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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

REPLY COMMENTS OF BELLSOUTH CORPORATION

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SUMMARY

BellSouth showed in its comments that there was no record basis for imposing a structural separation requirement on BOC cellular service, and nothing in the comments has changed that. Under the Sixth Circuit's *Cincinnati Bell* decision, the Commission has the burden of justifying the rule, and the record developed in this proceeding does not provide any support for retaining it, much less extending it to other CMRS or to non-BOC LECs. Because there are no valid reasons for a structural separation requirement, the Commission must eliminate the rule.

The *Cincinnati Bell* case and numerous other judicial decisions make clear that the Commission must consider all alternatives to the structural separation rule and may not impose regulations such as this on the BOCs unless it provides a reasoned explanation why less restrictive measures are insufficient. Given the well-established efficacy of non-structural safeguards and the Commission's decision to employ non-structural, instead of structural, safeguards for CPE, enhanced services, and payphones, the imposition of structural separation on BOC cellular service would require a substantial justification.

There is no such justification. First of all, there is nothing in the record demonstrating that BOCs pose any greater risk of anticompetitive activity regarding cellular service than other substantial LECs. In recognition of this fact, many commenters urged the Commission to treat all Tier 1 LECs alike. The attempts by several Tier 1 LECs to distinguish themselves from the BOCs provide no basis for different treatment. Non-BOC LECs are the sole incumbent LECs in their franchise areas just as the BOCs are. Competing CMRS providers must obtain interconnection from non-BOC LECs as well as BOCs. Non-BOC Tier 1 LECs serve the entire state of Hawaii and numerous major metropolitan areas, as well as demographically desirable suburban areas. The number of states served is not a relevant distinguishing factor—some non-BOCs serve more states than BOCs, while others serve fewer. The relative proportion of customers served in a given state by a non-BOC LEC and a BOC also does not serve as a valid distinction, given that the non-BOC LEC may be the principal source of interconnection in a given market. The average density and contiguity of BOCs' and non-BOC LECs' service areas also does not distinguish between them, given that both BOCs and non-BOCs serve isolated rural areas as well as urban and suburban areas. Company-wide averages do not affect the fact that both BOCs and non-BOC LECs operate cellular systems in areas where they are incumbent LECs. Similarly, the number of access lines a company serves nationwide does not justify different treatment in the markets where it operates as an incumbent LEC.

BellSouth agrees with rural telephone company representatives that there are reasons to exempt small rural LECs from safeguards imposed on larger LECs, given that rural telephone companies are unlikely to serve as a major source of interconnection for CMRS licensees. The appropriate dividing line is that established by Congress in the statutory definition of rural telephone company, Section 3(37) of the Act.

There is no record for conducting a cost-benefit analysis of the BOC cellular structural separation rule or whether to exempt non-BOC LECs from such a requirement. First, there is no way to quantify the supposed benefits of structural separation, and the record does not contain any evidence that there even would be measurable benefits to the public; indeed, the existing rule

actually harms the public by diminishing competition. Second, the costs imposed on the BOCs (or that would be imposed on non-BOC LECs) also cannot be measured with precision. The costs are nevertheless substantial: duplicative switching offices cost millions of dollars, and there are also the costs involved in maintaining separate corporate structures with separate staffs and utilizing non-LEC sites for transmitters. The joint marketing authority contained in Section 601 of the Telecom Act does little to mitigate these costs, which are continuing. On this record, the Commission cannot conclude that the benefits of structural separation outweigh the benefits. The benefits are minimal, if any, and the costs are substantial. Thus, even a rough cost-benefit analysis would require elimination of the rule.

The record does not support distinguishing between cellular and other broadband CMRS, particularly PCS. Wireless companies have already equated cellular and PCS—indeed, AT&T has branded its roll-out of digital cellular service as "Digital PCS." The Commission has repeatedly emphasized the need for symmetrical regulation of all broadband CMRS services, and the fact that PCS is new, while cellular is the incumbent service, has already been found by the Sixth Circuit to be an insufficient reason for different regulation. Congress did not establish different regulatory schemes for the two services; rather, it treated them identically in the Telecom Act. Historical measures of concentration in cellular do not warrant different treatment, given the fact that new competitive entry is guaranteed. Absent a reasoned explanation for treating the two services differently, they must be regulated alike.

After full development of a record for over a year, the Commission still has no evidence that BOCs or other LECs have engaged in any of the abuses on which a structural separation requirement might be premised. No concrete evidence was proffered by any of the proponents of structural separation. Moreover, GTE surveyed the Commission's complaint files and found that there were no relevant complaints concerning either BOCs or non-BOC LECs in recent years. Under these circumstances, there is no justification for structural separation.

Despite the lack of evidence justifying structural separation, several commenters asked the Commission to retain the rule for the foreseeable future, beyond even the 3-year "option 1" sunset period set out for comment. Given that there is no justification for the rule, it must be eliminated now.

