

conversations and that additional regulatory oversight or controls are not necessary at this time.

Agents

Commissions paid to agents of cellular carriers have been a major issue in resale complaint proceedings before us. We asked whether such complaints could be minimized if we required agents to publish the commission rates they received from carriers and resellers and also if such a requirement would result in lower retail rates.

U S West represents that agents are an effective addition to the carriers' sales network and have proven to be an important distribution channel for cellular service. It also represents that if agents are required to publish the commissions they receive from wholesalers and resellers, cellular rates will increase because the cellular providers will compete for the best agents. Other carriers such as Fresno Metropolitan Statistical Areas Limited Partnership (Fresno) feel that such a proposal will only drive up a carrier's marketing expense.

CRA represents that commission payments must be eliminated or reduced to no more than \$50 per activated customer, consistent with PacTel's and GTEM's commission payments proposed in their respective certificate proceedings in 1984.

The focus of CRA's position regarding commissions is that the carriers are using them to subsidize the acquisition of new customers; the new customer receives an actual or effective discount on equipment from the agent, and the resellers are disadvantaged because their sources of cash flow cannot support similar payments. We address the specific facts of this argument in the Phase II discussion that follows.

The above comments demonstrate that the end users will not receive any benefit, and may even be adversely affected, if agents are required to publish the commission rates they receive

from carriers and resellers. Absent any end user benefit, agents should not be required to publish their commission rates.

**Additional Ratemaking
and Regulatory Issues**

The issues identified in this category are directed towards whether a fair and equal treatment doctrine exists in the cellular industry. Components of this concern include whether: wholesale rates are set to discriminate against bulk-rate users, the rural cellular market regulatory treatment should mirror the metropolitan market regulatory treatment, the wireline carriers have a head start advantage over nonwireline carriers, the casual cellular users are being overlooked for regular cellular users, and tariffs should reflect roaming costs.

Bulk Rates vs. Wholesale Rates

Currently, the facilities-based carriers' bulk rate is set at the same rate or at a slightly higher rate than its wholesale rate. The bulk rate refers to the rate that large users pay to facilities-based carriers for service used for the large users' own business purposes and the wholesale rate refers to the rate that resellers pay to the facilities-based carriers for service.

CRA argues that the nominal difference between the bulk rate and the wholesale rate discriminates against the resellers because the facilities-based carrier does not incur the costs of service that the resellers must incur such as credit checks, billing, collection, bad debt risk, and marketing. Absent a wider gap between the bulk and wholesale rate, CRA argues that the facilities-based carrier is able to use wholesale profits to compete on the retail level with the resellers and preclude the resellers from competing profitably for the large-user market.

Roseville Telephone Company (Roseville) concurs with CRA and also asserts that such a practice discriminates against both the reseller and the end user because such pricing limits the

number of service providers in the marketplace and minimizes carrier choice.

GTEM and U S West, whose bulk rates are equal to their respective wholesale rates, dispute CRA's and Roseville's assertions. Similar to other facilities-based carriers, GTEM's and U S West's bulk rate is equal to their wholesale rate because their cost of service to the bulk rate and wholesale user is identical. Both rates attract large users who enable the facilities-based carrier to gain economies of scale not available from the small customer. Without setting the bulk rates at the same level as its wholesale rates, the facilities-based carriers believe that they would be discriminating against either the bulk rate or wholesale user.

U S West also justifies its identical rates to bulk and wholesale customers on the basis that it costs more to provide service to individual small users and the economies of scale gained from large users should not be used to subsidize rates to the small users.

We concur with U S West that cellular users should not be provided service below the facilities-based carriers' cost to provide service.

Because there are substantial fixed costs associated with the provision of service, U S West does not believe that it is economical to cultivate casual users, or recreational users at this time. However, it is exploring alternative rate structures for these potential customers in its cellular markets outside California. We concur that the cellular industry should be given flexibility to attract casual users so long as such flexibility is cost-effective.

Although CRA does not dispute that the facilities-based carriers' cost are equal and/or similar for providing bulk rate and wholesale rate service, it argues that the facilities-based

carriers' pricing policy precludes resellers from participating in the large-user market.

CRA may be correct. However, as LA Cellular points out, whether a facilities-based carrier or a reseller is the successful solicitor of a large-user account, the carrier will enjoy economies of scale through volume usage and lower bad debt losses, marketing and billing costs, and a lower churn rate which should be passed back to the class of service providing the economies of scale. The facilities-based carrier should not be precluded from flowing through economies of scale to their bulk-rate users.

