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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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

To: The Federal Communications Commission

DOCKET FILE COPY ORIGINAL

REPLY COMMENTS OF
SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

Respectfully submitted,

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SUMMARY

Comments filed in response to the Commission's Second NPRM offer further support for the Commission's initial decision not to promulgate regulations and impose obligations for CMRS-CMRS interconnection, CMRS roaming and the unbundling of wireless networks.

Mandatory CMRS-CMRS interconnection is not warranted and would lead to inefficiencies. Such mandatory interconnection is not supported by economic principles or anti-trust law. As the Commission notes the decision of whether CMRS-CMRS interconnection is warranted is best left to the business judgement of the CMRS providers themselves.

Roaming arrangements should also be left to the business judgments of the CMRS providers. Roaming in the cellular industry has thrived without government mandates regarding contract terms, price, technical interfaces or access to proprietary databases. The economic incentive to enter into roaming agreements and the competitive nature of the market renders regulation unnecessary.

Regulation carries with it a cost. As the Commission has noted, the congressional intent of the recent changes in the Communication Act regarding mobile services was to reduce CMRS regulation and to allow the CMRS market to develop subject only to as much regulation for which the Commission can demonstrate a clear cut need. The burdensome unbundling and cost based pricing being called for by resellers is simply not justified. Likewise,

wireless number portability is not justified given its effect on roaming and the industry.

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All regulatory intervention imposes costs; costs which can only be justified in situations where the benefits are clearly overriding.[1] Unnecessary regulation carries with it the potential to undercut the competitive process resulting in inefficiency and diminished consumer welfare.[2] Thus, as Commissioner Quello recognized in his separate statement when this proceeding[3] was announced "regulatory obligations created to address interconnection among common carriers controlling bottleneck facilities should not be grafted onto the mobile communications industries, which are competitive, which soon will become even more so and use differing and developing technologies".[4] This recognition is consistent with the Commission's acknowledgement

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[1]Comments of the Cellular Telecommunications Industry Association, p. 6 (June 14, 1995). (CTIA Comments).

[2]CTIA Comments, pp. 6-7.

[3]In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, Second Notice of Proposed Rulemaking (Released April 20, 1995). ("Second NPRM").

[4]See, Separate Statement of James H. Quello, Second NPRM.

that the Congressional purpose underlying the Communications Act amendments in the Omnibus Budget Control Act was to reduce CMRS regulation and allow the emerging CMRS market "to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear-cut need".[5]

Recognizing the detrimental affects of unnecessary regulation and the debilitating affect it can have in competitive markets, this Commission correctly concluded in the Second NPRM that it should not mandate CMRS-CMRS interconnection, should not mandate rules and regulations for roaming and should not require an unbundling of CMRS networks for resellers. Southwestern Bell Mobile Systems, Inc. (SBMS), joined the majority of the commentors in concurring with such conclusions and providing additional support for such conclusions in its initial Comments in response to the Second NPRM.

Other parties however continue to argue against the Commission's conclusions and advocate increased regulation to establish mandatory CMRS-CMRS interconnection, roaming rules and a Commission imposed unbundling of wireless networks, with a requirement of cost based rates. SBMS files these Reply Comments in response to such arguments and in support of the Commission's tentative conclusions. SBMS also notes that Commission needs to

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[5]Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, PR Docket 94-106, Report and Order, at para. 10 (Released May 19, 1995). Each of the seven orders denying the state petitions for continued regulation contains a nearly identical discussion of the Commission's regulatory approach to CMRS.

clarify the function Section 208 will play in requests for interconnection.