Similarly, some commenters asked the Commission to extend the structural separation to PCS and other CMRS offerings of LECs. The Commission has already found, however, that structural separation is not needed in other CMRS services, and there is no new evidence disturbing that determination. Simply put, there is no reason for the existing rule and no reason for extending it to other companies or services. Section 22.903 should be eliminated immediately.

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To: The Commission

REPLY COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation ("BellSouth"), by its attorneys, hereby submits its reply to comments filed 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*).

I. THE COMMENTS SUPPLY NO BASIS FOR THE BOC CELLULAR STRUCTURAL SEPARATION REQUIREMENT

BellSouth showed in detail in its comments that nothing in the record to date warrants the imposition of a structural separation requirement on Bell Operating Company ("BOC") provision

of cellular service. Indeed, the Commission acknowledged in paragraph 48 of the *NPRM* that it could not determine whether the existing rule was warranted. The comments filed in response to the *NPRM* do not fix this deficiency. They supply no factual basis on which the existing rule can be retained in whole or in part. Simply put, there is no reason for the rule, and it must be eliminated now.

A. The Burden Is on the Commission to Justify Retaining the Rule

Cox and Comcast falsely claim that the BOCs have the burden of demonstrating why the rule should be eliminated or that the Commission must retain the rule unless it establishes a factual basis for eliminating it.[1] In fact, precisely the opposite is true: In the Sixth Circuit *Cincinnati Bell* decision, the Court required the Commission to enunciate a reasoned justification for the rule if it chose to retain the rule on remand.[2] The Court did so only after finding that there was no "reasoned explanation" for the rule and that the Commission's assertion that there was an insufficient basis for eliminating the rule was arbitrary and capricious.[3] Given that there *was*, according to the Court, a sufficient basis for eliminating the rule and *no* reasoned basis articulated for retaining it, the rule is presumptively invalid.[4] The Court's mandate effectively gives the Commission two choices: eliminate the rule, or articulate valid reasons for retaining it. This places the burden squarely on the Commission and the proponents of the rule to demonstrate why the rule is necessary to protect the public interest.

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[1] *See* Comments of Cox Communications, Inc. at 3; Comments of Comcast Cellular Communications, Inc. at 5-7.

[2] *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995).

[3] *Id.*

[4] *See id.* at 767 (*citing Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir.), *cert. denied*, 113 S.Ct. 57 (1992))

Despite the Sixth Circuit's decision, Comcast and MCI argue that the Commission must have a substantial reason for deviating from the existing rule,[5] relying on cases such as *State Farm*[6] and *California v. FCC*[7] for the proposition that an agency must provide a reasoned analysis for deviating from prior policies and rules. These commenters ignore the fact that the Sixth Circuit has already found that the rule at issue was unlawfully retained. Section 22.903 has already been held to have no reasoned explanation for its continued existence. Therefore, the usual presumption of a rule's validity has no place here—instead, the rule at issue is presumed *invalid* unless justified on remand. The cases cited by Comcast and MCI have no application when the agency revokes or eliminates an invalid rule. Section 22.903 *must be revoked* in the absence of a reasoned explanation for keeping it.

Comcast and Cox suggest, as a basis for placing the burden on the BOCs, that there is an "acknowledged, continued need for safeguards," that the cellular structural separation rule has been "successful," and that it has "allowed non-BOC affiliated cellular providers to compete with BOC cellular operations."[8] These facile arguments are totally unsupported and unsupportable. The facts are that: (1) the Commission was unable to articulate *any* reasoned need for safeguards to the Sixth Circuit; (2) the only success the cellular structural separation rule has had is in imposing substantial costs on the BOCs and undermining competition; and (3) non-LEC cellular providers have competed successfully with LEC-affiliated cellular providers whether or not the LEC was subject to a structural separation rule. The Commission cannot shift the burden to the BOCs to justify eliminating the rule by presuming the rule to be lawful based on nonexistent facts.

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[5] Comments of MCI Telecommunications Corp. at 12-13; Comcast Comments at 7 & n.12.

[6] *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 42 (1983) (*cited in* MCI Comments at 13 & n.24).

[7] *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*cited in* Comcast Comments at 7 & n.12).

[8] Comcast Comments at 5-6; Cox Comments at 3.

B. The Commission Must Not Adopt More Restrictive Regulations Than Are Necessary

The *Cincinnati Bell* Court made clear that the Commission is not free to adopt highly restrictive regulations unless it explains why less restrictive regulations are insufficient: "The FCC is required to give an explanation when it declines to adopt less restrictive measures in promulgating its rules. . . . The failure to do so permits reversal . . . ."[9] The Court noted that the Supreme Court's *State Farm* decision held that "alternative way[s]" of achieving an agency's objectives must be addressed and "adequate reasons" must be given for not pursuing less drastic alternatives.[10] Accordingly, the Court held that mere "conclusory statements" as to why a more restrictive rule was adopted do not suffice, and that the Commission must "provide a reasoned explanation as to why the less restrictive alternatives . . . are insufficient."[11] In other words, the Commission must "'justify, in the face of the objections lodged with it, the *particular* restrictions that it imposed.'"[12]

In light of this case law, the Commission is not free to continue its cellular structural separation rule unless it is able to demonstrate, on the record before it, that the rule is likely to achieve the agency's lawful objectives, while less drastic or intrusive regulations are incapable of doing so. The Commission appears to recognize this fact: Paragraph 127 of the *NPRM* acknowledges that the Commission should "apply[] the least intrusive means to curb the residual market power of the local exchange carriers." Under this standard, BellSouth submits, the Commission cannot lawfully retain Section 22.903.

