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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services	)	WT Docket No. 96-162
	)	
Implementation of Section 610(d) of the Telecommunications Act of 1996, and Sections 222 and 251(c)(5) of the Communications Act of 1934	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services	)	GEN Docket No. 90-314
	)	
Requests of Bell Atlantic-NYNEX Mobile, Inc., and U S WEST, Inc., for Waiver of Section 22.903 of the Commission's Rules	)	

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To: The Commission

COMMENTS OF BELLSOUTH CORPORATION

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October 3, 1996

SUMMARY

In November 1995, the United States Court of Appeals for the Sixth Circuit found that the Commission had improperly continued to subject the BOCs to a structural separation requirement for cellular operations. The Court reasoned that because the Commission had found no such requirement necessary for PCS, an equivalent service, the statutory requirement of regulatory parity required a valid, articulated reason for treating the two services differently. Because the Commission had stated no basis for the disparate rules, the Court remanded the matter to the Commission to examine whether there is any reason for continuing to impose a structural separation requirement for BOC cellular service.

In this proceeding, the Commission is considering two options: (1) continue the rule in effect for a transition period relating to the BOCs' Section 271 authorization to enter interLATA service, and (2) eliminate the rule immediately. BellSouth submits that, given the current record, the Commission must adopt Option 2 and eliminate the rule in its entirety now.

The rule should be eliminated because it violates the statutory mandate of regulatory parity. Imposing such safeguards on the BOCs, while other major LECs such as GTE are not subjected to structural separation, violates regulatory parity because there is no reasoned basis for this disparate treatment. Imposing structural separation on BOC cellular service alone also violates regulatory parity because there is no difference between cellular and broadband PCS that warrants different structural regulation, and the Commission has already found that no such safeguards are needed for PCS.

There is no need for BOC cellular structural safeguards, in any event. The historical basis for imposing structural separation on AT&T's cellular offerings in the early 1980s does not apply to the BOCs. Cellular is not a new service, and interconnection issues have long been addressed. The record developed by the Commission over the last year in connection with BOC waiver requests also demonstrates that there is no need for structural separation. None of the filings opposing the BOC waivers included any evidence supporting the need for structural separation of BOC cellular operations. There is no evidence that the BOCs in particular are likely to discriminate in interconnection or to cross-subsidize cellular service, and there is no evidence that the absence of a structural separation requirement for non-BOC telephone companies has led to abuses.

Structural separation is not needed to ensure non-discriminatory cellular interconnection. The Commission has, over the past decade, developed interconnection policies that have worked well. Moreover, Congress and the Commission have recently established a comprehensive new interconnection scheme that governs cellular as well as other local service providers. There is nothing unique about cellular that requires the additional safeguard of structural separation. Structural separation is not needed to deter or detect price discrimination. The Commission has, since the cellular structural separation rule was imposed, adopted a wide variety of non-structural safeguards that are adequate to prevent or deter price discrimination by BOCs with respect to cellular service. These same safeguards will also deter cross-subsidization. Moreover, there is no evidence that BOCs or other LECs have the incentive or opportunity to leverage their market power from local exchange service to cellular—imposing structural separation on one carrier who must compete with others has little effect on market shares, but impedes price competition. Thus

structural separation benefits the non-BOC competitors at the expense of consumers. Moreover, BOCs in particular have a *disincentive* to engage in anticompetitive practices because that would impede their entry into interLATA service under Section 271. Finally, the fact that Section 601(d) of the 1996 Telecommunications Act permits the BOCs to engage in joint marketing of cellular service does not remove the cost of structural separation. While BellSouth agrees with the Commission that structural separation should not be required out-of-region, there is also no justification for imposing structural separation in-region.

Section 601(d) does not permit the Commission to adopt regulations that will prevent or restrict the joint marketing of cellular and landline services by BOCs or their cellular affiliates. In fact, that statutory provision permits such joint marketing *notwithstanding Section 22.903 or any other Commission regulation,* thereby expressly depriving the Commission of authority to prevent any such joint marketing. Congress expressly intended to put BOCs and all other companies "on par" with each other and to "be able to sell cellular services on the same terms." Thus, the Commission cannot limit BOCs' ability to resell cellular service or to act as agents or dealers for their cellular affiliates. The statute makes no distinction among different types of sales and marketing arrangements—all are permitted.

Moreover, the statute explicitly covers the provision of CPNI and supersedes any need for such protections in Section 22.903. Further, under Section 601(d), the Commission cannot impose particular organizational structure requirements on BOC sale or marketing of cellular service for purposes of CPNI protection. With respect to network disclosure, BellSouth agrees that Section 251 and the *Interconnection Order* fully address the issue, and no cellular-specific rule is needed.