I. CMRS-CMRS INTERCONNECTION SHOULD NOT BE MANDATED.

The Comments filed in response to the Second NPRM reaffirm the Commission's conclusion that CMRS-CMRS interconnection is premature, unwarranted and unnecessary.[6] The Commission has recognized that CMRS providers do not control bottleneck facilities.[7] Direct interconnection to all CMRS providers is not necessary for the provision of CMRS service--what is necessary is access to other networks through the landline public switched network. As SBMS demonstrates a CMRS provider has a number of options to connect to the public network and reach all other networks.[8]

Neither generally accepted economic principles[9] nor traditional anti-trust theory[10] support a policy of government mandated CMRS-CMRS interconnection. As explained in detail in the various Comments, CMRS providers do not possess sufficient "market

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[6]See e.g., SBMS Comments, pp. 2-13; AT&T Comments, pp. 5-20, Exhibits 1,2,3; BellSouth, pp. 2-3; CTIA Comments, pp. 3-19; GTE Comments, pp. 4-9; New Par Comments, pp. 2-15; PCS PRIMECO Comments, pp. 4-7.

[7]Regulatory Treatment of Mobile Services, GN Docket 93-252, Second Report and Order, para. 237 (March 7, 1994).

[8]SBMS Comments, pp. 4-8, 10-11, Attachments 1-3.

[9]See, AT&T Comments, pp. 5-12, Exhibit 1, pp. 3-7, pp. 9-23, pp. 28-42; CTIA Comments, pp. 3-13, 27-31.

[10]See,AT&T Comments, Exhibit 1 pp. 9-12, 21-24; CTIA Comments, pp. 3-13, 27-31; New Par Comments, pp. 8-15.

power" to effectively raise a competitor's costs by denying interconnection[11] nor do they control "essential facilities"[12].

As various commentors explain, government mandated CMRS-CMRS interconnection would be inefficient and uneconomical and would impede rather than advance competition.[13] Mandated interconnection would result in time and resource consuming disputes over the cost of interconnection because at least one party will feel that the interconnection is inefficient, otherwise it would have been accomplished without a mandate. A policy of mandatory interconnection will inevitably also result in regulatory intervention in price disputes. As AT&T notes "price regulation limits the ability of regulated firms to respond to changes in technology, costs and demand, thereby deterring new investments, improvements in quality, the introduction of new services and the entry of competitors".[14]

As the cellular experience has demonstrated, CMRS providers will interconnect their networks directly to each other when it makes economic sense to do so[15]--otherwise they will continue to take advantage of the efficiency of using the landline

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[11]AT&T Comments, pp. 11-12, Exhibit 1 pp. 9-12; CTIA Comments, pp. 3-13.

[12]AT&T Comments, Exhibit 1, pp. 21-24; CTIA Comments, pp. 8-12, pp. 28-31; New Par Comments, pp. 13-15.

[13]GTE Comments, pp. 7-9; AT&T Comments, pp. 16-19, Exhibit 1 pp. 12-14; SBMS Comments pp. 4-8; SNET Cellular Comments, pp. 6-7.

[14]AT&T Comments, p. 18.

[15]See, AT&T Comments, pp. 13-14 & Exhibit 2; SBMS Comments, pp. 6-7.

public switched network to interconnect.[16] If the CMRS providers see an economic advantage to interconnect they will, but it should be each providers choice. As the Commission observes, the "decision of interconnection "where warranted" is best left to the business judgement of the carriers themselves".[17] Further, the Commission should preempt state regulation of CMRS-CMRS interconnection to assure that the states do not take the decision away from the carriers.[18]

In the Second NPRM the Commission notes its intended reliance on the individual complaint process of Section 208 of the Communications Act to resolve any allegations of unreasonable or unlawful denials of CMRS interconnection.[19] The Commission states that the central issue in claims of an unreasonable denial of a request for interconnection is whether the public would be served by the imposition of interconnection obligations on CMRS providers.[20] SBMS supports the resolution of this issue on an individual case basis because the question of whether the public interest will be served is fact specific and market specific.[21] The Commission should clarify however that their use of Section 208

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[16] Id.

[17] Second NPRM, para. 17.

[18] See, AT&T Comments, pp. 20-23; CTIA Comments, pp. 16-19; Airtouch Comments, pp. 23-26; SBMS Comments, pp. 11-13.

[19] Second NPRM, para. 40.

[20] Second NPRM, para. 41.

