Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
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Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services	)	CC Docket No. 94-54
	)	

To: The Commission

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COMMENTS OF CELLULAR SERVICE, INC. &
COMTECH MOBILE TELEPHONE COMPANY

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Summary

Cellular Service, Inc. ("CSI") and ComTech Mobile Telephone Company ("ComTech") are cellular resellers in California. They are protesting the Commission's continued refusal to respond to their request for Commission recognition of a cellular reseller's right to interconnect a switch with the facilities of an FCC-licensed cellular carrier.

CSI and ComTech filed a petition for reconsideration of the Second Report and Order in General Docket No. 93-252 because of the Commission's failure to recognize a cellular reseller's interconnection rights under Section 201 of the Communications Act of 1934 and Commission precedent. CSI and ComTech also filed comments in response to the notice of inquiry in CC Docket No. 94-54.

CSI and ComTech's petition for reconsideration is still pending, and the Commission's current request for additional comment on the interconnection issue -- at least as applied to cellular resellers -- is inexplicable. The rights of cellular resellers to interconnect with the facilities of cellular carriers should not be dependent upon future developments in Personal Communications Services, Enhanced Specialized Mobile Radio services, or other new mobile technologies. Cellular resale is a mature service, and interconnection is needed now to further the Commission's oft-stated goal of more meaningful competition. The Commission has never explained why it cannot apply prior decisions setting forth the standard to govern requests for interconnection among common carriers.

CSI and ComTech have never sought and do not request the promulgation of regulations. Rather, the Commission should follow the same approach pursued in mandating interconnection between local exchange carriers and cellular carriers: namely, a requirement that the parties engage in good faith negotiations for six (6) months; any remaining disputes can then be brought to the Commission for informal mediation or formal resolution. In that way, any complaints will be decided on the basis of a particular request rather than speculation on industry-wide costs and benefits.

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Cellular Service, Inc. ("CSI") and ComTech Mobile Telephone Company ("ComTech"), acting pursuant to the Commission's Second Notice of Proposed Rule Making ("Notice") in the above-referenced docket, hereby comment on the obligations of the FCC-licensed cellular carriers to provide interconnection to the facilities of a cellular reseller.

Introduction

The Notice constitutes another -- and inexplicable -- refusal by the Commission to recognize a cellular reseller's right to interconnect its facilities with those of the FCC-licensed cellular carriers. The Commission initially refused to resolve that issue when it adopted the Second Report and Order in General Docket No. 93-252 on February 3, 1994 because, said the Commission, additional information was needed. Now, more than sixteen (16) months later, the Commission is still unprepared to address the narrow question whether cellular resellers should be allowed to interconnect their facilities with cellular carriers.

The Commission tentatively concluded in its Notice that CSI's and ComTech's cellular reseller switch proposal "should not be generally imposed upon [Commercial Mobile Radio Service] providers at this time." Notice at ¶ 95. However, CSI and ComTech never proposed that their proposal for a cellular reseller switch be imposed on every CMRS provider. Quite the contrary. CSI and ComTech explicitly acknowledged that the Commission may want to defer any decision on whether to impose similar interconnection obligations on providers of Personal Communication Services ("PCS"), Enhanced Specialized Mobile Radio ("ESMR") service, and other nascent and nonexistent technologies until they are sufficiently mature to understand the marketplace in which they operate.

The Commission's refusal to acknowledge a cellular reseller's right to interconnect thus reflects the demolition of the proverbial straw man. In this context, the Commission's call for more comments appears to be nothing more than a delaying tactic. After sixteen (16) months and the submission of hundreds of pages of documents from numerous parties, the Commission does not appear any closer to making a decision today than it did in February 1994. The Commission's failure to act is all the more remarkable since no fact or legal argument has been advanced in those voluminous submissions to justify the Commission's refusal to recognize the cellular resellers' interconnection rights or the concomitant obligation of a cellular carrier to negotiate

with a cellular reseller in good faith with respect to the terms and conditions of any such interconnection.

