

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of	)	PR Docket No. 94-105
	)	PR File No. 94-SP3
Petition of the People of the State of	)	
California and the Public Utilities	)	
Commission of the State of California	)	
to Retain State Regulatory Authority	)	
over Intrastate Cellular Service Rates	)	
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OPPOSITION OF THE CELLULAR CARRIERS ASSOCIATION OF  
CALIFORNIA TO THE REQUEST OF THE NATIONAL CELLULAR RESELLERS  
ASSOCIATION FOR ACCESS TO CALIFORNIA PETITION FOR STATE  
REGULATORY AUTHORITY PURSUANT TO THE  
TERMS OF A PROTECTIVE ORDER

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September 29, 1994

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**OPPOSITION OF THE CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA TO THE REQUEST OF THE NATIONAL CELLULAR RESELLERS ASSOCIATION FOR ACCESS TO CALIFORNIA PETITION FOR STATE REGULATORY AUTHORITY PURSUANT TO THE TERMS OF A PROTECTIVE ORDER**

Summary

Pursuant to Section 1.45 of the Rules of Practice and Procedure, 47 C.F.R. §1.45, of the Federal Communications Commission ("FCC"), the Cellular Carriers Association of California ("CCAC") hereby responds to the Request For Access To California Petition For State Regulatory Authority Pursuant To The Terms Of A Protective Order filed by the National Cellular Resellers Association (NCRA) on September 19, 1994.

The CCAC is a trade association which represents the major cellular license holders in California in regulatory and

legislative matters. This function has lead to CCAC's direct involvement in the state regulatory proceedings<sup>1</sup> which authorized the filing of the Petition to retain rate regulatory authority filed by the Public Utilities Commission of the State of California (CPUC). In addition, on September 19, 1994 the CCAC filed a response opposing the CPUC's Petition as well as a motion to reject said Petition, or alternatively, to reject the redacted information furnished with said Petition.<sup>2</sup>

The CCAC strongly opposes the Request of NCRA for the following reasons: 1) The information which the CPUC submitted under seal, and which was not produced in the CPUC's recent submission of additional material, is highly confidential and proprietary in nature; and 2) the CCAC has already provided to the FCC aggregated information regarding the statewide California cellular market which is sufficient to enable the Commission to address the factual issues raised by the CPUC Petition without compromising the highly sensitive subscriber and network capacity information provided by the cellular carriers to the CPUC and apparently included in the CPUC's Petition to the FCC.

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<sup>1</sup> Public Utilities Commission of the State of California, Investigation 93-12-007.

<sup>2</sup> Response of the Cellular Carriers Association of California Opposing the Petition of the Public Utilities Commission of the State of California to Retain State Regulatory Authority over Intrastate Cellular Service Rates, filed September 19, 1994 in FCC PR File No. 94-SP3, redesignated PR Docket No. 94-105.

I. The Remaining Redacted Information in the CPUC Petition Is Proprietary And Commercially Sensitive And Should Not Be Disclosed In This Proceeding

The CPUC originally filed its Petition to retain rate regulatory authority with the FCC in a highly redacted form. Numerous appendices and textual references were entirely deleted from the publicly filed version of the Petition.<sup>3</sup> Subsequently, by means of a written ex parte communication, the CPUC provided the FCC staff with eleven pages of revised text which contained previously redacted information as well as the full contents of Appendices I and J.<sup>4</sup> The material contained in Appendices I and J, as well as the textual references to said material, was clearly never entitled to confidential status, although CCAC and the other respondents to the CPUC petition had no way to be certain of that fact until the CPUC publicly disclosed the contents of the appendices. These appendices are merely a tabulation of cellular rate information taken from cellular carrier tariffs on file in the public records of the CPUC and simple calculations using such rate information. Information available in public files is clearly not entitled to any

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<sup>3</sup> Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain State Regulatory Authority over Intrastate Cellular Service Rates, filed August 9, 1994 in FCC GN Docket No. 93-252, redesignated PR File No. 94-SP3 and subsequently redesignated PR Docket No. 94-105. The CPUC also filed a sealed version of its Petition with the FCC at the same time which contained all the information redacted in the publicly filed version.