As shown by interested parties' comments, there are two separate issues associated with bulk-rate pricing. The first concerns the facilities-based carriers' passing through economies of scale to their bulk and wholesale customers, and the second concerns participation in the large-user market by both reseller and wholesalers. There is no dispute that bulk-rate users should benefit from the economies of scale. It is the balance between the level of economies of scale that should be passed back to the bulk-rate user and the extent of reseller competition for the large user, that must be considered. This regulatory issue is addressed in the Phase II issue of retail operations and resellers operations.

One other customer service question bears discussion here. Cellular telephony is still a utility service, and one where bills for substantial usage run into the hundreds of dollars per month. Ratepayers have a reasonable expectation that such billings will be correct, will be rendered in a timely and understandable fashion, and will be subject to a formal forum for resolving disputes. Where the customer's bill is rendered by a certificated carrier or reseller, the Commission clearly retains jurisdiction and can resolve formal or informal complaints about billing and service.

However, bulk-user tariffs may involve an intermediate party (such as an affinity group or professional association) between the utility and the ultimate customer. In that case the Commission's jurisdiction to settle disputes may be somewhat in question if an individual customer takes issue with the intermediate party's billing or service provision. Further, individual customers may be at risk for the intermediate party's handling of payments, so that moneys lost, stolen or otherwise misplaced by the intermediate party might lead to the individual customer losing service despite having paid the bill.

In this decision we are developing a procompetitive policy that offers the ability to make available margins from buying in bulk and reselling individually. We prefer to see bulk-user tariffs conditioned not by the characteristics of the purchaser, but by the particular business functions the purchaser is willing to assume (such as credit guarantees or billing). However, the ability for a customer to seek redress before the Commission is one characteristic of a reseller-provided service that is not necessarily present in a bulk-user arrangement. To date, various restrictions have limited the use of bulk-user tariffs; however, this decision may permit a substantial expansion of such service and its potential for leaving customers without recourse to the Commission.

Bulk-user tariffs are also employed by energy utilities, such as in the case of master meters. There the individual customers lose service if the landlord does not pay the bill. The disputes we have become aware of regarding these services typically involve energy diversion or the manner in which tenants pay for their share of the energy. However, tenants are entitled to order individual service from the energy utility by paying appropriate service initiation or line extension fees. Informed tenants are thus able to consider a tradeoff between potentially cheaper

master-meter service and the possibility of a dispute occurring with the landlord.

Cellular utilities breakout calls by individual telephone numbers in rendering bulk bill. Thus, disputes about the allocation of usage among customers should be minimized. The informed cellular customer is able to choose between participation in a bulk-user group and service offered directly by a certificated carrier or reseller. We have previously found that bulk-user customers need not be certificated if they do not markup the charges rendered to them by the utility. This policy permits professional or affinity groups to procure less expensive service for their members, and we are willing to continue it provided that subscribers are fully informed about their options and rights.

We will require that bulk-user tariffs contain the following consumer protection provisions, to apply when bulk services are purchased by those other than certificated resellers or carriers. The bulk user must notify individual subscribers that:

1. It is not a public utility.
2. The Commission will not resolve disputes between the bulk user and individual subscribers.
3. Small claims court and other similar forums are available to resolve disputes if necessary.
4. The service is provided under a bulk-user tariff from a utility and all service may be discontinued if the bulk-user does not pay its bills.
5. The bulk user is not permitted to markup the service billed by the utility or charge special cellular service fees of any kind.

Notice must be provided in writing to individual subscribers of the large user at the commencement of service. Also, an additional

copy of this notice must be provided at least twice a year to each individual subscriber by the bulk user.

Rural Markets

The FCC established 12 RSAs in California. Similar to the 18 metropolitan statistical areas (MSAs) which the FCC established in California, the FCC permits a duopoly structure in each RSA comprised of one nonwireline (Block A) carrier and one wireline (Block B) carrier. Although the FCC has awarded all RSA licenses in California, licensers have only recently filed applications for authority to operate.

The major issue facing the RSAs is whether they can construct and operate a cellular system on an economical basis. For the most part, the RSAs are located in remote areas with sparse populations. It is because of the remoteness and sparse population that interested parties question whether there will be sufficient demand for cellular service in the RSAs. To encourage the rapid deployment of cellular service and competitive cellular service in the RSAs, parties such as GTEM and McCaw recommend minimal regulatory oversight.

