access or interconnection to intelligent network services. BellSouth maintains that providing others with direct unbundled access to the HLR and VLR databases or other components of CMRS providers' intelligent network offerings would discourage CMRS licensees from making advanced services available to their customers. BellSouth argues that product differentiation is an important marketing tool that carriers should not be forced to sacrifice.[83]

51. Southwestern Bell argues that Commission mandates are not required in this area because economic forces alone will spur the growth of CMRS roaming markets. It asserts that CMRS providers have an economic interest in selling service to roamers in their market and in selling the ability to roam to their customers. Southwestern points to cellular, and argues that CMRS providers should have the opportunity to negotiate with similar CMRS providers where it makes economic and technical sense for both parties. Southwestern maintains that the IS-41 network[84] is an example of how the industry developed and implemented a common service standard to permit roaming. With IS-41, service providers can choose any vendor for construction of their networks with the assurance that the vendor's equipment will communicate with neighboring systems and distant systems utilizing the IS-41 standards. These standards were developed by the service providers, switch vendors, and access equipment manufacturers. Southwestern contends that new CMRS providers can build on the standards and structure that already exist.[85] Similarly, Ameritech argues that the type of interconnection that supports access to cellular databases to facilitate roaming is technically feasible today. Ameritech argues further that the Commission should refrain from mandating such interconnection arrangements and leave the issue to the marketplace. Ameritech asserts that if CMRS providers wish to provide roaming service to their customers,

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[83] BellSouth Comments at 16-17; *see also* Pacific Comments at 11 (favoring queries via SS7 network between CMRS databases for information that permits call routing, but not unlimited IXC access to CMRS databases).

[84] Recently, various cellular providers and independent "signaling backbone" network providers have begun to implement a ubiquitous, seamless roaming infrastructure utilizing out-of-band Signaling System Number 7 (SS7), an American National Standards Institute (ANSI) standard that specifies how data messages are packaged and then transported from one point on the network to another. Several CMRS carriers, and a least one independent network provider, have established signaling networks for the transport of IS-41 data messages for cellular call set-up, routing and customer service purposes. IS-41 is an industry standard adopted by the cellular industry that defines a protocol to enable switches of various types to communicate with each other. Seamless roaming is currently available only on cellular analog networks, because such roaming requires a common air interface. Seamless roaming enables roaming customers to make and receive calls without taking any action other than turning on their mobile phones and placing outgoing or receiving incoming calls. We have been told that similar networks are being established to provide roaming for PCS subscribers on other PCS systems, although it is unclear what the common air interface for PCS roaming can be, other than the analog cellular Advanced Mobile Phone Service (AMPS) standard.

[85] Southwestern Bell Comments at 61-62.

it will be in their business interests to enter into the interconnection arrangements necessary to provide roaming service in the most "user-friendly" fashion.[86]

52. In its comments, Pacific Bell argues that the Commission should mandate that PCS providers have fair and non-discriminatory access to cellular analog out-of-territory networks during the PCS 10-year build-out period. Pacific Bell contends that this policy will benefit all customers because they will be able to use wireless services wherever they are, even as PCS service begins. Pacific Bell asserts that the ability to roam is essential to public acceptance of PCS and to its competitiveness with cellular service. Without the ability to roam, Pacific argues that PCS providers will only be offering an ''island'' service which will compare unfavorably with cellular service and even with some of the developing SMR services.[87] In an *Ex Parte* letter, Pacific Bell argues that the CMRS marketplace may not sufficiently protect the interest of PCS providers in having their customers roam onto cellular networks. Pacific Bell notes the plans of large cellular companies to combine PCS and cellular spectrum to create "national networks" and the plan of at least one potential PCS provider to implement a national network. Pacific Bell contends that customers of independent PCS carriers (*e.g.*, regional and designated entities) may be unable to access these national networks for either technological or competitive reasons. Therefore, Pacific Bell urges the Commission to adopt a broad roaming policy that incorporates (1) the expectation that cooperative agreements among CMRS providers for roaming be entered into whenever technically feasible; and (2) the requirement that cellular carriers provide access to national analog roaming services on a fair and non-discriminatory basis.[88]

53. CSI/ComTech seek interconnection of cellular reseller switches as a means of solving certain problems that existed with cellular roaming service prior to the implementation of IS-41-based seamless roaming service. In an attachment to their comments, CSI\ComTech describe the practical problems encountered by cellular end-users when roaming in the early 1990s. According to CSI\ComTech, depending on the cellular carrier, a roamer was handled usually in one of four ways: (a) provided service without intervention; (b) provided the first call, but subsequent calls may or may not be denied; (c) calls are blocked and service is denied until the carrier receives a valid form of payment; or (d) all access to the cellular system is denied. CSI\ComTech allege that some cellular carriers serving areas that have heavy roaming between themselves will interconnect their switches to provide roamers service without intervention, but the availability of this automatic roaming is limited because the switches serving the areas must be from the same manufacturer, and must be interconnected with dedicated voice and data circuits. The most common method of handing roamer traffic, according to CSI\ComTech is to allow the first call and then the switch will request a

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[86] Ameritech Reply Comments at 5.

[87] Pacific Bell Comments at 19-20.

[88] *See Ex Parte* Letter in CC Docket No. 94-54, from G. Harrison, Director, Federal Regulatory Relations, Pacific Telesis (Feb. 28, 1995).

verification of the roamer's status from its home carrier. This process can take up to an hour or longer to complete, during which time the carrier will usually deny further service. Moreover, allege CSI\ComTech, the carriers usually only provide this service to roamers of like carrier, that is, A block to A block and B block to B block. CSI\ComTech argue that direct connection of their switches where their customers have the greatest amount of roaming traffic would allow CSI\ComTech, where it is also a reseller, to have their subscribers' calls forwarded directly to the CSI\ComTech switch for processing, thus permitting customers to avoid onerous roaming charges.[89]

c. Discussion

54. Roaming capability is an increasingly important feature of mobile telephone communications. It is one of the attributes that prominently sets mobile telephony apart from landline service. The intelligent network features and connections required to support roaming capability are critically important to the development of the "network of networks." Therefore, while we conclude that we should take any steps necessary to support roaming, we also believe that the technical issues should receive intense study and review by regulators prior to the imposition of regulatory requirements, if any are needed.

55. The current record in response to the NOI is limited on the subject of roaming even though APC and CSI/ComTech have discussed a number of technical issues related to roaming. While our preference is that concerns such as those expressed by APC be addressed at the outset by marketplace forces rather than regulation, we will continue to monitor the availability of roaming so that we can take any necessary regulatory action in a timely fashion. It appears that the types of technical problems described in the attachments to CSI\ComTech's comments have been largely addressed by the cellular industry itself in developing and implementing the IS-41 standard and the backbone network architecture needed to provide ubiquitous, seamless roaming service.

56. We are also aware of customer concerns regarding the availability and pricing of roaming service and hope that in the future, all CMRS providers will respond by implementing nationwide seamless roaming networks and by offering roaming service to interested subscribers at attractive, cost-based rates. We tentatively conclude that no regulatory action is required at this time, but that we should nonetheless continue to monitor the development of roaming service. We seek comment on this tentative conclusion.