Other parties -- most especially the cellular carriers -- may dispute that latter conclusion. Even the Commission may come to a different conclusion. But no difference of opinion can justify the Commission's continued refusal to act on a CSI's and ComTech's repeated requests for a decision as to whether they have a right to interconnect their switch with the facilities of the cellular carriers. The Commission's persistent refusal to make a decision -- even a decision adverse to cellular resellers -- reflects the kind of administrative delay which will protect the FCC-licensed cellular carriers from competitors and thus undermine the Commission's oft-repeated goal of a more competitive mobile communications market.

I. Background

As explained in the comments filed earlier in the instant proceeding, CSI and ComTech are cellular resellers in California.[1] Together they serve more than 60,000 subscribers.

For years CSI and ComTech have tried to negotiate agreements with the FCC-licensed cellular carriers to install a switch that would enable CSI and ComTech to reduce costs and improve service. Those efforts have been frustrated in large part by the carriers' insistence that cellular resellers do not have a right of

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[1]CSI and ComTech's prior comments and reply comments are hereby incorporated by reference.

interconnection under the Communications Act of 1934, as amended (the "Act").

The California Public Utility Commission has nonetheless ordered California's cellular carriers to unbundle their services to permit interconnection of a cellular reseller's switch. CSI and ComTech have engaged Ericsson, Inc. -- which also manufactures cellular carrier switches -- to produce a reseller switch. CSI and ComTech have already committed hundreds of thousands of dollars to the project. Tests are progressing, and a compatible switch will soon be available.

In the meantime, this Commission has reinforced the carriers' contentions by refusing to acknowledge the cellular resellers' right of interconnection and the concomitant obligation of the cellular carriers to negotiate an interconnection agreement in good faith. The unreasonableness of the Commission's inaction is perhaps illustrated best by a review of the procedural history concerning the issue.

On February 3, 1994, the Commission adopted its Second Report and Order in General Docket No. 93-252, 9 FCC Rcd 1411 (1994). In that decision, the Commission obligated the Local Exchange Carriers ("LECs") to provide interconnection to all providers of Commercial Mobile Radio Service ("CMRS"). The Commission deferred consideration of the question whether CMRS providers should provide interconnection to other CMRS providers. The Commission observed that "the comments on this issue are so conflicting and the complexities of the issue warrant further

examination in the record. . . ." Second Report and Order, 9 FCC Rcd at 1449.

On May 19, 1994, CSI and ComTech filed a Petition for Reconsideration of the Second Report and Order because of the Commission's refusal to recognize a cellular reseller's right under Section 201(a) of the Act to interconnect its switch with the Mobile Telephone Switching Office ("MTSO") of an FCC-licensed cellular carrier. In their petition, CSI and ComTech pointed out that a cellular reseller, like any telephone customer, has a right "reasonably to use his telephone in ways which are privately beneficial without being publically detrimental." Hush-A-Phone v. United States, 238 F.2d 266, 269 (D.C. Cir 1956). See CSI and ComTech Petition for Reconsideration (May 19, 1994) at 7. CSI and ComTech further pointed out that the Commission itself had concluded that the Hush-A-Phone standard should be applied in deciding whether to honor a common carrier's request for interconnection. Id. at 7-8, citing AT&T, 60 FCC 2d 939 (1976). No request was made for specific rules. CSI and ComTech requested only that the Commission recognize a cellular reseller's right to interconnection. CSI and ComTech further recommended that the Commission follow the same approach in cellular reseller interconnection that the Commission had utilized in mandating the LECs to interconnect with the cellular carriers -- namely, require the parties to negotiate an agreement within six (6) months and, failing an agreement, to bring the dispute to the Commission for resolution.

In their Petition for Reconsideration, CSI and ComTech identified the inequities of delaying a decision on cellular resale interconnection until the Commission made a decision about the interconnection rights of all CMRS providers. Cellular resale is a mature service. In contrast, PCS and ESMR are either nonexistent or only nascent services. If the Commission insisted on waiting for those latter services to mature, valuable time would be lost and competition would be undermined (since cellular resale currently provides the only meaningful competition to cellular carriers). CSI and ComTech emphasized that recognition of a cellular reseller's right to interconnection now would not limit the Commission's future options. Any policy for cellular resale interconnection could be modified by any rules or policies subsequently adopted pursuant to any proceeding concerning CMRS providers generally.