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[9] 69 F.3d at 761 (*citing City of Brookings Municipal Telephone Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987)).

[10] *Id.* (*quoting State Farm*, 463 U.S. at 48).

[11] *Id.*; *see also Telocator Network v. FCC*, 691 F.2d 525, 537 (D.C. Cir. 1982).

[12] *Id.* at 763 (emphasis added) (*quoting Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992)).

The cellular structural separation rule was adopted when non-structural safeguards had not yet been sufficiently developed. The rule was adopted in the *Computer II* era, when a separate subsidiary was required for CPE and enhanced services. As Bell Atlantic and NYNEX put it, "Section 22.903 is an orphan, a product of the agency's 1970s approach to regulation that (except for cellular) was long ago abandoned."[13] Over the past decade, however, the Commission has moved from structural separation to non-structural safeguards for CPE and enhanced services.[14] Just last month, the Commission extended its *Computer III* non-structural safeguards to payphone services, instead of requiring structural separation.[15] Thus, as U S WEST notes, the Commission has found non-structural safeguards sufficient protection in areas involving far more sharing of LEC facilities than is the case with cellular.[16] Given the agency's policy of moving away from structural separation and toward non-structural safeguards (except where Congress requires otherwise), the Commission must provide a substantial explanation if it decides to impose a structural separation requirement on BOC cellular service instead of the non-structural safeguards that it has found sufficient elsewhere.

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[13] Comments of Bell Atlantic Corp. and NYNEX Corp. at 9.

[14] *See Furnishing of CPE by the BOCs and Independent Telephone Companies*, CC Docket 86-79, *Report and Order*, 2 F.C.C.R. 143 (1987) (*CPE Relief Order*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 F.C.C.R. 7571 (1991) (*Computer III Remand Order*), *vacated in part sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1427 (1995).

[15] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket 96-128, *Report and Order*, FCC 96-388 at ¶¶ 145, 199 (Sept. 20, 1996) (*Payphone Order*).

[16] Comments of U S WEST, Inc. at 13.

C. There Is No Record Basis for Imposing Greater Restrictions on the BOCs Than Other Non-Rural Local Exchange Carriers

1. Tier 1 LECs

None of the commenters provided any evidence that the BOCs, alone among LECs, pose unique dangers warranting the imposition of a structural separation requirement on the BOCs' cellular or other CMRS operations. Indeed, many of the commenters seeking to keep Section 22.903 in place urged the Commission to paint with a broad brush and extend the structural separation requirement to all Tier 1 LECs because there is little basis for distinguishing among major LECs with respect to the relationship between their cellular and LEC operations.[17] While BellSouth disagrees with their argument concerning structural separation, the record nonetheless makes clear that there is no reasoned basis for distinguishing among non-rural LECs with respect to the need for structural separation. Even the Ohio PUC said that the current rule gives non-BOC Tier 1 LECs an "unfair competitive advantage over their BOC LEC competitors in the provision of cellular service."[18]

GTE and several other Tier 1 LECs argue that there are differences between the BOCs and other Tier 1 LECs warranting different treatment.[19] Their arguments are aptly summarized by GTE:

> [The non-BOC Tier 1 LECs] are much less geographically concentrated than the BOCs, serve less densely populated areas, and offer fewer access lines in any state than do BOCs. They also have on average smaller switches and transmission facilities than the BOCs, and lack the interexchange network of the more geographically compact BOCs.[20]

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[17] *See* AT&T Comments at 14-15; Comments of CMT Partners at 2, 14; Cox Comments at 3; *cf.* Comcast Comments at 8-9 (stating that expansion of Section 22.903 to all Tier 1 LECs would be appropriate but is not necessary).

[18] Comments of the Ohio Public Utilities Commission at 14.

[19] *See* Comments of GTE at 13-19; Comments of ALLTEL Corp. at 2-3; Comments of Cincinnati Bell Telephone at 2-4.

[20] GTE Comments at 14-15.