57. Some in the cellular industry have informally expressed the view that Section 22.901 of the Commission's Rules governing cellular service requirements may also cover PCS subscribers who roam in cellular service areas.[90] This is the case, we are told, because a

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[89] CSI\ComTech Comments, Attachment 1, Widmar Testimony at 5-6.

[90] *See Ex Parte* Letter in CC Docket No. 94-54, from A. D. Williams, CTIA (Feb. 9, 1995), referring to *Ex Parte* meeting on Feb. 9, 1995, between CTIA and Commission staff.

PCS subscriber using a hand-set capable of transmitting and receiving communications on cellular frequencies (dual-band or dual-mode) will appear to the visited cellular system like a cellular subscriber once the dual-mode PCS phone switches into its cellular mode. Because the cellular system would be unable to distinguish the transmissions received from PCS phones from those received from cellular phones, it would automatically serve the PCS subscriber, assuming the requisite connections and contractual arrangements between the carriers were in place. We seek comment on these representations and on this interpretation of Section 22.901.

58. Although the present record does not support proposed rules, it does highlight the importance of roaming service in a competitive CMRS marketplace. Therefore, we will continue to monitor the development of roaming service and to police actively any denials of reasonable requests for roaming agreements. As with general interconnection, we stand ready to intercede should the parties be unable to reach reasonable private agreements and will closely scrutinize any exercise of market power or engagement in other forms of anti-competitive conduct designed to raise rivals' costs and thwart competition, or to charge unjust or unreasonable prices for roaming service.

59. As an aid in our monitoring effort, we seek further comment on the following roaming issues. The present record is particularly unclear on the issue of whether physical or direct interconnection of CMRS networks is required to providing roaming capability. We therefore seek comment on the relationship between roaming and direct interconnection. In addition, we seek comment on the manner in which cellular nationwide, seamless roaming service is currently provided, both technically and contractually, and on alternative means of providing roaming. We seek comment on the same issues with respect to the anticipated means of providing PCS and SMR roaming service. In particular, we seek comment on whether cross-service, *e.g.*, PCS to cellular, roaming can be accomplished from a technical stand-point. We also seek comment on whether the different types of roaming present different technical and regulatory issues. Commenters should also discuss the costs and benefits of retaining the cellular analog "AMPS" common air interface standard to support cross-service roaming capabilities. Subscriber database access appears to be a key feature of ubiquitous, seamless cellular roaming. We seek comment on the type of access and data which CMRS providers and other common carriers need to support roaming service, as well as any privacy or proprietary concerns raised by such access.

B. Resale Obligations

1. Background

60. Resale has been defined as an activity in which one entity subscribes to the communications services and facilities of another entity and then reoffers communications

services to the public (with or without "adding value") for profit.[91] The Commission has consistently supported resale by prohibiting most common carriers from placing any restrictions on resale of their services. The Commission's resale policy was first established in the wireline telecommunications market, where carriers traditionally sought to restrict the resale of their tariffed and cross-elastic services to facilitate price discrimination. In the *Resale and Shared Use Decision*, the Commission held that provisions in carrier tariffs which had the effect of precluding the resale of private line service were unlawful.[92] The Commission found that tariff provisions restricting resale were "unjust and unreasonable" in violation of Section 201(b)[93] of the Communications Act.[94] The Commission also concluded that such restrictions were "unlawfully discriminatory" under Section 202(a)[95] of the Act because they would "effectively foreclose a certain class of potential subscribers from obtaining carrier services and facilities."[96] In *Resale of Switched Services,*[97] the Commission adopted a blanket prohibition on tariff provisions restricting the resale of common carrier domestic public switched network services, finding such restrictions to be unlawful under Sections 201(b) and 202(a) of the Act.[98] For switched services, the Commission also found that an unrestricted resale policy would produce benefits similar to those set forth in the *Resale and Shared Use Decision.*[99]

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[91] *See* Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261, 263 (1976) (*Resale and Shared Use Decision*), *reconsideration*, 62 FCC 2d 588 (1977), *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978).

[92] *Resale and Shared Use Decision*, 60 FCC 2d at 282-84.

[93] Section 201(b) of the Act provides that:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification or regulation that is unjust or unreasonable is hereby declared to be unlawful . . .

[94] *Resale and Shared Use Decision*, 60 FCC 2d at 283, 321.

[95] Section 202(a) makes it unlawful:

> for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service . . . .

[96] *Resale and Shared Use Decision*, 60 FCC 2d at 281, 282-84, 321.

[97] Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 FCC 2d 167 (1980) (*Resale of Switched Services*); *recon. denied*, 86 FCC 2d 820 (1981).

[98] *Id.* at 193.

[99] *Id.* at 172.

61. In 1981, the Commission amended its rules to authorize commercial cellular communications and extended its resale policy to cellular service.[100] The Commission provided a frequency assignment plan that would allow for two competing facilities-based cellular systems in any particular metropolitan area or geographic market[101] and reserved one block of spectrum for the exclusive use of the wireline carrier(s) certified to serve the area.[102] Although uncertain as to the ability of a cellular resale market to develop, the Commission, for the reasons set forth in *Resale and Shared Use Order* and *Resale of Switched Services*, found that restrictions on cellular resale were contrary to the public interest. Consequently, the Commission decided to grant cellular licenses only on the condition that a licensee not restrict the resale of its services, with the intent of promoting a "highly competitive secondary market for the distribution of cellular service."[103]

62. Subsequently, the Commission carved out an exception to its cellular resale policy. In 1992, the Commission found that a rule allowing a cellular carrier to deny resale capacity under certain circumstances to a fully operational facilities-based competitor would not violate the just and reasonable standard of Section 201(b).[104] The Commission also determined that resale restrictions as applied to a fully operational facilities-based competitor do not violate Section 202(a) of the Act.[105] The Commission reasoned that five years is sufficient time for a licensee to build its system, and that permitting licensees to deny each other resale after this period would promote competition by encouraging each licensee to build out its network.[106] The Department of Justice and other commenters agreed that maintaining the resale requirement until both carriers are fully operational helps to mitigate any

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[100] Cellular Communications Systems, 86 FCC 2d 469, 511, 642 (1981) (*Cellular Order*), *modified*, 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982), *appeal dismissed sub nom.* United States v. FCC, No. 82-1526 (D.C. Cir. Mar. 3, 1983).

[101] *Cellular Order*, 86 FCC 2d at 482.

[102] *Id.* at 483, 490 n.56. The other block was reserved for the use of the non-wireline carriers.

[103] *Id.* at 511, 642.

[104] *See* Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies, Notice of Proposed Rule Making and Order, CC Docket No. 91-33, 6 FCC Rcd 1719, 1724 (1991) (*Cellular Resale NPRM and Order*); Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies, Report and Order, CC Docket No. 91-33, 7 FCC Rcd 4006, 4008 (1992) (*Cellular Resale Order*), *aff'd sub nom* Cellnet Communications v. F.C.C., 965 F.2d 1106 (D.C. Cir. 1992).

[105] *Cellular Resale Order*, 7 FCC Rcd at 4008.