Santa Barbara has a particular concern with the development of the RSAs adjacent to its service areas, which may prove to be common to MSAs adjacent to other RSAs. Santa Barbara's wireline facilities-based carrier has been awarded the right to provide service in the adjacent RSA. Given the competitor's financial resources, technical expertise, and ability to tie the new system to its own switch in the Santa Barbara MSAs at a relatively low price, Santa Barbara's competitor will be able to establish the adjacent RSA operation in a short period of time and be able to promote service in the Santa Barbara area and adjacent RSA, well before Santa Barbara and the nonwireline RSA carrier.

McCaw recommends streamlined certification procedures for the RSAs and encourages the use of flexible and innovative arrangements between the RSAs and established cellular carriers

such as joint management and operational contracts, facility-sharing agreements, and marketing programs. However, it does not believe that any such arrangements should be subject to Commission approval.

Based on McCaw's experience with wireline facilities-based carriers, McCaw believes that the wireline facilities-based carriers will exploit the RSA market by restricting roaming arrangements to one particular carrier, such as an affiliated company. However, because we will require all facilities-based carriers to provide roaming arrangements to all cellular carriers, this should not be a problem in the future. Should any cellular carrier experience such a problem, it may file a complaint against the facilities-based carrier.

We concur with McCaw that the RSA cellular carriers should be given flexible and innovative arrangements so that the RSA cellular markets can develop rapidly. However, absent an understanding of the specific types of activity or regulatory flexibility the RSAs cellular carriers will need, we will not give the RSA cellular carriers blanket authority to enter into flexible and innovative arrangements. RSA cellular carriers are encouraged to request specific flexible and innovative arrangements when they file for their certificate of public convenience and necessity (CPCN). The request should include specific guidelines that minimal regulatory review to insure that such arrangements are not discriminatory and that the end users are not adversely affected by such arrangements.

Wireline Head Start

Responses to the question of whether wireline carriers have an unfair advantage over the nonwireline carriers are based on whether the carrier is a wireline carrier or not. The nonwireline carriers such as Santa Cruz, Cagal, and McCaw argue that the wireline carriers have an unfair advantage over the nonwireline

carriers. CRA and the wireline carriers such as Fresno, U S West, GTEM, PacTel, and GTE represent that there is no unfair advantage.

Those parties who argue that wireline cellular carriers enjoyed a head start period represent that such advantage is the result of the FCC licensing procedure.⁸ Although LA Cellular concurs with the nonwireline carriers, it recognizes that the head start advantage diminishes within four years of competition between the wireline and nonwireline carrier. It also recognizes that the FCC policy of unrestricted resale⁹ mitigates the head start advantage, but believes that the second carrier suffers from certain disadvantages, not identified in its comments.

The wireline carriers argue that the nonwireline carriers had the opportunity to operate as a reseller pending the construction of their system. U S West represents that if the nonwireline carriers took advantage of the resale opportunity, they were able to recognize and improve upon the competitive wireline carriers' weaknesses, reduce their capital expenditure needs, and engineer greater quality control. Fresno also points out that the FCC required the wireline carriers to accommodate the use of the nonwireline carriers' discrete NXX Code where technically and economically feasible; thus, nonwireline carrier customers would not have to change their telephone number when they became operational as a facilities-based carrier.

GTEM and PacTel argue further that the wireline carrier is disadvantaged by the head start, not the nonwireline carrier.

8 The FCC granted cellular permits under a lottery system. The wireline permits were issued first because the number of applicants interested in the wireline permits was smaller than the number of applicants interested in the nonwireline permits.

9 Wireline carriers were required to allow resellers, including nonwireline carriers while their system was being constructed, to resell their service on a nondiscriminatory basis.

This is because the wireline carrier, or first carrier must rely entirely on market projections of a new industry based on demographic analyses which may leave the first carrier with significant excess capacity for a period of time. The first carrier must also build a system to accommodate the resale customer base of the nonwireline carrier during the head start period causing excess investment, and degradation of service quality due to overloading incurred by the nonwireline carriers' delay in implementing its own service.

This head start issue impacts only the facilities-based carriers. As discussed above, parties do not dispute that the wireline carriers, via the FCC permit process, have been given a head start to begin cellular operations. The dispute lies in which carrier has been disadvantaged.