The Commission should adopt Option 2: Section 22.903 should be eliminated in its entirety and immediately. There is no lawful basis for adopting Option 1. The sunset periods in various provisions of the 1996 Telecommunications Act provide no basis for continuing the rule in effect until a sunset period has passed. In fact, Congress expected the Commission to do away with the rule. Moreover, the Commission's proposal to utilize as a sunset date the date of a BOC's authorization to enter the interLATA market is directly contrary to Congressional intent. The Section 271 checklist has to do with interLATA entry, not cellular structural separation, and in fact the checklist specifically *excludes* cellular-LEC competition as a factor to be considered.

Congress expressly allowed BOCs to engage in "incidental interLATA services," including CMRS, without employing a separate affiliate, as the Commission acknowledges. Because interLATA cellular service is offered only in conjunction with intraLATA service, all cellular service must be exempt from a separate affiliate requirement. The Commission's theory that it may nevertheless impose a separate affiliate requirement pursuant to Section 272(f)(3) is legally flawed, because that section only preserves the Commission's authority to prescribe safeguards for the interLATA services and manufacturing activities that are subject to a statutory separate affiliate requirement that sunsets after a specified number of years.

BellSouth supports the establishment of safeguards for in-region LEC provision of CMRS, but the proposals in the *NPRM* should be modified in certain respects:

- All safeguards should apply uniformly to all "broadband" services—cellular, broadband PCS, and "covered" SMR.

- The safeguards should apply only to in-region services, and not to out-of-region cellular or SMR service.

- Any 10 MHz exception should be equally applicable to cellular, broadband PCS, and "covered" SMR spectrum.

- The safeguards should apply equally to all non-rural telephone companies, rather than to all Tier 1 LECs, given the establishment of specific criteria by Congress for which rural telephone companies warrant special consideration.

- A separate affiliate should not be required. The fact that certain BOCs have voluntarily decided to offer PCS through a separate affiliate does not warrant imposing this as a requirement. Whether to employ a separate affiliate should be a business decision. Moreover, as the Commission recently concluded in its *Payphone Order*, Congress has decided when separate affiliates should or should not be required.

- All broadband CMRS providers should be subject to the same CPNI rules. There is no basis for imposing more onerous CPNI rules on particular carriers.

- No interconnection safeguards or network information disclosure safeguards are needed, in light of Sections 251-52 and the *Interconnection Order*.

- Any competitive safeguards adopted should sunset automatically after three years.

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ATTACHMENTS:

Attachment I:	BellSouth Corporation, Reply to Comments in Response to Request for Resale Authorization (filed September 25, 1995)
Attachment II:	BellSouth's February 15, 1996 letter responding to a January 18, 1996 joint *ex parte* filing in Gen. Docket 90-314

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To: The Commission

COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation ("BellSouth"), by its attorneys, hereby submits its comments in response to the Commission's *Notice of Proposed Rulemaking, Order on Remand, and Waiver Order*, FCC 96-319 (August 13, 1996), *summarized*, 61 Fed. Reg. 46420 (Sept. 3, 1996) (*NPRM*).[1] The Commission issued its *NPRM* partially in response to a decision of the United States Court of Appeals for the Sixth Circuit's *Cincinnati Bell* decision.[2] In that decision, the Court granted

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[1] References herein to the *NPRM* are to the released version, not the Federal Register synopsis, which differs in various respects.

[2] *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995).

BellSouth's petitions for review of the Commission's failure, in Docket 90-314, to eliminate Section 22.903 of the Rules, which imposes structural separation requirements on Bell Operating Company ("BOC") provision of cellular service, and the Court remanded the case to the Commission for a prompt determination whether there is any continuing need for this rule.

The *NPRM* acknowledges that even after studying the issue since August 1985 the Commission is "not able to determine" whether the rule is warranted.[3] The record to date discloses no basis for maintaining the rule and therefore the Court's mandate requires its immediate elimination.

INTRODUCTION

In 1981, the FCC required all local exchange telephone companies to provide cellular service only through structurally separated corporations.[4] The stated purpose of this "separate subsidiary" rule was to prevent cross-subsidization of cellular operations and assure nondiscriminatory interconnection.[5] When this separate subsidiary requirement was eventually limited to the BOCs in 1983, the Commission indicated that it would revisit the rule within two years and would modify or eliminate it if circumstances warranted.[6]

The Commission did not revisit the rule two years later, however, and the rule remained in place unreviewed for nearly a decade. Finally, in 1992, the Commission revisited the rule in its PCS

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[3] *NPRM* at ¶ 48.

[4] *Cellular Communications Systems*, CC Docket 79-318, *Report and Order*, 86 F.C.C.2d 469, 493-95 (1981), *recon.* 89 F.C.C.2d 58, 79-80 (*Cellular Reconsideration Order*), *further recon.*, 90 F.C.C.2d 571 (1982), *petition for review dismissed sub nom. United States v. FCC*, No. 82-1526 (D.C. Cir. Mar. 3, 1983).

[5] *See id.*, 86 F.C.C.2d at 493-95.