Nevertheless, GTE's comments do not contest that non-BOC LECs are the sole incumbent LECs in their franchise areas, just as the BOCs are in their local exchange areas. Thus, nonwireline cellular and PCS licensees must obtain interconnection from incumbent LECs in their market whether or not the LEC is a BOC, and non-BOC incumbent LECs often hold the wireline cellular licenses in their local exchange markets without being subject to any structural separation requirement. For example, GTE notes that it is the only incumbent LEC in the entire state of Hawaii[21]—a state coextensive with the Honolulu MSA, where GTE also holds the wireline cellular franchise. A BellSouth subsidiary is the non-wireline licensee in the Honolulu MSA and must obtain interconnection from a GTE LEC that is not structurally separated from GTE's cellular operations, with which BellSouth must compete. PCS and non-wireline cellular carriers in Connecticut must obtain interconnection from the incumbent LEC, Southern New England Telephone, at the same time as they compete with its wireline cellular affiliate, which is not required to be structurally separated. A nonwireline cellular licensee or PCS licensee in the Tampa-St. Petersburg, Florida market will have to compete with GTE, the wireline cellular licensee, even though GTE is also an incumbent LEC there. A nonwireline cellular licensee or PCS licensee in Lincoln, Nebraska must interconnect with Lincoln Telephone, which also holds the wireline cellular license A nonwireline cellular licensee or PCS licensee in Cincinnati, Ohio must turn to Cincinnati Bell for interconnection, even though Cincinnati Bell holds an interest in the Cincinnati wireline cellular system.

In these and many other cases, non-BOC Tier 1 LECs in major metropolitan areas can and do hold wireline cellular licenses without any structural separation requirement. In terms of their ability and incentives to engage in interconnection abuse, cross-subsidization, and "leveraging" their

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[21] *Id.* at 15 n.21.

incumbent LEC market power, there is nothing to distinguish them from BOCs, in their local exchange markets.

The differences between BOC and non-BOC Tier 1 LECs simply do not have any bearing on these concerns:

- **Number of states served:** The number of states or LATAs in which a company operates, which GTE seems to believe an important distinction,[22] is not a useful distinction between BOCs and non-BOC LECs. For example, GTE provides local telephone service in 28 states, BellSouth provides it in nine, and Lincoln Telephone serves only one state. Within their franchise areas, each is the sole incumbent provider of local exchange service. Indeed, GTE is an incumbent LEC in "markets encompassing more than a third of the U.S. population."[23]

- **Ratio of non-BOC to BOC access lines:** The ratio of access lines between a non-BOC and BOC LEC in a state has no relevance—GTE may serve less than half the subscribers BellSouth does in Florida,[24] but GTE is still the principal source of incumbent LEC interconnection in the Tampa-St. Petersburg market.

- **Density and contiguity of service area:** The density of population or the contiguity of LEC service areas[25] is not a valid basis on which to distinguish between BOC and non-BOC LECs. BOCs, like non-BOC LECs, serve plenty of sparsely populated areas and non-contiguous areas, as well as contiguous, densely populated areas. Non-BOC LECs do not only serve sparse, non-contiguous areas—they often serve contiguous, densely populated areas. In some instances, non-BOC LECs serve highly desirable suburban areas: GTE claims that it has an advantage over the BOCs because it serves "major suburban areas, which gives us the best of two worlds—the growth and affluent characteristics of big city suburbs combined with less competitive pressures in the rural areas we serve."[26] In fact, non-BOC LECs serve major markets, as well. For example, GTE serves all or major portions of Los Angeles, Dallas, Honolulu, Tampa-St. Petersburg, Riverside-San Bernardino, and other major markets; Cincinnati Bell serves Cincinnati; and Southern New England Telephone serves all of Connecticut. GTE notes that 45 percent of its access lines are in "the three largest Sunbelt states."[27] Nevertheless, BOCs' cellular operations in their low-density and non-contiguous areas must be structurally separated from their LEC operations, while those of GTE, Cincinnati Bell, and Southern New

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22 *Id.* at 15, 16.

23 GTE Corp. 1995 Annual Report at 12.

24 GTE Comments at 15.

25 *Id.* at 16.

26 GTE 1995 Annual Report at 5.

27 *Id.* at 12.

England Telephone, as well as Sprint, ALLTEL, and other non-BOCs need not be structurally separated even in the most densely-populated, contiguous areas they serve as LECs.

While non-BOC LECs, *on average,* do serve smaller proportions of a given state than do BOCs and their *average* service areas are less densely populated and less contiguous than those *generally* served by BOCs, these averages do not form a rational basis for distinguishing between BOCs and non-BOCs for purposes of structural separation. The reasons traditionally asserted for requiring structural separation have nothing to do with average company-wide characteristics; rather, they have to do with a single company holding both cellular and local exchange operations in a single market and having incentives and opportunities to take unfair advantage of the LEC's position for the benefit of the cellular operation. These concerns are equally true or untrue for all LECs operating cellular (or other CMRS) systems in their local exchange markets, regardless of a given company's *average* characteristics.

ALLTEL and Cincinnati Bell, which are Tier 1 LECs, also argued that the Commission should not place any separate affiliate requirement on Tier 1 LECs that have fewer than 2 percent of the nation's access lines.[28] These LECs argue that Congress showed special consideration to such LECs with respect to interconnection obligations in Section 251(f)(2) of the Act and that the Commission should therefore exempt them from any separate affiliate requirement. BellSouth opposes any different treatment for LECs based solely on the number of access lines a company has nationwide.