Both the wireline and nonwireline carriers' arguments are valid. However, there is no evidence to show that either carrier has been "unfairly" disadvantaged. The FCC foresaw the head start issue when it began its cellular licensing process. It attempted to mitigate any head start by issuing policies on resale use and discrete NXX Codes, as discussed above. Absent any finding that either the wireline or nonwireline carrier has been unfairly disadvantaged, this problem requires no regulatory remedy.

Resellers Roaming Cost

Roamer service is a service whereby a cellular customer of a carrier in one CGSA travels to another CGSA in which another cellular carrier provides cellular service to the visiting cellular customer.

Fresno explains that facilities-based carriers negotiate roamer and toll-interconnected arrangements/contracts with other cellular and long distance carriers, and that the facilities-based carriers are responsible for payment of roaming and toll-interconnection services rendered to their retail subscriber as well as a reseller's retail subscriber.

At present, the serving cellular carrier bills the facilities-based carrier operating the end user's home system who, in turn, bills the appropriate end user or reseller for roaming charges. The reseller, in turn, bills its end user, without any markup for cost incurred by the reseller.

CRA recommends that roaming tariffs reflect resellers' roaming cost such as the cost to bill and collect the charge from the end user, as well as a markup cost to compensate the reseller for roamer fraud, previously discussed.

Cellular Dynamics not only concurs with CRA's recommendation, it recommends that resellers should receive a share of the facilities-based carrier roaming revenues.

Although Santa Barbara argues that the billing function associated with roamer traffic is a financial burden, it does not agree with CRA and Cellular Dynamics that resellers should receive extra compensation for roamer service. Santa Barbara and other facilities-based carriers incur cost associated with the roamer service which resellers do not incur.

Santa Barbara spends approximately \$4,000 a month to participate in a "roamer verification scheme," the cost of which is not passed on to resellers. Since the resellers do not perform any of the special billing functions with respect to roamer traffic and do not participate in the cost of verification of roamer traffic, Santa Barbara does not recommend that resellers receive extra compensation for roamer service. McCaw concurs with Santa Barbara that facilities-based carriers incur charges with respect to managing roaming programs not borne by resellers.

Although Cellular Dynamics believes that resellers should be allowed a markup as compensation for risk associated with roamer fraud, such a procedure will not encourage cellular carriers to implement preventative controls to reduce and/or eliminate roamer fraud. If we implement a policy that will encourage cellular carriers to utilize present technology to alleviate such risk, the

end result will be lower roamer cost to the end users. Resellers and facilities-based carriers should negotiate for a PRV system in their respective roamer agreements.

Although CRA and Cellular Dynamics represent that resellers incur costs associated with roamer service, the bulk of roamer billing and collection costs is handled by the facilities-based carriers. Resellers costs associated with roamer services are incremental, as compared to the facilities-based carriers roamer costs. Resellers are not precluded from marking up their tariff rates to end users for roaming services.

Therefore, we will monitor these rates as part of the monitoring program discussed on page 60. We encourage a carrier to share with another carrier some portion of the revenues it receives as a result of roaming by a customer of the other carrier. This would be accomplished through the roamer contract negotiated between the respective carriers. Resellers will benefit as the reduced roaming charges are passed through to them through the billing carrier, allowing resellers greater latitude in marking up their roaming charges to their end users to cover the costs of billing and collecting roaming charges. For example, discounts based on time-of-day usage or the volume of roamer calls billed would be consistent with reflecting the economies that may be present in roamer usage.

Motion for a Phase I Order

Subsequent to the receipt of reply comments, on April 13, 1989, LA Cellular filed a motion for a Phase I order on undisputed issues. A response to LACTC's motion was filed by McCaw, DRA, CRA, PacBell, PacTel, and U S West.

LA Cellular filed a reply on May 4, 1989. LA Cellular revised its proposed Phase I findings of fact to incorporate minor changes proposed by the other interested parties. However, because the Phase I issues are discussed in this opinion and because the findings on those issues are consistent with LA Cellular's motion,

the motion need not be addressed further. LA Cellular's motion is denied.

PHASE II

Background

Comments and reply comments to the Phase II issues were filed by approximately 23 entities represented by 43 utilities and interested parties, including Advantage Group, as shown in Appendix C. Advantage Group, comprised of ten agents of PacTel, filed a motion to accept its late-filed comments on September 18, 1989.

Advantage Group represents that its comments should be accepted for filing because it can provide the only retail agent or dealer perspective to the investigation. Its comments were tardy because it was not aware of the September 1, 1989 deadline until after it received copies of other parties' comments in the mail.