[6] *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, 95 F.C.C.2d 1117, 1140 (1983) (*BOC Separation Order*), *aff'd sub nom. Illinois Bell Telephone Co. v. FCC*, 740 F.2d 465 (7th Cir. 1984), *recon.*, 49 Fed. Reg. 26,056, 26,063 (1985), *aff'd sub nom. North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282 (7th Cir. 1985).

rulemaking. In that proceeding, the FCC *proposed* to treat cellular and PCS systems alike by: (1) allowing all LECs, including the BOCs, to offer PCS service without structural separation; (2) eliminating the existing BOC cellular structural separation requirement; and (3) adjusting cellular and PCS service rules to allow the services to compete on an equal basis.[7] The Commission identified the same two reasons for considering a separation requirement — preventing discrimination in interconnection and preventing cross-subsidization.[8] It noted, however, that these concerns could be addressed through nonstructural safeguards.[9] Furthermore, the Commission said that it did not wish to prevent LECs from achieving the "significant economies of scope" that could occur if LECs were to offer wireless services.[10]

The proposal to allow LECs, including the BOCs, to provide both PCS and cellular directly—without a separate subsidiary—was virtually unopposed. It received both governmental and

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[7] *New Personal Communications Services,* GEN Docket 90-314, *Notice of Proposed Rule Making*, 7 F.C.C.R. 5676, 5705-06, *erratum,* 7 F.C.C.R. 5779 (1992) (*PCS NPRM*).

[8] *Compare PCS NPRM*, 7 F.C.C.R. at 5705 *with Cellular Communications Systems*, 86 F.C.C.2d at 493-95.

[9] *PCS NPRM*, 7 F.C.C.R. at 5705.

[10] *Id.* The Commission noted, as one example of the integration it sought to foster, that a local exchange company might wish to use PCS spectrum in lieu of wire connections for providing phone service. *Id.* It noted that the BOCs could not currently use cellular spectrum for such purposes because "the separate subsidiary regulatory requirements for [the BOCs] (which guard against cross-subsidy and discrimination problems) prevent . . . any ownership integration as a means of exploiting economies of scope." *Id.* at n.50. The FCC observed that if the cellular subsidiary rule were extended to PCS, "eighty percent of the [telephone] industry (and their customers) would be precluded from realizing any economies of scope between their wireless and wireline telephone services." *Id.* at 5706. The principal option proposed by the Commission to address this potential inefficiency was to allow all local telephone companies to hold PCS licenses directly and to eliminate the cellular separate subsidiary requirement. By eliminating the separate subsidiary requirement, the Commission hoped to allow local telephone companies to "capture the necessary economies of scope through use of [cellular] spectrum, rather than newly assigned PCS spectrum." *Id.*

private industry support,[11] and *even McCaw*, the leading non-BOC cellular provider, declared its neutrality on the issue.[12] The Government supported allowing local exchange carriers to provide PCS directly, without a separate subsidiary, and it urged the Commission to consider doing likewise for the Bell cellular operations, which would afford them "greater flexibility."[13] Several BOCs strongly supported the proposal.[14]

When the PCS rules were adopted, the FCC made clear that it viewed cellular and PCS as essentially identical services. Its technical rules gave PCS licensees coverage and service areas comparable to cellular licensees, and it allowed PCS and cellular licensees to offer the same services

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[11] *See* GEN Docket 90-314, Comments of National Telecommunications and Information Administration, United States Department of Commerce at 32 & n.55 (Nov. 9, 1992) (Government PCS Comments); Comments of Ameritech at 25 (Nov. 9, 1992) (Ameritech PCS Comments); *accord* Reply Comments of NYNEX Corporation at 7 (Jan. 8, 1993).

[12] Comments of McCaw Cellular Communications, Inc., GEN Docket No. 90-314, at 47 (Nov. 9, 1992).

[13] Government PCS Comments at 32 & n.55.

[14] For example, Ameritech stated that "the competitive anxieties which drove the Commission to fashion its 'separate subsidiary' edicts of past decades are more than adequately addressed by . . . non-structural safeguards. To promote efficient resource utilization and fair competition between PCS and cellular service providers, the Commission needs to eliminate its cellular structural separation requirements." Ameritech PCS Comments at 25; *accord* Reply Comments of NYNEX Corporation, GEN Docket 90-314, at 7 (Jan. 8, 1993). Ameritech argued that because the Commission envisioned PCS and cellular as highly competitive and because the principle of regulatory parity required treating PCS and cellular alike, "[t]he obvious choice . . . is to eliminate that requirement." Ameritech PCS Comments at 26. It noted that structural separation of cellular service imposes direct economic costs, as well as indirect costs, such as loss of network efficiencies. *Id.* As a result, carriers are prevented from taking advantage of the economies of integration and the development and delivery of new services is stifled, "all of which ultimately negatively impact the customer." *Id.* BellSouth and others attested to the economies of scale and scope that the Commission predicted would result if cellular carriers and local exchange carriers were allowed to integrate their operations fully with PCS. Comments of BellSouth, GEN Docket 90-314, at 43-55 (Nov. 9, 1992); *accord* Comments of Cincinnati Bell Telephone Company, GEN Docket 90-314, at 3-13 (Nov. 9, 1992).

to subscribers.[15] It nevertheless applied different regulatory policies to the Bell Companies' participation in these two wireless businesses.

