

competitive risks or concerns that are not already addressed by the Commission's general resale policies and requirements.²⁰² Conversely, CMT and Radiofone contend that rates, terms and conditions of service should be disclosed in cases where the LEC is reselling its cellular affiliate's service.²⁰³

88. With respect to volume discounts, Bell Atlantic/NYNEX and Pacific Bell contend that volume discounts offered by CMRS providers to LECs should not be restricted so long as the discounts are non-discriminatory.²⁰⁴ Bell Atlantic/NYNEX observes that the Commission has enacted a CMRS rule that affirms a CMRS provider's obligation to offer all resellers service on nondiscriminatory terms and conditions.²⁰⁵ Pacific Bell submits that the affiliate transaction guidelines would govern the purchase of service from an affiliate and would require that CMRS be sold to the LEC at the market rate (Section 37.27(d)), so any volume discounts would be at the level reflected in market prices.²⁰⁶ Radiofone, on the other hand, contends that the Commission should prohibit "one-of-a-kind" volume discounts for cellular service sold by the cellular affiliate of the LEC for resale to the end user.²⁰⁷

3. Discussion

89. Our analysis with respect to our authority to impose conditions on resale is similar to our analysis of our authority with respect to joint marketing. Section 601(d) clearly permits LECs to resell CMRS provided by their wireless affiliates, and as discussed above, we retain authority to place conditions on, or define the scope of, resale of wireline and CMRS services. However, we agree with commenters that argued against imposing restrictions or qualifications upon incumbent LEC resale of CMRS provided by its CMRS affiliate. As discussed above, there is a considerable amount of broadband CMRS spectrum capacity available in the open market.²⁰⁸ In addition, broadband CMRS providers (including LEC affiliates) are prohibited by our *CMRS Resale Order* from restricting resale of their

²⁰² *Id.* at 31.

²⁰³ CMT Comments at 17; Radiofone Comments at 9.

²⁰⁴ Bell Atlantic/NYNEX Comments at 28; Pacific Bell Reply Comments at 12-13.

²⁰⁵ Bell Atlantic/NYNEX Comments at 28.

²⁰⁶ Pacific Bell Reply Comments at 12-13.

²⁰⁷ Radiofone Comments at 9.

²⁰⁸ See paragraph 46 (discussing that each geographic area may have two cellular licensees, three 30 MHz broadband PCS licensees, and three 10 MHz broadband PCS licensees).

services or discriminating against resellers.²⁰⁹ In this environment, we do not believe that there is any reason to be particularly concerned about the terms and conditions in which the CMRS affiliate makes available CMRS to its incumbent LEC parent for resale. The competitive concerns and safeguards we address above focus upon the terms and conditions in which the incumbent LEC provides interconnection and other services to all in-region CMRS providers (including its CMRS affiliate) -- in this context, we are appropriately concerned that the incumbent LEC will utilize its market power in the local exchange to unduly advantage its CMRS operations or reduce competition to its wireline operations. These discrimination concerns are absent when the CMRS affiliate provides goods and services to its incumbent LEC parent, and our affiliate transaction rules will protect against any possible cost misallocation issues that would arise from these transactions. Therefore, we do not believe that it is appropriate to impose any further regulation upon incumbent LEC resale of its CMRS affiliate's CMRS, aside from other Commission rules such our accounting and affiliate transaction rules.

90. As articulated in the *Notice*, our concern was, for example, that a LEC-affiliated CMRS provider could tailor a volume discount offering for its affiliated LEC, who would in this case be acting as a CMRS reseller, by requiring a volume commitment that might not be attainable for other, non-affiliated, resellers.²¹⁰ Without an abundant supply of CMRS spectrum capacity in each market, such a relationship could indeed present competitive issues for competitive LECs, who would not be able to "match" that bundled product offering. However, given the amount of CMRS spectrum capacity now licensed, competitive LECs have other sources of CMRS supply that would enable them to create bundled LEC-CMRS service offerings. Since the market does not require competitive LECs to deal with the incumbent LEC's CMRS affiliates in order to provide this bundled service package, we do not believe that regulation in this area is necessary. Therefore, we agree with commenters who argue that we should not mandate public disclosure of terms and conditions of service where resale is involved because such disclosure would discourage price competition, and risk collusion, price-signalling and other anticompetitive conduct. We note that this decision is consistent with our position in the *IXC Detariffing Order*, where we determined that public disclosure of rate information can have serious anticompetitive effects.²¹¹

91. There was very limited comment with respect to joint billing and collection, which is not currently prohibited under Section 22.903, and other collateral activities that are

²⁰⁹ Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, *First Report and Order*, 11 FCC Rcd 18455 (1996) (*CMRS Resale Order*).

²¹⁰ *Notice*, 11 FCC Rcd at 16672, ¶ 67.