The percentage of access lines a particular company has nationwide is not a basis for deciding whether a company has the ability and incentive to engage in discriminatory pricing, interconnection abuse, cross-subsidization, or leveraging of local exchange market power *in the*

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[28] *See* ALLTEL Comments at 2-3; Cincinnati Bell Comments at 4.

markets where it operates as an incumbent LEC. Cincinnati Bell acknowledges that it has some 900,000 access lines concentrated in "a relatively small geographic area", namely Cincinnati.[29] In the Cincinnati market, Cincinnati Bell is the incumbent LEC just as BellSouth is the incumbent LEC in Atlanta. The fact that BellSouth is an incumbent LEC in numerous markets in addition to Atlanta, while Cincinnati Bell is only in Cincinnati, does not make BellSouth more likely to engage in improper activities in Atlanta than Cincinnati Bell in its single market. Percentage of national access lines is not, therefore, a valid basis for distinguishing among LECs for purposes of applying structural or nonstructural safeguards.[30]

2. Rural Telephone Companies

At the same time as non-BOC Tier 1 LECs were attempting to distinguish themselves from the BOCs, representatives of smaller and rural telephone companies emphasized the differences between Tier 1 LECs and smaller companies, arguing that small, rural telephone companies should not be subjected to the safeguards applied to larger companies.[31] BellSouth agrees that there may be reasons to exempt small rural telephone companies from the safeguards imposed on larger LECs. A small rural telephone company is unlikely to serve as a major source of interconnection for cellular, PCS, and covered SMR licensees providing service throughout a relatively large area. In essence, any concern the Commission may have concerning LECs vis-à-vis CMRS is *de minimis* in the case of these companies. As BellSouth showed in its comments, the appropriate dividing line

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[29] *See* Cincinnati Bell Comments at 2.

[30] BellSouth further notes that Section 251(f)(2) does not automatically exempt carriers with less than 2 percent of the nation's access lines from the interconnection requirements in Section 251(b)-(c). Instead, it simply allows such carriers to petition their State commissions for a suspension or modification under certain circumstances.

[31] *See* Comments of the National Telephone Cooperative Association ("NTCA") at 3-6; Comments of the Rural Telephone Group ("RTG") at 3-5.

between rural and other LECs for this purpose is that established by Congress in Section 3(37) of the Act, defining rural telephone companies.[32]

3. Cost-Benefit Analysis

In the *NPRM*, the Commission indicated that it planned to weigh the relative costs and benefits of a structural separation requirement (paragraphs 50-52) and that it based its tentative decision to exempt non-BOC Tier 1 LECs from the requirement on a similar cost-benefit analysis (paragraph 90). There is no record for conducting either of these cost-benefit analyses, however, assuming *arguendo* that a cost-benefit analysis is an appropriate way of reaching a reasoned decision as to what the public interest requires.

First, a cost-benefit analysis requires a quantification of the benefits that the regulation would achieve. Moreover, the benefits to be weighed are those affecting the public, not competitors. Not one single commenter favoring the retention or imposition of structural separation requirements has identified a single benefit to the public that would result from such regulation, much less attempted to quantify the dollar amount of such benefits. BellSouth noted in its comments that the public is disadvantaged by structural separation requirements, however, because imposing structural separation on one competitor in a market makes the market less competitive, thereby raising prices, deterring innovation, and depriving the public of the benefits of multi-service integration.[33] While these disadvantages to the public cannot be precisely quantified, they make it very unlikely that the rule brings any net benefits to the public.

The costs that structural separation imposes on the BOCs and would impose on other LECs cannot be quantified with precision, but they are substantial, as the Commission and the Sixth

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[32] *See* 47 U.S.C. § 153(37); Comments of BellSouth Corporation at 49-50.

[33] BellSouth Comments at 32-33.

Circuit have recognized.[34] The cost of duplicative switching offices—mobile telephone switching offices ("MTSOs") for cellular and central offices ("COs") for LEC service—alone run into the millions of dollars. Added to these costs are the substantial expenses involved in maintaining separate corporate structures, separate maintenance, sales, and marketing staffs, and utilizing cellular transmitter sites not collocated with LEC facilities.[35] These expenses are not mitigated, except to a minimal degree, by the fact that Section 601 of the Telecom Act permits BOCs to engage in joint marketing and sale of cellular service, as some commenters maintained.[36] Moreover, these are largely continuing costs, not merely one-time expenses that were recovered years ago. Retaining the structural separation rule in effect for the BOCs imposes real, substantial costs on the BOCs just as extending the rule to non-BOC LECs would impose new costs on them.

Under these circumstances, the Commission has no basis on which to conclude that the benefits to the public of BOC cellular structural separation are so great as to outweigh the costs imposed on the BOCs by the rule. The record permits the Commission to conclude only that the benefits are minimal, if they exist at all, and that the costs are substantial. Accordingly, given the state of the record, a cost-benefit analysis would militate against adoption or retention of a structural separation requirement.

