ORIGINAL

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

RECEIVED
FEB 14 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

DOCKET FILE COPY ORIGINAL

SUPPLEMENTAL COMMENTS OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

The Personal Communications Industry Association ("PCIA")[1] hereby submits these supplemental comments in response to the Commission's Second Notice of Proposed Rule Making in the above-captioned docket.[2] PCIA is filing these supplemental comments to augment the record with respect to certain aspects of the Commission's tentative decision to impose an affirmative resale obligation on all commercial mobile radio service ("CMRS") providers -- including paging providers -- despite the absence of an identified need for an affirmative paging resale requirement.

---

[1] PCIA recently merged with the National Association of Business and Educational Radio, Inc. Both entities now operate under the PCIA name as a new legal entity, an international trade association that represents the interests of both the commercial and private mobile radio service industries. As the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Radio eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of FCC licensees. PCIA's Federation of Councils includes: the Paging and Narrowband PCS Alliance, the Broadband PCS Alliance, the Specialized Mobile Radio Alliance, the Site Owners and Managers Association, the Association of Wireless System Integrators, the Association of Communications Technicians, and the Private System Users Alliance.

[2] Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, FCC Docket No. 95-149 (April 20, 1995).

No. of Copies rec'd 0+4
List ABCDE

As detailed below, PCIA strongly urges the Commission to refrain from adopting a mandatory resale obligation for paging operators. Imposition of a paging resale requirement is unnecessary and unwarranted, and will not produce any corresponding public interest benefits because the paging marketplace already enjoys all of the benefits sought to be gained through imposition of a resale obligation -- the paging marketplace is already highly competitive, paging rates have steadily been declining, new paging competitors are continually emerging, and the paging industry is marked by innovation, efficiency, and numerous specialized service offerings. Moreover, while a mandatory paging resale obligation will not produce any appreciable benefits, adoption of such a requirement will impose enormous regulatory costs on paging providers, driving rates upward and ultimately harming consumers.

I. Imposition of An Affirmative Resale Obligation Is Unnecessary and Inappropriate in the Case of Paging Service Providers.

Both the history and current state of competition in the paging marketplace demonstrate that there is not now -- nor has there ever been -- any need for the imposition of an affirmative federal paging resale obligation. The paging marketplace is already robustly competitive. Industry estimates show that there are between 500-600 paging operators currently providing service in the U.S.[3] -- a figure that includes a

---

[3] Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, 10 FCC Rcd 8844, 8854 (1995) [hereinafter

(continued...)

number of resellers that have emerged as successful participants in the paging industry without any regulatory intervention. In addition, available statistics show that in most large metropolitan areas, there are at least twelve[4] -- and in some markets as many as nineteen[5] -- facilities-based paging service providers. The highly competitive nature of the paging marketplace is an indication of both the ease of market entry and the ability of subscribers to switch to new paging operators.[6] In addition, expanded marketing of pagers, resale, and other non-direct forms of distribution have intensified the competitive nature of the industry, driving rates downward while dramatically increasing the number of paging subscribers.[7]

---

[3] *(...continued)*
1993 Annual Report]. This figure does not include the eight nationwide narrowband PCS operators that will offer services competitive with paging.

[4] *Id.*

[5] R. Ridley, 1993 Survey of Mobile Radio Paging Operators, COMM., Sept. 1993.

[6] See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1468 (1994) (Second Report and Order) [hereinafter *Regulatory Parity Second Report and Order*].

[7] *See* Comments of the Personal Communications Industry Association, CC Docket No. 94-54, at 11-12 (filed June 14, 1995); *see also 1993 Annual Report,* 10 FCC Rcd at 8854. EMCI estimates that the U.S. paging industry added 7.5 million pagers in 1994, resulting in total pagers in service of 27.3 million. This 38 percent growth rate over the previous year was the second highest experienced by the paging industry since 1981. Economic and Management Consultants International, Inc., The State of the U.S. Paging Industry: 1995, at 1 (June 1995) [hereinafter *EMCI 1995 Report*].