[106] *Id.* at 4007-08. This rule originally was codified in Section 22.914 of the Commission's Rules, 47 C.F.R. § 22.914. *Id.* at 4011.

disadvantage a second carrier may incur during the "headstart" period.[107] The Commission emphasized that this is the only exception to the general rule that cellular licensees may not restrict the resale of their services.[108]

63. The *Interconnection NOI* requested comment on whether the Commission should propose rules to place the resale obligations that apply to cellular licensees on all CMRS providers or any particular class of CMRS providers.[109] Specifically, the *Interconnection NOI* sought comment on whether regulatory symmetry requires unrestricted resale obligations for all CMRS services. The *Interconnection NOI* further invited comment on how resale obligations would assist in the development of CMRS services, *e.g.*, whether resale would allow new entrants in a market to offer service to the public more quickly because they could resell another service while building their own facilities.[110]

64. Additionally, the *Interconnection NOI* sought comment on whether the current policy limiting a facilities-based competitor's mandatory right to resale to five years should be applied to those CMRS providers if the Commission imposes a resale obligation on some or

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[107] *Id.* When the Commission established the wireline frequency set aside and filing requirements, it indicated that there was a possibility that wireline carriers would have an unfair "headstart" over non-wireline carriers in the introduction of cellular service to the public. *Id.* at 4007 n.13. In the cellular context, the term "headstart" generally refers to any potential competitive advantage that may be gained by one cellular carrier because it is granted a construction permit and begins providing service over its own facilities prior to its competitor providing service. *See id.* at 4007. *See also Cellular Resale NPRM and Order*, 6 FCC Rcd at 1721.

[108] *See Id.* at 4009. The Commission recently revised Part 22 of its rules, moving the cellular resale requirement to Section 22.901 of its rules, 47 C.F.R. § 22.901 (1994). *See* 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 Service, 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 Land Mobile Service, 9 FCC Rcd 6513, 6571, 6660 (1994). The text of the rule reads as follows:

> Provision of resale capacity. Each cellular systems licensee must permit unrestricted resale of its service, except that a licensee may apply resale restrictions to licensees of cellular systems on the other channel block in its market after the five year build-out period for licensees on the other channel block has expired.

47 C.F.R. § 22.901(e).

[109] *Interconnection NOI*, 9 FCC Rcd at 5466.

[110] *Id.*

all CMRS providers.[111] The *Interconnection NOI* also asked whether, for the various CMRS geographic market areas to develop expeditiously and meet our policy objectives, cellular providers should be exempt from providing resale to facilities-based CMRS competitors in their service areas even during the first five years that these competitors hold their licenses. The *Interconnection NOI* requested that commenters address the standards the Commission might use to identify the services that compete with cellular. In considering a limit on the resale obligation, the *Interconnection NOI* noted that the Commission must eventually determine whether the restrictions are just and reasonable under Section 201(b) of the Act, and in doing so, must weigh any harm to the public posed by such restrictions against any potential benefits to the public. The *Interconnection NOI* also stated that the Commission must make a similar determination under Section 202(a) of the Act.[112]

2. Positions of the Parties

65. Resale Generally. Commenters generally agree that the Commission should impose an obligation on CMRS carriers to permit unrestricted and nondiscriminatory resale.[113] Bell Atlantic and SBC contend that the same rationale which supported the extension of resale obligations to cellular carriers in 1981 supports that application to all CMRS providers.[114] McCaw argues that to the extent that resale is found to foster competition, the networks of all CMRS providers should be made available to competitors and new entrants in the mobile services marketplace.[115] Allnet and MCI assert that because a strong market for resale fosters competition, the Commission should now issue a general statement indicating that resale prohibitions will not be allowed.[116] LDDS contends that resale plays a crucial role in

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[111] *Id.* at 5467.

[112] *Id.* at 5467, para. 141 & n. 256, *citing Resale and Shared Use Decision*, 60 FCC 2d at 283; Hush-a-Phone Corp. v. U.S., 238 F.2d 266 (D.C. Cir. 1956).

[113] Allnet Comments at 7; Ameritech Reply Comments at 6; APC Comments at 8 (should include appropriate restrictions so that CMRS providers do not abuse resale opportunities to avoid building out their systems); Bell Atlantic Comments at 16; BellSouth Comments at 18, 22-23 (also impose on CMRS resellers); CTIA Comments at 35; GSA Comments at 7; LDDS Comments at 21-22; McCaw Comments at 21; MCI Comments at 13; NYNEX Reply Comments at 8; PCIA Comments at 18-19; Rochester Comments at 12-13; SBC Comments at 54-55.

[114] Bell Atlantic Comments at 17-18; SBC Comments at 54-55.

[115] McCaw Comments at 21.

[116] *See* Allnet Comments at 7 (may need to consider stronger measures in the future to protect resale); MCI Comments at 13. *See also* LDDS Comments at 21.

preventing unreasonable price discrimination among customers, drives rates toward cost, and serves as a vehicle for competitive entry.[117]

66. Several parties emphasize that whatever the Commission decides, all CMRS providers should be treated identically.[118] Bell Atlantic contends that the Commission should impose an obligation on all CMRS providers to permit unrestricted and nondiscriminatory resale.[119] CTIA argues that consistent with Congressional intent, the Commission, in its continued adherence to Section 332 of the Act, must ensure that similar services are treated alike.[120] CTIA, Bell Atlantic, PCIA and SBC assert that the Commission must impose resale obligations on CMRS providers to the same extent as cellular carriers because such a policy is consistent with the goal of "regulatory parity."[121] BellSouth agrees, arguing that the only exception to this obligation is resale to facilities-based competitors.[122] AT&T contends that imposition of resale requirements solely on cellular licensees would thwart the intent of Congress to avoid differential regulation of CMRS providers and would impose a significant regulatory burden on one class of CMRS providers -- cellular providers -- to the benefit of competitors.[123] AT&T asserts that if the Commission adopts resale requirements, it is critical that the Commission not artificially distinguish between CMRS providers.[124]

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[117] LDDS Reply Comments at 14.

[118] Ameritech Reply Comments at 6; AT&T Comments at 14; Bell Atlantic Comments at 18; CTIA Comments at 35; McCaw Comments at 21; New Par Reply Comments at 8; NYNEX Reply Comments at 8; SBC Comments at 55-56; SNET Comments at 15.

[119] Bell Atlantic Comments at 16-18.

[120] *See* CTIA Comments at 34-35 *citing* H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 259 (1993). *See also* CTIA Reply Comments at 15-16.

[121] CTIA Comments at 34-35; Bell Atlantic Comments at 16-18; PCIA Comments at 19 (as long as cellular providers remain subject to resale obligations, regulatory parity demands that all providers of substantially similar services be treated consistently); SBC Comments at 55.

[122] BellSouth Comments at 22-23. For further discussion of facilities-based resale see paras. 68-73, *infra*.

[123] AT&T Reply Comments at 15.