D. There Is No Record Basis for Distinguishing Between Cellular and other Broadband CMRS Regarding Structural Safeguards

The comments do not provide any factual basis for imposing a structural separation requirement on BOCs' cellular operations, while leaving other CMRS providers exempt from such

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[34] *See NPRM* at ¶¶ 38, 50; *Cellular Reconsideration Order*, 89 F.C.C.2d at 77-80; 69 F.3d at 768.

[35] *See* BellSouth Comments at 34.

[36] *See* AT&T Comments at 10-11; MCI Comments at 14.

a requirement. In fact, the comments indicate that all broadband CMRS services, particularly PCS and cellular, are effectively the same and should be treated alike.

AT&T, for example, observes:

> The Commission has held on various occasions that all CMRS are competing services or have the potential to become competing services in the wireless marketplace. This is especially the case with PCS and cellular, which often are viewed by customers as identical services.[37]

In fact, AT&T views cellular and PCS as being so completely identical that it is marketing its digital cellular service as "Digital PCS"[38] and has argued in civil litigation that 1.8 GHz PCS constitutes cellular service.[39] As an AT&T spokesman put it, "[W]ho cares? Customers don't care whether the frequency they're using is 1900 megahertz or 800 megahertz."[40] As a result, AT&T, along with Cox and Comcast, argues that the same regulations should govern BOCs' participation in cellular and other broadband CMRS.[41] Given the Commission's repeated determinations that cellular, PCS, and covered SMR services should be regulated alike,[42] and the Sixth Circuit's decision that the

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[37] AT&T Comments at 11-12 (footnote omitted).

[38] Jared Sandberg and John J. Keller, *AT&T Launching New Wireless Service*, Wall St. J., Oct. 2, 1996, at A3.

[39] *See AT&T Wireless Services, Inc. v. Circuit City Stores, Inc.*, Civ. No. 2:96CV-0576J (D. Utah), AT&T Wireless Services, Inc.'s Post-Hearing Memorandum in Support of Its Application for Preliminary Injunction at 18-24 (filed July 16, 1996); *id.*, Plaintiff's Reply to Defendant's Memorandum in Opposition to Motion for Preliminary Injunction at 4-8 (filed July 9, 1996).

[40] Letter from Richard J. Martin, Vice President, Public Relations, AT&T, *AT&T First to Offer New Service*, USA Today, October 10, 1996, at 14A.

[41] *See* AT&T Comments at 11-14; Cox Comments at 3; Comcast Comments at 4-5.

[42] *See, e.g.*, *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 Order*) (subsequent history omitted); *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), *pets. for recon. pending; see id.*, *Notice of Proposed Rulemaking*, 11 F.C.C.R. 2445 (1996); *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); *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)

Commission had not, to date, identified any reasoned basis for treating cellular differently,[43] the record simply does not provide any basis for maintaining a structural separation rule for BOC cellular service, when other LECs are not subject to such a rule and other CMRS are not subject to such a rule.

MCI argues in favor of continuing to impose a structural separation requirement only on BOC cellular service, but its comments provide no reasoned basis for doing so. MCI offers only the conclusory rationale that the existing structural separation rule "will be crucial to ensuring the development of competition in PCS as well [as cellular]."[44] MCI provides no distinction between broadband PCS and cellular other than that PCS is new, while cellular systems are already established[45]—a distinction of which the *Cincinnati Bell* Court was well aware and which the Court found amounted to no explanation at all.[46] Moreover, MCI's substantive arguments in favor of the *cellular* structural separation rule do not distinguish between cellular and CMRS in general.[47]

U S WEST alone attempts to create a distinction between BOC provision of PCS, which it believes should not be subject to structural separation, and BOC cellular service, which it argues "may warrant" temporary retention of the structural separation requirement.[48] Having withdrawn

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(*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.); *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), *erratum* Public Notice, DA 96-1124 (July 15, 1996), *further erratum* Mimeo 64044 (July 17, 1996), *pets. for recon. pending; 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*); *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).

43 69 F.3d at 768.

44 MCI Comments at 5.

45 *See id.* at 5-6.

46 *See* 69 F.3d at 768.

47 *See, e.g.*, MCI Comments at 7-12.

48 U S WEST Comments at 20.

from active involvement in the provision of cellular service, U S WEST's willingness to maintain a BOC cellular structural separation rule is not surprising. As shown below, however, all of its arguments lack merit and fail to establish a reasoned basis for differing treatment of cellular and PCS.

First, U S WEST argues that Congress distinguished between BOC cellular and BOC PCS in the Telecom Act by permitting BOCs to engage in "joint marketing and resale" of cellular service, while not eliminating the cellular structural separation rule and "impos[ing] no separate affiliate requirement on BOC PCS, including interLATA CMRS."[49] According to U S WEST, this constitutes a "Congressional distinction between cellular and PCS."[50] It is nothing of the sort. Congress did not include any cellular-specific or PCS-specific provisions in the Telecom Act. In fact, Congress permitted BOCs to engage in the joint marketing and sale of *all CMRS*, not just cellular service,[51] and it also permitted BOCs to provide *all CMRS* on an interLATA basis without a separate affiliate, not just PCS.[52] The fact that the CMRS joint marketing provision specifically overrode Section 22.903 did not indicate that Congress endorsed the remainder of Section 22.903—indeed, the legislative history indicates that Congress expected the Commission to eliminate the rule in the near future.[53] Moreover, the joint marketing provision did not only override the cellular rule, Section 22.903: It provided that BOC joint marketing and sale of CMRS was permitted notwithstanding that rule or "any other Commission regulation,"[54] thereby making clear that all CMRS were to be treated alike, just as was the case with respect to interLATA CMRS.

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[49] *Id.* at 21.

[50] *Id.* at 22.

[51] *See* Telecom Act § 601(d).

[52] *See* 47 U.S.C. § 271(b)(3), (g)(3).

[53] *See* H.R. Conf. Rep. No. 104-458 at 199 (Jan. 31, 1996) ("Conference Report" or "Joint Explanatory Statement").

[54] Telecom Act § 601(d).

Next, U S WEST appears to use the fact that the broadband CMRS market is more concentrated (as measured by the Herfindahl-Hirschman Index ("HHI")) when there are only two cellular and one enhanced SMR provider than after the entry of new PCS systems as a basis for temporary continuation of Section 22.903.[55] This is not a meaningful use of HHI concentration figures, however. The *Justice Department Merger Guidelines*, from which the HHI analysis technique is derived, makes clear that the HHI is a static, historically-based figure that does not provide an accurate picture of competition under changing market conditions:

> Market concentration and market share data of necessity are based on historical evidence. However, recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance. For example, if a new technology that is important to long-term competitive viability is available to other firms in the market, but is not available to a particular firm, the Agency may conclude that the historical market share of that firm overstates its future competitive significance. The Agency will consider reasonably predictable effects of recent or ongoing changes in market conditions in interpreting market concentration and market share data.[56]

Given that the Commission has already licensed three PCS competitors (two in some markets) and is currently conducting auctions for three more, entry of new competitors is not only "reasonably predictable," it is certain in the near term. Indeed, several PCS licensees have already begun operation. Under these circumstances, the historical concentration in the CMRS industry is meaningless as a basis for forward-looking regulation.

The next distinction between PCS and cellular that U S WEST uses as a basis for retaining Section 22.903 is the same distinction MCI relied upon, namely, that new PCS entrants face

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[55] U S WEST Comments at 22.

[56] U S Department of Justice and Federal Trade Commission Horizontal Merger Guidelines § 1.521, pp. 31-32 (1992), *reprinted in* DEPARTMENT OF JUSTICE MANUAL ¶ 7-2A.100 at pp. 7-58.3 to 7-58.4 (Aspen Law and Business) (1992-93 Supp.)

competition from established cellular incumbents.[57] As discussed above, the Sixth Circuit was well aware of this "distinction" and found it unavailing.

Finally, U S WEST argues that the fact that Section 601(d) of the Telecom Act permits BOCs to offer "one-stop-shopping," and the relaxation of the rule for out-of-region cellular service, makes the current cellular structural separation rule materially different from the rule reviewed by the Sixth Circuit.[58] These changes are irrelevant, because the central holding of the *Cincinnati Bell* decision is that different treatment of cellular and PCS is impermissible, absent a reasoned explanation. There still is no reasoned explanation for different treatment, which continues even after these changes.

E. The Comments Supply No Evidence Supporting Structural Separation

Despite an open invitation to the BOCs' competitors to supply evidence of interconnection abuse, cross-subsidization of cellular service, discriminatory pricing of interconnection, or LEC monopoly leverage, the comments contain no factual evidence of such abuses—only a rehash of the same speculative allegations that the Commission has rejected in the past.[59] No concrete factual evidence is supplied on which the Commission can base a structural separation requirement. Two commenters made allegations that BOC cellular affiliates had denied them "interconnection," but these claims actually pertain to roaming and resale arrangements offered by BOC cellular carriers, not to interconnection with a BOC LEC.[60]

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[57] U S WEST Comments at 23.

[58] *Id.* at 22-23.

[59] *See Pacific Telesis Mobile Services*, DA 95-1414 (WTB June 23, 1995).

[60] MCI claims that as a cellular reseller it has been unable to arrive at "interconnection arrangements with the BOCs' and other LECs' cellular affiliates." MCI Comments at 3. This apparently pertains to MCI's desire to utilize its own switch for resale of cellular capacity, and has nothing to do with the fact that the cellular carriers involved are LEC-affiliated. Moreover, the Commission has never required cellular carriers to accommodate such requests for switchless resale,

One commenter, GTE, supplied valuable information demonstrating that there is no need for a structural separation rule to prevent anticompetitive conduct by LECs with respect to cellular carriers. GTE reports that "[i]n a survey of FCC complaints over the last few years, GTE was unable to find *any* complaints against *any* LECs of such anticompetitive conduct."[61] In particular, GTE found no such complaints filed against BOCs (which are subject to structural separation) or against GTE or other non-BOC Tier 1 LECs (which are not subject to structural separation).[62] Thus, not only does the record show that there is no problem requiring a solution, it also shows conclusively that the absence of a structural separation requirement does not result in an increased incidence of discrimination complaints. Under these circumstances, the Commission cannot justify a structural separation rule, period.

