are:

> First, the FCC allocated a substantial amount of additional spectrum for the provision of these services, further expanding the resources that are available for their provision. Second, it plans to auction a number of large spectrum blocks, and will permit subsequent combinations of blocks, to permit economies of scale in the provision of mobile services to be exploited. Third, while recognizing the importance of these scale economies, in order to limit industry concentration the Commission has constrained both the amount of PCS spectrum that can be licensed to any single entity in a given geographic area and the amount of spectrum that can be licensed to cellular incumbents in either the PCS auctions or the aftermarket.
>
> Finally, and perhaps most importantly, by broadly defining PCS as 'a family of mobile or portable radio communications services which could provide services to individuals and business, and be integrated with a variety of competing networks,' the Commission has chosen to give substantial latitude to operators to

> offer a wide range of service under the PCS rubric.

CR Study, p. 3. In light of the FCC's broad definition of PCS, PCS providers will be able to offer not only value-added services such as voice mail, call waiting, call forwarding, portable facsimile and wireless transmission services offered by conventional cellular service providers, but may supplement those services with additional communications opportunities for customers in a host of environments (e.g., in-building, neighborhood, pedestrian), and a panoply of voice or data instruments offering various integrated enhanced service. CR Study, p. 4. Further, the Commission has recently taken additional action that will strengthen broadband PCS and wide-area SMR competitors. The Commission tentatively concluded to lift wireline restrictions on the ownership of wide-area SMR licenses.[35] In addition, the FCC has determined that broadband PCS spectrum blocks should be contiguous, eliminating the need for PCS carriers to provide costly dual-frequency equipment.[36]

As a result of the encouraged introduction of new service providers to the marketplace, competition will be increased, as explained in the following scenario:

> ... the industry is about to experience a significant increase both in

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[35] Eligibility for the Specialized Mobile Radio Services, (Notice of Proposed Rulemaking), GN Docket No. 94-90, 1, 11-15 (released Aug. 11, 1994).

[36] PCS MO&O, at 17.

> the number of firms that supply mobile communications services and in the amount of spectrum that has been allocated for this purpose. At least three, and perhaps as many as six, new firms will operate in each geographic area, and the amount of spectrum available for the provision of mobile services will more than triple.
>
> Moreover, even this understates the amount of additional capacity that will be available to serve subscribers since the new operators will use digital technologies that are more efficient than the analog technologies that have been used by incumbent cellular operators. [Footnote omitted] To this must be added the effect of the introduction of Enhanced Special Mobile Radio (wide area SMR) in the near term and satellite mobile service somewhat later, both of which will add further to the number of firms providing mobile services and the amount of spectrum devoted to this purpose. By any standard, industry concentration will decline greatly -- and limitations on industry growth that have resulted from government-imposed limits on available spectrum will be greatly relaxed.

CR Study, p. 8.

6. The Petition Offers No Evidence of Discriminatory Behavior, and its Allegation of Anti-Competitive Behavior is Based Upon Unreasonable and Unsupported Assumptions

As discussed in Section III B, supra, the CPUC has previously raised allegations of collusion once before in response to the Notice of Proposed Rule Making issued in Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, 8 FCC Rcd. 7988 (1993), which preceded the 2nd R&O. The FCC in the 2nd R&O fully considered the CPUC's arguments. Notwithstanding those

arguments, the FCC found collusion unlikely as: 1) there exist several services which compete with cellular service; 2) cellular carriers face the threat of future competition by, among others, PCS carriers; and 3) a result of ever-improving technology, cellular carriers must continually improve the quality of their service in order to maintain demand. 2nd R&O, 9 FCC Rcd. at 1470.

The CPUC attempts to revive its collusion argument in its Petition without providing documentation of anti-competitive behavior or discriminatory practices. Petition, pp. 27-9. The statement most resembling a proffer of evidence, although not offered as such, is the discussion of the similar basic rates of competitors in certain California markets. However, as discussed supra., the existence of similar prices in a market is just as consistent with a competitive marketplace. GAO Report, p. 41. Indeed, while the GAO noted that some conditions present in the cellular marketplace could possibly enable carriers to collude, the GAO expressly stated that "we found no evidence of anticompetitive or collusive behavior in the course of our work...." GAO Report, pp. 19-20. Specifically, when analyzing cellular carriers' past behavior, the GAO found that cellular carriers compete with one another, virtually every month, when customers' month-to-month contract terms expire, to sign customers onto their systems. GAO Report, p. 21.

