

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

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In the Matter of)

Interconnection and Resale Obligations)
Pertaining to)
Commercial Mobile Radio Services)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

CC Docket No. 94-54

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PETITION FOR RECONSIDERATION

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Summary

The Commission's decision to sunset its resale policy for cellular telephone service and other providers of Commercial Mobile Radio Services ("CMRS") constitutes a flagrant disregard of Sections 201(b) and 202(a) of the Communications Act of 1934 (the "Act"), precedent, and common sense. The National Wireless Resellers Association ("NWRA") therefore requests that the Commission rescind its decision to sunset CMRS resale.

The foundation of the CMRS resale policy is the resale policy which the Commission promulgated for private line services in 1976. At that time, the Commission concluded (1) that, in accordance with Hush-A-Phone Corp. v. the United States, 238 F.2d 266 (D.C. Cir. 1956), a customer was entitled to use a common carrier's services in any way that was privately beneficial as long as such use was not publicly detrimental, (2) that the carriers had the burden of demonstrating that any privately beneficial use was publicly detrimental, (3) that carrier restrictions against resale of private line services were unjust and unreasonable under Section 201(b) because the carriers had failed to provide any reliable data of public detriment, (4) that resale restrictions were also "patently" discriminatory because they were unsupported by any reasonable justification, and (5) that allowing resale of private line services would also generate public benefits. In short, the prohibition against resale restrictions was not dependent on a showing that resale was necessary to promote competition (although that was an ancillary benefit); rather, resale of private line services was required because there was no basis to justify any restriction on resale under Sections 201(b) or 202(a) of the Act. The Commission extended its resale

policy to switched services and then to cellular services on the basis of the same reasoning utilized in the private line services decision.

The Commission reaffirmed its long-standing resale policies when it issued its Notice of Inquiry and its Second Notice of Proposed Rulemaking in CC Docket No. 94-54. The Commission concluded that resale involved minimal cost and low risk of technical harm to the carriers. Accordingly, the Commission proposed that resale be extended to other CMRS providers which do compete or were expected to compete with cellular.

The Commission's First Report and Order ("First Report") represents a stunning reversal of the Commission's earlier positions and a clear violation of Sections 201(b) and 202(a) of the Act. Although it reaffirms the statutory and policy basis for extending resale to other CMRS providers, the First Report concludes that the development of a competitive CMRS marketplace would "obviate" the need for resale. The Commission therefore decided to repeal its resale policy for CMRS providers five years after the issuance of initial PCS licenses.

The First Report assumes -- wrongly -- that the Commission's resale policy can and should be repealed in the absence of any demonstration that it would promote competition. However, as explained in the Commission's first resale decisions, resale restrictions cannot be sustained under the Act if there is some private benefit (which would obviously be the case for the resellers) and there is no public detriment. The First Report vaguely refers to "administrative costs" generated by its resale policies, but that hardly

constitutes the kind of reliable data that would satisfy the carriers' burden in showing a public detriment. In short, the Commission has woefully failed to satisfy its obligation to provide a rational explanation for any major departure in policy.

Nor can the Commission rely on predictive judgments. The Commission's discretion to utilize its expertise does not entitle the agency to proceed on the basis of empty speculation. There is no evidence in the record that PCS and other new CMRS providers will generate vigorous competition in the marketplace within 5 years -- especially since FCC Rules only require new PCS licenses to serve one-third of their service areas after the expiration of 5 years. It also bears emphasizing that resale can only thrive if it continues to provide a valuable service to the public -- regardless of how competitive the wireless marketplace may appear to the Commission.

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To: The Commission

PETITION FOR RECONSIDERATION

The National Wireless Resellers Association ("NWRA"), acting pursuant to Section 1.106 of the Commission's rules, hereby petitions for reconsideration of the First Report and Order ("First Report") in the above-referenced docket to the extent that decision sunsets the prohibition against resale restrictions for cellular carriers and other providers of Commercial Mobile Radio Services ("CMRS") five years after the grant of initial licenses for broadband Personal Communications Services ("PCS"). Interconnection and Resale Obligations, FCC 96-263 (July 12, 1996) at ¶¶ 23-24.

