

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

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OCT 10 1996

Federal Communications Commission
Office of Secretary

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

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REPLY TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

AT&T Corp. ("AT&T"), by its attorneys and pursuant to 47 C.F.R. § 1.429(g), hereby submits its reply to the oppositions to or comments on the petitions for reconsideration of the Commission's Order in the above-captioned proceeding,^{1/} filed by the National Wireless Resellers Association ("NWRA"), the Telecommunications Resellers Association ("TRA"), Cable & Wireless, Inc. ("CWI"), and ARDIS Company ("ARDIS").^{2/} These parties seek, among other things, retention of the CMRS resale rule in perpetuity; a requirement that facilities-based carriers make available to resellers the non-Title II components of bundled packages; and a special exemption from the resale obligation for certain SMR providers. The Commission should reject these proposals and, instead, should reconsider its decision to impose an explicit resale requirement on CMRS providers.

^{1/} In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, First Report and Order, FCC 96-163 (released July 12, 1996) ("Order").

^{2/} See Opposition of the National Wireless Resellers Association to AT&T Corp.'s Petition for Partial Reconsideration (filed Sept. 27, 1996) ("NWRA Opposition"); Comments of the Telecommunications Resellers Association on Petitions for Reconsideration (filed Sept. 27, 1996) ("TRA Comments"); Comments of Cable and Wireless, Inc. (filed Sept. 27, 1996) ("CWI Comments"); Opposition of ARDIS Company to Petition for Partial Reconsideration (filed Sept. 27, 1996) ("ARDIS Opposition").

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I. IF THE COMMISSION RETAINS ITS CMRS RESALE OBLIGATION, IT SHOULD SUNSET THE RULE IN FIVE YEARS AT THE VERY LATEST

TRA and CWI argue that the Commission should retain the CMRS resale requirement indefinitely. TRA contends that until there is a "perfectly competitive market, facilities-based providers retain sufficient market power to discriminate against resale carriers."^{3/}

According to CWI, the Commission's explicit sunset provision is premature because "there is no way to predict at this time exactly how the market will unfold with added PCS entrants."^{4/}

There are no grounds for grant of these requests. In arguing for a perpetual resale rule, both TRA and CWI neglect to balance the costs and benefits of such regulation. While mandated resale may help resellers, the rule does not necessarily promote competition under all circumstances.^{5/} Indeed, the Commission correctly found that as the CMRS marketplace becomes more competitive, the need for a resale obligation diminishes. Furthermore, the market need not be "perfectly competitive," as TRA suggests, to warrant removal of the

^{3/} TRA Comments at 12.

^{4/} CWI Comments at 2-3.

^{5/} For this reason, CWI's and Connecticut Telephone's argument that the Commission ignored the costs to small businesses is misplaced. See Petition for Reconsideration of Connecticut Telephone and Communication Systems, Inc. at 4 (filed Aug. 23, 1996); CWI Comments at 4. In assessing the costs and benefits of the resale requirement, the Commission is obligated to examine the effect of the rule on competition, not on individual competitors. There is nothing in law or Commission precedent that requires the Commission to protect in perpetuity the business interests of resellers, small or large.

resale rule.^{6'} Rather, the Commission appropriately concluded that any competitive benefit of the rules will completely dissipate once new competitors offer wireless service.^{7'}

Contrary to TRA's conclusory statements, there are significant costs associated with requiring resale. Most importantly, a mandatory resale rule dampens the incentive of underlying carriers to provide innovative pricing, packages, and technology.^{8'} Moreover, as the Rural Cellular Association ("RCA") asserts, a resale requirement that outlasts its usefulness would be especially harmful in rural areas. RCA, which represents the interests of small and rural cellular licensees, explains that if the resale rule is retained, facilities-based carriers would be disinclined to maximize utilization of their systems and rural areas could thereby remain unserved.^{9'} These costs, which ultimately are borne by consumers,

^{6'} TRA Comments at 5.