The FCC concluded, based on the record, that the public interest would not be served by imposing a separate subsidiary rule on local exchange carriers' PCS operations. It found that allowing local exchange carriers to participate directly in PCS "may produce significant economies of scope between wireline and PCS networks."[16] It also found that such economies "will promote more rapid development of PCS and will yield a broader range of PCS services at lower costs to consumers" and would "encourage [local exchange carriers] to develop their wireline architectures to better accommodate all PCS services."[17]

At the same time, the FCC decided to retain the separate subsidiary rule for the provision of cellular service by Bell local exchange companies. The only explanation for the decision to maintain this rule in force was contained in a footnote concluding that the record did not "provide[] enough information for us to eliminate the [cellular separate subsidiary] requirement at this time."[18] The FCC did not provide any explanation for how the record before it, which was sufficient to allow all LECs to offer PCS wireless service without structural separation, could be inadequate to relieve them of a separate subsidiary requirement for an equivalent form of wireless service.

NYNEX Corporation sought reconsideration of this decision and asked the Commission to eliminate the cellular separation rule. NYNEX addressed the "radical[]" changes that had taken place in telecommunications in the decade since the cellular separate subsidiary rule was adopted and showed that there was no continuing justification for requiring cellular service to be offered by

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15 *New Personal Communications Services,* GEN Docket 90-314, *Second Report and Order,* 8 F.C.C.R. 7700, 7715, 7725, 7727, 7732-33, 7742-47, 7764 & n.120 (1993) (*PCS Second Report*).

16 *Id.* at 7751.

17 *Id.*

18 *Id.* at 7751 n.98.

Bell Companies only through a separate subsidiary.[19] NYNEX pointed out the record support for eliminating the cellular subsidiary rule, setting forth in some detail the ways in which the rule disserves the public interest:

- It has prevented or delayed the Bell Companies from meeting customer demand, resolving technical problems, and realizing cost efficiencies, thereby denying the customer the benefits of cost-effective Bell Company operations.

- It has denied the public the efficiencies resulting from the integration of cellular and landline services, as well as services that could not be provided except through integration.

- It has increased the cost of services, due to the Bell Companies having to maintain separate staffs, as well as increasing the cost of market research, advertising, sales, and marketing due to the need to maintain two separate organizations for these functions.[20]

NYNEX also showed that to prevent cross-subsidies and interconnection discrimination, it was not necessary to impose the drastic prophylactic measure of a separate subsidiary. *Id.* at 18-21. There was no opposition to NYNEX's proposal to apply a single, consistent structural approach to the Bell Companies' provision of wireless services.[21] When the Commission ruled on the petitions for reconsideration, however, it again ignored issues relating to the separate subsidiary rule.[22]

Reviewing the Commission's decision, the Sixth Circuit held that the cellular separate subsidiary rule could not be continued indefinitely without review because it had no apparent basis and was unlawfully discriminatory. The Court ruled in *Cincinnati Bell* that the FCC's retention of

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[19] NYNEX Petition for Reconsideration, GN Docket 90-314, at 19, 16-22 (Dec. 8, 1993).

[20] *Id.* at 16-18.

[21] Several other parties sought further reconsideration, and in its comments BellSouth again urged the Commission to eliminate the cellular separate subsidiary rule, particularly if a Bell local exchange carrier's eligibility for PCS spectrum would be adversely affected by attribution of the separate subsidiary's cellular spectrum. *See* BellSouth Comments on Further Reconsideration, GN Docket 90-314, at 38 (Aug. 30, 1994).

[22] *New Personal Communications Services,* GEN Docket 90-314, *Third Memorandum Opinion and Order,* 9 F.C.C.R. 6908, 6912-13 (1994).

its cellular structural separation rule was arbitrary and capricious, given the agency's own finding that a separation rule would disserve the public interest in PCS, a service directly competitive with cellular.[23] The Court observed that it is well established when the factual assumptions supporting an agency rule are no longer valid, the rule must be revisited and may not be maintained indefinitely.[24] The Court found that the "disparate treatment afforded the Bell Companies impacts on their ability to compete in the ever-evolving wireless communications marketplace" and "severely penalizes" them "at a time when the communications industry is exploding and changing almost daily."[25]

Since *Cincinnati Bell,* the Commission has repeatedly found that PCS and cellular should be treated alike. Recent examples include:

- The *CMRS Flexible Service Order,* which treated cellular and broadband PCS carriers alike with respect to the provision of fixed wireless service.[26]
- The *CMRS Roaming Order,* which equalized the treatment of cellular and broadband PCS relating to serving "roamers."[27]
- The *CMRS Spectrum Cap Order,* which treated cellular and broadband PCS alike with respect to their access to radio spectrum.[28]

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23 69 F.3d at 768.