I. Interest Of NWRA

NWRA is a trade association representing the interests of the wireless resale industry. NWRA is the successor to the National Cellular Resellers Association, which was formed in 1987 by resellers of cellular telephone service. In December of 1994 the

association changed its name to reflect the broader spectrum of wireless communications technologies utilized by its members. NWRA members typically purchase wholesale service from the FCC-licensed cellular carriers and other facilities-based providers of CMRS service and then resell such services to the public. NWRA's mandate is to promote a competitive wireless resale market which will facilitate the provision of resale services, including cellular telephone service.

II. Facts

A. Evolution of Commission's Resale Policies

Although the history of the Commission's resale policies is briefly summarized in the First Report, as well as the Notice of Inquiry and the Second Notice of Proposed Rulemaking which preceded the adoption of the First Report, it would be useful to review that history in greater detail. That closer examination underscores the fatal defects in the Commission's decision to sunset its resale policy for CMRS providers five years after the issuance of initial PCS licenses.

1. Resale of Private Line Services

The Commission's first resale policy concerned private line services. Resale and Shared Use of Common Carrier Facilities, 60 FCC2d 261 (1976), recon., 62 FCC2d 588 (1977), aff'd sub nom., AT&T v. FCC, 572 F.2d 17 (2d Cir.), cert. denied, 439 U.S. 875 (1978). However, there was nothing novel about the legal principles underlying that

policy. The Commission premised its action on a long line of cases concerning the regulation of railroads under the Interstate Commerce Act. See 60 FCC2d at 281-82.

The basic obligation of a common carrier -- whether a railroad or a telecommunications provider -- is to serve all members of the public indifferently without regard to their identities or the use they make of the services purchased. That fundamental duty was made clear by the United States Supreme Court decades ago when it considered a railroad's refusal to provide a bulk rate to a "forwarder" who aggregated the orders of smaller shippers:

"The contention that a [railroad] when goods are tendered to [it] for transportation can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inherent in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods is so in conflict with the obvious and elementary duty resting upon a [railroad], and so destructive of the rights of shippers as to demonstrate the unsoundness of the proposition by its mere statement."

ICC v. Delaware, L.&W.R.R.Co., 220 U.S. 235, 252 (1911), quoted in 60 FCC2d at 281-82. Accord AT&T v. FCC, 572 F.2d at 24 ("a common carrier is one which undertakes indifferently to provide communication service to the public for hire"); National Ass'n of Regulatory Utils. Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) (common carrier status "arises out of the undertaking 'to carry for all people indifferently'"); National Ass'n of Regulatory Utils. Comm'rs v. FCC, 525 F.2d 630, 640-41 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) (a common carrier "must hold [itself] out indiscriminately to the clientele [it] is suited to serve"); Weade v. Dichmann,

Wright & Pugh, Inc., 337 U.S. 801, 807 (1949) (the duty of a common carrier engaged in transportation "is to transport for hire whoever employs it"). The Supreme Court's holding was echoed by this Commission on a later occasion:

[I]t is clear that common carriers are required to indifferently hold themselves out to provide substantially the same services on substantially the same terms and conditions to any and all similarly situated persons or entities on a nondiscriminatory basis.

TRAC Communications, Inc. v. Detroit Cellular Tel. Co., 4 FCC Rcd 3769, 3771 (CCB 1989), recon. denied, 5 FCC Rcd 4647 (1990).

The foregoing principles of common carriage are reflected in Sections 201(b) and 202(a) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §§ 201(b) & 202(a). Not surprisingly, the Commission relied on those two sections in establishing its first resale policy for private line services.

Section 201(b) provides as follows:

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

In applying Section 201(b), the Commission placed principal reliance on Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956) ("Hush-A-Phone"). 60 FCC2d at 280-81. Under that case, the Commission explained, "a carrier may not restrict a subscriber's right to use the carrier's services and facilities in ways which are privately beneficial without being publicly detrimental." 60 FCC2d at 280, citing 238 F.2d at 269. Since resale of private line services was plainly beneficial to those seeking to resell the

service, the Commission observed that "the lawfulness of tariff provisions restricting resale and sharing of a particular service turns on whether unlimited resale and sharing of that service will be publicly detrimental." 60 FCC2d at 281.