F. IMMEDIATE ELIMINATION OF THE RULE IS REQUIRED

BellSouth showed in its comments that the rule should be eliminated because the record did not warrant retention of the rule. Others' comments add nothing to the record supporting the rule, and GTE's findings demonstrate that the rule is plainly unnecessary.

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but has only required that cellular carriers permit resale of the services that they offer. *See generally CMRS Resale Order.* Radiofone recites two claims of allegedly improper BellSouth "interconnection" practices. Comments of Radiofone, Inc. at 2. These pertain to roaming, not interconnection: One involved BellSouth's decision not to pursue an application for a new site that would provide service to Radiofone roamers in an area BellSouth did not want to serve, while the other involves an ongoing complaint proceeding concerning temporary roaming problems that have long since been resolved. *See Baton Rouge MSA Limited Partnership*, 6 F.C.C.R. 5948 (Mob. Serv. Div. 1991), *recon. in part*, 8 F.C.C.R. 2889 (Com. Car. Bur. 1993); *Radiofone, Inc. v. BellSouth Mobility Inc*, CCB File No. E-88-109, WTB File No. WB/ENF-F-96-008, Brief of BellSouth Mobility Inc in Opposition (filed July 10, 1996). Neither of these has any relevance to the issue of whether BOCs should be required to maintain structural separation between their LEC and cellular operations. Radiofone also claims that it was unable to obtain LEC interconnection from BellSouth in Baton Rouge without Justice Department assistance, but provides no specifics. After an internal inquiry, BellSouth has been unable to determine what Radiofone is referring to.

[61] GTE Comments at 4 n.10.

[62] *See id.* at 4 n.10, 7 & n.14.

Nevertheless, the comments of a number of CMRS providers indicate that they see the opportunity to hamstring effective competition for an extended time, if the rule can be kept in place for the foreseeable future. Thus, several parties urge the Commission to reject both Option 1 and Option 2 and keep the BOCs subject to structural separation or a variety of alternative periods: (a) forever, (b) for ten years or more, (c) until the local exchange is completely competitive, or (d) for as long as the BOCs' interLATA service is subject to the Section 271 separate affiliate requirement.[63] Given that there is no reasoned explanation for the rule, it must be eliminated now. As ALLTEL said, echoing the Sixth Circuit, relief from Section 22.903 is "long overdue."[64]

In an effort to continue constraining their BOC competitors, several parties have urged the Commission not only to keep the rule, but also to extend it to all CMRS and to a broader variety of LECs and thereby avoid regulatory disparity.[65] These comments should be rejected as untimely petitions for reconsideration of the Commission's decision in the PCS, SMR, and CMRS rulemakings that structural separation would not serve the public interest. Nothing has changed that calls into account the validity of those determinations, and a sudden reversal by the Commission at this time would be evidence of unreasoned decisionmaking.[66] The fact that the Commission has eliminated the 10 MHz limit on PCS ownership by cellular licensees does not change this fact, as AT&T argues.[67] The Commission found that one reason for not requiring structural separation for PCS was that its cellular-PCS cross-ownership regulations are adequate.[68] The Commission has not

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[63] *See* AT&T Comments at 17-18; Cox Comments at 3; Comcast Comments at 9; MCI Comments at 14-15; Radiofone Comments at 11; *accord* Ohio PUC Comments at 13.

[64] ALLTEL Comments at 2.

[65] *See* AT&T Comments at 11-15; CMT Comments at 2, 6, 14; Comcast Comments at 3-9; Cox Comments at 3.

[66] *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (1970), *cert. denied*, 403 U.S. 923 (1971).

[67] *See* AT&T Comments at 12.

[68] *See PCS Order*, 8 F.C.C.R. at 7752.

eliminated its regulations on cellular-PCS cross-ownership, however—it has simply decided to rely on the overall 45 MHz CMRS spectrum cap, which includes both cellular and PCS, instead of a separate cellular-PCS limit.[69] It is significant that when it proposed and adopted this change in its regulations, the Commission did not even suggest that the change would result in upsetting its existing policy of not requiring structural separation for BOCs or other LECs engaging in PCS.

CONCLUSION

For the foregoing reasons and those stated in BellSouth's Comments, Section 22.903 must be eliminated immediately and in its entirety.

Respectfully submitted,

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October 24, 1996

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[69] *See CMRS Spectrum Cap Order.*

CERTIFICATE OF SERVICE

I, Phyllis M. Martin, do hereby certify that I have, on this 24th day of October, 1996, served by US mail, postage prepaid, a copy of the foregoing Reply Comments Of BellSouth Corporation, WT Docket No. 96-162, to the following:

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