<sup>4</sup> See Letter of Ellen LeVine to William F. Caton, dated September 13, 1994 and attachments.

confidential status.

However, the same cannot be said for that information which remains redacted, and available only to the FCC through the sealed Petition filed by the CPUC. The letter of Ms. LeVine to Regina Harrison of the FCC Private Radio Bureau dated September 13, 1994<sup>5</sup> indicates that the remaining data comes from two sources: 1) confidential data responses provided by the cellular carriers in response to a request of the CPUC, and 2) information obtained by the CPUC from employees of the California Attorney General. Neither category of information should be made public in the proceeding before the FCC, irrespective of any proposal to use traditional non-disclosure agreements.

The non-public information provided to the CPUC by the cellular carriers was provided in response to two Administrative Law Judge Rulings which directed cellular carriers to provide additional information for the record in the CPUC's generic investigation into the regulation of the cellular industry.<sup>6</sup>

The information sought in these two rulings involved two general categories of information--the number of subscribers

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<sup>5</sup> Attached to the LeVine-Caton letter of September 13, 1994 cited previously.

<sup>6</sup> See Administrative Law Judge's Ruling Directing Parties to Provide Supplemental Information, CPUC Investigation (I.)93-12-007, April 11, 1994; and Administrative Law Judge's Ruling Directing Parties to Provide Further Supplemental Information, (I.)93-12-007, April 22, 1994, attached hereto as Appendices A and B, respectively.

to the various retail and wholesale rate plans, and the current levels of capacity utilization of the carriers' cell sites throughout their networks. For example, the April 11th ALJ ruling requests the total number of "units" or subscribers on all types of rate plans as well as an indication of whether such subscribers are retail or wholesale customers.<sup>7</sup> The April 22nd ALJ Ruling requires carriers to disclose the capacity utilization of each of their cell sites by reference to a standardized scale of high, medium or low capacity utilization rates.<sup>8</sup>

All of this information is of significant commercial and financial value to the competitors of a cellular carrier, and as such it is entitled to confidential, proprietary status. See Gulf & Western Industries, Inc. v. U.S., 615 F.2d 527 (D.C. Cir., 1979).<sup>9</sup> The value of such information is immediately obvious. If a competitor were to learn which rate plans were most successful, i.e. which had the most subscribers, it would provide a blueprint for offering successful competing rate plans. Similarly, if a competitor

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<sup>7</sup> April 11th ALJ Ruling, supra, at p. 4.

<sup>8</sup> April 22nd ALJ Ruling, supra, at pp. 1-2.

<sup>9</sup> While NCRA has not made a proper Freedom of Information Act request by virtue of its request, the Gulf & Western case is relevant here as it sets out the applicable standard for defining commercially sensitive confidential information. Where the information is "commercial or financial", obtained from someone outside government, and is "of the type that, if released to the public, would cause substantial harm to the competitive position of the person from whom the information was obtained" it is entitled to be protected. Gulf & Western, supra at 530.

were to learn which cell sites in a competing network were most congested it would indicate both a likely area for seeking additional customers and a potential target for advertising campaigns claiming higher service quality.

Neither CCAC nor the California cellular carriers are aware of the content of the information obtained by the CPUC from the office of the Attorney General, but, as explained in the CCAC motion to reject the CPUC petition or reject the redacted information<sup>10</sup>, the release of such material to the CPUC was itself violative of California law and any subsequent indirect disclosure in the FCC proceedings is equally inappropriate. The CPUC described this information in its request for confidential treatment as, "materials provided to the CPUC by the Office of the Attorney General of the State of California gathered in the course of an ongoing investigation of the cellular industry within California to determine compliance with antitrust laws." The CPUC relied upon California Government Code section 11181 as authority to justify this disclosure of confidential investigative files. However, Section 11181(f) provides that, in connection with investigations and actions, the department may:

Divulge evidence of unlawful activity  
discovered . . . from records or  
testimony not otherwise privileged or  
confidential, to the Attorney General or

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<sup>10</sup> Motion of the Cellular Carriers Association of California to Reject Petition Or, Alternatively, Reject Redacted Information, PR File No. 94-SP3, PR Docket No. 94-105, filed September 19, 1994, pp. 6-12.

to any prosecuting attorney who has a responsibility for investigating the unlawful activity discovered, or to any governmental agency responsible for enforcing laws related to the unlawful activity discovered.

