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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20026

Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services	)	CC Docket No. 92-115
Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-common Carrier Services	)	CC Docket No. 94-46 RM 8367
Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Mobile Service	)	CC Docket No. 93-116

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REPLY COMMENTS OF BELLSOUTH IN SUPPORT OF SOUTHWESTERN BELL MOBILE SYSTEMS, INC.'S PETITION FOR RECONSIDERATION

BellSouth Corporation and BellSouth Enterprises, Inc. (collectively "BellSouth"), by their attorneys, respectfully submit reply comments in support of Southwestern Bell Mobile Systems, Inc.'s ("SWB") Petition for Reconsideration and Clarification ("Petition") of *Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services*, CC Docket No. 92-115, *Report and Order*, 59 Fed. Reg. 59502 (1994) ("*Report and Order*"). Specifically, BellSouth agrees with SWB that there should not be an absolute prohibition on LEC resale of the service of its cellular affiliate.[1]

Section 22.903 uniquely precludes Regional Bell Operating Companies ("BOCs") from engaging in the provision of cellular service except through a separate subsidiary,

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[1] Although SWB's Petition addressed a variety of issues, BellSouth only addresses the resale issue.

while other entities may provide commercial mobile radio services ("CMRS"), such as PCS, in a unified business structure.[2] The rule states that BOCs "may engage in the provision of cellular service only in accordance with the conditions in this section."[3] Under these conditions, "BOCs must not engage in the sale or promotion of cellular service on behalf of the separate corporation."[4] The rule is ambiguous, however, because it does not make clear whether resale by a Bell Company's LEC constitutes the "provision" of cellular service. As a result, it is unclear whether the new rules require a Bell cellular affiliate to refuse to allow resale of its service by a sister telephone company or whether the rules forbid a cellular affiliate from restricting resale by its LEC affiliate.[5]

Although BellSouth has urged both the elimination or, alternatively, the clarification of the rule, BellSouth urges the Commission to eliminate it in this proceeding because it contravenes not only the regulatory parity for like services mandated by Congress, but also the Commission's well-established policy of treating similarly situated licensees in the same manner.[6] Additionally, the underlying rationale for the establishment of the separate subsidiary restriction no longer exists. At the time the restriction

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2 *See* 47 C.F.R. § 22.903.

3 47 C.F.R. § 22.903.

4 47 C.F.R. § 22.903(e).

5 *Compare* 47 C.F.R. § 22.903(e) *with* § 22.901(e) ("Each cellular system licensee must permit unrestricted resale of its service. . . .").

6 *See* BellSouth Reply Comments, GN Docket No. 93-252, at 4-6 (July 11, 1994); BellSouth Comments on Further Reconsideration, GEN Docket No. 90-314, at 39-40 (Aug. 30, 1994); BellSouth Comments, CC Docket No. 94-54, at 25-27 (Sept. 12, 1994). *See also Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965); *Public Media Center v. FCC*, 587 F.2d 1322, 1331 (D.C. Cir. 1978).

was adopted in 1982, it was designed to protect against improper cross-subsidization that could result in anti-competitive conduct in the infant cellular marketplace, as well as possible interconnection abuses.[7] CMRS, and the cellular industry in general, now are a competitive market,[8] however, so the potential for such abuses is inconsequential. LEC interconnection requirements are well established, and there are other mechanisms to protect against interconnection abuses.[9] In this regard, the Commission has recognized that current regulations are sufficient to protect against anti-competitive practices such that no new separate subsidiary requirements were imposed upon BOC LEC participation in PCS.[10] Accordingly, BellSouth suggests that the separate subsidiary rule be eliminated.

If the rule is retained, however, BellSouth submits that it does not preclude LEC resale of its cellular affiliate' services. The original purpose of the rule was to bar LECs

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7 *Cellular Communications Systems, Memorandum Opinion and Order on Reconsideration*, 89 FCC 2d 58, 78 (1982) (subsequent history omitted).

8 *See Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd. 1411, 1467 (1994) ("*CMRS Second Report*"); *see also* BellSouth Comments on Further Reconsideration, GN Docket No. 90-314, Exhibit I, Affidavit of Richard P. Rozek, Vice President, National Economics Research Associates, Inc., at 8 (Aug. 30, 1994).