[124] AT&T Comments at 14. AT&T contends that if there are particular areas within the CMRS market where resale could be effective, competitive market forces will ensure that resale opportunities are made available. AT&T notes that it is skeptical of the link between the existence of resale and the stimulation of competition and claims that in the rapidly expanding CMRS market there will probably be enough direct competition that resale will be unnecessary and uneconomical. *Id.*

67. Some commenters contend that there is no need to impose any resale obligation on any CMRS providers.[125] ALLTEL and AMTA insist that the presence of multiple, facilities-based providers will ensure that consumers have sufficient choice and that price competition is vigorous.[126] Moreover, contends ALLTEL, by avoiding imposition of resale obligations, the Commission will ensure that incentives to build out new services expeditiously are not diminished.[127] Nextel argues that there is no reason to impose resale obligations in the competitive CMRS market, asserting that those supporting a resale requirement generally include those companies currently subject to the regulation.[128] Nextel warns that mandated resale could likely have inequitable results as some CMRS providers would avoid significant investment in CMRS facilities and simply use the facilities of a competitor who has invested the requisite time, money and effort to build a system.[129]

68. Other commenters, however, argue that there is no need to impose resale obligations on certain categories of CMRS.[130] PageNet contends that the Commission has not previously imposed resale obligations on paging companies and should not do so now.[131] PageNet argues that resale has been a tool of the Commission to assist carriers in entering the market and to eliminate discriminatory pricing. PageNet contends that there are no barriers to entry in the paging market, that permissible resale is already part of the distribution chain for paging services and therefore the Commission does not need to require resale for paging providers.[132] E.F. Johnson and other commenters urge that resale obligations only be imposed on cellular-like services.[133] NABER and OneComm contend that resale obligations are

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[125] ALLTEL Comments at 9; AMTA Comments at 14-15; Comcast Reply Comments at 25-26; Nextel Comments at 19-20; OneComm Comments at 21 (premature to impose general resale requirements).

[126] ALLTEL Comments at 9; AMTA Comments at 14-15.

[127] ALLTEL Comments at 9.

[128] Nextel Reply Comments at 15.

[129] Nextel Comments at 19-20, Reply Comments at 15.

[130] E.F. Johnson Comments at 8; GTE Comments at 48-49 (not on air-to-ground service); NABER Comments at 9 (not on SMR systems); PageNet Comments at 12-13 (not on paging).

[131] PageNet Comments at 12-13.

[132] *Id.* at 12.

[133] *See* E.F. Johnson Comments at 8. *See also* GTE Comments at 48-49; NABER Comments at 9. *See also* PCIA Comments at 18-19 (no compelling reason to exempt broadband providers from the resale obligation).

unnecessary and technically problematic for SMR providers.[134] NABER asserts that the limited capacity of SMR systems mandates a high degree of user management by SMR operators, and that mandatory resale is unnecessary because: (1) SMRs do not have market power; (2) SMRs offer a limited interconnect service; (3) SMRs do not control a bottleneck; and (4) customers have many alternatives for service.[135]

69. GTE argues that imposing a resale obligation on air-to-ground providers is technically and economically infeasible and therefore contrary to the public interest. Specifically, GTE contends that the Commission applied a limited resale obligation to air-to-ground only during its nascent period to minimize headstart concerns when GTE Airfone was operating but other carriers had not yet constructed their facilities. GTE asserts that no carrier requested resale capacity. GTE also argues that there are significant technological limitations that distinguish air-to-ground from cellular and other CMRS carriers, rendering the provision of resale an impossibility.[136] For example, asserts GTE, capacity on a particular aircraft for air-to-ground communication is very limited, making it infeasible for the air-to-ground provider to permit resale in bulk the way landline and cellular carriers can.[137] In addition, GTE contends that, in contrast to its decision to mandate equipment compatibility for cellular service, the Commission permitted air-to-ground licensees to develop their own unique systems without regard to equipment compatibility. GTE asserts that equipment compatibility is essential for resale. Thus, argues GTE, air-to-ground service's lack of uniformity among different systems creates conditions that inhibit, if not preclude, resale.[138]

70. AT&T replies that the Commission should reject proposals, including those of the air-to-ground service providers and SMR providers, to treat cellular carriers differently than other CMRS providers with respect to resale.[139] Bell Atlantic asserts that commenters in the SMR and paging industries have offered no reason why SMR or paging in this context are different from cellular service and thus why differential treatment might be justified. Bell Atlantic argues that because these entities do not provide any evidence that resale obligations would burden SMR and paging services differently from cellular service, regulatory parity requires applying the Commission's policy in favor of resale to all CMRS providers. Bell Atlantic further contends that unrestricted resale is even more important in the wide-area SMR

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[134] NABER Comments at 11-12, Reply at 2-3; OneComm Comments at 21, Reply Comments at 10-11.

[135] NABER Comments at 11-12, Reply at 2-3.

[136] GTE Comments at 49-50.

[137] *Id.* at 51.

[138] *Id.* at 50.

[139] AT&T Reply Comments at 15.

service, because at this time only one company, Nextel, is offering this service and is rapidly acquiring potential SMR competitors.[140] Allnet argues that opposition to resale is based on a contrived, nonsensical argument that CMRS competitors would avoid significant investment by simply using the systems built by other parties which would unfairly shift risk to existing firms. Allnet contends that if it is more profitable for a new entrant to resell rather than invest, this is not necessarily an uneconomic outcome or contrary to the public interest. Rather, insists Allnet, such an outcome simply states that the market cannot profitably support additional capacity.[141]

71. CTIA also requests that the Commission clarify that its cellular resale rules merely require that carriers cannot discriminate in the rates they charge resellers and do not require carriers to offer bulk rates to resellers.[142] Pacific Bell objects to this, arguing that while the cellular resale policy does not require the creation of a specific wholesale rate, the policy does require any bulk rate made available to some customers must be made available to resellers on the same terms and conditions. Pacific Bell contends that this is critical to the resale market and urges the Commission to make clear that resellers are eligible for bulk rates made available to other cellular customers. Pacific Bell asserts that resale of cellular service by PCS providers will help to mitigate the headstart cellular providers have. Pacific Bell contends that without the ability to purchase at a bulk rate the market for resale will disappear.[143]

72. Resale to Facilities-Based Carriers. Most parties that commented on the resale issue distinguished the provision of resale capacity from facilities-based competitors. GSA and NCRA argue that the establishment of resale obligations will allow new entrants to offer services to the public more quickly because they will be able to resell services while building their own facilities.[144] APC, however, cautions that the Commission should include appropriate restrictions so that CMRS providers do not abuse resale opportunities to avoid building out their systems.[145] Several commenters argue that the Commission should place a limit on the obligation of facilities-based CMRS providers to resell services to non-facilities based providers. Some propose specific periods similar to those adopted for cellular service. Ameritech and Bell Atlantic encourage the Commission to permit any CMRS provider to

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[140] Bell Atlantic Reply Comments at 15.

[141] Allnet Reply Comments at 10-11.

[142] CTIA Comments at 35.

[143] Pacific Bell Reply Comments at 14-15.

[144] *See* GSA Comments at 7, Reply Comments at 11-12; NCRA Comments at 21. *See also* Ameritech Reply Comments at 6; McCaw Comments at 21

[145] APC Comments at 8.