[21] SBMS Comments, pp. 8-11.

to resolve the issue does not give rise to a claim for damages pursuant to Sections 208 and 209.[22] The requirement to interconnect exists "in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest".[23] It would be a violation of fundamental due process and the express wording of Section 201 for a CMRS provider to be found liable for damages for failing to interconnect, prior to the Commission determining that such interconnection is in the public interest.

II. ROAMING ARRANGEMENTS SHOULD BE LEFT TO THE INDUSTRY AND THE MARKET--NOT REGULATORY MANDATES.

The Commission tentatively concluded that there was no need for regulatory management of roaming arrangements and thus refrained from proposing specific regulations for roaming.[24] As various parties note, there is an economic advantage to all parties to enter into roaming agreements where technically practical and thus regulatory mandates are not required.[25]

Roaming in the cellular industry has thrived without government mandates regarding contract terms, price, specific technical interfaces or access to various proprietary databases.[26] Further, as CTIA notes, a cursory review of the winning PCS bidders

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[22]See, 47 USC 208; 47 USC 209.

[23]47 USC 201(a).

[24]Second NPRM, 54, 58.

[25]New Par Comments, pp. 20-22; GTE Comments, pp. 12-14; PCS PRIMECO Comments, pp. 8-9.

[26]SBMS Comments, pp. 13-18.

demonstrates that current cellular providers will also be providing PCS services.[27] PCIA notes that given the existence of the cellular roaming model upon which to base new roaming agreements, it is likely that expanded CMRS roaming agreements can be quickly consummated and in fact, work has already begun to extend existing roaming agreements to new services.[28]

A few parties representing PCS interests argue that the Commission should reconsider its decision and regulate roaming arrangements.[29] Other parties holding or representing PCS interests, including PCS PRIMECO the winning bidder of 11 MTA licenses in the A/B band auction ($1.1 billion investment), support the Commission's finding that the record does not warrant adopting rules governing roaming service.[30]

Pac Bell claims that some hypothetical "consortium of cellular carriers" might create a "blockage" to roaming out of territory and choose not to accommodate roamers from a competing PCS provider. Such speculation ignores the fact that a number of PCS providers are also cellular providers[31] and the economic incentive to enter into roaming agreements if technologies are

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[27]CTIA Comments, p. 21; See also, New Par Comments, pp. 20-22.

[28]PCIA Comments, p. 8.

[29]Pacific Telesis Mobile Services and Pacific Bell Mobile Services (Pac Bell) Comments, pp. 3-7; Comments of American Personal Communications, 7-9.

[30]PCS PRIMECO Comments, pp. 7-9; SBMS Comments, pp. 13-18; GTE Comments, pp. 12-14; BellSouth, pp. 5-7.

[31]See, CTIA Comments, p. 21; New Par Comments, pp. 20-22.

compatible[32]. The fact that many cellular providers will also be PCS providers will spur the development of cross service roaming.[33]

As Nextel notes, the questions surrounding the feasibility of CMRS roaming are not regulatory questions--they are technical questions.[34] Pac Bell, in arguing for a reconsideration and a promulgation of new regulations for roaming, acknowledges that there are difficult technical issues involved but states many "can probably be resolved with sufficient investment".[35] CMRS providers should not be forced to make additional "sufficient investments" in their network merely because some other CMRS provider who has chosen an incompatible technology or interface wants to give its customers the ability to roam on the other party's system. Such investment decisions should be left to the CMRS provider and private negotiation between the parties regarding how the cost of achieving compatibility between the systems should be divided, if at all.

III. THE COMMISSION SHOULD NOT REQUIRE THE UNBUNDLING OF WIRELESS NETWORKS.

Various resellers again suggest that the Commission should require CMRS providers to unbundle their wireless network, sell the various elements at cost based rates and allow interconnection between the resellers switch and the CMRS providers

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[32]New Par Comments, pp. 20-22; GTE Comments, pp. 12-14.

[33]See, New Par Comments, pp. 20-22.

[34]Comments of Nextel, p. 6.

