

simply no way to determine if a reseller switch will have a deleterious impact on the interstate network over which the FCC has exclusive authority. The Commission's assertion that a reseller switch will certainly be technically compatible because the resellers have an incentive to buy such a switch is nothing more than tautology.

The question is not whether it is technically possible, in the narrowest sense, for the carriers to interconnect with a reseller switch, but whether that switch will adversely affect network reliability and disrupt the carriers' ability to control the quality of cellular service. These issues raise serious questions about whether the reseller switch is compatible with the federal standards announced by the FCC.

The FCC has previously asserted federal primacy over technical standards and the competitive market structure for cellular service. Cellular Communications Systems, 86 FCC 2d 469, 504-05 (1981); see Cellular Communications Systems (Reconsideration), 89 FCC 2d 58, 95 (1982).<sup>6</sup> By approving a reseller switch without regard to the FCC standards in

---

6 The FCC stated:

We have carefully developed the technical requirements essential for efficient spectrum re-use and nationwide compatibility, while providing sufficient flexibility to accommodate new technological innovations. It is imperative that no additional requirements be imposed by the states which could conflict with our standards and frustrate the federal scheme for the provision of nationwide cellular service.

89 F.C.C.2d at 95 (emphasis added).

this area, the Commission threatens to disrupt national uniformity in technical standards.

III. DUE PROCESS AND SOUND REGULATORY POLICY  
REQUIRE THAT HEARINGS BE HELD PRIOR TO  
IMPLEMENTING A NEW REGULATORY FRAMEWORK.

The evidentiary record required in this proceeding could not be adequately developed within the constraints imposed by the OII.<sup>7</sup> The imposition of a regulatory framework based solely on the radically conflicting comments of the parties is beyond the Commission's authority. See Dec. at 88, FF 5. The Decision must contain separately stated findings of fact and conclusions of law "on all issues material to the decision." Cal. Pub. Util. Code § 1705. To the extent that material facts are in dispute, those findings must be based on an evidentiary record. See Camp Meeker Water System, Inc. v. Pub. Util. Comm'n, 51 Cal. 3d 845, 863-64 (1990); Greyhound Lines Inc. v. Pub. Util. Comm'n, 65 Cal. 2d 811, 813 (1967); Pacific Telephone & Telegraph Co. v. Public Utilities Commission, 62 Cal. 2d 634, 645-49 (1965); California Motor Transp. Co. v. Pub. Util. Comm'n, 59 Cal. 2d 270, 273-74 (1963).

---

7 Despite opening an investigation raising over 50 substantive issues for comment and significant dispute among the parties on those issues, the Commission limited the parties' submissions to opening and reply comments of 80 and 40 pages, respectively, and denied numerous parties' requests for hearing.

As a result of the failure to conduct evidentiary hearings, the Decision relies upon "evidence" untested by cross-examination, makes findings unsupported by evidence, and renders conclusions unsupported by or inconsistent with its own prior findings. These actions are contrary to the Public Utilities Code and violate due process of law. Cal. Pub. Util. Code §§ 1705, 1708; Toward Utility Rate Normalization v. Public Utilities Commission, 22 Cal. 3d 529, 546-47 (1978); see California Portland Cement Co. v. Public Utilities Commission, 49 Cal. 2d 171, 179 (1957).

The reliance on a limited written record is insufficient to protect the parties' due process rights. "The phrase 'opportunity to be heard' implies at the very least that a party must be permitted to prove the substance of its protest rather than merely being allowed to submit written objections to a proposal." California Trucking Assn. v. Public Utilities Commission, 19 Cal. 3d 240, 244 (1977) (Supreme Court rejected the Commission's adoption of a rate proposal based on a written record, holding that the opportunity afforded to interested parties to comment on and protest the proposal did not satisfy the requirements of Public Utilities Code Section 1708, and that a "trial-type hearing" was required). Indeed, as the Supreme Court has found:

The Commission must hold a full hearing before the promulgation of a general rate tariff. (Pub. Util. Code § 728.) At such a hearing, the company has the opportunity through testimony, briefs, exhibits, and oral argument to inspect and challenge any formula proposed.

City of Los Angeles v. Public Utilities Com., 15 Cal. 3d 680, 698-99 (1975); see also D.83-12-047, 13 CPUC 2d 561 (1983). The denial of the parties' requests for hearings precluded the admission of evidence relevant to determining the extent of competition and denied the parties the right to test critical assumptions through cross-examination.

At a minimum, sound regulatory policy requires that the Commission hold evidentiary hearings prior to implementing a new regulatory framework. The Decision attempts to excuse the Commission's failure to hold hearings on the theory that it is merely interested in "broad patterns" or "broad conclusions" rather than "precise measures of market power." Dec. at 16-17, 21. This approach contrasts sharply with the Commission's regulation of the interexchange market. Despite AT&T's undisputed dominance in that market, the Commission did not abrogate its duty and rely on "broad patterns" in establishing a dominant/nondominant framework. The Commission recognized "the difficulties implicit in determining market power" and held extensive proceedings to determine the appropriate measures of market power in the interexchange market. D.84-06-113, 15 CPUC 2d 426, 431-32 (1984); D.87-07-017, 24 CPUC 2d 541, 550 (1987). Here, the need for hearings is even more critical due to the fundamental and rapid changes occurring in the wireless marketplace and in light of the basic issues in dispute. Indeed, the inadequacy of the record has forced the Commission to defer critical issues to another phase of the

proceeding. This piecemeal approach to regulation will only perpetuate the acknowledged "crazy quilt"<sup>8</sup> approach to regulation of the cellular industry imposed by the Commission.

IV. THE DOMINANT/NONDOMINANT FRAMEWORK IS  
PREDICATED ON FAULTY ASSUMPTIONS CONTRADICTED  
BY THE RECORD.

In establishing the dominant/nondominant framework, the Decision mischaracterizes the nature of cellular service and clings to an outdated view of the marketplace. The Decision reverses the Commission's prior finding that cellular service is a discretionary, rather than an essential service. See Dec. at 21. The Decision also cites historical barriers to entry in cellular service, despite the recent entry of new, competitive wireless service providers into the marketplace. Additionally, in assessing market share, the Decision ignores the fundamental changes in the retail marketplace that have gradually replaced an inefficient distribution channel, the resellers, with a more efficient channel, mass retailers.

A. There is no evidence to support the  
conclusion that cellular service is a  
bottleneck.

The Decision erroneously designates cellular carriers as "dominant," finding that they control a "bottleneck."

---

8 I.93-12-007 at 14.

Dec. at 89, 95, FF 9, CL 2-3. This conclusion is factually and legally erroneous and utterly ignores the entrance of Nextel into the market. The Commission cannot reverse its prior finding absent hearings.

"Bottleneck facility" refers to refusals to deal by a monopolist controlling an "essential facility" or to multiple providers acting in concert to control such a facility. See City of Malden, Mo. v. Union Electric Co., 887 F.2d 157, 160 (8th Cir. 1989); MCI Communications v. American Telephone and Telegraph Co., 708 F.2d 1081, 1132 (7th Cir. 1983), cert. denied, 464 U.S. 791 (1983). There is no evidence here of control of any essential facility.

First, there is no evidence that cellular service constitutes an essential facility. The Commission has observed that the "basic means of communication . . . [is] provided by the local telephone compan[ies]." Rprt. to Gov. at 13.<sup>9</sup> "Traditionally, basic service has referred to the group of telecommunications services that enjoy social status as essential for Californians" (emphasis added). As the Commission has found, cellular service is "discretionary," providing a mode of communications complementary

---

9 In light of the nature of cellular usage, the Commission declined in 1990 to set a basic service goal for the cellular industry based on the observation that cellular service does not replace or compete directly with landline service. See D.90-06-025 (mimeo) at 7. The bulk of cellular calls that interconnect with the local exchange are calls that would not otherwise have been made had cellular not existed. Id. at 18.

to wireline service.<sup>10</sup> D.90-06-025 (mimeo) at 99. Indeed, as Nextel states, "No customer . . . is forced to use its service." Nextel at 13. Similarly, no customer is forced to use cellular service.

Second, there is no evidence of "control" necessary to establish the existence of a bottleneck. The Decision asserts that "control" can be shared between the carriers. Dec. at 89, FF 10. However, there is no finding, nor is there any material evidence, of the concerted action required for a bottleneck. In fact, the Commission expressly found in 1990 that the cellular network is not a bottleneck monopoly facility.<sup>11</sup> If there was no "bottle-

---

10 The majority of the parties to this proceeding stated categorically that cellular is not a basic or essential service. TURN at 1-2; GTEM at 12-13; McCaw at 23-24; U S WEST at 45; Fresno at 26. For example, DRA noted that "Today cellular service is a discretionary service, used more as an additional service for reasons such as mobility or safety, as opposed to a replacement service for basic landline." DRA at 40.

The Attorney General recently concluded, in connection with the AT&T/McCaw merger, that landline telephone and cellular service providers do not compete with one another. See Opinion of The Attorney General on Competitive Effects of Proposed Merger of American Telephone & Telegraph Company and McCaw Cellular Communications, Inc., February 9, 1994 at 14. See also Hausman Affidavit at 20-21 ("landline telephone and cellular are in different antitrust markets").

11 In the cellular industry, there is no bottleneck monopoly, this is a discretionary service, and technological change and service expansion are key issues.

"Cellular risk is substantially different from the monopoly telecommunications market . . . Unlike monopoly local exchange telephone companies, cellular carriers have no captive market of monopoly ratepayers.

(continued...)

neck" in 1990, it cannot exist now. In any event, the Commission cannot reject its prior finding in the absence of evidence submitted at hearings warranting such a reversal.

Indeed, the conclusion that cellular service constitutes a bottleneck is inconsistent with the Decision's own definition of a bottleneck. The Decision claims that a "bottleneck" exists where "it would be economically infeasible for any other firm to duplicate the facility, product or service; and . . . access to that facility, product, or service is necessary for other firms to compete successfully." Dec. at 21. Under this definition, cellular service cannot possibly constitute a bottleneck, as demonstrated by the entrance of Nextel. Nextel has duplicated the service without access to the alleged cellular "bottleneck."

---

11(...continued)

Id. at 99-100, FF 82, 87).

Similarly, the FCC rejects the motion of cellular as a bottleneck: "cellular operating companies do not possess a monopoly of bottleneck facilities; each will be competing against a nonwireline carrier. . . ." Cellular CPE NPRM, 1984 FCC LEXIS 2461, CC Dkt. No. 84-637, FCC 84-271 (released June 26, 1984). In the order subsequently adopted, the FCC noted that cellular was not a monopoly service, and the BOCs' cellular subsidiaries must "compete with other carriers and resellers who are able to offer 'one stop shopping' for cellular service and CPE . . . . Cellular resellers and CPE vendors are not disadvantaged, as non-cellular CPE retailers are, by the presence of a firm that has dominated the CPE market for a number of years." Cellular CPE (Structural Separation of BOCs), 57 RR 2d 989, 992 (1985).

B. The Commission's narrow market definition is contrary to its own findings and the record evidence.

In proposing a regulatory program which "encompasses all forms of mobile telephone service provided to the public within California," the OII initially defined "mobile telephone service" to include "any service which permits a user to initiate or receive calls and engage in two-way voice communications while moving freely about within a broad serving area."<sup>12</sup> Such services "employ various forms of wireless communications technology to provide mobile capability."<sup>13</sup> Yet, in deciding that cellular carriers possess "dominant" market-power, such that additional regulation is warranted, the Commission relied on a different and unduly narrow definition of the mobile service market. Dec. at 90, FF 18. The Commission has rejected its prior finding, made in 1990, that cellular "carriers face competition not only from direct competitors but from providers of alternative telecommunications services."<sup>14</sup> The Commission cannot properly reverse this finding in the absence of evidentiary hearings. Indeed, the competition is even more intense now than it was in 1990.

The parties presented conflicting positions regarding the timing of the new competitors' entry into the market, as

---

12 I.93-12-007 at 2.

13 Id.

14 Decision 90-06-025 (mimeo) at 99, FF 78.

well as their costs, technical capability and pricing schemes, among other factors.<sup>15</sup> These matters required factual and economic analysis that could not be resolved through a mere review of the parties' comments. Based on the conflicting claims regarding the capabilities of the new market entrants, there is no clear evidence upon which the Commission can rely to set up a framework limiting the market to cellular service. Indeed, the Commission chose to ignore substantial evidence in the record supporting a broader market definition.<sup>16</sup>

The Commission, while recognizing that "emerging technologies such as PCS and ESMR services" are "likely candidates for substitution with cellular service,"<sup>17</sup> determined

---

15 CCAC at 58; BACTC Reply at 16; Fresno/Contel at 34-35; U S WEST at 2, 8.

16 See also BACTC at 22-23; Fresno at 13-14; GTEM at 8-10; LACTC, Exh. A at 5; McCaw at 20-23. Other parties have limited their market analysis to cellular, ESMR and PCS providers. CRA at 17-24; DRA at 6-10; Pacific Bell at 31-32; MCI at 9-11; CCAC at 32-33; Comments of the Cellular Carriers Association of California ("CCAC") at 29, 30-31, 32; Opening Comments of Fresno MSA Limited Partnership, et al. ("Fresno") at 28-29; Initial Comments of GTE Mobilnet, et al. ("GTEM") at 8-9; Comments of McCaw Cellular Communications, Inc. ("McCaw") at 13-14; Opening Comments of Pactel Cellular and its Affiliates ("Pactel") at 26-34; Opening Comments of U S West Cellular of California, Inc. ("US West") at E1, 2-10; Reply Comments of Bay Area Cellular Telephone Company ("BACTC Reply") at 2-5.

The Commission's narrow market definition is also inconsistent with the FCC's definition of commercial mobile services to include not only cellular but PCS and other services. See CCAC at 12-13; see also FCC News Release, "FCC Clears Way for Licensing of PCS; Provides Framework for Competitive Mobile Communications Market," Rpt. No. DC-2564, February 3, 1994.

17 Dec. at 89, FF 15.

that the market for these new services "is not sufficiently developed at the present nor is it likely to be in the near term future due to various market, technical and regulatory impediments."<sup>18</sup> In so holding, the Commission has ignored the uncontradicted evidence that Nextel has already injected additional competition into the marketplace.<sup>19</sup>

Nextel Communications, Inc. ("Nextel") is operational in Southern California, and plans to initiate service in San Francisco and other parts of California in 1994.<sup>20</sup> Full statewide service is imminent.<sup>21</sup> Nextel regards itself as a direct competitor with existing cellular service providers.<sup>22</sup> Through acquisitions and strategic alliances, Nextel is in a position to provide wireless mobile services throughout California without the need to use the alleged "essential" facilities of the cellular carriers.<sup>23</sup> Because

---

18 Id., FF 16.

19 LACTC at 11-12, 40; LACTC Reply at 13-14; BACTC Reply at 10; CCAC at 20-24; CCAC Reply at 3-5; McCaw at 9-10; US WEST at 12-15.

20 See CCAC at 58; GTEM at 9; Comments of RSA No. 3 Limited Partnership ("RSA") at 3; US West at 6-7; Fresno at 33-34; BACTC Reply at 10; Reply Comments of McCaw Cellular Communications, Inc. ("McCaw Reply") at 9.

21 GTEM Reply at 30; BACTC Reply at 10; CCAC at 58; McCaw at 14; U S WEST at 2.

22 See Comments of Los Angeles Cellular Telephone Company ("LACTC") at Exh. A. p. 1; McCaw at 14, n. 18, Att. B., p. 5-6; US West at 7; Fresno at 28; BACTC Reply at 10; Reply Comments of AirTouch Communications, PacTel Cellular and its Affiliates ("Airtouch Reply") at 21; McCaw Reply at 9.

23 See RSA at 3. See also McCaw at 14, Att. B, p. 5; CCAC at 32.

(continued...)

of its existing base and recent acquisitions, Nextel will be able to move quickly in building a nationwide digital network.<sup>24</sup> And Nextel has received considerable financial backing from Motorola, Northern Telecom and Matsushita.<sup>25</sup>

The Decision similarly ignores the record evidence that PCS providers will shortly inject additional competition into the wireless marketplace. With the Pioneer's Preference granted by the FCC to Cox Enterprises, Inc. ("Cox"), PCS competition is imminent in California.<sup>26</sup> This award gives Cox a 30 Mhz license covering nearly 20 million people and extending throughout Southern California and the southern half of Nevada.<sup>27</sup> Cox has an existing infrastructure that will vastly reduce both the cost and time neces-

---

23(...continued)

The Decision relies on untested claims to support its conclusion that the new competitors will not inject competition. For example, the Decision cites the alleged high construction costs of Nextel as evidence that it will not place competitive pressure on cellular carriers. Dec. at 35. This claim ignores the undisputed evidence that Nextel has already exerted competitive pressure on the cellular carriers resulting in price reductions in the Los Angeles market. Moreover, this claim is not supported with analysis considering that Nextel will not incur the digital conversion costs faced by the cellular carriers.

24 See PacTel at 36.

25 See CCAC at 48-49; GTEM Reply at 30-31.

26 See GTEM at 9; McCaw at 15, 22, Att. B p. 1; US West at 9; Fresno at 29, 31; AirTouch Reply at 22; Reply Comments of Fresno MSA Limited Partnership, et al. ("Fresno Reply") at 6; See GTEM at Att. A p. 1; Fresno at 29, 31.

27 See GTEM at 9, Att. A p. 1; McCaw at 15, Att. B p. 1; Fresno at 3; Fresno Reply at 6.

sary to construct a network in California.<sup>28</sup> Additional potential entrants into the PCS arena, some of whom have already conducted extensive PCS trials,<sup>29</sup> include major telecommunications, cable and multimedia companies such as Pacific Bell, Time Warner Telecommunications, Inc., AT&T, and Viacom International.<sup>30</sup> Thus, there is substantial evidence that PCS is a very real and imminent competitor to cellular.

C. The analysis of market share as an indicator of "dominance" is superficial.

The parties' comments reflected a wide disparity in views regarding the use of market share to determine dominance, as well as the appropriate measurement for market share.<sup>31</sup> As the Commission has observed:

[t]here are potential problems with use and measurement of market share which must be guarded against. One problem is that current market share within the telecommunications arena is a static measure in what is a very dynamic industry . . . . Theoretically, a dominant firm will behave exactly like a competitive firm if there is the threat of

---

28 See AirTouch Reply at 22. The Decision acknowledges that "[e]conomies of scope exist between services when costs of providing those services over one network is less than the combined cost of separate networks." Dec. at 24. The Decision fails to conduct any analysis of the potential economies of scope for potential PCS providers such as LECS and Cox.

29 See CCAC at 18.

30 See PacTel at 39; McCaw at 15; US West at 8-9; CCAC at 18.

31 See, e.g., CRA at 28-29, 33-36; CSI at 12-13; DRA at 17-19; Nextel at 15-16; Pacific Bell at 9-11; Fresno/Contel at 40-42; GTE-M at 29-32; MCI Reply at 10; GTE-M Reply at 12-13; AirTouch Reply at 23-24.

entry by another firm even if the dominant firm has a large market share.<sup>32</sup>

24 C.P.U.C.2d at 557, 560 (emphasis added). Despite this observation, the Commission has relied upon an outmoded evaluation of market share, assuming that, even with the entrance of ESMRs, cellular carriers should be treated as "dominant."

The Decision cites the resellers' diminishing market share as evidence of the cellular carriers' alleged dominance. Dec. at 26. The Decision does not support this claim with any evidence in the record, but with supposition.<sup>33</sup> The Decision acknowledges that the resellers' loss of market share is caused by several factors, but the Decision fails to identify or analyze those factors. Dec. at 26. Indeed, the Decision fails even to identify the significant impact of the entrance of more efficient

---

32 24 C.P.U.C.2d 541, 558 (citing D.86-11-079). At the AT&T's market share was 82%--a share far in excess of anything possessed by any of the cellular carriers.

33 The assumption that resellers are at a disadvantage because they cannot interconnect is not supported by the record. Dec. at 94, FF 52. Price discrimination or access concerns arising from any purported "bottleneck" facilities are eradicated by the carriers' obligations under Sections 201 and 202 of the Communications Act of 1934 to offer just and reasonable service to all requesters in a nondiscriminatory manner. See Cellular Communications Systems, 86 FCC 2d 469, 511 (1981) ("Therefore . . . we will condition radio licenses to system operators such that no restrictions on resale and shared use of cellular services will be permitted.").

distribution channels, such as mass retailers, which has eroded the market share of the resellers.<sup>34</sup>

The Decision concludes that market concentration ratios support the conclusion that cellular carriers are not subject to significant competition. Dec. at 35-36. This conclusion is supported by a superficial and incomplete analysis. The Decision selectively relies upon the market concentration ratios calculated by CRA. Dec. at 35. These ratios have not been tested by cross-examination. Indeed the focus on the HHI values is misplaced since it fails to consider that competition occurs at the margin. The Decision purportedly follows the Department of Justice ("DOS") Merger Guidelines, but fails even to consider the relevant factors, other than the HHI values. As the guidelines state "market share and concentration data provide only a starting point for analyzing the competitive impact of a merger."

¶ 2.0 The Herfindahl-Hirschman Index is merely an "aid" to the interpretation of market data. ¶ 1.5. DOJ has recognized the limitations of HHI:

[m]arket concentration and market share data of necessity are based on historical evidence. However, recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance. . . . The Agency will consider reasonably predictable effects of recent or ongoing changes in market conditions in interpreting market concentration and market share data.

---

34 The Decision erroneously concludes that the resellers are "captive" to the two cellular carriers. Dec. at 23. There is nothing that precludes the resellers from buying in bulk from Nextel or from bidding on or reselling PCS.

¶ 1.52. The Commission has relied upon a static assessment of market concentrations without factoring in the rapid market changes.

D. The use of cellular bandwidth as the criterion for dominance is admittedly in error.

The Decision recognizes that "the specific proportion of the cellular bandwidth or mobile service bandwidth controlled by a given carrier is not, of itself, a definitive criteria for distinguishing dominant from nondominant providers." Dec. at 27. Yet the Decision selects this criterion as the basis for the designation for dominance, despite a plethora of evidence from virtually every party attesting to the flaws inherent in the use of this single market power criterion.<sup>35</sup>

Indeed, the Decision inconsistently finds that a cellular carrier controlling more than 25% of the cellular bandwidth shall be considered "dominant," but that the Commission would "entertain applications" from cellular carriers seeking nondominant status by a showing the carrier controls no more than 25% of all bandwidth, including noncellular bandwidth. Dec. at 22. The very fact that the Commission will entertain such applications is an admission that its narrow market definition is in error.

---

35 CRA at 28-29, 33-36; CSI at 12-13; DRA at 17-19; Nextel at 15-16; Pacific Bell at 9-11; Fresno/Contel at 40-42; GTE-Mobilnet at 29-32; AirTouch Reply at 23-24; GTE-Mobilnet Reply at 12-13; MCI Reply at 10.

V. THE COMMISSION'S ANALYSIS OF COMPETITION IN  
THE WIRELESS MARKET PLACE IS NOT SUPPORTED BY  
THE RECORD.

A. The Commission unbelievably denies responsi-  
bility for the very same rates it has  
approved.

As a threshold matter, the Commission improperly denies its responsibility for establishing rates in California by implying that cellular carriers are free to establish their own rates. See Dec. at 90-91, FF 22, 24, 26, 28, 33. The Commission, not the cellular carriers, has controlled the rates for cellular service in California.

It has been the Commission's responsibility to ensure that the rates charged for cellular service are "just" and "reasonable."<sup>36</sup> The claim that those rates are not just and reasonable is effectively an admission that the Commission has not fulfilled its statutory obligation.

The Decision also denies that regulation has caused high rates in California. Yet there is no evidence in the record to support this conclusion. Indeed, the Decision acknowledges that in interpreting price comparisons "a

---

36 "Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged or collected by any public utility for or in connection with any service, product, or commodity or the rules, practices or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory or preferential, the commission shall determine and fix, by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force." Cal. Pub. Util. Code § 728.

variety of factors contribute to the comparatively higher rates," including "high demand . . . , greater disposable income . . . , higher population density and a highly mobile population." Dec. at 43.<sup>37</sup> The Commission failed to analyze these factors and simply assumes that lack of competition is the cause. Dec. at 43.

The Decision relies upon a superficial analysis of rates to support its claim of allegedly high rates. Rather than holding hearings to assess the reasonableness of the rates, as required under section 728, the Commission cites a Division of Ratepayer Advocates study submitted in legislative hearings. See Dec. at 37. This evidence is outside the record and thus untested by cross-examination. Similarly, the Decision's reliance on the NCRA study (Dec. at 45) is misplaced since that study dealt solely with emergency plans, not basic service. Moreover, the Commission has in the past found that a mere comparison of rates in California with lower rates on the same commodity in other jurisdictions is not convincing proof that such rates are per se unreasonable. D.66275, 61 CPUC 660 (1963); D.43756 PUC 341 (1950); D.20550, 32 CRC 466 (1928).

---

37 The Decision complains that carriers do not explain why certain RSAs and MSAs subject to the same regulation in California also exhibit lower rates than other markets outside of California. Dec. at 45. Yet even the Decision itself recognizes the variety of factors that impact rates. Had the parties been given an adequate opportunity to present evidence, a full record would have been developed. Indeed, AirTouch offered to submit a study comparing regulated and unregulated markets.

B. The Decision ignores substantial record evidence of price competition between the cellular carriers.

The Decision's finding that prices have not declined is flatly at odds with the evidence. Dec. at 90, FF 26. The record is replete with evidence demonstrating that rates have declined substantially and that the overwhelming majority of customers subscribe to plans that offer a discount off the basic plan.<sup>38</sup> The carriers demonstrated that a broad variety of innovative pricing programs have been offered, thus increasing consumer choice.<sup>39</sup>

The Commission cannot dispute that consumers are paying less for cellular service today. To the contrary, the Commission admits prices have been reduced. CPUC Petition at 34. Accordingly, the Commission presents several rationalizations for its unsupported claim. First, the Commission claims that "reductions in price are not necessarily evidence of competitive pricing, but can be due to other factors such as changes in consumer demand, technology or marginal costs." Dec. at 91, FF 31 (emphasis added). There is no evidence to support this claim. Indeed, the Commission did not even request evidence on the

---

38 Pactel at 16-17; Opening Comments of GTE Mobilnet ("GTEM") at 22-23; Opening Comments of Cellular Carriers Association of California ("CCAC") at 20-22; Opening Comments of McCaw ("McCaw") at 9-10; Opening Comments of Bay Area Cellular Telephone Company ("BACTC") at 10-17; LACTC at 10-12; Fresno at 9; U S WEST at 12-14.

39 BACTC at 10-15; Fresno/Contel at 9, U S WEST at 12; GTE-M at 23; Pactel/AirTouch at 16-17.

impact of these factors. Rather than a finding of fact, it is sheer speculation.

Second, the Decision erroneously finds that price reductions have expired and provide no ongoing benefit. Dec. at 91, FF 30. The Decision fails to acknowledge that promotions are continuously replaced by new discount programs<sup>40</sup> and that the customer who signs up has the benefit of the lower rates for the duration of his or her contract.<sup>41</sup>

Third, the Decision attempts to discredit the price reductions on the theory that discount plans require that certain conditions be met. Dec. at 47. This claim does not disguise the fact that these plans offer consumers lower rates. There is no evidence in the record that consumers find the restrictions unreasonable. To the contrary, the steady migration of customers from the basic plan to the discount plans demonstrates that the conditions are reasonable for most consumers. Term contracts and similar conditions are routinely offered in a number of industries and, even when coupled with exclusive dealing arrangements, have been upheld by courts. See FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 396 (1952) (court upheld the use of one year contracts). Courts have routinely rejected the contention that term contracts impose

---

40 LACTC at 40; LACTC Reply at 13-14; CCAC at 21; CCAC Reply at 3-5.

41 Id.

an undue restraint on competition by foreclosing alternative sellers from a portion of the market. See, e.g., Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 236 (1983) (court upheld two-year "requirements" contract which gave buyer a discount in exchange for clause that penalized early cancellation, noting the buyer enjoys a stable source of supply and a favorable price for the length of the contract).

Similarly, there is no support for the finding that a significant number of customers remain on the basic plan.<sup>42</sup> Dec. at 90, FF 25. The undisputed evidence demonstrates that the majority of customers have the benefit of discount plans.<sup>43</sup> For example, the evidence submitted by AirTouch demonstrated that over 60% of its customers in the Los Angeles market had shifted to discount plans.<sup>44</sup> Today almost 80% of AirTouch's customers in that market have shifted to discount plans. In any event, the Decision ignores the evidence of a steady decline in the price for service.<sup>45</sup>

---

42 The claim that not all customers receive service under the optimal service plan is irrelevant. Dec. at 40. As the Decision notes, the customer "selects" the plan. Dec. at 48. There is no evidence that customers are incapable of determining whether a specified plan meets their needs.

43 CCAC at 21; CCAC Reply at 3-5; GTE-M at 23; McCaw at 9-10; BACTC at 17; LACTC at 10.

44 PacTel/AirTouch at 16.

45 CCAC OC at 20-24.

Finally, the Commission resorts to the claim that similar prices between cellular carriers "raises questions." Dec. at 43. These alleged "questions" do not constitute evidence. There is no evidence in the record to establish that similar prices are due to a lack of competition. Such an assumption is contrary to the Commission's prior findings that similar prices can be expected in a competitive environment. D.90-06-025 at 49-50. ("[i]n a fully competitive market, the prices of individual firms track closely and may even be identical.") D.90-06-025 at 49.

As further evidence of a lack of price competition, the Decision cites "the pattern of interlocking ownership among major carriers." Dec. at 26. This claim is, on its face, sheer speculation. The Commission "believe[s]" the ownership interests are "evidence" because the carriers "might" share price information which "might" blunt competition. Dec. at 26. The Decision can point to no evidence in the record to support this conjecture. In fact, once again the Commission denies responsibility for a regulatory framework it approved. This Commission, the Department of Justice and the Federal Communications Commission have repeatedly examined such relationships, yet they have never concluded that such arrangements lessen competition.<sup>46</sup>

---

46 See In the Matter of Application of MMM Holdings to Acquire LACTC via LIN, FCC Opinion, 1989 FCC Lexis 2466 (Nov. 6, 1989) (statement of Commissioner Barrett); D.89-12-056, 34 CPUC 198 (1989); D.86-02-059, 20 CPUC 585, 592 (1986); In the Matter of Capitalization Plan of Pacific Telesis, FCC Memorandum Opinion and Order, AAD 5-1213, Mimeo (continued...)