Ameritech and Bell Atlantic encourage the Commission to permit any CMRS provider to restrict resale of its services by any facilities-based CMRS provider five years after the issuance of the license to the second provider.[146] McCaw and AT&T support an eighteen-month window for resale to facilities-based competitors, arguing that continuing the five-year window -- particularly if the resale obligation is imposed only on cellular carriers -- would disserve the public interest in promoting competition. McCaw and AT&T contend that an eighteen-month window is an acceptable balance of new entrants' interest in reselling temporarily and the public interest in encouraging aggressive development of new networks.[147] Pacific Bell supports linking the fill-in period to the build-out requirements for licensees which, in the case of PCS, would be 10 years.[148]

73. Pacific Bell also asserts that PCS licensees reselling cellular services during their build-out period should be allowed to migrate cellular customers to PCS services when the PCS systems are operable. Pacific Bell argues that the migration should include being able to transfer the end users' number from cellular service to PCS. According to Pacific Bell, the ability to migrate customers from cellular service to PCS will put PCS licensees in a better position to compete with cellular providers and will somewhat mitigate the head start cellular providers have.[149]

74. SBC and RCA argue that a cellular carrier should not be required to resell its services to facilities-based CMRS competitors who hold their own licenses.[150] SBC contends that restricting competitor resale promotes efficient use of the spectrum and stimulates interbrand competition. SBC further asserts that, because the mobile service market is now established, there is no need to apply the five year rule, and that the public is better served by new CMRS entrants being encouraged to put the spectrum they have been assigned to use rather than relying on their competitors' facilities.[151] SBC adds that the Commission should reject the notion that there should be a certain overlap between competing carriers services before resale obligations can be restricted. SBC asserts that if service areas are overlapping,

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[146] Ameritech Reply Comments at 6; Bell Atlantic Comments at 17-18.

[147] *See* McCaw Comments at 22; AT&T Reply Comments at 15.

[148] *See* Pacific Bell Comments at 25-27. *See also* BellSouth Comments at 23-24 (encouraging stricter limitation of resale to facilities-based competitors); New Par Reply Comments at 8-9 (12-month limit); Rochester Comments at 12-13 (not for a lengthy period of time).

[149] *See* Pacific Bell Comments at 28. *See also Ex Parte* Letter in CC Docket No. 94-54, from G. Harrison, Director, Federal Regulatory Relations, Pacific Telesis, (Feb. 2, 1995), Attached Letters.

[150] SBC Comments at 58-59; RCA Comments at 11.

[151] SBC Comments at 59-60.

then the carriers are competing in that service area and resale should not be required in the overlapping area.[152]

75. Pacific Bell argues that PCS providers should have no obligation to resell to their facilities-based PCS competitors. Pacific Bell asserts that, since all PCS licenses are to be auctioned within a relatively short time of each other, no carrier will have significant lead time over any other. Thus, argues Pacific Bell, it is not in the public interest to require resale of PCS services among licensees serving the same area since the Commission presumably wants to encourage build-out of systems. However, Pacific Bell supports reselling by non-licensees as providing competition and furthering the Commission's goal of universality of PCS services.[153] APC contends that cellular providers should not be exempt from providing resale opportunities to facilities-based CMRS competitors in their service areas, but, like Pacific, argues that PCS providers should be permitted to restrict the sale of PCS to cellular carriers in the same service areas. APC asserts that allowing cellular carriers to obtain additional PCS spectrum by purchasing it from a PCS competitor will only add to cellular's competitive advantage.[154] PCIA requests clarification that CMRS providers cannot use resale opportunities to evade the intent of the construction requirements for broadband PCS.[155]

76. BellSouth replies that APC's proposal violates the requirement of regulatory parity, and argues that neither cellular nor PCS providers should be required to permit resale of their service by facilities-based competitors. BellSouth argues that barring limits on resale would comport with regulatory parity because cellular and PCS licensees would be allowed the same resale restrictions and would be given an incentive to compete on the basis of their own facilities-based coverage.[156] AT&T responds that any such distinction would avoid the intent of Congress and impose a significant regulatory burden on one class of CMRS providers -- cellular operators -- to the benefit of their competitors.[157]

77. Few commenters attempted to define what constitutes a "facilities-based competitor." In responding to the Commission's equal access proposal, WilTel states that its use of the term CMRS is limited to cellular services and service "potentially competitive with cellular services, including PCS and enhanced (or wide-area) specialized mobile radio

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[152] *Id.* at 59.

[153] Pacific Bell Comments at 24-26.

[154] APC Comments at 8.

[155] PCIA Comments at 19.

[156] BellSouth Reply Comments at 5.

[157] AT&T Reply Comments at 15.

(ESMR) services."[158] NABER states that it disagrees with the Commission's statement in the *CMRS Third Report and Order* that all SMR systems are potentially competitive.[159] NABER further argues that there is insufficient spectrum in any band to permit an SMR operator to be truly competitive in the CMRS marketplace, with the exception of the aggregation already accomplished by Nextel.[160]

78. Reseller Switch Proposal. Along with their general support for a resale obligation for CMRS providers, NCRA and CSI/ComTech argue that the Commission should require cellular providers to allow cellular resellers to install their own switching equipment between the cellular network's mobile telephone switching office (MTSO) and the facilities of the LEC and the IXC.[161] NCRA and CSI/ComTech contend that requiring cellular providers to permit resellers to interconnect their switches with those of the cellular provider is in the public interest.[162] CSI/ComTech claims that there is nothing in Section 201 of the Act, its history, or precedent which dictates that any and all interconnection obligations are premised on a connecting carrier having bottleneck facilities. CSI/ComTech argues that the Commission has already determined that the standard of analysis for interconnection under Section 201 is whether the requested interconnection is privately beneficial without being publicly detrimental.[163] NCRA further contends that Section 332(c)(1)(B) requires all common carriers to interconnect with CMRS providers and, since CMRS providers are, by statute, classified as common carriers, Section 332(c)(1)(B) clearly obligates CMRS providers to interconnect to

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[158] WilTel Comments at 2, n.2.

[159] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, Third Report and Order, 9 FCC Rcd 7988 (1994) (*CMRS Third Report and Order*).

[160] NABER Reply Comments at 5.

[161] *See* NCRA Comments at 2, 20; CSI/ComTech Comments at 3-4. *See also* California PUC Comments at 4. NCRA also proposes to maintain their own customer records and be responsible for the intercept of both the land-to-mobile and mobile-to-land calls of their mobile customers and may also provide a variety of enhanced services to their customers. NCRA Comments at Appendix A. In order to implement the switch effectively, NCRA claims that the resellers would need carriers to identify the following service charges: (1) per minute charges for airtime, mobile handoff, cell site backhaul; (2) a monthly line termination charge for each T-1 channel terminating at the MTSO; (3) any non-recurring charge(s) associated with establishing service according to this format. *Id.*

[162] NCRA Comments at 2-4, 9-16; CSI/ComTech Comments at 5-9.

[163] CSI/ComTech Comments at 6 *citing* AT&T, 60 FCC 2d 939 (1976).

other CMRS providers.[164] Therefore, assert NCRA and CSI/ComTech, the Commission should require cellular providers to permit cellular resellers to interconnect their switches.

79. The California PUC supports the reseller switch proposal, arguing that the Commission should promote switch-based resellers in order to stimulate competition in the cellular industry. The California PUC contends that in order to become a competitive alternative, switch-based resellers must be able to isolate charges for monopoly bottleneck services they must acquire from facilities-based carriers from services which they can acquire elsewhere or produce themselves.[165]

80. Most commenters, including most cellular providers, oppose the reseller switch proposal.[166] AirTouch and others contend that the reseller switch is a vague, yet-to-be-designed facility. These commenters claim that the reseller switch does not add value and may harm the network.[167] AirTouch, BellSouth, Comcast, and McCaw contend that resellers are in effect attempting to require cellular carriers and other CMRS providers to "unbundle" their networks. These commenters oppose any such action.[168] GTE argues that the costs of cellular providers would likely increase due to such connection since the proposal would probably require the addition of ports to the cellular switch to accommodate inter-switch trunks. GTE contends that neither the purchase of their own NXX codes, nor their payment to LECs for traffic termination would counterbalance the cost to cellular carriers of providing such interconnection.[169]

81. NCRA responds that the reseller switch is technically feasible and would resemble, in almost all cases, the interconnections between interexchange and local exchange carriers. NCRA insists that the reseller switch would not result in the degradation of the quality of service or an increase in processing time.[170] CSI/Comtech argues that the

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[164] NCRA Comments at 8-9.