This provision does not apply to a disclosure to the CPUC. The CPUC is not charged with enforcing the antitrust laws. A state regulatory agency does not have jurisdiction to determine violations of the antitrust laws. See Northern California Power Agency v. Public Utilities Commission, 5 Cal. 3d 370, 377 (1971), citing Northern Natural Gas Company v. Federal Power Comm'n, 399 F.2d 953 (D.C. Cir. 1968). The CPUC's consideration of antitrust issues is limited to carrying out its legislative mandate to determine whether the public convenience and necessity (including public interest considerations) are being met by a proposed (or ongoing) utility action, such as a rate increase. This does not equate to enforcement of laws related to antitrust violations. **A** the CPUC does not have enforcement authority over antitrust violations, the Attorney General did not have the requisite authority under California Code Section 11181 to release the information it had obtained in its investigation to CPUC. The Attorney General's violation of the California Code has been compounded through CPUC's release of the information to the FCC, especially as such release carries the potential of full public disclosure.

II. The FCC Has Before It A Sufficient Record to Rule Upon The CPUC Petition Without Requiring The Release Of Confidential Carrier Information

It is important for the FCC to consider the purpose for which the CPUC has offered the large quantity of redacted material in this proceeding. The CPUC must provide evidence or information to substantiate its assertion that market conditions in California fail to protect cellular customers from unfair or unreasonable rates.<sup>11</sup> While the CCAC cannot know what is in all the redacted portions of the CPUC Petition, it appears the CPUC has chosen to submit evidence to the FCC non-public confidential information which is highly confidential, including the number of subscribers on each rate plan and the capacity utilization rate of each cell site. As explained above, disclosure of this information would provide competing carriers with a substantial and entirely unfair marketing advantage.

It is critical for the Commission to understand that it need not risk procedural error in disclosing such confidential information because the existing public record in this proceeding is sufficient to enable the Commission to make findings on the crucial issues of the extent of cellular competition and the reasonableness of cellular rates in California. The CCAC has filed a Response in this proceeding

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<sup>11</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6006(b)(2)(A), § 6002(b)(2)(B), 107 Stat. 312, 392 (1993); 47 U.S.C. 332(c)(3).

primarily to ensure that the Commission will have available to it relevant and non-confidential information on cellular rates and subscriber trends. If the FCC can examine cellular rate trends and subscriber trends in California on an aggregated, state-wide basis, it can thereby avoid compromising confidential proprietary information pertaining to individual cellular carriers. CCAC believes that the FCC should take the prudent course in this regard and avoid the risk that its decision on the California petition could be tainted with procedural error as a result of the failure to give sufficient protection to carriers' confidential information.

The decision to avoid a fight over releasing confidential information is made a great deal easier because the FCC has sufficient rate and subscriber information in its record already. CCAC has provided in its Response a study of the California cellular market which contains aggregate information on cellular rate trends throughout the state. This study depicts rate trends statewide for the most cost effective rates widely available to all customers. The rates are broken down into large, medium and small markets and trends are calculated for a range of typical call usage patterns. This analysis covers the years 1990 to 1994. In addition, CCAC has provided information over the same time period covering the number of customers in large, medium and small markets who have left the so-called "basic" rate plans

and subscribed to a discounted plan.<sup>12</sup>

The CCAC has also addressed the CPUC's attempted use of capacity utilization data to "prove" that cellular rates are unreasonable. The critique of the CPUC Petition by Charles River Associates, Appendix A to the Response of CCAC, thoroughly debunks the notion that excess capacity in a rapidly-growing, capital-intensive industry is evidence of an abuse of market power.<sup>13</sup> On the contrary, some excess capacity will always exist, and it is absolutely foolish to expect that the construction of 40 distinct cellular networks within California will all expand at precisely the right rate to exactly match demand at all times. The capacity utilization information submitted under seal by the CPUC can do tremendous competitive damage to individual carriers, but it can add very little, if anything, to the Commission's analysis of competition and rates within the California market.