On June 9, 1994, the FCC adopted its Notice of Inquiry in CC Docket No. 94-54 to determine whether every CMRS provider should have a right to interconnect with other CMRS providers. In the notice, the Commission acknowledged (but did not decide) CSI and ComTech's Petition for Reconsideration in General Docket No. 93-252. The Commission stated that, "[u]ntil any such generic rules [for interconnection] are adopted, we will, of course, entertain any requests to order interconnection [for a switch-based cellular reseller] pursuant to Section 332(c)(1)(B) on a case-by-cases basis." Equal Access and Interconnection Obligations, 9 FCC Rcd 5408, 5458 n.213 (1994).

In their comments, CSI and ComTech responded that the Commission's offer was a meaningless gesture. The Commission is not likely to dispose of any such complaints until it first decides the generic policy question of whether a cellular reseller has a right of interconnection to cellular carriers.

On April 5, 1995, the Commission adopted its Notice in the above-referenced docket. The Commission tentatively concluded that "the reseller switch proposal espoused by [the National Cellular Resellers Association] and ComTech/CSI in this proceeding should not be generally imposed upon CMRS providers at this time." Notice at ¶ 95. The Commission expressed its hope that the emergence of PCS, ESMR and other mobile communications systems in the future would create "competitive forces" that would "provide a significant check on any efficient or anticompetitive behavior." The Commission added that it needed additional comments on the issue because (1) "the record reflects differing views with regard to this issue of [interconnection] costs," (2) the Commission is "concerned about the administrative complexity and costs of imposing [interconnection] regulations," and (3) the Commission is generally "unable to conclude at this time that the benefits of general unbundling and interconnection requirements for switch-base resale outweigh the costs." Notice at ¶ 96.

Since it was not prepared to recognize a right of interconnection for any CMRS provider, the Commission said that

"the decision of interconnection 'where warranted' is best left to the business judgment of the carriers themselves." Notice at ¶ 37. The Commission reminded all CMRS providers that they are subject to the commands of the Act, including Section 201, and that "CMRS providers may avail themselves of the Section 208 complaint process to bring to our attention any denials of interconnection they believe to be unreasonable or otherwise unlawful. . . ." Notice at ¶ 40. The Commission did not explain how a CMRS provider could successfully prosecute an interconnection complaint against another CMRS provider if the Commission is unwilling to recognize any CMRS provider's right to interconnect with another CMRS provider.

In the meantime, Cellnet Communications, Inc. and Nationwide Cellular Service, Inc., two cellular resellers, filed separate complaints under Section 208 of the Act on January 27, 1995 protesting a cellular carrier's refusal to discuss interconnection of the reseller's switch with the carrier's MTSO. Although the Enforcement Division of the Wireless Telecommunications Bureau does not have a backlog of complaints, there does not appear to be any prospect that those complaints will be resolved soon -- and certainly not until the Commission makes a policy determination whether to recognize a cellular reseller's right of interconnection with a cellular carrier. Nor is there any indication as to when the Commission will act on CSI and ComTech's Petition for Reconsideration of the Second Report and Order in General Docket No. 93-252.

II. The Public Interest Requires A Decision

In proposing to establish "regulatory parity" through an amended Section 332, the House of Representatives Budget Committee observed that it "considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network." House Report No. 103-111, 103 Cong., 1st Sess. 261 (May 25, 1993). It is now two years since the House Budget Committee issued that pronouncement, and this Commission does not seem to be any closer to rendering a decision on CSI and ComTech's request for Commission recognition of a cellular reseller's right of interconnection with a cellular carrier's MTSO. No reasonable basis can justify the Commission's continued refusal to respond to that request.