The only opposition to Advantage Group's motion was filed by the San Jose Real Estate Board (SJREB) on September 29, 1989. SJREB opposes the motion because Advantage Group's comments were tendered for filing approximately six weeks after comments were due and three weeks after reply comments were due.¹⁰ SJREB represents that it and other parties will be disadvantaged if Advantage Group's motion and comments are accepted because there is no opportunity to respond to Advantage Group's comments.

We concur with SJREB that parties may be disadvantaged if they are not able to respond to Advantage Group's

¹⁰ Phase II comments were due on August 11, 1989 and reply comments due on September 1, 1989.

comments. However, the agent's perspective in this investigation is important. To alleviate SJREB's concern and to protect other parties' rights, Advantage Group's comments will be considered only to the extent that its comments corroborate other parties' comments. Advantage Group's comments will not be the sole consideration for setting regulatory policy in this investigation. Advantage Group's motion is granted to the extent discussed above.

The second phase of the proceeding is divided into three categories, the duopolistic wholesale market, LECs interconnection arrangements, and the reseller market.

Motion to Seal a Document

CRA filed a motion to seal Attachment D to its Phase II comments which contain Pactel's and LACTC's wholesale and retail divisions' cost-allocation policies. Since Pactel and LACTC considered the policies to be proprietary, CRA entered into a stipulated agreement to file the attachment under seal and to hold the information confidential pursuant to General Order (GO) 66-C. Copies of the attachment were provided to all parties who stipulated to the agreement and to unnamed "Commission personnel" pursuant to the agreement. CRA's motion to accept Attachment D under seal should be granted.

Duopolistic Wholesale Market

The duopoly market structure for facilities-based carriers has led to many concerns discussed in the investigation. To assess these concerns, parties were requested to comment on the competitiveness of the duopoly market structure and on the need to regulate the duopoly carriers' rates.

Duopoly Carriers Competitiveness

The major concern with the duopoly market structure is whether there is sufficient competition among the carriers to maintain fair and efficient pricing of cellular services.

DRA, CRA, and Cellular Dynamics do not believe that effective price competition can flourish in the cellular market without regulatory oversight.

Cellular Dynamics promotes the need for additional regulatory oversight of the duopoly carriers because it believes that the duopoly carriers' pricing of services is not constrained by any potential for competitive entry into the cellular market. This is because a pure duopoly arrangement precludes additional competitors from entering the market and from creating strong price competition at the retail level, which encourages duopoly carriers to behave as if they share a monopoly service.

It concludes that cellular resale, in a supportive and unrestricted market, will provide the necessary incentive for duopoly carriers to keep from coordinating price and market power and encourage efficient cellular service pricing. This conclusion is consistent with CRA's position.

DRA also concurs that the duopoly structure doesn't provide effective pressures to move the cost of cellular services toward competitive levels. It believes that such pressures are absent because competition decreases as the number of competitors decreases.

DRA also believes that the duopoly structure impedes competition because each competitor recognizes that any price reduction will be either matched or undercut by the other carrier resulting in a neutral dependence on each other. Absent price competition, DRA doubts that the end user will receive any competitive benefits.

None of the carriers concurs with these competitive concerns. GTEM reminds parties that each duopoly carrier faces competition not only from its direct rival but from providers of alternative telecommunications services. These alternative services come from providers of landline telephone service, paging, conventional mobile telephone, mobile data services, and in the

future from stationary cordless CT2 (cordless telephone, second generation) technology.

LA Cellular and other cellular carriers dispute any inference of collusion among the duopoly carriers. They point out that any collusion to suppress competition is a violation of antitrust laws, and they dispute the need for additional controls.

GTEM acknowledges that the cellular industry is not perfectly competitive. This is because rivalry among a small number of carriers reaches an equilibrium where price is somewhere above the competitive level but below the level that would result from collusion.

U S West argues that competition flourishes in the duopoly market because two key conditions exist. The first is that the cellular market continuously offers end users an opportunity to choose from alternative solutions and the second, that the market continuously affords carriers with current or new solutions an economic opportunity to offer them to their end users.

In response to the investigation's request to provide specific evidence to support statements on the competitive pressures that exist in the duopoly market structure, Cellular Dynamics, CRA, and DRA contend that the evidence to date substantiates that the duopoly carriers do not provide effective competition. In support, they cite the MSAs wholesale prices of the competitive carriers which are substantially the same, if not identical, and point out that there has been very little price change activity since the establishment of cellular service in 1983.

CRA also represents that there is no evidence of price competition. As shown in Appendix B to its comments, the weighted average rate of return on net book plant of the duopoly cellular carriers operating for at least three years exceeded 45 percent. Although CRA does not define an excessive rate of return, it believes that 45 percent is excessive and that such excessive

returns clearly demonstrate the existence of monopoly profits in the cellular markets.

Again, the duopolistic carriers disagree and argue that the evidence demonstrates that competition has already developed in the cellular market both with respect to price and to service.

GTEM substantiates its competitive claim by identifying various price and service activities that have been undertaken by the various duopoly carriers. Price activities include discounts for multiple-unit accounts, lower rates for volume resellers and bulk users, special rates for occasional and off-peak users, cooperative advertising, lower rates for long-term users, and promotional discounts resulting in free airtime, and waiver of activation fees.

Service activities include increased coverage of areas, increased quality of service, and the offering of enhanced service options. Such enhanced services options identified by PacTel include roaming services, automatic call forwarding, coverage in underground tunnels, data transmission services, custom calling features, and voice mail and freeway call boxes.

Arguments of DRA, CRA, and Cellular Dynamics all lead to the conclusion that the FCC-mandated duopoly market structure inherently precludes the existence of a perfectly competitive market between the duopoly carriers. However, this market structure represents the status quo until such time that the FCC decides to expand the market. Even GTEM acknowledges the existence of limited competition. Controls are in place via the antitrust laws to discourage collusion among carriers, but these do nothing to encourage or stimulate future competition.

Additional controls to encourage duopoly competition within a discretionary market can and should be implemented through regulatory oversight to enhance competition among the carriers and to protect the basic rights of end users. This is substantiated by

the arguments discussed above and by the number of cellular complaints identified in DRA's Phase I comments.

As a corollary to the competitive pressures, parties were requested to comment on whether the carrier's wholesale rates were too high. Again DRA and CRA assert that high returns on net cellular plant substantiate that rates are excessive. CRA's analysis of the LA, San Diego, and San Francisco/San Jose market operations for the 1988 year show that wholesalers' investment returns in these markets ranged from 25.3 percent to 123.1 percent. DRA believes that such a high level of profits substantiates that cellular rates are above competitive levels.

On the other side, LA Cellular represents that the reasonableness of cellular rates must not be considered solely from the viewpoint of the resellers. Consideration should also be given from the viewpoint of the wholesaler and from the customer.

LA Cellular believes that the relevant issue from the reseller perspective is whether there is a sufficient rate spread between wholesale and retail rates to permit resellers to be competitive. LA Cellular believes that this is currently the case. It cites continual reseller requests for certification and increased reseller activation on the cellular system. For example, the Los Angeles market, characterized as the most difficult reseller market, has steadily increased since March 1987 to the point where nearly 50 percent of all system activation originates with resellers.

LA Cellular also believes that the relationship between demand and price should be balanced; i.e., rates should not be so high as to dampen demand and not so low as to discourage the investment of large sums of money to expand system coverage or capacity.

Assuming rates are high, parties were requested to address the reasons for such high rates. Scarcity of radio spectrum was suggested as a possible reason. However, all parties

concur that it has no impact at present. The Phase I discussion substantiates this consensus. However, as the prior discussion regarding economic efficiency stated, the wholesale market structure is limited by the amount of radio spectrum the FCC has licensed for cellular to use. Further, the FCC's initial decision to allocate 20 megahertz to each cellular carrier was followed by a later decision to allow each an additional 10 megahertz based on growth in the number of customers outstripping the capacity of the original allocation. In reviewing our regulatory framework's oversight of rates, we need to create incentives for the efficient and full use of spectrum and to consider how its limited availability affects the dynamics of the industry.

Thus, while parties agree that spectrum limits are not now significant, they have been in the past and may well become so again given the continuing dramatic growth in the number of customers. This is why it is important for our policies to encourage the most intensive and efficient use of the allocations the FCC has made, for they are the limiting factor in the availability of service.

McCaw reminds us that cellular is not an essential service, and that the service is used by only a small portion of the public. Unlike a monopoly which is given a fair rate of return commensurate with risk, and the opportunity to attain it, a cellular carrier is not assured any return or recovery of risk.

GTE concurs with McCaw and believes that the notion of high profits is an illusion. It reminds us that the cellular market is still a start-up industry requiring high construction costs and franchise acquisition costs to obtain a market share.

The record shows that cellular returns-on-investment are substantially higher than the monopoly telecommunications market. However, this is not a valid comparison to determine price competition among duopoly carriers or the reasonableness of rates. This is because risk is substantially different between the

markets. No quantitative analysis of this risk has been undertaken to date. Not only is the cellular industry in a start-up mode requiring substantial amounts of money to invest in facilities, it is already facing technological obsolescence because of enhanced digital technology. Further, we have no ready way to evaluate the competitiveness of the individual markets directly by observing patterns of pricing or profits. In a fully competitive market, the prices of individual firms track closely and may even be identical. In a collusive oligopoly, the same pattern of pricing occurs, but at a higher level. It is apparent from the prices being paid for acquisition of cellular licensees that the FCC license itself has considerable market value. Substantial earnings could indicate a lack of competitiveness or could reflect the market value of the scarce licenses. Neither pricing patterns nor profits can indicate directly whether or not cellular carriers are competing fully with each other.

Because of the factors discussed above, we conclude that current earned rates of return on book investment do not in and of themselves directly indicate whether rates are reasonable or unreasonable.

Again, cellular service as a discretionary service with rates was first set at a level where discretionary customers would choose to subscribe cellular service in 1984 by D.84-04-014. Although rates have not dramatically changed since 1984, the parties to this investigation concur that demand for cellular service has increased far above expectation.

On balance, we conclude that the duopoly market structure does not necessarily foreclose sufficient competitiveness to maintain fair and efficient pricing of cellular services. However, we believe that a form of continuing regulatory oversight is necessary to help promote this competitiveness. We therefore turn to an analysis of how our regulation has been affecting the market and how it may be improved.

Absent a risk analysis and a mechanism to measure a reasonable return on cellular investment, there can be no finding that cellular carriers are earning an excessive return on their investment. However, the appearance of high returns on investment and the lack of price variability since 1984 leads us to the question of whether our regulatory policy on cellular carriers promotes competition.

In rejecting rate of return regulation for duopoly cellular carriers, we are not abdicating our responsibility to assure that cellular rates be just and reasonable. For the various reasons articulated throughout this decision, we believe that rate of return or cost of service calculations are not a representative basis for calculating the cellular rates that will best meet our goals of fairness to consumers and the most rapid increase in availability of high-quality service. Again, increased competitiveness among cellular carriers and resellers is the most direct and appropriate means for achieving reasonable rates as the technology and the markets continue to change.

Most parties concur that regulatory oversight has encouraged competition. Specific encouragement occurred through policies requiring carriers to receive Type 1 or Type 2 interconnection with the LECs, which discourages direct and indirect cross subsidization and requiring the wireline facilities-based carrier to provide the nonwireline facilities-based carrier an opportunity to resell. The Commission also acts as a lead agency in California Environmental Quality Act issues and affords local parties opportunities for input.

However, CRA does not believe that regulatory policy has promoted competition because we have not yet applied cost of service tests to the rates of wholesale service. Cellular Dynamic also asserts that the duopoly carriers will have no incentive to compete on price unless there is a regulatory policy promoting unrestricted resale of cellular services by independent retailers.

Cellular carriers believe that competition can be enhanced with the undertaking of additional regulatory policies which reduce regulatory requirements; such as, the current need to require lengthy advance notice of tariff changes and protest procedures, the regulation of the margin between wholesale and retail rates (addressed in the reseller market section of this opinion), and streamlined certification process for future RSA carriers. We concur in principle with the streamlined certification process and invite RSA carriers to submit a specific procedure during the third phase of this investigation.

Currently, all tariff changes must take place through the advice letter procedure. Absent any protest, such a filing can take between 30 and 40 days to become effective after submission to the Commission. If a protest is filed, the proposed tariff may be delayed even longer. Carriers believe that this lengthy requirement precludes them from gaining any competitive advantage through the introduction of innovative price and service offerings.

In 1987, similar tariff concerns resulted in a rulemaking investigation to determine the need for revision of GO 96-A tariff requirements (Rulemaking 87-08-017). A copy of the rulemaking investigation was mailed to 53 cellular carriers. Responses were received from six wireline facilities-based carriers, three nonwireline facilities-based carriers, two resellers affiliated with facilities-based carriers, and CRA. Many of these respondents are also respondents to this investigation.

The carriers' comments to the rulemaking proposed either a 30-day or 40-day tariff notice requirement for wholesalers and resellers. Two additional proposals outside the scope of the rulemaking investigation were made. The first proposal was to develop a minimum-maximum rate structure to allow cellular providers flexibility to adopt tariff revisions within a range previously approved and to be effective upon publication of the revised tariffs. The second proposal was to adopt a procedure

where the Commission would review tariff protests to determine whether substantial grounds exist to warrant a suspension of the tariff so that the mere filing of a protest would not result in a de facto suspension of an advice letter.

D.88-05-067 amended GO 96-A to require a 40-day notice requirement for wholesale carriers and a 30-day notice requirement for retail carriers. The opinion recognized that while the adopted tariff changes were timely and appropriate, further changes in the context of a broader review of the cellular industry might be warranted.

This investigation has undertaken the broader review of the cellular industry discussed in D.88-05-067. Although a number of comments filed in this investigation make reference to the apparent existence of limited competition among the carriers because of the similarity of the wholesale carriers' tariffs, carriers have substantiated that the two-tier notice period and comment period discussed above does not enhance the effectiveness of competition between carriers, a stated goal of this investigation. Carriers' comments confirm that the current tariff provisions require carriers to provide competitors advance notice of marketing strategy so that the competitors may offer similar, if not identical programs, thereby encouraging carriers to file identical tariffs.

The tariff process can be an effective regulatory tool to encourage carriers to promote effective competition within the discretionary market and should be utilized. However, any changes to the tariff process must acknowledge the primary purpose of a notice period before a tariff change is implemented which is to protect end users from unfair discrimination and unjustified rate increases.

We will modify our existing advice letter process to make it more responsive. A new procedure, as described below, should be adopted for expedited approval of relatively small rate changes

that can be effective immediately when filed. Carriers will have available both the modified version of the old process and this new expedited procedure.

To balance the interest of competition among carriers and end users' rights to a reasonable period of time to file comment or protest, GO 96-A's 40-day notice requirement should be reduced for wholesale carriers. The wholesale carriers' notice requirement should be similar to the reseller's current 30-day notice requirement. The 20-day protest period provided in GO 96-A should remain in place for both wholesale and retail carriers. However, any tariff filing which does not decrease a carrier's average customer bill by more than a nominal percentage, ten percent, should be identified as a temporary tariff and effective on the date filed. Absent a protest within the 20-day period, the temporary status of the tariff should expire and become permanent. If a protest is filed, the tariff should remain as a temporary tariff until the protest has been resolved or by order of the Commission. Utilities may file multiple ten percent rate reductions during any calendar year. These GO 96-A exemptions are allowable under GO 96-A(XV) and do not require modification of the existing GO.

The ALJ's proposed decision contemplated the use of temporary tariffs for rate increases and decreases. This decision provides that temporary tariffs be used only for rate decreases, and that increases be filed by advice letter for approval by Commission Resolution. Carriers may file temporary tariffs for promotional offerings with a set expiration date; the expiration of such a tariff will not require additional approval. In reviewing rate increase advice letters, we will also be mindful that allowing increases that merely counteract a portion of a previous decrease may be less contentious than considering increases beyond current rate levels.

Cellular utilities that wish to use temporary tariffs will be required to make an annual filing to establish how large a range they should have for temporary tariff filings. Otherwise, the question of whether or not temporary tariffs fall within the ten percent limit could become contentious. The ten percent is the limit as to how the total revenues expected from a given customer may be reduced in a temporary tariff. For example, a waiver of activation fees would be acceptable so long as the activation fee waiver and any other discounts established in the temporary tariff amount to less than ten percent of what a customer is expected to pay over the life of his service from the utility (average bill times number of months).

Naturally, we will expect that promotions or special service offerings will continue to be available throughout each carrier's entire service area.

Each utility wishing to use temporary tariffs shall file an advice letter containing calculations sufficient to support the requested range of flexibility. Utilities can request less than ten percent of the expected customer revenues as the allowed range, but must file a further advice letter if they wish later to expand the range. Competitively-sensitive information such as average customer bills and expected service life may be afforded proprietary treatment under GO 66-C. The initial filing by each utility requesting temporary tariff authority shall be effective only upon Commission Resolution; subsequent filings to renew this authority shall be 40-day effective advice letters. These filings shall be served on all respondents in this proceeding by summary, including the range of flexibility desired; the Director of CACD will be authorized to modify this service list to include other parties requesting such notice or to delete parties appearing to be inactive.

Several carriers believe that the margin between wholesale and retail rates should not be regulated. There is no