9 The Commission has made clear that the interconnection obligations currently imposed upon LECs with regard to Part 22 licensees will apply to all CMRS licensees. *CMRS Second Report*, 9 FCC Rcd. at 1420, 1497-1501.

10 *See Amendment of the Commission's Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, *Second Report and Order*, 8 FCC Rcd. 7700, 7751 (1993).

from participating in the provision of facilities-based cellular service, not resale.[11] The Commission even contemplated separate subsidiaries allowing affiliated entities to resell their cellular service, provided non-affiliated entities could obtain the service for resale on the same terms and conditions as affiliated entities.[12] A LEC reselling either its affiliate's cellular service or another company's cellular service is not engaged in facilities-based cellular service, however. Accordingly, if the rule is retained, the Commission should make clear that Section 22.903 does not in any way limit the ability of LECs to resell cellular service.[13]

The Commission does not have to modify its existing cellular separation rule to make clear that LECs may resell cellular service. The Commission merely needs to interpret the rule consistent with its underlying purpose. It is clear from Section 22.903, former Section 22.901, and the decision adopting Section 22.901, that the purpose of the separate subsidiary rule is to ensure that LECs do not have an opportunity to cross-subsidize cellular services.[14] Thus, Section 22.903(e) precludes a LEC from selling or

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11 *See Cellular Communications Systems,* 86 FCC 2d 469, 487 n.40 (1981) ("We are requiring all wireline licensees *to operate cellular systems* through a separate subsidiary."), *modified,* 89 FCC 2d at 78 (limiting separate subsidiary requirement to AT&T).

12 *See Cellular Communications Systems,* 86 FCC 2d at 511; *see also* Comments of AT&T, CC Docket No. 79-318, at 65-66 (May 1, 1980).

13 As BellSouth has previously indicated, clarifying that Bell Company LECs may resell cellular service could increase the revenues paid for new PCS licenses substantially, by as much as $82 million. *See* BellSouth Reply Comments, CC Docket No. 94-54, Affidavit of Richard P. Rozek, Vice President, National Economic Research Associates, Inc. (Oct. 13, 1994).

14 *See* 47 C.F.R. §§ 22.903 and former 22.901; *see also Cellular Communications Systems,* 86 FCC 2d 469, 493-95(1981), *modified,* 89 FCC 2d 58, 78-79, *further*

(continued...)

promoting cellular service on behalf of its cellular affiliate, as its agent.[15] Resale, however, is not the same as acting as an agent. An agent acts on behalf of the cellular carrier, while a reseller purchases service as an independent actor and then sells it to customers on its *own* behalf. The LEC would obtain service for resale on exactly the same terms as any other reseller.[16] The cellular service is "provided" by the cellular company to the LEC and other resellers, who in turn offer that service to others independently of the cellular company. Accordingly, there is no opportunity for the LEC to cross-subsidize its cellular affiliate.

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14 (...continued)
modified, 90 FCC 2d 571 (1982).

15 To ensure that LECs may resell the service of their cellular affiliate, SWB requests that the Commission revise the rule to read: BOCs must not engage in the sale or promotion of cellular service on behalf of the separate corporation *except on an arms length basis*. Petition at 8. BellSouth supports the revision of the rule in this manner.

16 Just as the cellular subsidiary must obtain services from its affiliated LEC on a non-discriminatory, arm's length basis, *see* 47 C.F.R. § 22.901(d)(1), any cellular service provided by the cellular subsidiary to the LEC for resale would have to be on the same terms as are available to other resellers.

CONCLUSION

For the foregoing reasons, BellSouth urges the Commission to eliminate the separate subsidiary rule or, at a minimum, clarify that Bell Companies may resell the cellular service of their affiliates, as suggested by SWB.

Respectfully submitted,

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Certificate of Service

I, Mary Jane Adcock, hereby certify that on this 30th day of January, 1995, a copy of the foregoing "Reply Comments in Support of Southwestern Bell Mobile Systems' Petition for Reconsideration and Clarification" was mailed via first class United States mail, postage prepaid, to the following:

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