Figures supplied to PCIA by its members suggest that there are literally of thousands of paging resale agreements already in effect, and that both the number of entities reselling paging services and the quantity of agreements with those entities is growing significantly. In fact, resellers account for about 30 percent of all paging activations,[8] which reflects that paging operators view resellers as an essential component of their distribution chain. In this same connection, it is estimated that the nation's largest paging carrier uses resellers for approximately two-thirds of its activations.[9]

The broad use and acceptance of resale by the paging industry undoubtedly accounts for the fact that, as of December, 1995, there were *no* reseller complaints pending against paging operators at the FCC. Significantly, PCIA has been unable to uncover *any* complaints filed at the FCC by resellers concerning the practices of facilities-based paging operators, which leads PCIA to conclude that few, if any, such complaints have ever been filed.

In view of the competitive nature of the paging industry, it is difficult to identify any benefit that would accrue from an affirmative paging resale obligation or any problem that an affirmative paging resale obligation would be designed to address. The fact is that the market incentives for paging resale have worked well and will continue to do so without federal regulatory intervention.

---

[8] *EMCI Report* at 99-101.

[9] *Id.* at 99.

II. An Affirmative Paging Resale Obligation Would Result in Substantially Increased Regulatory Costs for Paging Operators and Put Upward Pressure on Rates Charged to Paging Consumers.

Not only would an affirmative paging resale obligation provide no identifiable public interest benefit, but it would substantially increase regulatory costs faced by paging operators. These increased regulatory costs will in turn drive rates upward to the ultimate detriment of consumers.

National and regional paging companies provide service through hundreds of local operating companies. Under typical procedures, each local operator enters into individual resale agreements with local outlets for distribution of paging services. As a result, facilities-based paging operators, as indicated above, have thousands of outstanding resale agreements.

For example, one of the larger paging companies has reported to PCIA that it has an estimated 3,000 resale agreements. Another paging operator reports an estimated 2,500 outstanding resale agreements. PCIA estimates that the cost of reviewing the existing resale agreements for these two companies alone would be in excess of $1 million.[10] Significantly, this estimate does not include the litigation costs that will undoubtedly be incurred in the wake of an affirmative resale obligation. PCIA estimates that adoption of an affirmative resale obligation will impose review and litigation costs of tens of millions of dollars on paging service providers annually.

---

[10] This assumes a conservative estimate of one hour of review time for each agreement at a legal billing rate of $200 an hour.

Obviously, this extreme regulatory burden will put substantial upward pressure on subscriber rates, ultimately harming consumers.

III. Paging is Fundamentally Different -- and Distinguishable -- From Other Markets Where the Commission Has Imposed Affirmative Resale Obligations.

Paging is readily distinguishable from other market segments -- notably cellular and interexchange -- where the Commission has imposed affirmative resale obligations. Perhaps most dramatically, paging may be distinguished, as indicated above, by the absence of reseller complaints. In contrast, the Commission's own records reveal that, in December of 1995, there were 14 pending resale complaints against cellular operators and 12 resale complaints pending against interexchange carriers. Moreover, although the Commission's records only deal with *pending* resale complaints, a review of the applicable case law discloses an extensive history of resale complaints in the cellular and interexchange contexts.[11]

---

[11] *See, e.g.*, AT&T Communications, Apparent Liability for Forfeiture and Order to Show Cause, 10 FCC Rcd 1664 (1994) (Commission-initiated proceeding holding AT&T liable for a forfeiture in the amount of $1 million because of failure to provide service to resellers); AT&T Communications, Revisions to Tariff No. 12, 4 FCC Rcd 4932 (1989) (investigating AT&T's Tariff 12 offerings), *recon.*, 4 FCC Rcd 7298, *on remand*, 6 FCC Rcd 7039 (1991); Public Service Enterprises of Pennsylvania, Inc. v. AT&T, 10 FCC Rcd 8390 (1995) (finding that AT&T violated the Communications Act by refusing reseller's request for service); TRAC Communications, Inc. v. Detroit Cellular Tele. Co., 5 FCC Rcd 4647 (1990) (affirming Bureau decision finding exclusivity provision in contract between cellular licensee and reseller unlawful); *see also* Cellnet Communications, Inc. v. Detroit SMSA Limited Partnership, 9 FCC Rcd 3341 (1994) (Common Carrier Bureau).