[35]Pac Bell Comments, p. 6.

switch.[36] Time Warner goes so far as to demand that the Commission ignore the congressional intent of achieving regulatory parity among mobile services Act and impose unbundling only on cellular carriers.[37] Despite the expressly stated Congressional intent of regulatory parity, Time Warner claims that the Commission should adopt a dominant/non-dominant scheme for CMRS providers.[38] Time Warner offers no explanation of a public need for such dominant/non-dominant treatment or why treating cellular differently benefits the public.[39] Time Warner's and the other resellers' calls for unbundling and increased regulation of CMRS providers should be rejected. As the Commission acknowledges, the unbundling of the CMRS networks will impose costs on the Commission, the industry and the consumer and add administrative complexity.[40] The burden and cost of such unbundling and regulation outweigh the benefit, especially when the only true beneficiary of the unbundling is the reseller itself.

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[36]See e.g., National Wireless Resellers Association Comments, Comments of Cellular Service, Inc & Comtech Mobile Telephone Company; Time Warner Comments.

[37]Congress amended Section 332(c) to ensure that "services that provide equivalent mobile services are regulated in the same manner" and thus directed "the Commission to review its rules and regulations to achieve regulatory parity among services that are substantially similar". H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 259 (1993).

[38]Time Warner Comments, p. 16.

[39]The only explanation given is that "a general interconnection obligation on all CMRS providers is not justified at this time". Time Warner Comments, p. 8.

[40]Second NPRM, para. 96.

Reseller contentions that the unbundling of CMRS networks and the assignment of cost based rate elements will not be costly and an administrative nightmare is simply wishful thinking.[41] The Commission need only remember the experience of the local exchange carriers Open Network Architecture proceedings. CMRS providers have not been required to break down each element of the network and assign it a cost. As CTIA explains, this would be a monumental task.[42] Likewise the burden on the Commission to promulgate rules, to resolve disputes over whether the network has been properly unbundled and to determine and resolve the numerous disputes over whether the rates are truly "cost based" will be enormous. As CTIA notes, any such unbundling will undoubtedly require a devotion of resources in terms of personnel and time for the Wireless Bureau parallel to the Commission efforts to regulate cable rates.[43] Contrary to Time Warner's statement[44] there is "record support" for the Commission's statement that "a mandatory switch based resale policy may impose costs on the Commission, the industry and consumers", including the Testimony of Dr. Jerry Hausman attached to Airtouch's Reply Comments and the Declaration of Economist Bruce

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[41]See e.g., National Wireless Resellers Association Comments, p. 8, Connecticut Telephone and Communication Systems, Inc., pp. 4-8.

[42]CTIA Comments, pp. 31-33, 36-37.

[43]See, CTIA Comments, pp. 31-34.

[44]Time Warner Comments, p. 4.

M. Owen attached to McCaw's Comments.[45] As Dr. Hausman explains the likely result of an unbundling of cellular networks will be an increase in the overall cost of service and higher prices for the consumer.[46]

There is simply no justification for such extraordinary action in a competitive market. The proposal is contrary to sound economic principles as it undermines the competitive initiative to take risks, invest aggressively and develop sophisticated networks.[47] As CTIA notes, as a legal proposition, not even a monopolist has a general duty to share facilities--mandating access remains the exceptional case to be imposed only when absolutely necessary i.e. when a monopoly provider controls access to essential facilities.[48] This Commission has recognized that the imposition of interconnection requirements is unnecessary in the absence of "essential facilities" or "market power sufficient to thwart competition".[49] As several parties explain in their comments, CMRS providers simply do not meet the test for controlling essential facilities nor any other anti-trust theory

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[45]See, Reply Comments of AirTouch Communications, Appendix 1, CC Docket 94-54, filed October 14, 1994; McCaw Cellular Comments, Exhibit A, filed September 12, 1994.

[46]Airtouch Initial Reply, Hausman Testimony pp. 12-18, 19-20; See Also McCaw Initial Comments, Owen Declaration, paras. 100-111.

[47]Airtouch Comments, pp. 19-22.