^{7'} In denying State petitions to regulate CMRS rates, the Commission stated that "[a]lmost all markets are imperfectly competitive, and that such conditions can produce good results for consumers." See Petition of the Connecticut Department of Public Utility Control To Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, PR Docket No. 94-106, Report and Order, FCC 95-199, at ¶ 17 (released May 19, 1995). The Commission observed that "[i]n general, perfect competition can exist only where goods are homogenous, and all buyers and sellers have full information and accept price as a given." Id. at n.47. This solely theoretical possibility of achieving perfect competition renders nonsensical TRA's suggestion that such conditions must exist before the resale obligation can be eliminated.

^{8'} See Opposition of AT&T Corp. to Petitions for Reconsideration at 4 (filed Sept. 27, 1996) ("AT&T Opposition").

^{9'} Opposition of the Rural Cellular Association to Petitions for Reconsideration at 5 (filed Sept. 27, 1996) ("RCA Opposition").

should not continue to be imposed absent strong evidence that the rule is accomplishing its stated purposes.^{10/}

With the onset of substantial CMRS competition, there is little evidence the rule continues to be necessary today.^{11/} CWI and TRA plainly ignore marketplace realities, however, when they argue that the Commission's predictions about conditions five years from now lack sufficient foundation.^{12/} A and B block PCS providers are already offering service in some markets and many more will do so by the end of 1996. The C block authorizations were just issued and service can be expected on those frequencies in the near future. There is no question that the D, E, and F block licensees will pursue an aggressive build-out schedule as well. Many cellular providers are already bringing to market innovative new services at lower prices in anticipation of new competitors.^{13/} TRA's and CWI's pessimistic outlook on the state of wireless competition is simply unsupported.

Similarly, TRA's assertion that the Telecommunications Act of 1996 favors perpetual retention of the CMRS resale requirement is wrong.^{14/} In contrast to the 1996 Act's explicit

^{10/} When the factual assumptions upon which a rule are premised disappear, the rule must be eliminated. Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1979); Meredith Corp. v. FCC, 809 F.2d 863, 873 (D.C. Cir. 1987).

^{11/} As Bell Atlantic NYNEX Mobile, Inc. states, "[t]he real issue for the Commission as it reconsiders the First Report and Order, is whether the resale rule should be kept at all." Opposition of Bell Atlantic NYNEX Mobile, Inc. to Petitions for Reconsideration at 5 (filed Sept. 27, 1996).

^{12/} CWI Comments at 3.

^{13/} See, e.g., M. Landler, "From AT&T, A Cellular Service With a Jazzy Name," New York Times at D1 (Oct. 3, 1996); M2 Presswire, "AT&T: Wireless AT&T Digital PCS Service Launched Nationwide, Serves 70 Million," AT&T Press Release (Oct. 3, 1996).

^{14/} See TRA Comments at 6-7.

prohibition on resale restrictions by local exchange carriers ("LECs") (which does not include CMRS providers), the Act places no corresponding obligation on telecommunications carriers (which includes CMRS providers).^{15/} Moreover, as RCA points out, the 1996 Act directs the Commission to review regularly all of its regulations to "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such services."^{16/} In light of this statutorily-grounded deregulatory approach and the imminent competition from new wireless entrants, the CMRS resale requirement should be eliminated at the soonest possible date.

II. THERE IS NO LEGAL OR POLICY JUSTIFICATION FOR REQUIRING BUNDLED PACKAGES TO BE MADE AVAILABLE TO RESELLERS

In arguing that a facilities-based carrier's resale obligation must encompass "the totality of bundled services offerings," TRA ignores the law and invents a problem where none currently exists.^{17/} As a threshold matter, the Commission has no authority to require resale of customer premises equipment ("CPE") and enhanced services even if they are sold to retail customers in conjunction with communications services.^{18/} The Commission's resale rule stems from the non-discrimination provisions contained in Title II of the

^{15/} Compare 47 U.S.C. § 251(a) with id. at § 251(b).

^{16/} RCA Opposition at n.5 (citing 47 U.S.C. § 11(a)(1), (2)).

^{17/} TRA Comments at 11. See also NWRA Opposition at 2-3.

^{18/} See AT&T Opposition at 6; Petition of the Personal Communications Industry Association for Reconsideration and Clarification at 13-14 (filed Aug. 23, 1996).