[165] California PUC Comments at 4.

[166] AirTouch Comments at 24-26; BellSouth Comments at 18; Comcast Comments at 17-18; GTE Comments at 46; McCaw Comments at 14-16; RCA Comments at 10-11.

[167] *See, e.g.,* AirTouch Comments at 24-26, Reply Comments at 3-12; BellSouth Comments at 18; Comcast Comments at 17-18, Reply Comments at 24-26; GTE Comments at 46; McCaw Comments at 14-16; RCA Comments at 10-11.

[168] AirTouch Comments at 24-26, Reply Comments at 6-8; BellSouth Comments at 18; Comcast Comments at 17-18; McCaw Comments at 14-16 (unbundling not required to promote retail competition).

[169] GTE Comments at 46-47.

[170] NCRA Reply Comments at 6-7.

commenters have failed to cite any legal authority to justify a blanket refusal to allow cellular resellers' interconnection to facilities-based carriers. CSI/ComTech further contends that the cost/benefit arguments raised by the carriers do not justify a finding that resellers do not have a right to interconnection under Section 201.[171]

82. Miscellaneous. BellSouth raised an issue which was not part of the *Interconnection NOI.* BellSouth requests that, in extending its cellular resale policies to CMRS, the Commission eliminate any ambiguity in the cellular rules regarding whether Bell Company local exchange carriers may resell cellular service, without having to use a separate subsidiary.[172] Currently, Section 22.901 of the Commission's Rules requires structural separation between the Bell Companies' LEC and cellular units -- a Bell Company may "provide" cellular service only through its cellular subsidiary.[173] BellSouth contends that, while cellular carriers are not permitted to restrict resale of their services (except in the case of operational facilities-based competitors), the structural separation rules for Bell Companies may inadvertently force the Bell subsidiaries to restrict resale to their affiliated telephone companies. BellSouth argues that this rule is ambiguous because it does not make clear whether resale by a Bell company's LEC constitutes the "provision" of cellular service. As a result, argues BellSouth, it is unclear whether a Bell cellular affiliate either must refuse to allow resale by its sister telephone company, as a consequence of the separation rule, or may not restrict resale by its LEC affiliate.[174] BellSouth asserts that, to the extent that PCS licensees are permitted to resell cellular service, regulatory parity requires that this opportunity should be available to Bell Company LECs providing service as PCS licensees, on the same basis as others.[175] Ameritech, Bell Atlantic, NYNEX, and SBC support this proposal.[176]

3. Discussion

83. Resale Generally. We tentatively conclude that the existing obligation on cellular providers to permit resale should be extended to apply to CMRS providers, unless there is a

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[171] CSI/ComTech Reply at 1-4.

[172] BellSouth Comments at 25, Reply Comments at 5-6.

[173] Since the filing of BellSouth's Comments, Part 22 was amended. Consequently, the rule section to which BellSouth refers is now found in Section 22.903 of the Commission's Rules, 47 C.F.R. § 22.903.

[174] BellSouth Comments at 25.

[175] *Id.* at 26. BellSouth recently submitted an *ex parte* letter detailing certain regulatory changes in the State of Georgia. *See Ex Parte* Letter in CC Docket No. 94-54, from W. Barfield, Associate General Counsel, BellSouth Corporation, (Mar. 27, 1995).

[176] Ameritech Reply Comments at 6-7; Bell Atlantic Reply Comments at 15-16; NYNEX Reply Comments at 8-9; SBC Reply Comments at 13 n.34.

showing that permitting resale would not be technically feasible or economically reasonable for a specific class of CMRS providers.[177] As we have noted, the Commission has a long history of encouraging resale. The Commission has found on many occasions that the denial of resale is unjust and unreasonable and unlawfully discriminatory in violation of Section 201(b) and Section 202(a) of the Act.[178] We also tentatively conclude that we should impose a resale obligation as a condition of license pursuant to our authority under Title III of the Communications Act, as we have for cellular providers. The Commission has authority, through rule making or by imposing license conditions, to apply such a restriction to existing licensees under Title III.[179]

84. We further tentatively conclude that requiring CMRS licensees to provide resale capacity will have the overall effect of promoting competition. Prohibiting resale restrictions provides a means of policing price discrimination, mitigating head-start advantages among licensees, and providing some degree of secondary market competition (*i.e.*, retail price competition). Further, promoting resale is advantageous because resellers may be a source of marketplace innovation (*e.g.*, by adding value to the resold service). For example, a reseller may provide a customized billing service, or bundle resold service with other telecommunications services such as interexchange or cable service. Resale could increase overall demand for CMRS services and increase overall traffic on telecommunications networks, thus permitting achievement of economies of scope and scale.

85. It is our tentative view that requiring resale would involve minimal expense and no technical problems for most of the CMRS licensees subject to the requirement. CMRS providers are permitted to charge resellers, thereby ensuring that they are compensated for the provision of resale capacity. This obligation would extend existing Commission policy for cellular carriers to CMRS providers, *i.e.*, CMRS providers would be required to make airtime available to resellers. Thus, under our proposal, any volume discount available to a cellular or other CMRS carrier's large "retail" customers must also be available to resellers on the same terms and conditions offered to retail customers.[180] Of course, any interstate bulk rate offerings would be subject to the non-discrimination requirements of Section 202(a) of the

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[177] *See* paragraph 87, *infra*.

[178] *See, e.g., Resale and Shared Use Decision*, 60 FCC 2d 261 (1976); *Resale of Switched Services*, 83 FCC 2d 167 (1980); *Cellular Order*, 86 FCC 2d 469, 511, 642 (1981); *Cellular Resale Order*, 7 FCC Rcd 4006 (1992). *See also* notes 91, 97, 100 and 104, *supra*.

[179] *See* Section 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 303(r). *See also WBEN, Inc. v. FCC*, 396 F.2d 601, 618 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968); *Upjohn, Inc. v. FDA*, 811 F.2d 1583, 1585 (D.C. Cir. 1987).

[180] *See Cellular Resale NPRM and Order*, 6 FCC Rcd at 1724-25.

Act.[181] In addition, if the Commission decides to make a resale obligation a condition of license then the resale obligation would apply to all services provided by a CMRS licensee.

86. CMRS providers may have incentives to refuse to enter into resale arrangements with competing carriers. For example, even though carriers are permitted to charge and realize a profit from selling service to resellers, the return is higher when they provide the retail service directly to end users. Thus, absent a Commission-imposed resale obligation, it is our tentative view that carriers might very well refuse to permit other providers to resell their service. Therefore, we tentatively conclude that a mandatory general resale requirement is necessary because it will serve as an effective means of promoting competition in the CMRS marketplace.