The Commission observed that "[t]he burden of proof of establishing the justness and reasonableness of the [resale] restrictions and discrimination associated therewith is squarely on the carriers in whose tariffs the restrictions and exceptions are found." 60 FCC2d at 263-64. It was therefore incumbent on the carriers to provide competent proof of any public detriment that would ensue from resale of private line services.

After consideration of an extensive record, the Commission concluded that the carriers could not satisfy that burden. The Commission discounted the claims of "financial harm" from AT&T and GTE -- the two carriers immediately affected by imposition of the new resale policy -- because those claims were not supported by studies with reliable data. Instead, the carriers' claims of revenue loss were premised on studies "replete with unsupported assumptions about customer behavior." 60 FCC2d at 291-92. The absence of statistical evidence on lost revenue to the carriers was particularly important because "the only revenue losses of consequence in assessing the lawfulness of tariff restrictions on resale and sharing are those which ultimately burden subscribers to the carriers' services and facilities." 60 FCC2d at 283.

Since the carriers had not established any public detriment from resale, the Commission concluded that restrictions on the resale of private line services were "unjust and unreasonable." 60 FCC2d at 283. The Commission similarly concluded that the

carriers' tariff restrictions on resale were "patently discriminatory" and therefor in violation of Section 202(a) of the Act. That latter provision 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

The Commission recognized that the carriers' restrictions on resale "effectively foreclose[d] a certain class of potential subscribers from obtaining carrier services and facilities -- specifically, those persons or entities acting as intermediaries between underlying carriers and the using public." 60 FCC2d at 281 (footnote omitted).

The Commission did find that public benefits would also accrue from elimination of restrictions on resale. 60 FCC2d at 265, 298-302. Thus, the Commission observed that "a reseller could profitably subscribe to the bulk quantity [offered by the carrier], pay the bulk rates, and resell the capacity in unit quantities at rates below the tariff unit quantity rate." 60 FCC2d at 298. But the Commission's elimination of resale restrictions was not premised on the existence or scope of those anticipated benefits. Rather, those public benefits were merely an additional justification for the prohibition of restrictions that could not otherwise be squared with the basic requirements of Sections 201 and 202 of the Act. See 60 FCC2d at 264-65.

2. Extension of Resale Policy to Switched Services

In 1980 the Commission extended its resale policy to switched services on the basis of the same reasoning of its 1976 decision on private line services. Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 FCC2d 167

(1980), recon. denied, 86 FCC2d 820 (1981). The Commission again invoked Hush-A-Phone and again found that the carriers had failed to carry their burden to justify the restrictions against resale. 83 FCC2d at 171-72. The Commission stated that "there is no evidence in this record which convincingly demonstrates that any public detriments would result if WATS, MTS or other public network switched services were not subject to resale and shared use restrictions." 83 FCC2d at 172. The Commission therefore "concluded that the restrictions against reselling and sharing of domestic public switched network services are unlawful under [Sections] 201(b) and 202(a)" 83 FCC2d at 174.

The Commission also determined that "obvious and extensive benefits to the public . . . will accrue from resale and sharing" 83 FCC2d at 174. However, the Commission's decision to allow resale of public switched services was not predicated on a finding that resale could survive only if it advanced competition in the marketplace.

Rather, the Commission stated that

[t]he marketplace rule of primary importance here is that all users . . . should have the opportunity to use the telephone network to satisfy individual needs, as long as firmly established evidence is not presented which would show that such individual actions would significantly harm or otherwise constrain the development of the network for users as a whole.

83 FCC2d at 178 (emphasis in original). In short, the decisive marketplace theory underlying the Commission's decision was the same one articulated in Hush-A-Phone.

The Commission's implementation of that marketplace theory could not be deterred by the carriers' speculation about anticipated financial harm or disruptions to their

network. The Commission therefore rejected AT&T's proposal to defer implementation of the new resale policy pending the conduct of a "market experiment." 83 FCC2d at 188-193. Although the Commission acknowledged that its new resale policy could affect AT&T's revenues and raise a "question of engineering impact on the network," neither possibility was supported by sufficient evidence to outweigh the private and public benefits envisioned by the Commission. *Id.*

3. Extension of Resale Policy to Cellular Services

When it established the duopoly regulatory scheme for cellular in 1981, the Commission extended its resale policy to cellular "for reasons similar" to those relied on by the Commission in establishing resale policies for private line services and switched services. Cellular Communications Sys., 86 FCC2d 469, 510-11 (1981) (subsequent history omitted). In later explaining its cellular resale policies, the Commission observed that restrictions on resale of private line services and switched services had been found "to be unlawful" under Sections 201(b) and 202(a) of the Act and that its resale policy "would produce public benefits" Commission's Cellular Resale Policy, 6 FCC Rcd 1719 (1991) (subsequent history omitted). Stated another way, the Commission reaffirmed that its resale policies were premised on two independent bases: first, that a carrier's restrictions on resale would violate the Act; and, second, that the availability of resale would benefit the public.¹ In either event, the Commission confirmed that the burden of justifying resale restrictions at any time "lies on the carriers." 6 FCC Rcd at 1730 n.7.

¹ In proposing to allow restrictions on resale to a facilities-based competitor, the Commission once again invoked Hush-A-Phone and explained that it had to "weigh any
(Footnote continued)

B. Decision to Sunset Resale Policies.

The Commission's Notice of Inquiry in the instant docket primarily focused on matters other than resale. However, the Commission did devote five paragraphs to an inquiry whether it "should propose rules to place the resale obligations that apply to cellular licensees on all CMRS providers or on any particular class of CMRS providers." Equal Access and Interconnection Obligations, 9 FCC Rcd 5408, 5466 (1994). The Commission recognized that different kinds of CMRS service reflected different features and, for that reason, inquired whether the "unique features" of any of those services "might support retaining a resale obligation only for cellular service." *Id.* In light of its prior resale decisions, the Commission further observed that it had to determine whether any restrictions on resale "are just and reasonable under Section 201(b) of the Act," a process which would require the Commission to "weigh the harm to the public posed by such restrictions against the potential benefits to the public."² 9 FCC Rcd at 5467 (footnote omitted).

Nowhere did the Commission suggest in its Notice of Inquiry that it might sunset its resale policy for cellular. Nor did the Commission identify any public detriment

(Footnote continued)

adverse impact on the public against the countervailing benefits to the public." 6 FCC Rcd at 1721.

² The Commission's last assertion misstated the Hush-A-Phone standard articulated in the Commission's prior resale decisions. The initial decisions to impose resale for private line services, switched services, and cellular did not require any showing of public benefit; rather, the question was whether the subscriber's resale of the carrier's services would be "privately beneficial without being publicly detrimental." Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d at 280. In other words, the Commission applied the wrong standard in deciding whether it could or should sunset wireless resale.

that had been or would be incurred by retention of the cellular resale policy. Quite the contrary. The Commission observed that "a strong resale market for cellular service fosters competition." 9 FCC Rcd at 5466.

Like the Notice of Inquiry, the Second Notice of Proposed Rulemaking released a year later did not make any reference to the possibility that the Commission might sunset its resale policies for cellular. Interconnection and Resale Obligations, 10 FCC Rcd 10666 (1995). Indeed, the Commission again reaffirmed that its cellular resale policy was required by the Act and the public interest. The Commission observed that it "has found on many occasions that the denial of resale is unjust and unreasonable and unlawfully discriminatory in violation of Sections 201(b) and 202(a) of the Act." 10 FCC Rcd at 10708 (footnote omitted). The Commission therefore tentatively decided to extend its resale policy to all CMRS providers that would compete with cellular because resale will "have the overall effect of promoting competition" and because "requiring resale would involve minimal expense and no technical problems for most of the CMRS licensees subject to the requirement." *Id.*

The Commission proposal to extend its resale policy to other CMRS providers, then, was not premised on the limited competition in the mobile communications market. Nowhere did the Commission suggest that additional competitors would somehow eliminate a carrier's economic incentive to prohibit resale. Quite the contrary. The Commission expressed concern that the carrier's incentive to prohibit resale would remain intact despite the influx of new competitors:

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.

10 FCC Rcd at 10709.

The First Report similarly reaffirmed the value of cellular resale in promoting competition and in providing other public benefits. First Report at ¶ 10. As in prior resale cases, the Commission rejected the carriers' speculation concerning the public detriment that would occur if the Commission's resale policy was extended to other CMRS providers. For example, the Commission discounted the carriers' arguments that resale could result in "stranded investment" (in the event a reseller discontinued service after a carrier had made investments to provide the services) because "[n]othing about the resale rule precludes a provider from engaging in the commonplace business practice of insuring that the terms and conditions of its offering provide adequate compensation for its services over the term during which those services will be provided" First Report at ¶ 13.

The Commission nonetheless concluded that neither the Act nor relevant precedent required a conclusion that resale restrictions would "necessarily" violate Sections 201 or 202 of the Act. First Report at ¶ 14. The Commission observed that "the resale rule, like all regulation, necessarily implicates costs, including administrative costs, which should not be imposed unless clearly warranted." First Report at ¶ 14 (footnote omitted).

Nowhere, however, did the Commission identify the nature or scope of those "administrative costs."³ Nor did the Commission identify any legal authority to support its conclusion that resale could be prohibited unless "clearly warranted."

Having adopted a new standard of analysis, the Commission endorsed a proposal from Geotek Communications, Inc. ("Geotek") to sunset its resale policy for cellular carriers as well as other CMRS providers five (5) years after the issuance of initial broadband PCS licenses. First Report at ¶ 23. The Commission reasoned that the five-year sunset was appropriate because FCC rules "require broadband PCS licensees to significantly build out their networks within five (5) years of being licensed." First Report at ¶ 24 (footnote omitted). The Commission asserted "that the competitive development of broadband PCS service will obviate the need for a resale rule in the cellular and broadband PCS market sector." First Report at ¶ 24.

Since Geotek's proposal was included within its reply comments, no other party was given an opportunity to comment on the proposal.

III. Sunset Policy Arbitrary and Unlawful

The Commission's decision to sunset resale for cellular and other CMRS providers constitutes an arbitrary and unlawful disregard of the Act, applicable precedent, and the Commission's obligation to rationally explain major departures from prior policies. The decision will not withstand judicial scrutiny and should be rescinded on reconsideration.

³ The Commission cited only a general article concerning "The Effects of Economic Regulation." First Report at ¶ 14 n.41.

A. Sunset Policy Violates the Act

Sections 201(b) and 202(a) of the Act -- as interpreted by Hush-A-Phone -- requires a common carrier to serve all members of the public indifferently -- even if the member of the public happens to be a reseller. Indeed, to hold otherwise would contravene the plain language of Sections 201(b) and 202(a) of the Act and thereby authorize a carrier to choose the members of the public it will serve.

The Commission has abided by the foregoing principles for more than 20 years. The First Report proposes to wash away the plain language of the Act and 20 years of precedent by sunseting wireless resale and thereby authorizing a common carrier -- for the first time -- to refuse service to a member of the public who happens to be a reseller.

The Commission is not entitled to change its interpretation of the Act or policies adopted under the Act unless the Commission acknowledges the change and provides a rationale basis to support it. E.g., Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42 (1983) ("an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"); CBS v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971). (FCC "must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law"). Consequently, a court will reverse a Commission change in policy if the Commission should "fail to recognize the change or fail to provide either adequate explanation or adequate consideration of relevant

factors and alternatives"4 United Church of Christ v. FCC, 707 F.2d 1413, 1426 (D.C. Cir. 1983).

Although it did acknowledge that a sunset date would constitute a change in policy, the Commission made no effort whatsoever to reconcile that change with precedent. The Commission could not succeed even if it had made the attempt. The decision to sunset resale contravenes the plain language of the Act, precedent, and common sense.

One fundamental and unexplained departure is the Commission's unstated assumption that its resale policy can be abandoned if there are insufficient public benefits. That assumption, however, flies in the face of the common carrier's obligation to serve all members of the public "indifferently." See supra at 3-4. Hush-A-Phone embodies that bedrock principle. Under that case -- which constitutes a basic bastion of the Commission's resale policies -- a member of the public is entitled to "use the carriers' services and facilities in ways which are privately beneficial without being publicly detrimental." Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC2d at 280. In short, a member of the public does not have to demonstrate any public benefit in order to resell a carrier's service; if the resale is privately beneficial, the only question is whether resale is publicly detrimental.

⁴ The Commission's repeal of the fairness doctrine for broadcasters provides one example of the Commission's willingness to fulfill its obligation under law when changing course. Syracuse Peace Council, 2 FCC Rcd 5043 (1987), aff'd, Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990). In that case, the Commission relied on an exhaustive study -- which carefully reviewed applicable legislative history and prior cases -- in deciding that the fairness doctrine was not mandated by the Act or otherwise required by the public interest.

A privately beneficial use cannot be frustrated because of a carrier's conclusory claim of public detriment. As one court explained,

Public detriment requires a showing of "technical harm to the telephone system or economic impact which adversely affects the ability of a carrier adequately to serve the public, or both." AT&T Premises Ruling, 60 FCC 2d 939, 943 (1976); see also, Carterfone, 13 FCC 2d 420, recon. denied, 14 FCC 2d 571 (1968). The burden of proof rests on the carrier to demonstrate either the harm to the network or the severe economic losses, see Amendment on Part 68, 94 FCC 2d 514 (1983); ARINC, 71 FCC 2d at 10; AT&T Premises Ruling, 60 FCC 2d at 943, and the carrier must prove that the public detriment is "direct, substantial, and immediate." Mebane Hometel Co., 53 FCC 2d 473, 480 (1975), aff'd mem., 535 F.2d 1324 (D.C. Cir. 1976).

Public Util. Comm'n of Texas v. FCC, 886 F.2d 1325, 1336 (D.C. Cir. 1989). The foregoing standard is reflected in the Commission's initial resale decision where the Commission (1) acknowledged that the carriers had the burden of justifying any restrictions on resale, and (2) rejected carrier claims of financial or technical harm which were not supported by reliable data. See supra at 5-6.

The First Report totally ignores the foregoing precedent. The Commission's arbitrary approach is exemplified by its reliance on Geotek's Reply Comments. Geotek offered no facts to justify any restriction on resale; Geotek merely asserted that resale would not be needed in a "broadly competitive CMRS marketplace" because "[a] consumer in need of mobile communications service will have a highly diverse market from which to choose." Geotek Reply Comments at 4. Geotek's assumption may or may not prove accurate; but it hardly constitutes proof of "direct, substantial, and immediate" harm to the public.

Like Geotek, the First Report fails to identify any specific "administrative costs" or other harm that would be imposed if resale were continued for the indefinite future. Nor is there any likelihood that the carriers could carry their heavy burden to demonstrate the existence of such harm. See Public Util. Comm'n of Texas, 886 F.2d at 1336. The Commission had already concluded in this very docket -- after digesting hundreds of pages of comment from the carriers -- that extension of resale to other CMRS providers "would involve minimal expense and technical problems for most of the CMRS licensees subject to the requirement." 10 FCC Rcd at 10708. The First Report did not explain what evidence had been received afterwards to justify a change in position -- an oversight of critical import because, as the Commission has often stated, the burden is on the carriers to justify any restrictions on resale under Section 201(b) and 202(a) of the Act. Since the carriers have not satisfied that burden, the Commission is not free to abandon its resale policy under Sections 201(b) and 202(a) of the Act.

B. No Basis For Commission's Predictive Judgment

The Commission's sunset policy could not survive judicial review even if the Commission had the discretion to disregard the requirements of Sections 201(b) and 202(a) of the Act. To be sure, the Commission has wide latitude in developing policies based upon predictive judgments. As the United States Supreme Court observed, "[T]he Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations. In such cases complete factual support for the Commission's

ultimate conclusions is not required" FCC v. WNCN Listeners Guild, 450 U.S. 582, 594-95 (1981).

At the same time, the Commission cannot formulate policies which are based on predictions unsupported by logic or record evidence. E.g. Century Communications Corp. v. FCC, 835 F.2d 292, 304 (1987), cert denied, 486 U.S. 1032 (1988) (court cannot "countenance reimposing must-carry rules [for cable television systems] for five years based on 'sound predictive judgment' that is never explained"); International Ladies' Garment Union v. Donovan, 722 F.2d 795, 821, n.56 (D.C. Cir. 1983), cert. denied, 496 U.S. 820 (1984) ("the suggestion that such [administrative] determinations are entitled to deference and do not require complete factual support does not mean that agencies are free to engage in unreasoned decisionmaking"); Telelocator Network of America v. FCC, 691 F.2d 525, 544 (D.C. Cir. 1982) (court's respect for "agency's superior position to make judgments still requires judicial review to assure that the agency has 'identified all relevant issues, gave them thoughtful consideration duly attentive to comments received, and formulated a judgment which rationally accommodates the facts capable of ascertainment and the policy slated for effectuation").

The limitations on the Commission's use of predictive judgments is aptly illustrated by Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752 (6th Cir. 1995). In that case, the court rejected the Commission's reliance on "common sense" and predictive judgments to justify the cellular cross-ownership rules which prohibited a minority owner of a cellular carrier from acquiring an interest in a PCS licensee which served an overlapping area. The Commission policy was premised on an assumption that parties with minority interests

would somehow inhibit the cellular carrier from competing with a PCS licensee which served some of the same population. The court concluded that the Commission's predictive judgment "is highly suspect, makes little common sense," and was unsupported by any "statistical data or even a general economic theory" ⁵ 69 F.3d at 760.

The Commission decision to sunset its resale policy for CMRS providers suffers from the same fatal defects as the cellular cross-ownership rules. The Commission's basic premise is that "the competitive development of broadband PCS service will obviate the need for a resale rule" within five years after the issuance of initial licenses for PCS. However, the Commission's rules do not provide any assurance that the majority of the public will even have access to PCS service within five years after the issuance of initial licenses. The Commission's rules only require PCS licensees with 30 MHz of spectrum to reach one-third of their service area populations within five years after the issuance of license, and PCS licensees with 10 MHz of spectrum only have to serve one quarter of the population within five years or, failing that, "make a showing of substantial service." 47 CFR § 24.203. In short, within five years after the issuance of PCS licenses, no more than one-third of the population will have access to the PCS competitors envisioned by the First Report.

Nor is there any evidence in the record to support the Commission's prediction of vigorous competition among all providers of PCS with the cellular carriers. In

⁵ The Commission itself acknowledged the wisdom of that judicial perspective when it rejected carrier claims of financial harm twenty years ago which reflected nothing more than unsupported assumptions about customer behavior. See supra 5.

establishing the allocation scheme for PCS, the Commission itself acknowledged that many PCS licensees -- particularly those with 10 MHz of spectrum -- might provide "niche" services or merely augment services currently provided by the cellular carriers. Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 4957, 4981 (1994) (subsequent history omitted). There is thus no basis for the Commission to assume that the issuance of six PCS licenses in any geographic area will necessarily result in six competitors vigorously competing with the existing cellular carriers.

Beyond that, PCS is still in nascent stages of development, and there is no prior experience with PCS (or other enhanced CMRS services) to know precisely how markets will develop. It may well be, for example, that the substantial (if not mind-boggling) capital costs of paying the FCC for the license and constructing the systems will result in extensive disaggregation of spectrum -- a result which would enhance the number of niche competitors but decrease the number of competitors providing nationwide mobile communications services comparable to that provided by existing cellular carriers. See Geographical Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees, FCC 96-287 (July 15, 1996).

In the interim, cellular carriers, PCS Licensees, and other CMRS providers will continue to have the same incentives which the Commission acknowledged before to restrict the resale of service. Supra at 10-11. Indeed, the Commission's analysis contains a fundamental flaw from which it can never escape: if the advent of more competition does not eliminate the carriers' economic incentive to prohibit resale, there is no public interest basis for sunseting the Commission's resale policy; if, on the other hand, more

competition does -- despite logic to the contrary -- eliminate the carriers' incentive to prohibit resale, retention of the policy will not impose any cost on any carriers.

In either event, it must be remembered that a reseller will only be able to profit and survive if it is providing a service not otherwise offered by the FCC-licensed carriers. That service may be limited to the resale of time at lower prices than those offered by the underlying carrier; or, the offering may include a package of equipment and services that the carrier will not or cannot match. Whatever the precise nature of the resellers' offerings, the Commission should not artificially skew the interplay of forces in the wireless marketplace by trying to decide whether and to what extent that marketplace is competitive. The Commission should leave that decision to the ever-changing dynamics of the marketplace itself.