Communications Act and if a particular component of a bundled package is not regulated under Title II, it cannot lawfully be made subject to resale.^{19/}

In any event, there is no factual basis for imposing a resale obligation on the non-Title II aspects of bundled offerings. Because of competition, facilities-based carriers are not able to offset lower CPE prices with higher service charges. Rather, market forces cause bundled offerings to include both low equipment prices and low service prices.^{20/} Moreover, some customers acquire their own equipment from CPE distributors and purchase only telecommunications services from the carrier. Resellers have the ability to purchase the underlying carrier's service under any of these arrangements. Thus, the claims of TRA and NWRA that resellers would be consigned to taking service at an "artificially inflated" price are simply incorrect.^{21/}

Moreover, from a policy perspective, there is no justification for extending the resale obligation to CPE and enhanced services. These markets are extremely competitive and, consequently, resellers have a plethora of outlets from which to purchase equipment and non-regulated services to create their own functionally-equivalent packages. In addition, if all packages must be made available to resellers in their entirety, it would prevent facilities-based carriers from distinguishing their offerings in the marketplace. As a result, carriers

^{19/} See 47 U.S.C. §§ 201(b), 202(a).

^{20/} For example, AT&T uses commissioned-based dealers and its own retail outlets as distribution channels in a number of markets as a way to ensure maximum customer exposure. These dealers sometimes use a portion of their commissions to reduce the price customers pay for equipment, while still offering low service rates. AT&T's retail outlets need to match these offers to remain competitive.

^{21/} See TRA Comments at 12; NWRA Opposition at 2-3.

would have little incentive to provide the types of bundled packages or negotiate the deals desired by consumers.^{22/} For these reasons, the Commission should clarify that only Title II services, regardless of whether they are bundled with non-Title II components, must be offered to resellers.

III. THERE IS NO BASIS FOR EXCLUDING SMR DATA-ONLY SERVICES FROM THE RESALE OBLIGATION WHILE INCLUDING DATA SERVICES PROVIDED OVER CELLULAR AND PCS SPECTRUM

RAM Mobile Data ("RAM"), a provider of interconnected SMR mobile data services, agrees with AT&T that there is no basis for subjecting the data services of cellular and PCS providers to the resale rule while excluding the comparable data services of SMR providers.^{23/} ARDIS, another SMR operator, argues, however, that its SMR offerings are not functionally similar to AT&T's.^{24/} ARDIS bases this conclusion on the fact that cellular operators have more spectrum and are able to offer voice as well as data over their systems.^{25/}

These are distinctions without a difference. The wireless data market is new for ARDIS, RAM, and AT&T and the amount of spectrum a company is theoretically able to devote to the service or whether it can bundle voice and data does not answer the question of

^{22/} The Commission has recognized the "significant public interest benefits associated with the bundling of cellular CPE and service." Bundling of Cellular Customer Premises Equipment and Cellular Service, Report and Order, 7 FCC Rcd 4028, 4030 (1992).

^{23/} See Consolidated Response of RAM Mobile Data USA Limited Partnership at 6-7 (filed Sept. 27, 1996) ("RAM Response"); Petition of AT&T Corp. for Partial Reconsideration at 4-5 (filed Aug. 23, 1996).

^{24/} ARDIS Opposition at 1, 4-5. ARDIS takes no position on whether the resale rule should apply to AT&T's cellular data service. Id.

^{25/} Id. at 5-6.

whether it competes or has the potential to compete with another company operating in the data market.^{26/} In this regard, the Commission has found that, despite these technological distinctions, wide-area SMR service is, or will be, competitive with other CMRS and thus should be subject to the same rules.^{27/} Moreover, as AT&T explained, its data services are viewed by customers as substitutable with SMR data services^{28/} and, to the extent AT&T is subject to the resale requirement and ARDIS is not, AT&T is at an extreme competitive disadvantage.

In any event, there is a strong policy justification for excluding all wireless data services from the resale obligation, at least until the market has had an opportunity to develop. Unlike the relatively mature mobile voice market, wireless data services are in their infancy. A resale requirement at this crucial stage would constrain companies from experimenting with new technology or entering into innovative arrangements with customers.