87. We also seek comment on whether resale is unreasonable, unnecessary, or technically infeasible for specific classes of CMRS providers. For example, GTE contends that resale obligations do not make sense for air-to-ground services, because of technical limitations and the nature of the service. NABER alleges technical and capacity problems for SMR systems. PageNet urges that a resale obligation is unnecessary for paging companies. We tentatively conclude that there may be considerations, such as technical problems, that would support limiting the resale requirement. We seek comment on whether the technical considerations raised with regard to air-to-ground service and SMR service are sufficient to permit restrictions on the resale of these services and whether such restrictions would violate the just and reasonable standard of Section 201(b), and the non-discrimination provisions of Section 202(a). We seek further comment on whether resale obligations are unnecessary for paging operators and whether permitting restrictions on the resale of paging services would violate the just and reasonable standard of Section 201(b), and the non-discrimination provisions of Section 202(a).

88. Resale to Facilities-Based Carriers. We further tentatively conclude that the ability to resell other CMRS services could be used by new facilities-based carriers to enter the CMRS market in advance of the completion of their systems and begin competing with existing providers much sooner. A resale requirement, for example, may "jump-start" competitive entry of PCS services into the CMRS marketplace. The ability to enter the market quickly as cellular resellers could assist them in building a customer base now, and could counteract the head-start advantage that cellular providers possess. Resale could also be a marketing tool by which new entrants could build a customer base before they have completed construction of their systems. We seek comment on these observations and on APC's proposal that PCS providers should have no obligation to resell service to their facilities-based competitors.

89. We recognize, however, that at some point the facilities-based competitor will have had sufficient opportunity to build its system. There is a concern that by not placing

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[181] 47 U.S.C. § 202(a).

limits on the resale requirement, we increase the chances that CMRS licensees will opt not to complete construction of their systems. On the other hand, as we noted in the *Cellular Resale Order*, there are many factors that can delay construction of facilities, including state and local zoning approval delays,[182] weather conditions, and site availability for additional transmittal locations. We recognized in that Order the importance of adopting a rule that takes all of these factors into account. We also found that eliminating the resale requirement prior to the end of a new licensee's five-year fill-in period would interfere with the flexibility of cellular carriers to construct their systems. Therefore, we determined that the public interest was best served by eliminating the resale requirement to facilities-based competitors after the five-year build-out period.[183]

90. In the interest of striking an acceptable balance of new CMRS entrants' interest in reselling in order to enter the market as quickly as possible and the public interest in encouraging the aggressive development of new networks, we tentatively conclude that, as in the case of cellular carriers, a time limitation on the obligation of one facilities-based CMRS provider to permit another facilities-based CMRS provider to resell its services is appropriate. Several commenters have cited resale as an important aspect of creating a customer base during the build-out phase. We tentatively conclude that, as in the case of cellular service, once the newer entrant in a market is fully operational one rationale for prohibiting resale restrictions between facilities-based carriers, *i.e.*, to offset any competitive advantage gained as a result of a service provider's "headstart", ceases to exist. We further tentatively conclude that a rule allowing a carrier to deny resale capacity to a fully operational facilities-based competitor would not violate the just and reasonable standard of Section 201(b), or the non-discrimination provisions of Section 202(a). We seek comment on these tentative conclusions.

91. Additionally, we seek comment on Allnet's assertion that if it is more profitable for a new entrant to resell rather than invest, this is not necessarily an uneconomic outcome or contrary to the public interest. Allnet argues that such activity may indicate that the market cannot profitably support additional capacity.[184] Commenters should address whether Allnet's assertions should cause the Commission to rethink the advisability of allowing limitations of resale to facilities-based competitors. In particular, we seek comment on whether the assignment of licenses through competitive bidding should affect our analysis of this issue.

92. The commenters propose several different "windows" after which the resale obligation would cease, including: no "window"; a twelve-month "window"; an eighteen-

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[182] *See* Amendment of the Commission's Rules To Preempt State and Local Regulation of Tower Siting For Commercial Mobile Radio Service Providers, Cellular Telecommunications Industry Association's Petition for Rulemaking, RM 8577, Public Notice, Report No. 2052 (rel. Jan. 18, 1995).

[183] *Cellular Resale Order*, 7 FCC Rcd at 4009-10.

[184] *See* Allnet Reply Comments at 10-11.

month "window"; a five-year "window"; and a ten-year "window" (for PCS).[185] We seek comment on these proposals. We also seek comment on whether, as in the case of cellular, the resale requirement should remain in effect until the termination of the fill-in period of the particular service, which we have previously established in our Rules.[186] In the alternative, we seek comment on whether the resale requirement should terminate in advance of the termination of the build-out period to encourage licensees to complete construction of their systems as rapidly as possible.

93. If we ultimately decide to allow carriers to deny resale capacity to facilities-based competitors, we need to establish what constitutes a facilities-based competitor. Under current rules, a cellular licensee "may apply resale restrictions to licensees of cellular systems on the other channel block in its market" at the expiration of the five-year build-out period.[187] Here, we are proposing a broader rule that would include most, if not all, CMRS providers. The rule that currently applies to cellular carriers does not readily translate to the CMRS marketplace where different services have different service areas. In the *CMRS Third Report and Order*, the Commission concluded that all CMRS providers are providing competing services or have the reasonable potential to provide competing services in the CMRS marketplace.[188] We also noted, however, that a different set of policy goals, or the application of the same policy goals to differing circumstances, may require a different analysis and may result in different conclusions regarding the extent of competition between services.[189] Some commenters suggest that the Commission should only include "broadband" services in our determination of what constitutes a competitor. We seek comment on what factors the Commission should consider in defining a carrier's facilities-based competitor. We also seek comment on the factors we should consider for determining the geographic market in which

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[185] *See, e.g.,* Bell Atlantic Comments at 17-18 (no resale to facilities-based competitors after five years); BellSouth Comments at 23-24 (encouraging stricter limitation of resale to facilities-based competitors); McCaw Comments at 22 (18-month limit); New Par Reply Comments at 8-9 (12-month limit); Pacific Comments at 25-27 (should not require resale of PCS among licensees serving the same territory, but should allow PCS resale of cellular service for 10 years).

[186] *See Cellular Resale Order*, 7 FCC Rcd at 4009 (five-year period is appropriate termination point for resale obligation because the Commission provided flexibility to cellular carriers to construct their systems for five years). *See also* Section 22.947 of the Commission's Rules, 22 C.F.R. § 22.947 (1994). PCS, however, has a 10-year build-out requirement and does not use the concept of a carrier-defined service area, such as a Cellular Geographic Service Area. *See* Sections 24.103 and 24.203 of the Commission's Rules, 24 C.F.R. § 103 (narrowband PCS); 24 C.F.R. § 203 (broadband PCS) (1994).

[187] *See* 47 C.F.R. § 22.901(e).

[188] *CMRS Third Report and Order*, 9 FCC Rcd at 7996, 8009-12.

[189] *Id.* at 8011.

to apply a resale obligation. For example, should there be a certain percentage of overlap between competing carriers before resale obligations can be restricted?