24 *Id.* at 767, 768.

25 *Id.* at 768.

26 *Flexible Service Offerings in the Commercial Mobile Radio Services,* WT Docket 96-6, *Report and Order and Further Notice of Proposed Rulemaking,* 11 F.C.C.R. 8965 (1996) (*CMRS Flexible Service Order*), *pets. for recon. pending; see id., Notice of Proposed Rulemaking,* 11 F.C.C.R. 2445 (1996).

27 *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services,* CC Docket 94-54, *Second Report and Order and Third Notice of Proposed Rulemaking,* FCC 96-284 (Aug. 15, 1996) (*CMRS Roaming Order*).

28 *Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap,* WT Docket 96-59, *Report and Order,* FCC 96-278 at ¶¶ 94-95 (June 24, 1996) (*CMRS Spectrum Cap Order*), *pets. for recon. pending, pet. for review pending sub nom. Cincinnati Bell Telephone Co. v. FCC,* No. 96-3756 (6th Cir.).

- The *Number Portability Order*, which affords the same regulatory treatment to cellular and broadband PCS with regard to number portability, based on the "view . . . that cellular, broadband PCS, and covered SMR providers will compete directly with one another, and potentially will compete in the future with wireline carriers."[29]

- The *CMRS Resale Order*, which equalized the treatment of cellular and PCS with regard to resale because "extending the [cellular] resale rule to broadband PCS providers, which are already competing directly with cellular carriers for the mass consumer two-way voice market where they have begun service and are expected in the near future to do so nationwide as their primary business, will advance regulatory parity."[30] The Commission reasoned that it "expect[s] broadband PCS providers to target their services, at least initially, toward the same customers who are currently served and sought after by cellular providers."[31]

- The *E911 Order*, which subjected cellular and broadband PCS to the same emergency call completion obligations because they compete directly with one another.[32]

Each of these decisions acknowledges the need for the same regulatory treatment of competing cellular and PCS carriers.

Moreover, on February 8, 1996, the Telecommunications Act of 1996 ("Telecom Act") became law.[33] There Congress considered the subject to separate subsidiaries (and long-distance restrictions) and imposed no such obligations or restrictions on BOC wireless offerings — cellular or PCS. In fact, Congress relieved AT&T/McCaw of its separate subsidiary requirement (imposed via a consent decree with the U.S. Department of Justice) based, at least in part, on the assumption

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[29] *Telephone Number Portability*, CC Docket 95-116, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 8352 at ¶ 155 (1996) (*Number Portability Order*), *erratum* Public Notice, DA 96-1124 (July 15, 1996), *further erratum* Mimeo 64044 (July 17, 1996), *pets. for recon. pending.*

[30] *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket 94-54, *Report and Order*, FCC 96-263 at ¶ 16 (July 12, 1996) (*CMRS Resale Order*).

[31] *Id.* at ¶ 18.

[32] *Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 96-264 (July 26, 1996) ("*E911 Order*").

[33] Pub. L. No. 104-104, 110 Stat. 56 (1996).

that the FCC would eliminate the cellular separate subsidiary rule based on the *Cincinnati Bell* decision. The Act also granted immediate joint marketing relief.

DISCUSSION

After a remand, the FCC "must 'implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.'"[34] Once the Court of Appeals has finally ruled on a matter, its ruling is the law, and the FCC is not free to disregard the Court's decision.[35] An agency acting on remand "cannot . . . choose to ignore the decision as if it had no force or effect. Absent reversal, that decision is the law which the [agency] must follow."[36]

The Sixth Circuit recently summarized its own *Cincinnati Bell* decision as follows:

> After noting that *the . . . Commission's structural separation requirement was somewhat dubious*, we found the agency's "insufficient record" justification arbitrary and capricious. Accordingly, we remanded the case to the Commission for a reexamination of whether the structural separation was in the public interest. In so doing, the Court instructed that "time is of the essence" due to the ongoing auction of the Personal Communications Service blocks and the potential harm to *Bell Operating Companies—the only group under the structural requirement*—as a result of their ability to compete on a level playing field in that auction process. *The Court thus instructed the Commission to determine "as soon as possible" whether the structural separation requirement was necessary and in the public interest.*[37]

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[34] *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994), *quoting United States v. Kikumura*, 947 F.2d 72, 76 (3d Cir. 1991) (citations omitted).

[35] *See Beverly Enterprises v. NLRB*, 727 F.2d 591, 593 (6th Cir. 1984) ("Administrative agencies are no more free to ignore [the mandate of a court of appeals] . . . than are district courts.").

[36] *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980).

[37] *BellSouth Corp. v. FCC*, — F.3d —, No. 94-4113, *Order*, slip op. at 2-3 (6th Cir. Oct. 1, 1996) (*BellSouth Order*) (Sixth Circuit electronic citation 1996 FED App. 0320P) (emphasis added).

The specific issue remanded to the Commission was to "determine . . . whether the [cellular] structural separation requirement placed upon the Bells is necessary and in the public interest," given the FCC's contrary ruling for PCS.[38] As the Court put it:

> If Personal Communications Service and Cellular are sufficiently similar to warrant the Cellular eligibility restrictions and are expected to compete for customers on price, quality, and services, . . . what difference between the two services justifies keeping the structural separation rule intact for Bell Cellular providers?[39]

Because the Commission had already sought and received comments on elimination of the rule and on that very record decided that the public interest would not be served by imposing a structural separation requirement on PCS, the Court rejected the Commission's assertion that it needed a further record.[40] Moreover, the Court held that the record supported the Commission's findings that:

> (1) the public interest is served by allowing local exchange carriers to obtain Personal Communications Service spectrum to provide a broad portfolio of services, (2) Personal Communications Service and Cellular providers will compete for customers on price, quality, and service, (3) a symmetrical regulatory structure for wireless communications service providers is required by Congressional mandate, and (4) safeguards other than a structural separation requirement adequately guard against possible discrimination and cross-subsidization.[41]

Moreover, there has been no record of any cellular-related abuse by carriers covered by the rule or by carriers not covered (*i.e.*, GTE). The Commission still has provided no reason for treating

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38 *Cincinnati Bell*, 69 F.3d at 768.

39 *Id.*

40 In two additional notice-and-comment rulemaking proceedings the FCC has found no public interest justification for structural separation requirements in other wireless services that compete with cellular. *See Eligibility for the Specialized Mobile Radio Service*, GN Docket 94-90, *Report and Order*, 10 F.C.C.R. 6280, 6294 (1995) (*SMR Eligibility Order*); *Regulatory Treatment of Mobile Services*, GN Docket 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1492 (1994) (*CMRS Second Report*).

41 *Cincinnati Bell*, 69 F.3d at 768.

cellular differently from PCS for structural separation purposes. In fact, the *NPRM* admits that the Commission is "not able to determine" whether there is any reason for keeping the rule.[42] Given that the Commission has elsewhere continued to treat cellular and broadband PCS alike and there exists no valid reason for treating cellular different from PCS for structural separation purposes, there is "no just alternative" but to end application of the rule.[43] The court's mandate requires that this be done as soon as possible.

I. NO BOC CELLULAR SAFEGUARDS ARE WARRANTED

The current and proposed cellular structural separation rules should be eliminated because there is no basis for such rules. As shown herein, the safeguards are contrary to regulatory parity, there is no evidence in the record supporting adoption of safeguards applicable only to the BOCs, and there is no evidence in the record supporting different structural rules for cellular than for broadband PCS.

A. Regulatory Parity Requires Immediate Elimination of Section 22.903

The *NPRM* states that the purpose of this proceeding is to:

> implement further the mandate of the 1993 Budget Act to treat similar commercial mobile radio services similarly by placing all CMRS licenses under a uniform set of nonstructural safeguards.[44]

Despite this recognition, the FCC proposes two options for the provision of cellular and PCS. Option 1 would continue the current disparate regulatory regime which requires BOCs to provide cellular service through a structurally separated subsidiary but would not require structural

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[42] *NPRM* at ¶ 48. The Commission has noted that structural separation is necessary where it would otherwise be difficult to detect abuses. *NPRM* at ¶¶ 43-46.

[43] *Greyhound v. ICC*, 668 F.2d at 1364-65.

[44] *NPRM* at ¶ 2.

separation in the provision of PCS.[45] Option 2 would eliminate the current rule and instead apply uniform standards to provision of cellular, PCS, and other similar services by LECs.[46] Regulatory parity requires adoption of Option 2. The Commission asserts no record basis even for proposing Option 1, which is what the Court found to be arbitrary and capricious in *Cincinnati Bell,* given the requirement of regulatory parity.

The Sixth Circuit relied on the fact that Congress had required "a symmetrical regulatory structure for wireless communications service providers" and concluded that the FCC's application of a structural separation requirement to BOC cellular service alone was not consistent with this principle, absent a reasoned explanation.[47] There can be no reasoned explanation, however, for applying the requirement only to BOCs, while exempting other LECs, or for applying it to cellular service when it is not needed for competing services such as broadband PCS.

1. There Is No Justification for Treating the BOCs Differently From GTE

There is no justification for imposing structural separation on BOCs and leaving other major LECs exempt from the rule. Any conceivable rationale for imposing a structural separation requirement on BOCs stems from their position as major providers of local exchange service. In fact, the Commission acknowledges that any "rationale for imposing structural separation on the BOCs' cellular service would appear to apply to all Tier 1 LECs."[48] GTE, however, is a Tier 1 LEC larger than any single (pre-merger) BOC. Despite this fact, the Commission proposes to exempt all non-BOC Tier 1 LECs, including GTE, from any structural separation requirements it continues to apply to the BOCs.

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45 *NPRM* at ¶¶ 4, 79-81.

46 *NPRM* at ¶¶ 5, 82-83.