A further indication of the lack of need to confront the difficult issues raised by the disclosure of this sensitive confidential information is the fact that not one party, including NCRA, required the confidential information submitted under seal by the CPUC to prepare their response to the CPUC's initial Petition. NCRA did not seek access to the

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<sup>12</sup> See Appendix B, Response of CCAC, supra, charts D, E, F, G, H, and I.

<sup>13</sup> Response of CCAC, Appendix A, pp. 27-31.

redacted information until the very day it filed its Response. Nor did NCRA claim in its response that lack of access to this information has prejudiced its ability to respond to the CPUC.<sup>14</sup>

CCAC is seriously concerned that NCRA's motion is an attempt to delay and obstruct the Commission's consideration of the CPUC Petition and the Responses thereto by bringing additional information into the record, which will in turn provide NCRA with justification for seeking leave to file another set of responsive pleadings. The Commission should not countenance additional delay in this proceeding. The Commission's ruling<sup>15</sup> granting a two week extension of time for the CPUC and other parties to reply to the Responses in this Docket indicated that any comment on the additional materials produced by the CPUC on September 13, 1994 should be filed at the same time as reply comments are filed. This date, October 19, 1994, should represent the conclusion of the evidence-gathering phase of this proceeding and the submission

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<sup>14</sup> NCRA merely claimed in a footnote that it "reserved the right" to file additional comments after obtaining access to the sealed material, without any justification for claiming such a right under FCC procedures. Altruistically, NCRA claimed that it was filing its motion to unseal the redacted material "for the benefit of participating parties." None of this constitutes a showing of need by NCRA or any other party sufficient to overcome the carriers' interest in preventing disclosure of confidential proprietary information. Comments of NCRA, filed September 19, 1994, FCC PR File No. 94-SP3.

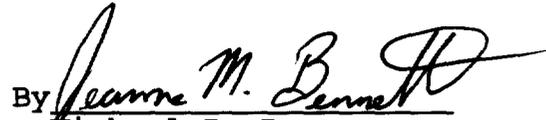
<sup>15</sup> Order Extending Time And Permitting Replies To Revised Petition, adopted and released September 26, 1994, FCC PR Docket No. 94-105.

of the case to the FCC for decision.

WHEREFORE, CCAC respectfully requests that the Commission deny the NCRA's Request for the reasons described above.

Respectfully submitted,

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September 29, 1994  
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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's  
Own Motion into Mobile Telephone  
Service and Wireless Communications. )

I.93-12-007

**ADMINISTRATIVE LAW JUDGE'S RULING**  
**DIRECTING PARTIES TO PROVIDE SUPPLEMENTAL INFORMATION**

As directed by the Commission's Order Instituting Investigation (OII) in the above-captioned matter, parties provided initial comments on February 25, 1994 and reply comments on March 18, 1994.

Regarding the scheduling of further action following receipt of the filed comments, the OII states that:

"[T]he assigned Commissioner may work with the assigned administrative law judge to identify issues in this OII which should be dealt with on a separate and expedited track for the purpose of meeting [Federal Communications Commission] FCC filing requirements ... for the purpose of retaining [CPUC] authority over the regulation of the cellular industry." (Page 35.)

Accordingly, the schedule for this proceeding shall be divided into two phases. The initial phase shall consider whether current market conditions in the mobile telephone industry protect subscribers adequately from unjust, unreasonable, or discriminatory rates. The Commission shall issue an interim opinion addressing this question on an expedited basis in time to meet the FCC filing deadline for state agency petitions to retain regulation over the cellular industry after August 10, 1994.

Depending on our findings as to industry competitiveness and the need to petition the FCC for continued regulatory jurisdiction over the cellular industry, further action will be taken to address the "Proposed Policies Governing Mobile Telephone Services" as enumerated in Appendix B of the OII. A separate

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ruling will be issued addressing this second phase of the proceeding.

The OII further states:

"Upon receipt of comments, for those issues involving disputed factual matters, the Commission may conduct evidentiary hearings. The Commission may issue interim rulings or decisions to guide parties for further comments or to dispose of matters ready for early resolution." (Page 35.)

A number of the parties contend that evidentiary hearings are required before the Commission can issue a decision in this proceeding. Other parties contend that evidentiary hearings are not needed and that a Commission decision can be issued based upon the comments which have been filed.

For purposes of at least the initial phase of the proceeding limited to industry competitiveness and the need for continuation of state regulation of cellular carriers, it is not expected that hearings will be required. While the comments reflect a range of divergent opinions, they generally provide a responsive framework upon which the Commission can prepare an interim opinion. Yet, certain additional information is needed regarding whether competition can be relied upon to protect consumers from unjust or discriminatory pricing.

Accordingly, this interim ruling provides guidance regarding certain additional information needed to examine industry competitiveness. The additional information sought is directed to the limited parties as identified below. The parties identified are to provide the requested information by April 29, 1994.

**IT IS RULED that:**

1. The following information shall be provided by the parties as identified below no later than April 29, 1994:

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**A. Wholesale Price Competition**

Appendix A - Question 4 of the OII asked parties to comment on this order's characterization of competition in the mobile telephone market at the wholesale level. While various parties addressed retail prices, additional information is required to assess wholesale competition.

Each of the cellular carriers identified below are hereby directed to provide the following information with respect to their operation in the listed Metropolitan Statistical Areas (MSA) and Regional Statistical Areas (RSA). A set of blank data response forms is attached hereto to facilitate uniform preparation of responses.

Cellular carriers that are required to respond to the data request:

1. Los Angeles MSA (Los Angeles, Orange, Riverside, and San Bernardino Counties):  
  
Los Angeles Cellular Telephone Company  
Los Angeles SMSA
2. Bay Area MSA (Alameda, Contra Costa, Marin, San Francisco, San Mateo, and Santa Clara Counties):  
  
Bay Area Cellular Telephone Company  
GTE Mobilnet Limited Partnership
3. Sacramento MSA (Placer, Sacramento, and Yolo Counties):  
  
Sacramento Cellular Telephone Company  
Sacramento Valley Ltd Partnership
4. San Diego MSA (San Diego County):  
  
U.S. West Cellular  
AirTouch Cellular
5. Santa Barbara MSA (Santa Barbara County):  
  
Santa Barbara Cellular  
GTE Mobilnet Ltd Partnership

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6. Fresno MSA (Fresno County)  
Fresno Cellular Telephone Company  
Fresno MSA Ltd. Partnership
7. California 2 (RSA 2) (Modoc, Lassen, and Plumas Counties):  
California 2 Cellular Corporation  
Modoc RSA Ltd Partnership)
8. California 7 (RSA 7) (Imperial County):  
Century El Centro Cellular Corporation  
Contel Cellular, Inc.

Questions:

1. Provide total number of activated wholesale cellular telephone numbers (units) at the end of each year for the last five years, inclusive for 1989 - 1993. Breakdown wholesale units into facilities-based retail operations, resellers, master volume users, and governmental agencies. For each of the above classifications provide total number of units based on the following usage categories in minutes of use: 0 - 60, 61 - 120, 121 - 480.

2. Provide number of wholesale units on "Basic Plan," or equivalent service plan, for the last five years (1989-1993, inclusive), broken down into facilities-based operations and resellers. Show billed rate for each classification in dollar(s) per minutes of usage based on 60, 120, and 480 minutes of use per month. In addition, separately identify the access charge for each classification. Assume minutes of use are divided 80% peak and 20% off-peak use.

3. Provide total number of units on each plan other than basic or its equivalent for the last five years (1989-1993, inclusive). Separately report contractual plans that require customers to stay on the same service plan for one or more years. Units should be broken down into facilities-based operations, resellers, master volume users, and governmental agencies. Show

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monthly customer bill in dollar(s) per minutes of usage based on 60, 120, and 480 minutes of use per month. In addition, separately identify the access charge for each classification. Assume minutes of use are equally divided between 80% peak and 20% off-peak use.