[48]CTIA Comments, p.28, citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[49]See, Expanded Interconnection with Local Telephone Company Facilities, 9 FCC Rcd 5154, 5184 (1994).

mandating unbundling.[50] Further, CMRS providers, including cellular providers do not have market power sufficient to thwart competition.[51] Time Warner would have this Commission abandon the "essential facility" test and other traditional anti-trust theories and instead require unbundling whenever there was a market that was not yet "fully competitive".[52] The fact that the Commission has in the past referred to the cellular market as not being "fully competitive", does not equate into a need for a wholesale unbundling of wireless networks as Time Warner contends. Being a participant in a market referred to as not being "fully competitive" simply does not equate to having "essential facilities" or the ability to "thwart competition". As CTIA notes, "Commission declarations, the MFJ court's conclusions and economic analyses, all support a finding that the CMRS market is competitive".[53]

Mandated unbundling is generally disfavored under anti-trust law because the general duty to share one's facilities may have a chilling effect on a firm's willingness to invest in such

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[50]CTIA Comments, pp. 28-31; AT&T Comments, pp. 6-12, Exhibit 1 pp. 6-23; New Par Comments, pp. 8-15; McCaw Initial Comments, Owen Declaration paras. 16-89.

[51]See, AT&T Comments, Exhibit 1, pp. 6-23.

[52]Time Warner, p. 15. Under Time Warner's theory the Commission would order the cellular industry to incur the costs and burdens of unbundling its network because PCS providers are not yet in service and would continue as long as the supplier had "market power" (i.e. until there are additional facilities based competitors providing equivalent two way voice and data services). Time Warner Comments, pp. 10-14.

[53]See, CTIA Comments, fn. 10 and cites contained therein.

facilities in the first place.[54] As PCS PRIMECO notes, the reseller proposal would mean that after having invested $1.1 billion to obtain 11 PCS licenses, after having invested the time and money to develop their network and build out their system, a reseller could then gain access to the PCS PRIMECO network by demanding unbundled elements at cost based rates and "siphon off customers and revenues".[55] Under the reseller unbundling proposal the reseller has invested little risk capital in either spectrum or infrastructure and yet is artificially positioned to compete directly with the carrier for the most profitable segment of the market.[56] As Pac Bell notes "if resellers want to be facilities-based providers, then they can bid for spectrum too".[57] In the simple words of American Personal Communications "federal regulations should not be used as a substitute for investment in technology and infrastructure".[58] For these reasons and the technical problems associated with the reseller switch proposal,[59] the Commission should reject the argument the wireless networks should be unbundled.

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[54]CTIA Comments, p.34 quoting from Phillip Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L.J. 841, 851 (1990).

[55]PCS PRIMECO Comments, pp. 11-13.

[56]ALLTEL Mobile Communications, Inc., pp. 4-5.

[57]Pac Bell Comments, p. 11.

[58]American Personal Communications Comments, p. 12.

[59]See e.g., AT&T Comments, Exhibit 3.

IV. THE COMMISSION SHOULD NOT MANDATE NUMBER PORTABILITY.

As discussed in SBMS' Initial Comments[60] the issues involved in wireless number portability are complex and different than those associated with landline portability due to the mobile nature of the wireless customer and the associated affect on roaming. This quickly became apparent in Illinois where an industry task force is working on the "development and implementation of number portability solutions" as part of the Ameritech's Customers First Plan in Illinois.[61] After several meetings it was agreed that it would be best not to include wireless as part of the number portability process. The Commission should not Order wireless number portability without fully investigating the affect on roaming, the cost and whether the benefits justify the burdens. SBMS believes that wireless number portability is simply not warranted.

V. CONCLUSION.

For the reasons stated herein and in SBMS' Initial Comments, SBMS supports the Commission's decision not to promulgate rules and obligations regarding CMRS-CMRS interconnection, CMRS roaming and the unbundling of CMRS networks. SBMS also urges the Commission not to require wireless number portability.

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[60]SBMS Comments, pp. 20-22.

[61]Illinois Bell Telephone Company, Proposed Introduction of a Trial of Ameritech's Customers First Plan in Illinois, I.C.C. 94-0096 (consolidated), Order pp. 109-110 (Released April 7, 1995). The Commission noted that "the issue is no longer whether - but how and when - to develop number portability in Illinois".

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