GTE does not know of any situation in which California cellular carriers have used cellular partnerships as devices to further anti-competitive behavior. Indeed, six characteristic traits of the wireless marketplace make it very unlikely that collusion among cellular carriers would succeed, since they render such agreements difficult to maintain and make cheating almost impossible to detect or punish. Those traits, as described by CR, are as follows:

> First, the rapid technological change in the provision of cellular service imparts a high degree of variability to the services offered and the prices of those services. When firms are continually modifying, improving and adding new products and services, the price of each new service must be integrated into the existing price structure....
>
> Second, when markets are growing rapidly, the elasticity of demand tends to decline. In such circumstances, which certainly characterize the provision of cellular services, the gains from deviating from a collusive pricing agreement are increased.
>
> Third, with rapid technological innovation, there may be gains to pricing aggressively. These gains arise because a firm can achieve cost savings more rapidly as it moves more quickly down its learning curve....
>
> Fourth, newcomers in an industry have strong incentives to compete aggressively to attract market shares from existing firms....[A]ggressive pricing can be expected from PCS entrants as they seek to increase their shares of the mobile services market.
>
> Fifth, collusive behavior is generally believed to occur much less

> frequently in industries, like mobile telecommunications services, in which a significant portion of a firm's costs must be incurred regardless of the level of output, i.e., when fixed costs are high relative to variable costs. In such circumstances, there are considerable incentives for firms to reduce prices if demand falls short of capacity....
>
> Finally, although the quality of airtime may not vary significantly across providers, an array of service packages, some including equipment, is typically offered, and these packages may not be directly comparable between competing providers. The lack of an obvious basis for comparing service and equipment prices -- which makes it difficult to distinguish price changes that reflect differences in service quality from those that undercut a tacit agreement -- increases the cost of monitoring and punishing deviations from any such agreement.

CR Study, pp. 10-13. CR thus concludes that "the combined effect of these factors is to make it difficult for cellular firms to coordinate their pricing behavior." CR Study, p. 13.

In light of the findings of the FCC and GAO and the evidentiary burden imposed by Section 20.13, undocumented allegations of collusion cannot be deemed to constitute adequate evidence of anti-competitive acts.

7. The CPUC's Allegations of Unreasonable Rates are Based Upon a Review Which Disregards Discounted Rate Plans, and Which Fails to Acknowledge Several Key Factors Which Affect Rates

As GTE discussed in detail in Section III B(3) above, the CPUC's analysis of cellular service rates is based upon meaningless data. First, the CPUC utilizes nominal rates in its examination of rate trends. The results which the CPUC

proffers to this Commission do not reflect the reality that inflation-adjusted rates are decreasing in the face of stiff competition.

The reliability of the CPUC's results is further undermined by the CPUC's decision not to meaningfully consider the myriad non-basic rate plans which have been introduced to meet the unique and changing needs of subscribers and to minimize churn. As GTE revealed, in Section III B(3)(b)(i), supra., more than 85 percent of GTE's subscribers take service pursuant to those plans; thus, the impact of those plans cannot be ignored.

Finally, the CPUC's review is rendered unreliable by the failure to consider other relevant factors which enter into a cellular carrier's rate setting strategy, namely: future system development, opportunity costs associated with the use of the limited spectrum for the provision of traditional cellular service, in addition to the common fixed and variable costs associated with any business. See, Petition at pp. 48, 50, 54 and 57 for a discussion of cellular carriers' earnings which omits these factors.

A rate analysis which is dependent upon improper data and excludes relevant data does not satisfy the intensive and realistic review of market conditions which the Commission expected when it constructed the rigorous requirements of Section 20.13 of its Rules. 47 C.F.R. § 20.13. GTE in its Comment has provided the Commission with data which

demonstrates that cellular rates, in real terms, have decreased significantly while GTE has simultaneously increased the number of cells and the coverage area of its cellular systems. See, Section III B(3), supra. Rather than support a return to state regulation, a historical review of GTE's California cellular rates evidences that the predicate for continued state regulation, unreasonable rates, is non-existent.

IV. THE CPUC HAS NOT ADEQUATELY DESCRIBE ITS PROPOSED METHOD OF REGULATION

In order for the FCC to make a reasoned decision, any state petitioning the FCC for retention of jurisdiction must provide the Commission with an accurate and specific picture of the state's regulation of cellular. This task is made exceedingly difficult, if not impossible, by the very nature of the CPUC's regulation of the cellular industry, which the CPUC candidly described as a "crazy quilt." OII, p. 14. A brief historical review of the CPUC's regulatory efforts will illustrate the difficulties of describing the past, present and future of CPUC cellular regulation.

In 1984, the CPUC began regulating cellular carriers and permitting them to set "basic" rates based upon market conditions and carriers' cost projections. Minor rate increases could be accomplished with the filing of an advice

letter; major rate increases required application--by tariff.[37] In an effort to enhance competition in the cellular marketplace, the CPUC adopted a protectionist "resale plan" which required facilities-based carriers to establish wholesale rates and to maintain a wholesale-retail margin for resellers' benefit. See, D.84-04-014.

After two years of imposing this regulation on cellular carriers, the CPUC began to realize that the burdens imposed were not only cumbersome, but had also failed to achieve their intended purpose, i.e., resellers were not performing to their expectation within the marketplace. Instead of examining closely the most likely possibility, that the resellers, who were guaranteed a substantial margin by the CPUC, were not marketing their offerings competitively or that the public did not perceive the reseller as providing any unique value, the CPUC assumed that the "flaw" in the marketplace was a result of the cellular carriers' "market power."

The CPUC decided that the appropriate response was more regulation. Despite its apparent recognition that cost-based regulation is inappropriate for the cellular industry in light of carriers' widely varying costs and the rapid technological developments associated with the industry, Petition, p. 57,

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[37] The CPUC subsequently rescinded carriers' authority to enact even minor price increases by filing advice letters; carriers must now comply with the more time-consuming and burdensome task of implementing any rate increases by undergoing an application process, entirely independent of the tariff filing process.

the CPUC required carriers to supply certain cost-support data with requests to raise rates. See, D.90-06-025.

In the same proceeding in which it acknowledged the wide variance in cellular carriers' costs, the CPUC stated that it would address in a future proceeding the possibility of foregoing the required wholesale margin in favor of the adoption of a Uniform System of Accounts for cellular service which would include cost allocation methods for wholesale and retail operations. Id. The CPUC did, in fact, subsequently adopt this system of accounts. See, D.92-10-026.[38] The Commission also proposed another regulatory requirement: cellular carriers would be required to unbundle wholesale rates, and the rate for access to the switch would have to be cost-based, with a rate of return, while the remaining portions of the wholesale rate would have to be market-based. See, D.92-10-026.

In December of 1993, after the OBR was enacted, the CPUC proposed a complete overhauling of its regulatory framework. The CPUC proposed adopting a dominant/non-dominant regulatory framework - decades after the FCC first adopted such a regulatory structure, and only months before the FCC recognized that, in light of the rapidly impending entry of additional competitors to the marketplace, the dominant/non-

[38] Further complicating the regulatory scheme was the CPUC's shift from avoided cost to fully allocated cost in the CPUC's Phase III decision. See D.92-10-026.

dominant scheme may not be the most appropriate method by which to regulate. See, I.93-12-007.

In its Interim Decision, issued days before its filing of the instant Petition, the CPUC held that facilities-based cellular carriers were dominant[39] and that other cellular competitors would be classified as non-dominant and subject to a highly streamlined set of regulations. In addition, the Interim Decision delayed until a future date consideration of price cap regulation. I.93-12-007.

In light of this history, a succinct description by the CPUC of its view of the regulatory structure would be vital to the FCC's deliberation process. Rather than state with specificity its proposed regulatory scheme, the CPUC states its intention to "overs[ee] ... the transition to competition to ensure just and reasonable rates to California consumers." See, Petition, p. 79. What the CPUC appears to propose is a

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[39] The CPUC's finding that cellular carriers were dominant was completely unsupported. The CPUC's classification of cellular carriers as "dominant" stems from a conclusion reached in a prior state proceeding (I.93-12-007). The CPUC concluded that cellular carriers are dominant, despite admittedly having conducted no analysis of, and failing to reach an empirically supported conclusion with respect to, competition within the cellular marketplace. OII, p. 19. The closest thing one will find to factual support for the CPUC's classification of cellular carriers as dominant was found in a footnote of the decision in that proceeding, where the CPUC cited to comments filed by the staff of the Bureau of Economics of the Federal Trade Commission in the FCC's proceeding regarding the bundling of cellular service and equipment. OII, n. 17. Within the same footnote, however, the CPUC recognized that other federal regulatory bodies, namely the FCC and the Department of Justice, had previously concluded that the cellular marketplace is sufficiently competitive. OII, n. 17.