Documents, workpapers, reports, or any other source of information on which responses are based may be required by the Commission staff to clarify or substantiate responses.

**B. Cellular Carriers Association of California Rate Study**

The Cellular Carriers Association of California (CCAC) presented a rate comparison study on page 20 of their initial comments. CCAC shall provide the following additional information with respect to the rate study.

1. Identify by name the cellular carriers included in the study. Where different carriers were included in some years but not others, so identify.
2. Provide for each of the cellular carriers included in the study the raw data used to compute the average cost per minute of usage for each "optimal rate plan" included in the study. The raw data should be provided in computer-readable format.
3. Were the terms offered by each carrier under its "optimal rate plan" consistent from year to year of the study? To the extent the answer is "no," please indicate by carrier and year where the terms of the plan changed and what those changes were.
4. Describe what terms and conditions generally were required to receive service under the "optimal rate plans" with respect to minimum duration, minimum usage, or penalties for early cancellation.
5. Of the subscribers under discounted rate plans in Charts H-J, for each year and subcategory of size and usage identified:
  - (a) What percentage of subscribers received service under the "optimal plan" as identified in Charts E-G?
  - (b) What was the average cost per minute of usage for customers under discounted rate

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plans who did not receive service under the "optimal" plan?

- (c) What was the average cost per minute of usage for customers under basic undiscounted rate plans?

C. Nationwide Cellular Services, Inc. Study

Nationwide provided as its comments two papers authored by Thomas W. Hazlett, Ph.D (Hazlett). The second of the two papers is a rebuttal to a critique of the first Hazlett paper. The critique by John Haring (Haring) and Charles Jackson (Jackson), "Errors in Hazlett's Analysis of Cellular Rents," is referenced, but not provided in Nationwide's comments. In order to provide a complete context for understanding the Hazlett papers, Nationwide is directed to provide a copy of the Haring and Jackson paper.

Nationwide should also provide the following:

1. Congressional Budget Office Report "Auctioning Radio Spectrum Licenses" (March 1992) referenced in footnote 13 of the Hazlett paper.
2. 1992 FCC Study prepared by David Reed: "Putting it all Together: The Cost Structure of Personal Communications Services" referenced in footnote 79, page 36 of Hazlett's second paper.
3. 1992 Kwerel & Williams Study referenced in footnote 80 of the Hazlett paper.

Dated April 11, 1994, in San Francisco, California.

/s/ THOMAS R. PULSIFER  
Thomas R. Pulsifer  
Administrative Law Judge

Number of Units												
Retail Operations			Resellers			MVU*			Govn't Use			
U	0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480
9												
0												
11												
12												
13												
sic Plan or Equivalent												
Number of Units												
Retail Operations			Resellers									
U	0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480						
89												
90												
91												
92												
93												

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J	\$/MOU			Access Charge	Resellers			Access Charge									
	Retail Operations																
9	60	120	480		60	120	480										
0																	
1																	
2																	
3																	

If access charges vary with minutes of usage, show amounts.

Name of plan:																
Number of Units																
Retail Operations			Resellers			MVU*			Gov't Use							
0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480					
89																
90																
91																
92																
93																
\$/MOU																
Retail Operations			Access	Resellers			Access	MVU*			Access	Gov't Use			Access	
60	120	480	Charge	60	120	480	Charge	60	120	480	Charge	60	120	480	Charge	
89																
90																
91																
92																
93																
Make as many copies of this form as needed to include all plans.																

Contractual Plans														
Required years of contract														
	1													
Number of units														
Retail Operations														
			Resellers			MVU*			Govn't Use					
0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480	0 - 60	61 - 120	121 - 480
989														
990														
991														
992														
993														
MOU														
Required years of contract														
	1													
\$MOU														
Retail Operations														
			Access Resellers			Access MVU*			Access Govn't Use			Access		
60	120	480	Charge	60	120	480	Charge	60	120	480	Charge	60	120	480
989														
990														
991														
992														
993														