47 *Cincinnati Bell,* 69 F.3d at 768.

48 *NPRM* at ¶ 90.

The Commission offers no comprehensible explanation for this rejection of symmetrical regulation, because there can be no reason for it. The Commission states only that if it sunsets Section 22.903 and replaces it with "streamlined safeguards" applicable to in-region cellular service by LECs (including GTE), the "relative benefits of imposing 22.903 on any additional Tier 1 LECs for a transition period followed by a sunset would [not] outweigh the costs of such requirements." Incredibly, the *NPRM* reaches this tentative conclusion without any discussion of the relative benefits *or* costs of imposing Section 22.903 requirements on either the BOCs or GTE.

GTE's size is of direct relevance here. When the Commission imposed structural separation on AT&T alone, it did so because "the costs of the requirement, measured in terms of economic inefficiency, decrease as the size of the firm increases," further explaining that "as a firm increases in size there is a corresponding increase in the flexibility necessary to effect the separation."[49] Given that GTE is a larger firm than BellSouth, the cost burden of imposing structural separation on GTE will be less than the cost burden of imposing it on BellSouth.

Likewise, the benefits (if there are any) of structural separation are likely to be proportional to the size and scope of the affected company's operations. The purported benefits of structural separation relate to the prevention of discriminatory interconnection practices where a company offers both LEC and cellular service in a given area and to prevention of cross-subsidization of cellular service from local exchange revenues. Clearly, the company with more extensive local exchange operations will have greater potential opportunities to engage in discriminatory interconnection practices and will have more potential sources of monopoly funds with which to cross-subsidize cellular operations.

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[49] *Cellular Reconsideration Order*, 89 F.C.C.2d at 80 & n.39.

Under these circumstances, there is no possible factual basis for the Commission's proposal to exclude other Tier 1 LECs from Section 22.903 if the rule is maintained for the BOCs. The fact that the rule would be in force for only a limited time before it sunsets does not exempt the Commission from its obligation to engage in reasoned, factually-supported decision making.[50] Simply put, if the benefits of structural separation do not outweigh the costs in the case of GTE, they do not for the BOCs, either. The principle of regulatory symmetry requires like treatment of like service providers. The Commission should abolish the rule for *all* LECs.

2. There Is No Justification for Differing Structural Regulation of BOC Participation in Cellular and PCS

The Commission has repeatedly recognized the similarity of cellular and Broadband PCS, even after the Sixth Circuit decision,[51] and the court relied on that similarity, and the statutory requirement of regulatory parity, in reaching its decision.[52] Accordingly, symmetrical regulation of cellular and PCS is the law of the case.[53] Similarly, the Commission has found, in the PCS rulemaking, that the public interest does not require structural separation for PCS. The Court relied on that determination, too, in reaching its decision,[54] and, accordingly, the fact that structural separation is not needed for PCS is also the law of the case.[55] Not surprisingly, the Court recently described the cellular structural separation rule as "dubious."[56] Absent a valid, articulated reason

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50 *See* page 43, *infra.*

51 *See* page 7, *supra.*

52 *Cincinnati Bell,* 69 F.3d at 768.

53 Under the law of the case doctrine, issues decided by an appellate panel may not be revisited by the lower tribunal on remand. *See generally Ohio Oil Co. v. Thompson,* 120 F.2d 831 (8th Cir. 1941), *cert. denied,* 314 U.S. 658 (1941).

54 69 F.3d at 768.

55 *See generally Ohio Oil Co.,* 120 F.2d 831.

56 *BellSouth Corp.,* slip op. at 2.

for imposing a structural separation requirement on BOC provision of cellular service in particular, while no such requirement is imposed on PCS, the rule must be eliminated.

BellSouth submits that there is no valid basis on which the Commission may impose a structural separation requirement on BOC cellular service if there is no need for structural separation of PCS. The two services are subject to the same interconnection policies and they obtain interconnection from LECs of the same type and in the same way. There is no interconnection-based reason for distinguishing between the two services for purposes of structural separation. The two services offer similar features and functionalities to customers and compete on the basis of price, quality, and services. Both services have the potential to function as alternatives to wireline local exchange service. There is no reason to be more concerned about cross-subsidization of one service than the other. The only fundamental difference between the two services is the frequency band in which they operate. That clearly has no relevance to the need for structural separation, however.

B. There Is No Need for BOC Cellular Structural Safeguards

There is no justification for continuing Section 22.903 in effect, even for an interim "transition" period, in its existing form or some modified form. There has never been any record basis for imposing a structural separation requirement uniquely on the BOCs in the past, and there is no record basis for it now.