In addition, the successful history facilities-based paging providers and resellers have had negotiating their own resale contracts indicates that, unlike other services, an affirmative resale requirement is not necessary to ensure that paging operators comply with basic Section 201(b) and 202(a) obligations.[12] The marketplace itself has offered and continues to offer paging operators substantial economic incentives to permit, and indeed to encourage, resale.

The level of competition in the paging industry also stands in stark contrast to markets where the Commission has found it necessary to impose an affirmative resale obligation. In particular, the Commission has imposed a mandatory resale requirement only on service categories in which an individual provider or class of providers possesses market power -- *i.e,* in the case of private line services, public switched network services, and cellular telephone services.[13] A general resale obligation has

---

[12] The Commission has acknowledged that "in a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power." *Regulatory Parity Second Report and Order,* 9 FCC Rcd at 1478. In addition, the Commission has stated that carriers lacking market power "cannot rationally price their services in ways which, or impose terms and conditions which, would contravene Sections 201(b) and 202(a) of the Act." Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 85 FCC 2d 1, 31 (1980) (First Report and Order).

[13] *See* Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261, 263 (1976), *recon.*, 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) (private line services); Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 FCC 2d 167 (1980) (public switched network services); Cellular Communications Systems, 86 FCC 2d 469, 511, 642 (1981), *modified,* 89 FCC 2d 58,

(continued...)

never been adopted for a service category such as paging, where no provider possesses market power and the industry is vigorously competitive with dozens of operators in most markets.[14]

IV. Conclusion.

For the foregoing reasons, the Personal Communications Industry Association urges the Commission to refrain from imposing an affirmative resale obligation on paging operators. As discussed above, the record does not provide a basis for concluding that the imposition of resale obligations on paging carriers will produce any corresponding public interest benefits -- all of the benefits the Commission could hope to produce through imposition of an affirmative resale requirement have already been achieved. As the Commission itself has acknowledged, the paging industry is vigorously competitive. Likewise, the record confirms that rates have been declining

---

[13](...continued)
further modified, 90 FCC 2d 571 (1982), *appeal dismissed sub nom.* United States v. FCC, No. 82-1526 (D.C. Cir. Mar. 3, 1983) (cellular).

[14] The Commission has explicitly found that "all CMRS service providers, other than cellular service licensees, currently lack market power." *Regulatory Parity Second Report and Order*, 9 FCC Rcd at 1467; *see also* Preemption of State Entry Regulation in the Pubic Land Mobile Service, 59 RR2d 1518 (1986) (finding that Public Mobile Radio Service licensees providing interstate mobile services -- including providers of paging services -- possess insufficient market power to charge unlawful rates or unjustly discriminate, and therefore are "non-dominant" carriers for purposes of Title II regulation), *remanded on other grounds,* National Ass'n of Regulatory Util. Comm'rs v. FCC, No. 86-1205 (D.C. Cir. Mar. 30, 1987), *clarified,* Preemption of State Entry Regulation in the Public Land Mobile Service, 2 FCC Rcd 6434 (1987).

rapidly, that new competitors are continually entering the paging marketplace as a result of new spectrum allocations, that there are no significant entry barriers, that new paging services are regularly evolving, and that innovation, efficiency, and specialized offerings are already the hallmarks of the paging industry.

In view of the robust level of competition that characterizes the paging marketplace and the successful role that resellers have played in the paging industry, a mandatory resale requirement is unnecessary, unwarranted, and cannot be justified on

the basis of the record -- particularly in light of the significant regulatory burden a mandatory resale requirement will place on paging operators.

Respectfully submitted,

PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

By: Mark Golden / KK

Mark J. Golden
Vice President -- Industry Affairs
Personal Communications Industry Association
1019 19th Street, N.W.
Suite 1100
Washington, D.C. 20036
(202) 467-4770

By: _____

R. Michael Senkowski
Robert L. Pettit
Karen A. Kincaid
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Dated: February 14, 1996

Its Attorneys