^{26/} Although ARDIS is correct that cellular service is allotted more spectrum than SMR, this does not mean that cellular operators actually use 25 MHz of spectrum for data applications. Because AT&T must continue to support its primary voice service on such spectrum, it generally dedicates only one channel per system to data services. Thus, the amount of spectrum used by SMR and cellular providers for data services is roughly comparable.

^{27/} See Implementation of Sections 3(n) and 332 of the Communications Act, Third Report and Order, 9 FCC Rcd 7988, 8027-36 (1994). ARDIS' attempt to differentiate SMR from cellular service on the ground that cellular providers can bundle voice and data is undercut by the fact that ARDIS can resell the voice services of other wireless operators if it wants to enter that market. See ARDIS Opposition at 6. For this reason, RAM's suggestion that any exemption granted for cellular and PCS data services be limited to systems providing data services that are not bundled with "covered" services is misguided. RAM Response at 6. The Commission should exclude all wireless data services from the resale requirement regardless of whether they are bundled with other services.

^{28/} The examples set forth by ARDIS of the data services it provides are also examples of AT&T's data services and, in fact, the two companies compete head-to-head in these areas. See ARDIS Opposition at 6.

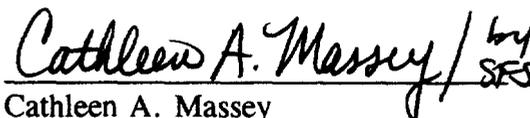
For example, AT&T may need to consider factors other than immediate financial gain in launching new and untried services. If these services must be made available to all resellers on similar terms before potential engineering problems are solved and before AT&T determines what the appropriate long-term conditions of sale should be, AT&T could be severely harmed from both a customer relations and financial perspective. As a consequence, AT&T likely would be deterred from engaging in the experimentation necessary to bring additional innovation to the wireless data market. These considerations militate in favor of exempting, at least for now, all CMRS providers from the obligation to make their data services available for resale. At the very least, the Commission should treat the data service provided by all broadband CMRS operators -- SMR, cellular, and PCS -- in a similar fashion.

CONCLUSION

For the foregoing reasons, the Commission should affirm its decision to sunset the resale requirement in five years or, in the alternative, should shorten the sunset period. In addition, the Commission should conclude that the resale requirement does not attach to the non-Title II components of bundled packages. Finally, the Commission should treat all wireless data services in a similar fashion.

Respectfully submitted,

AT&T CORP.

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October 10, 1996
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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

In re Applications of)
)
RAINBOW BROADCASTING COMPANY) GC Docket No. 95-172
) File No. BMPCT-910625KP
For an Extension of Time) File No. BMPCT-910125KE
to Construct) File No. BTCCT-911129KT
)
and)
)
For an Assignment of its)
Construction Permit for)
Station WRBW(TV), Orlando, Florida)

TO: The Honorable Joseph Chachkin
Administrative Law Judge

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Federal Communications Commission
Office of Secretary

RAINBOW BROADCASTING COMPANY

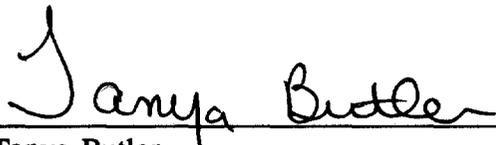
MOTION FOR EXTENSION OF TIME

Rainbow Broadcasting Company ("RBC"), by its attorney, hereby requests the Presiding Judge to grant a one-week extension of time to and including October 24, 1996, in which the parties to the above-captioned proceeding may file their replies to Proposed Findings of Fact and Conclusions of Law. In support thereof, the following is shown:

1. Undersigned counsel, like other attorneys in the communications group of his law firm, has been assigned various projects which have previously been overseen by Irving Gastfreund. Mr. Gastfreund is seriously ill and may be absent from the office for a significant period of time. Several of his cases require immediate and close attention so that it will be extremely difficult to provide the kind of scrutiny necessary to adequately compile RBC's reply.

CERTIFICATE OF SERVICE

I, Tanya Butler, do hereby certify that on this 10th day of October, 1996, I caused a copy of the foregoing "Reply to Oppositions to Petitions for Reconsideration" to be delivered by messenger (*) or first class mail to the following:



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