C. The Decision disregards critical evidence of competition.

The Commission previously recognized, that "price alone is not the only measure of effective competition. Effective competition can also be provided by carriers which offer superior service." D.93-02-010 (mimeo) at 43. Yet the Decision is devoid of any reference to the abundant evidence of service competition reflected by the cellular carriers' enhancements to the infrastructure, such as system expansion and increased geographic coverage, and new product innovations, such as voice mail and automatic call forwarding.<sup>47</sup> Similarly, the Decision is silent regarding the undisputed evidence of the high level of customer satisfaction despite the Commission's acknowledgment that "customer satisfaction is an important measure of the success of competition."<sup>48</sup> 24 C.P.U.C.2d at 565.

---

46(...continued)  
No. 2845 (Feb. 27, 1986); In Re Application of James F. Rill and Pacific Telesis for Consent to Transfer Control of Communications Industries, FCC Memorandum Opinion and Order, 60 R.R.2d 583, 592 (1986) (Step 2); D.87-09-028, 1987 CPUC LEXIS 197 (1987).

47 U S WEST at 16-17, 19; LACTC at 8-9, 16; LACTC Reply at 30; McCaw Reply at 13; BACTC at 7-9, 18-21; CCAC at 22; GTE-M at 23; Fresno/Contel at 8, 26-27; PacTel/AirTouch at 15-17; AirTouch Reply at 10; RSA No. 3 at 5-6.

48 U S WEST OC at 17-18; PacTel/AirTouch OC at 21; BACTC OC at 18-19.

- D. The Decision's analysis of cellular carrier's earnings as evidence of a lack of competition is based on unproven assumptions.

The Decision recognizes the difficulties inherent in using earnings as an indicator of market power: "cellular earnings data must be interpreted carefully." Dec. at 54. Yet the Decision embarks on a superficial analysis of the carriers' returns based on assumptions, rather than evidence, and concludes that the earning levels of cellular carriers are indicative of a failure to compete. Dec. at 66. The failure to analyze carriers' earnings based on a full evidentiary record has forced the Commission to default to the type of "arbitrary presumptions" the Decision purportedly seeks to avoid. Dec. at 54.

1. The claim that the carriers' returns are excessive conflicts with the Commission's prior findings and is based on inadequate analysis.

The Commission has repeatedly recognized that earnings are not an accurate measurement of competition. As the Commission observed, "[r]ates of return vary for many reasons and do not per se indicate the absence of effective competition. D.93-02-010 (mimeo) at 49; see also 24 C.P.U.C.2d at 559. "Neither pricing patterns nor profits can indicate directly whether or not cellular carriers are competing fully with each other." D.90-06-025 (mimeo) at 49. The Commission previously studied cellular carriers'

rates of return and concluded that "[t]he record [did] not substantiate that cellular carriers are earning an excessive return on their investment." D.90-06-025 (mimeo) at 105 (Conclusion of Law 20). The Commission now reverses these findings based on an inadequate evidentiary record.

The Decision concludes that market power is indicated if a cellular firm earns returns above those of firms of similar risk and that the carriers' returns are high, as compared to other regulated industries. Dec. at 49-50, 92, FF 36. The Commission makes the fundamental error of failing to compare the cellular industry to firms of comparable risk, ignoring the observation in the Decision that:

The market and technological characteristics of the cellular industry are different from those of other industries which we regulate, and we would not necessarily expect to see rates of returns which are uniform among different industries or among individual firms in the cellular industry.

Dec. at 54.

The Decision selectively relies upon an analysis of returns submitted by DRA (Dec. at FF 37), but ignores the critical evidence undercutting this study. In his Phase II Reply statement as part of the record in I.88-11-040, Professor Hausman refuted the DRA's claims about excessive carrier returns, pointing out the "extremely problematic" basis for the DRA's conclusion about excessive cellular returns. In particular, Hausman noted the inaptness of a comparison between cellular and the telecommunications industry generally, as evidenced by the far greater risk