94. We seek comment on whether it is necessary to revise our rules to encourage resale in the wireless marketplace. It has been argued, for example, that number transferability would aid the resale market, *e.g.*, if numbers were "transferable" resellers could use their ability to move their customers and their numbers to other facilities-based providers as leverage to obtain better service at lower prices.[190] Number transferability, in this context, means the capability of a CMRS reseller either to migrate its customers' numbers to its system when completed, or to move its block of numbers to other facilities-based providers in the event that the reseller is able to negotiate a better wholesale rate from another provider. The Commission has previously determined that, with regard to cellular resale, "a transferable NXX scheme . . . would serve the public interest."[191] We seek comment on whether we should make number transferability requirements a part of our CMRS resale policy.[192]

95. Reseller Switch Proposal. We tentatively conclude that the reseller switch proposal espoused by NCRA and Comtech/CSI in this proceeding should not be generally imposed upon CMRS providers at this time.[193] We tentatively conclude that in each local geographic market, the relevant product market for purposes of analyzing this proposal comprises those wireless carriers that offer switched mobile voice services over networks that are fully interconnected to the public switched telephone network. We reach this conclusion because the product that resellers appear to want to provide is mobile voice telecommunication

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[190] *See, e.g.,* Note 149, *supra.*

[191] *See* Amendment of Part 22 of the Commission's Rules Relative to the Domestic Public Cellular Radio Telecommunications Service, CC Docket No. 85-25, 59 Rad. Reg. 2d 209, 212 (1985). *See also* Cincinnati SMSA Limited Partnership, Memorandum Opinion and Order, Mimeo No. 4124 (Com.Car. Bur., released April 30, 1985) (finding that where "the wireline carrier is able to accommodate a request for a separate, transferable number block by a non-wireline permittee or applicant wishing to resell during the headstart period, the public interest requires it to negotiate with the non-wireline party in good faith to make such arrangements available"); Tucson Cellular Telephone Company v. Tucell Limited Partnership, Memorandum Opinion and Order, 1986 WL 291347 (Com.Car.Bur., released Feb. 18, 1986).

[192] Number portability issues are important in wireline as well as wireless settings. Whether to adopt rules governing number transferability for cellular resellers may be determined in the instant proceeding or, alternatively, in a more general proceeding on number portability that has yet to be initiated.

[193] *See* NCRA Comments, *passim*, and Reply Comments, *passim*; CSI/Comtech Comments, *passim*, and Reply Comments, *passim*.

services.[194] We believe the relevant geographic market may be either the service area or license area. We seek comment on the scope of both the relevant product and geographic market.

96. Under our tentative conclusions about the relevant product and geographic markets, this market would include cellular providers and the up to six broadband PCS providers who are purchasing licenses at auction. It may also include wide-area SMR providers. Given the number of competitors we expect to be present in this market in the near future, competitive forces should provide a significant check on inefficient or anticompetitive behavior. This fact suggests that a regulatory mandate to allow switch-based resale may be unnecessary. Moreover, a mandatory switch-based resale policy may impose costs on the Commission, the industry, and consumers. For example, CMRS providers might have to incur costs to satisfy a requirement to unbundle their services and offer interconnection on the terms needed for switch-based resellers.[195] We acknowledge, however, that the record reflects differing views with regard to this issue of costs,[196] and we thus seek further comment on this issue. Further, we are concerned about the administrative complexity and costs of imposing such regulations. In addition, we seek comment on whether it would be anomalous to establish an interconnection obligation for the benefit of switch-based resellers alone and not for other CMRS providers. In light of these considerations, we are unable to conclude at this time that the benefits of general unbundling and interconnection requirements for switch-based resale outweigh the costs. We seek comment on these tentative conclusions.

97. We note that two cellular resellers have filed complaints against two different cellular licensees, claiming that the cellular licensees' refusal to permit interconnection with the respective cellular resellers' switches violates Sections 332(c)(1)(B) and 201(a) of the Communications Act.[197] We will address these specific requests in the context of these complaint proceedings. We note that our tentative conclusions regarding a general reseller

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[194] The relevant product market here may differ from the relevant product market for general CMRS interconnection because resellers advocating the reseller switch proposal focus on mobile voice services. In this case, the resellers' universe of suppliers is therefore limited to the wireless voice facilities-based providers and the market should not include wireline facilities to the extent they do not currently provide significant direct competition for wireless services.

[195] *See, e.g.,* AirTouch Comments at 24-26, Reply Comments at 3-12; McCaw Comments at 14-16.

[196] *See, e.g.,* NCRA Comments at 16-18; CSI/ComTech Comments at Exh. 2, pp. 5-9, Reply Comments at 3-4.

[197] *See* Cellnet Communications, Inc. v. New Par, Inc., d/b/a Cellular One, File No. WB/ENF-F-ENF-95-010, filed Feb. 16, 1995; Nationwide Cellular Service, Inc. v. Comcast Cellular Communications, Inc., File No. WB/ENF-F-ENF-95-011, filed Feb. 16, 1995.

switch interconnection requirement should not be viewed as prejudging any specific complaints filed with respect to this issue.[198]

98. Miscellaneous. Finally, we find that this rule making is not the appropriate proceeding in which to address BellSouth's proposal that the Commission determine that the structural separation requirement contained in Section 22.903 does not apply to the resale of cellular service by a Bell Operating Company. Therefore, we do not decide that question here. Rather, we intend to address this question in a separate proceeding.

III. CONCLUSION

99. We conclude that it is premature, at this stage in the development of the CMRS industry, for the Commission to impose a general interconnection obligation on all CMRS providers. We further tentatively conclude that resale, where technically feasible, serves the public interest in promoting competition in the CMRS marketplace. We also tentatively conclude that the requirement of CMRS providers to provide resale capacity to facilities-based competitors should not continue indefinitely, and therefore seek comment on when the obligation to resell to facilities-based competitors should terminate.

IV. PROCEDURAL MATTERS

A. Ex Parte Rules

100. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules.[199]

B. Regulatory Flexibility Act

101. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et.seq.* (1981), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of the policies and rules proposed in this Notice on small entities. The IRFA is contained in Appendix B to this *Notice*. The Secretary shall cause a copy of this *Notice*, including the IRFA, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.

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[198] *See* Section III. A. 1. c., *supra*.

[199] *See generally*, Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a).

C. Authority

102. This action is taken pursuant to Sections 1, 4(i), 4(j), 201, 202, 208, 332, and 403 Communications Act as amended; 47 U.S.C. §§ 154(i), 201, 202, 208, 332, and 403.

D. Further Information

103. For further information regarding this *Notice*, contact Judy Argentieri or Barbara Esbin (Wireless Telecommunications Bureau, Policy Division) at (202) 418-1310.

V. ORDERING CLAUSES

104. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory changes described above, and that COMMENT IS SOUGHT on these proposals.

105. IT IS FURTHER ORDERED that the motion to accept a late filed pleading filed by UTC, The Telecommunications Association, IS GRANTED.

106. IT IS FURTHER ORDERED that the proposed action is authorized under Sections 1, 4(i), 4(j), 201, 202, 208, 332, and 403 Communications Act as amended; 47 U.S.C. §§ 154(i), 201, 202, 208, 332, and 403.

107. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, comments SHALL BE FILED with William F. Caton, Acting Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before June 14, 1995 and reply comments SHALL BE FILED with the Secretary on or before July 14, 1995. To file formally in this proceeding, parties must file an original and five copies of all comments, reply comments, and supporting comments. Parties wishing each Commissioner to receive a personal copy of their comments must file an original plus nine copies. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, the International Transcription Services, Inc., Suite 140, 2100 M Street, N.W. Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the Reference Center of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary