

CC MAIL SECTION

DOCKET FILE COPY ORIGINAL

DEC 23 12 01 PM '96

DISPATCHED BY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)	
)	
Implementation of Sections 3(n) and)	
332 of the Communications Act)	GN Docket No. 93-252
)	
Regulatory Treatment of Mobile Services)	

MEMORANDUM OPINION AND ORDER
ON PARTIAL RECONSIDERATION OF SECOND REPORT AND ORDER

Adopted: December 11, 1996; Released: December 20, 1996

By the Commission:

I. INTRODUCTION

1. On February 3, 1994, the Commission adopted an Order implementing revisions to Sections 3(n) and 332 of the Communications Act of 1934 (the Act),¹ effected by Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 (hereinafter referred to as the Budget Act).² The Commission received 15 petitions for reconsideration of that Order (hereinafter referred to as the *CMRS Second Report and Order*).

¹ Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994).

² Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), codified in principal part at 47 U.S.C. § 332. The Budget Act revisions to Sections 3(n) and 332 of the Communications Act create a comprehensive framework for the regulation of mobile radio services, including existing common carrier mobile services, private land mobile services, and new services such as Personal Communications Services (PCS). The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), amended and redesignated Section 3 of the Communications Act. Section 3(n) is now codified at Section 3(47) of the Communications Act.

2. Two of these petitions, one filed jointly by Cellular Service, Inc., and ComTech, Inc. (CSI/ComTech) and one filed by the National Wireless Resellers Association (NWRA) (formerly the National Cellular Resellers Association), addressed the rights of resellers of commercial mobile radio services (CMRS). The Petitioners raised issues concerning the right of cellular resellers to interconnect their switching facilities with those of facilities-based cellular carriers, and challenged the Commission's authority to defer decision on these matters to a separate proceeding.³ In addition, CSI/ComTech sought interim relief with respect to its reseller switch interconnection proposal.

3. Both CSI/ComTech's petition for reconsideration and that portion of NWRA's petition for reconsideration that deals with the resale of CMRS are addressed in this partial Order on Reconsideration.⁴

II. DISCUSSION

A. Background

4. In the *CMRS Second Report and Order*, we determined that we did not have a sufficient record to consider adequately the circumstances in which CMRS providers may be required to provide interconnection to other carriers, including resellers.⁵ We pointed out that the Commission has had "a long history of dealing with issues relating to resellers" and that, while it has received complaints concerning cellular carriers' denials of interconnection to resellers, the number of complaints it received was relatively small.⁶ Recognizing the conflicting claims of affected parties, the complexity of the issues relating to interconnection, and the need to develop a more thorough record on those issues, we deferred consideration of

³ NWRA also raised issues concerning forbearance from regulation under certain provisions of the Communications Act. These issues will be addressed in a subsequent Order disposing of the remaining petitions for reconsideration of the *CMRS Second Report and Order*.

⁴ On April 9, 1996, CSI/ComTech filed a petition in the United States Court of Appeals for the District of Columbia seeking a writ of mandamus ordering the Commission promptly to dispose of its petition for reconsideration. On August 28, 1996, the D.C. Circuit denied the Petition for Writ of Mandamus without prejudice to CSI/ComTech's right to renew the mandamus petition if the Commission failed to act on CSI/ComTech's petition for reconsideration within 45 days of the Court's Order.

⁵ *CMRS Second Report and Order*, 9 FCC Rcd at 1499-1500 (para. 237).

⁶ *Id.*

such issues and committed to begin a new rulemaking proceeding to examine them in depth.⁷ We did determine, however, that any analysis of those issues:⁸

must acknowledge that CMRS providers do not have control over bottleneck facilities. We would consider control of bottleneck facilities significant in deciding whether to impose on licensees obligations toward resellers, because access to such facilities would be crucial in order to allow the customers of the provider seeking interconnection to speak with the customers of other CMRS providers.

B. Statutory Deadline and Decision to Defer

5. Both NWRA and CSI/ComTech request that we reconsider our decision to address CMRS interconnection issues in a separate docket.⁹ NWRA argues that Section 6002(d)(3)(C) of the Budget Act requires the Commission to promulgate regulations governing CMRS-to-CMRS interconnection no later than August 10, 1994, whereas it may take years to resolve interconnection issues if they are deferred to a separate proceeding.¹⁰ The Petitioners also request that the Commission resolve on reconsideration questions concerning the right of cellular resellers to interconnect their own switches to the facilities of licensed cellular carriers and their right to obtain such interconnection under reasonable terms and conditions.¹¹ In

⁷ *Id.*

⁸ *Id.* In the *CMRS Second Report and Order*, we also reviewed our policies and rules governing local exchange carrier (LEC) offerings of interconnection services to CMRS providers. For example, we found it in the public interest to require LECs to provide reasonable and fair interconnection to all CMRS providers and to govern such agreements by the principle of mutual compensation. We also determined that LECs cannot deny a CMRS provider any form of interconnection made available to any other carrier or customer, unless the LEC demonstrates that the requested interconnection is not technically feasible or economically reasonable. *Id.* at 1497-98 (paras. 230-234). We subsequently initiated and issued Orders in several other proceedings concerning LEC-CMRS interconnection, including rules implementing Sections 251, 252, and 253 of the Telecommunications Act of 1996. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 94-54, First Report and Order, FCC 96-325, released Aug. 8, 1996. *See also Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 94-54, Notice of Proposed Rulemaking, 11 FCC Rcd 5020 (1996).

⁹ NWRA Petition at 2-5; CSI/ComTech Petition at 11-12.

¹⁰ NWRA Petition at 2-3.

¹¹ *Id.* at 9-11; CSI/ComTech Petition at 5-10.

addition, NWRA requests that such interconnection be provided on an unbundled basis.¹² Petitioners argue that the interconnection rights of cellular resellers must be determined under Section 201 of the Act. They argue further that cellular resellers satisfy criteria established under Section 201 to justify an order for interconnection, *i.e.*, that the request be from a common carrier, and that the request be "necessary or desirable to serve the public interest."¹³

6. Several commenters, including GTE Service Corporation (GTE) and McCaw Cellular Communications, Inc. (McCaw), challenge the contentions that Section 332 creates a right to interconnect with a CMRS provider. McCaw argues that the interconnection provisions of Section 201 have never been applied to mobile service providers and that, because Section 332(c) references that Section, it cannot be interpreted as mandating CMRS-to-CMRS interconnection.¹⁴ Commenters also challenge NWRA's claim that the Budget Act requires the Commission to promulgate regulations implementing this putative right by August 10, 1994.¹⁵ GTE asserts that, based on the plain language of the statute and its legislative history, the one-year deadline applies only to rules implementing the Congressional directive for regulatory symmetry.¹⁶

7. We find that NWRA and CSI/ComTech are wrong as a matter of law in arguing that the Budget Act required us to adopt rules mandating CMRS-to-CMRS interconnection by August 10, 1994. The Petitioners have not cited any provision of the Act or its legislative history that persuasively supports their claims, and we are not aware of such evidence. Section 6002(d)(3)(C) provides, in pertinent part, as follows:

¹² NWRA Petition at 9-11.

¹³ CSI/ComTech Petition at 6, quoting Section 201 of the Act. See also *Id.* at 7-9, quoting *Hush-a-Phone v. United States*, 238 F.2d 266, 269 (D.C.Cir. 1956); also citing *Carterfone*, 13 FCC 2d 420, 424, recon. denied, 14 FCC 2d 571 (1968); CSI/ComTech Reply at 1-2, 8.

¹⁴ McCaw Opposition at 14; accord CTIA Oppositions/Comments at 8-10.

¹⁵ AirTouch Communications (AirTouch) Opposition at 2; Bell Atlantic Companies Opposition at 14-17; GTE Opposition at 3; McCaw Opposition at 13-15; NYNEX Corporation Opposition at 3-4; Cellular Telecommunications Industry Association (CTIA) Oppositions/Comments at 8-10; Nextel Communications, Inc. Opposition at 14; Sprint Corporation Comments at 6-7.

¹⁶ GTE Opposition at 3.

(d) DEADLINES FOR COMMISSION ACTION. --

* * * * *

(3) TRANSITIONAL RULEMAKING FOR MOBILE SERVICE PROVIDERS. -- Within 1 year after the date of enactment of [the Budget] Act, the Federal Communications Commission --

* * * * *

(C) shall issue such other regulations as are necessary to implement the amendments made by subsection (b)(2)

Section 6002(b)(2) amends Section 332 of the Communications Act of 1934. Specifically, Section 332(c)(1)(B) was amended to read as follows:

Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of Section 201 of [the Communications] Act. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act.

Since Section 6002(d)(3)(C) grants the Commission discretion to issue such regulations "as are necessary" to implement the amendments to Section 332, by its plain language, it does not require that the Commission adopt rules implementing every statutory change. Nor is the language of Section 332(c)(1)(B), itself, suggestive of a rulemaking proceeding. It refers, instead, to Commission action on specific requests for interconnection. Moreover, the Conference Report mentions certain particular matters that Congress intended to be the subject of the August 10, 1994 deadline, but does not state that interconnection is among them.¹⁷ This provides further support for our conclusion that the deadline does not apply to the possibility that the Commission may adopt CMRS-to-CMRS interconnection rules. Thus, we reject the Petitioners' contentions with respect to this issue.

8. The express language of the statute undercuts the Petitioners' claim that Section 332(c)(1)(B) grants CMRS providers an unqualified right to interconnect with CMRS providers. Section 332(c)(1)(B) provides that the Commission act "upon reasonable request" and states further that nothing in that section "shall be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to [Section 201 of] the

¹⁷ See H.R. Rep. No. 103-213, 103rd Cong., 1st Sess. at 497-498 (referring to matters such as certain provisions regarding regulatory symmetry, private land mobile services, and state preemption); see also GTE Opposition at 3; accord McCaw Opposition at 14.

Act.”¹⁸ Under Section 201, this Commission is authorized to grant requests for interconnection where we, “after opportunity for hearing, [find] such action necessary or desirable in the public interest.”¹⁹ Nothing in this language gives anyone an absolute right to interconnection.²⁰ Therefore, even if we are required to adopt rules to implement Section 332(c)(1)(B) with respect to CMRS-to-CMRS interconnection, those rules would not have to mandate such interconnection in all cases.

9. As to deferral of specific interconnection issues, our decision in the *CMRS Second Report and Order* to review the public interest aspects of CMRS-to-CMRS interconnection in a separate proceeding was not only consistent with the language of Sections 332 and 201, as discussed above, but also was wholly in accord with our responsibility and authority to structure and conduct proceedings efficiently.²¹ We initiated a comprehensive examination of interconnection less than four months after release of the *CMRS Second Report and Order*.²² In a second notice of proposed rulemaking in the same docket, we examined a broad range of issues concerning CMRS interconnection and CMRS resale, including the reseller switch proposal made by the Petitioners.²³ CSI/ComTech filed comments in response to both of these orders.²⁴ Because these complex issues are better handled in such comprehensive rulemaking proceedings, we affirm our prior decision to defer consideration of this issue to the proceeding

¹⁸ 47 U.S.C. § 332(c)(1)(B).

¹⁹ 47 U.S.C. § 201(a).

²⁰ We do not address here the relevance of new Section 251(a)(1) of the Telecommunications act of 1996, which provides that “[e]ach telecommunications carrier has the duty -- to interconnect directly or indirectly with the facilities of other telecommunications carriers. . . .” That provision was not addressed in the record in this proceeding.

²¹ See 47 U.S.C. § 154(j).

²² See *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, RM-8012, Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408 (1994)(*Interconnection NOI*).

²³ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, Second Notice of Proposed Rulemaking, 10 FCC Rcd 10666 (1995)(*Second Interconnection NPRM*). The Commission recently acted to extend the cellular prohibition against unreasonably restricting the resale of services to cover broadband PCS and certain specialized mobile radio services. See *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, First Report and Order, FCC 96-263, released July 12, 1996.

²⁴ See, e.g., CSI/ComTech Comments in CC Docket No. 94-54, filed June 14, 1995; Reply Comments filed July 14, 1995.

identified, or related proceedings, which expressly focus on interconnection. We note that, during the period in which we are developing broad interconnection policies in these proceedings, we explicitly have provided resellers (and others) the opportunity to file fact-specific complaints concerning CMRS-to-CMRS interconnection disputes, should such disputes arise.²⁵

C. Interim Relief; Bottleneck Facilities

10. CSI/ComTech asserts that, unless and until the Commission formulates explicit policies and rules concerning CMRS interconnection, it should provide interim relief to resellers seeking interconnection by recognizing explicitly the right of cellular resellers to interconnect with licensed cellular carriers, and by directing licensed cellular carriers to honor the same principles applicable to LECs in providing interconnection to other carriers.²⁶ GTE responds that interconnection of reseller switches with cellular mobile telephone switching stations (MTSOs) would raise difficult economic, policy, legal, and technical issues of which it is better to defer consideration, and thus, opposes the request.²⁷

11. CSI/ComTech and NWRA also challenge the Commission's determination that CMRS providers do not have control over bottleneck facilities. NWRA argues that the Commission arrived at this conclusion by inappropriately grouping all CMRS providers within the same product market, and contends that, because facilities-based cellular providers operate in a duopoly marketplace, they have control over bottleneck facilities.²⁸ On the other hand, CSI/ComTech argues that a finding of bottleneck facilities is not a prerequisite to the cellular resellers' right to interconnection under Section 201(a).²⁹ GTE disagrees and claims that no CMRS provider, and, specifically, no cellular carrier, enjoys market power to the extent that the Commission has previously required to justify imposing specific interconnection obligations.³⁰

²⁵ *Interconnection NOI*, 9 FCC Rcd at 5458 n.213; see *Cellnet Communications, Inc. v. New Par, Inc., d/b/a Cellular One*, File No. WB/ENF-F-ENF-95-010, filed Feb. 16, 1995, pending; *Nationwide Cellular Service, Inc. v. Comcast Cellular Communications, Inc.*, File No. WB/ENF-F-ENF-95-011, filed Feb. 16, 1995, pending.

²⁶ CSI/ComTech Petition at 15-16, *citing* Policy Statement of Interconnection of Cellular Systems, 59 Rad. Reg. 2d (P&F) 1283 (1986).

²⁷ GTE Opposition at 3-4.

²⁸ NWRA Petition at 8-9.

²⁹ CSI/ComTech Petition at 11-13.

³⁰ GTE Opposition at 2; see also *AirTouch Opposition* at 3-4.

12. We deny the Petitioners' request for reconsideration concerning the question of bottleneck control and the request for interim relief implementing the reseller switch proposal. These issues relate to CMRS interconnection and are subject to consideration under the *Second Interconnection NPRM*, concerning interconnection and resale. Consideration of the issues in this or related dockets, rather than in the context of the *CMRS Second Report and Order*, is consistent with the language of Sections 332 and 201³¹ that the Commission consider whether interconnection is in the public interest and with our responsibility and authority concerning the conduct of proceedings. CSI/ComTech has not made a persuasive showing that the public interest will be served by providing interim relief regarding the reseller switch proposal, such as providing an economic justification for imposing an interconnection requirement, or a description of the market impact and effects on consumers should the Commission fail to provide such relief.³²

13. Thus, we deny the Petition for Reconsideration filed by CSI/ComTech and that portion of the Petition for Reconsideration filed by NWRA that relates to CMRS-to-CMRS interconnection. We also deny CSI/ComTech's request for interim relief to implement the reseller switch interconnection proposal.

III. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, that the Petition for Reconsideration of the Second Report and Order, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, 9 FCC Rcd 1411 (1994), filed jointly by Cellular Service, Inc., and ComTech, Inc., and that portion of the Petition for Reconsideration filed by the National Wireless Resellers Association that relates to the right of cellular resellers to interconnect with facilities-based cellular carriers, ARE DENIED as provided herein.

³¹ See discussion in para. 8, *supra*.

³² As noted above, we do not address here the relevance of new Section 251(a)(1). See para. 8, note 20, *supra*.

15. This action is taken pursuant to Sections 4(i), 4(j), 7(a), 201, 303(c), 303(f), 303(g), 303(r), 332(c) and 332(d) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 157(a), 201, 303(c), 303(f), 303(g), 303(r), 332(c), 332(d).

FEDERAL COMMUNICATIONS COMMISSION



William F. Caton
Acting Secretary