First, contrary to the implication in the Notice, CSI and ComTech have not requested the promulgation of regulations. CSI and ComTech have only requested the issuance of a policy statement that would recognize a cellular reseller's right to interconnection and the concomitant obligation of a cellular carrier to engage in good faith negotiations. That informal process of negotiation has been effective in facilitating interconnection arrangements between the cellular carriers and the LECs; there is no reason to believe that same process would not be effective in facilitating interconnection arrangements between cellular resellers and cellular carriers. See CSI & ComTech Reply to Oppositions to Petition for Reconsideration

(Gen. Docket No. 93-252 June 29, 1994) at 8 and sources cited therein.

Second, contrary to the Notice's statement, CSI and ComTech have not requested that the Commission recognize any other CMRS provider's right to interconnection to other CMRS providers. As the Commission itself acknowledges, it is difficult to decide whether to apply that right of interconnection to CMRS providers which are not yet in existence (PCS) or are in nascent stages of development (ESMR). There is no public policy which requires the Commission to wait until all CMRS services are mature before it decides the rights to be accorded to any provider of CMRS service.

Third, neither the carriers nor the Commission has cited any fact or legal authority to justify the Commission's departure from its earlier conclusion that the Hush-A-Phone standard should be applied in deciding requests for interconnection. As the Commission explained almost two decades ago, a common carrier's right to interconnection should not be based on the connecting carrier's speculation concerning technical harm or undue economic costs. Those kind of specific factual questions can and should be decided in the context of a specific request to a specific carrier. In short, a recognition of the right sought by CSI and ComTech would not mean that any and every cellular reseller interconnection request would be honored; such recognition would only mean that CSI and ComTech, as well as other cellular resellers, would have the right to negotiate an interconnection

agreement with a cellular carrier. If the parties could not reach an agreement through informal negotiations, the Commission would then be in a position to dispose of any ensuing Section 208 complaint on the basis of specific facts.

Fourth, recognition of a cellular reseller's right to interconnection will not in any way foreclose the Commission's options in deciding the scope of other CMRS providers' rights of interconnection or, indeed, in changing a cellular reseller's right of interconnection. The Commission always has the option to change its rules or policies upon provision of a reasonable explanation. See Comments of CSI & ComTech Mobile Telephone Company (CC Docket No. 94-54 September 12, 1994) at 10-11 and sources cited therein.

Fifth, The Commission cannot and should not cast the cellular resellers' fate to the business judgment of the cellular carriers. We all know where that road will lead to. The cellular carriers have made it clear that they will not provide any interconnection in the absence of any regulatory mandate to do so. There is no evidence in the record to justify the Commission's view that some vague notion of competition will somehow inspire those cellular carriers to change their position.

Sixth, there is a certain irony in the Commission's claim that the CMRS market is too immature to render any judgment concerning the scope of a CMRS provider's obligations to provide interconnection to another CMRS provider. In denying the State of California's petition to continue to exercise regulatory

authority over cellular rates, the Commission placed substantial reliance upon the advent of PCS, ESMR and other new mobile communications services. State of California, PR Dkt. No. 94-105 (May 19, 1995) at ¶ 103. If those services are too nascent to reach any conclusions concerning the interconnection rights of cellular resellers -- who have been established for more than ten (10) years -- it is hard to understand how the Commission can draw definitive conclusions on the impact which those new services will have on competition in California's mobile communications market.

CSI and ComTech believe that the foregoing propositions are unassailable. Regardless of whether it agrees, the Commission should act forthwith on CSI and ComTech's request for recognition of their right to interconnect with a cellular carrier's MTSO. If the Commission cannot grant that request, then the Commission should say so and at least afford CSI and ComTech the opportunity to pursue their request before a reviewing court.

Conclusion

WHEREFORE, in view of the foregoing and the entire record in this docket, it is respectfully requested that the Commission recognize a cellular reseller's right to interconnection with a cellular carrier's MTSO, order cellular carriers to engage in good faith negotiations with any cellular reseller requesting such interconnection, and dispose of any interconnection complaints under Section 208 of the Act on the basis of specific

disputes which revolve around the particular parameters of the request and any harm claimed by a carrier.

Respectfully submitted,

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