Any structural separation rule emerging from this proceeding must be fully supported on its own as a new rule, because the Sixth Circuit has held that there is no "reasoned explanation" for the current rule.[57] The court affirmed that the asserted reasons for originally adopting a LEC structural separation rule—prevention of cross-subsidization and interconnection abuse—no longer form a

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[57] *Cincinnati Bell,* 69 F.3d at 768.

basis for the rule, because "safeguards other than a structural separation requirement adequately guard against possible discrimination and cross-subsidization."[58] The court also held that the record in the PCS docket was adequate to determine whether to eliminate the rule.[59] Given the court's affirmance of the FCC's determination that broadband PCS and cellular service were similar, competing services and that "a symmetrical regulatory structure for wireless communications service providers is required by Congressional mandate," the court asked:

> [W]hat difference between the two services justifies keeping the structural separation rule intact for Bell Cellular providers? The FCC provides no answer to this question, other than its raw assertion that the two industries are different.[60]

The Court thus concluded that there was no "reasoned explanation" for the current rule. BellSouth submits that there is, likewise, no lawful reason for establishing such a rule now.

1. Section 22.903 Lacks Any Current Basis

The Commission has consistently stated that separate subsidiary rules are adopted to prevent cross-subsidization and interconnection abuse.[61] The Commission also has acknowledged, however, that such rules "entail[] costs to the carriers, in the form of lost efficiencies of scope and added costs of establishing separate facilities, operations, and personnel, as well as lost opportunities for customers to obtain integrated and innovative service packages."[62] Thus, the Commission will impose structural separation only if the costs to the public and the carriers are outweighed by the benefits of the rule.

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58 *Id.*

59 *Id.*

60 *Id.*

61 *See, e.g., Cellular Communications Systems*, 86 F.C.C.2d at 493-95; *NPRM* at ¶¶ 12, 37.

62 *NPRM* at ¶ 38, *Cellular Reconsideration Order*, 89 F.C.C.2d at 77-80.

When adopting structural separation for cellular, the need to easily detect abuses was deemed to outweigh the costs to the public and carriers, given that cellular was in its infancy and interconnection arrangements between wireless providers and LECs had not yet been established.[63] Structural separation was a mechanism to facilitate detection of whatever abuses might occur in the new industry. The Commission said it would reevaluate whether structural separation continued to be necessary after the industry had developed for a few years.[64]

Cellular now is a well-established industry, and interconnection arrangements have long been established, without any record of the abuses that structural separation was intended to highlight. The FCC has found that neither discrimination nor the potential for cross-subsidization is a problem in the cellular service.[65] In fact, there is no record of interconnection abuse by LECs affiliated with cellular carriers. Accordingly, the original reason for cellular structural separation can no longer stand.

Moreover, non-structural safeguards have been developed over the last decade that clearly are sufficient to prevent or bring to light the types of abuses for which structural separation was once believed necessary. The same barriers to cross-subsidization that exist for BOC PCS—*i.e.*, non-structural safeguards—also exist, and are equally effective, for cellular service. Moreover, safeguards such as mandatory interconnection enforceable through the complaint process, suffice to deter interconnection abuses.[66] Given these facts, the record requires elimination of the cellular structural separation rule.

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63 *See NPRM* at ¶ 37.

64 *BOC Separation Order*, 95 F.C.C.2d at 1140.

65 *SMR Eligibility Order*, 10 F.C.C.R. at 6294.

66 *Id.*

The Commission has concluded, and BellSouth agrees, that with regard to PCS, the public interest would *not* be served by requiring LECs, including those affiliated with BOCs, to provide PCS only through a separate subsidiary.[67] The Commission concluded that its accounting and other non-structural rules were sufficient protection to warrant not require structural separation for PCS, especially in view of the important public interest benefits of integrated service.[68] Given that the Commission has viewed structural separation as being more important for ensuring the development of competition in a new industry than for established, competitive industries, there can be no reason to subject the well-established cellular industry to structural separation deemed unnecessary for the new PCS industry. Accordingly, retention of a structural separation rule for cellular that it has repeatedly found unnecessary for PCS[69] would be arbitrary and capricious. Given the treatment of PCS and the nearly identical nature of cellular and PCS, the cellular structural separation rule must be eliminated immediately.

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[67] Specifically, the Commission found that allowing LECs to participate directly in PCS "may produce significant economies of scope between wireline and PCS networks." *PCS Second Report*, 8 F.C.C.R. at 7751. It also found that such economies "will promote more rapid development of PCS and will yield a broader range of PCS services at lower costs to consumers" and would "encourage [LECs] to develop their wireline architectures to better accommodate all PCS services." *Id.*

[68] *Id.*; *accord SMR Eligibility Order*, 10 F.C.C.R. at 6294.

[69] It is noteworthy that the Pacific Telesis non-structural safeguard plan for PCS, which forms the basis for the PCS non-structural regulations proposed in the *NPRM* (at ¶¶ 7, 93-124), was approved by the Wireless Telecommunications Bureau over objections claiming that the non-structural safeguards were inadequate to detect abuses associated with the LEC provision of wireless services such as PCS. *See* AirTouch Comments on PacTel plan at 5; Cox Comments on PacTel plan at 4, 9; Nextel Comments on PacTel plan at 12-13; Sprint Comments on PacTel plan at 16-18; *see also NPRM* at Appendix B, n.1.