²¹¹ See Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act, as amended, *Second Report and Order*, CC Docket 96-61, 11 FCC Rcd 20730, 20760-67, ¶¶ 52-65 (1996) (*IXC Detariffing Order*).

currently prohibited under Section 22.903, including joint installation, maintenance, and repair for BOC cellular and wireline local exchange services. Upon consideration of these issues, we believe that these collateral services advance the goal of "one-stop shopping" and we do not intend to impose any restriction on their implementation at this time, except that carriers must adhere to other applicable Commission rules such as our accounting and affiliate transactions rules. To the extent such transactions present competitive concerns, the safeguards we adopt above require that incumbent LECs must offer the same services at the same terms and conditions to other CMRS providers as it offers to its CMRS affiliate. We believe that it would be inconsistent with our elimination of some of the structural separation requirements of Section 22.903 to retain restrictions on joint installation, maintenance, and repair activities, particularly since we are allowing wireline and wireless affiliates to share personnel and to jointly use facilities. Moreover, with respect to billing and collection, we adopt the tentative conclusion of the *Notice* that our Part 64 rules as they apply to affiliate transactions adequately address any concern over improper cross-shifting through joint billing.²¹²

F. Customer Proprietary Network Information

1. Overview

92. Section 22.903(f) of our rules states that BOCs must not provide to their cellular separate affiliate any customer proprietary information, unless such information is publicly available on the same terms and conditions. The 1996 amendments to the Communications Act address telecommunications carriers' use, disclosure and permission of access to Customer Proprietary Network Information (CPNI) in general.²¹³ Specifically, Section 222(c)(1) provides:

PRIVACY REQUIREMENTS FOR TELECOMMUNICATIONS CARRIERS.--
Except as required by law or with the approval of the customer, a
telecommunications carrier that receives or obtains customer proprietary

²¹² *IXC Detariffing Order*, 11 FCC Rcd at 16673, ¶ 68.

²¹³ CPNI is defined in Section 222(f)(1)(A) and (B) of the Communications Act, as follows: "The term 'customer proprietary network information' means --

(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and
(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier;

except that such term does not include subscriber list information."

47 U.S.C. § 222(f)(1)(A), (B).

network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.²¹⁴

Section 222(c)(2) provides that, "[a] telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer."²¹⁵ Section 222(c)(3) allows a local exchange carrier to use, disclose, or permit access to aggregate customer information for purposes other than those described in Section 222(c)(1) only if the LEC provides such information to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request.²¹⁶

93. We observed in the *Notice* that we recently initiated a separate proceeding to consider the formulation of CPNI regulations pursuant to Section 222 that would apply to all telecommunications carriers.²¹⁷ We sought comment on whether Section 22.903(f) is inconsistent with Section 222 of the Communications Act. We also sought comment on whether we should eliminate Section 22.903(f) even if the rule is consistent with Section 222, on the grounds that Section 22.903(f) is superfluous in light of Section 222.²¹⁸

2. Comments

94. The non-BOC carriers generally contend that Section 22.903(f) should be retained in order to prevent a BOC's CMRS affiliate from gaining a competitive advantage through using CPNI obtained during the BOC's former monopoly exchange franchise.²¹⁹ Some of these commenters contend that Section 22.903(f) should extend to all Class A LECs,²²⁰ and to

²¹⁴ 47 U.S.C. § 222(c)(1).

²¹⁵ 47 U.S.C. § 222(c)(2).

²¹⁶ 47 U.S.C. § 222(c)(3).

²¹⁷ *Notice*, 11 FCC Rcd at 16675, ¶ 72 (citing *CPNI NPRM* and seeking comment on proposed regulations to specify and clarify the obligations of telecommunications carriers with respect to CPNI).

²¹⁸ *Notice*, 11 FCC Rcd at 16675-76, ¶¶ 72-73.

²¹⁹ *See, e.g.*, AirTouch Comments at 3; CMT Comments at 12; Cox Comments at 9.

²²⁰ *See, e.g.*, AT&T Wireless Comments at 23; Comcast Comments at 14; Radiophone Comments at 10.

all their CMRS offerings.²²¹ They argue that, unless such competitively valuable CPNI is made available to non-LEC-affiliated competitors, its use by LECs would disadvantage other wireless carriers and undermine competition.²²² The BOC commenters and GTE argue that Section 22.903(f) should be eliminated and that there should be no special rules for CPNI relating to wireless services. Instead, they contend, Section 222 should govern CPNI in the context of all telecommunications services offered by a carrier, including cellular and other CMRS offerings.²²³

3. Discussion

95. Based on the record, the ability to use CPNI obtained from the wireline monopoly service for marketing purposes is clearly a competitive advantage the BOC CMRS providers would be very interested in utilizing, and other carriers are equally anxious to obtain. So that we do not prejudice any aspect of our CPNI rulemaking, however, we defer to CC Docket No. 96-115 for the appropriate interpretation of the scope of Section 222's CPNI protections. Accordingly, pending our decision in the CPNI proceeding, we will not eliminate Section 22.903(f) at this time, nor will we expand Section 22.903(f) to non-BOC LECs and to all CMRS as suggested by some commenters. We will take appropriate action regarding Section 22.903(f) upon resolution of our Section 222 proceeding.

G. Network Information Disclosure

96. In the *Notice* we stated that Section 251(c)(5) of the Communications Act²²⁴ imposes a duty on incumbent LECs to provide reasonable public notice of changes to the network necessary for the transmission and routing of services using that LEC's facilities or networks, as well as any other changes that would affect the interoperability of those facilities and networks.²²⁵ We tentatively concluded that no specific Part 22 rule pertaining to network information disclosure by the BOCs would be necessary or appropriate due to the requirement in Section 251(c)(5). Only two commenters addressed this issue. BellSouth and AT&T

²²¹ AirTouch Comments at 6-8.

²²² AirTouch Comments at 3; CMT Comments at 12; Comcast Comments at 14; Cox Comments at 9.

²²³ Bell Atlantic/NYNEX Reply Comments at 23; BellSouth Comments at 40; GTE Comments at 29; SBC Comments at 13.

²²⁴ 47 U.S.C. § 251(c)(5).

²²⁵ *Notice*, 11 FCC Rcd at 16677, ¶ 75.

Wireless agree that no CMRS-specific network disclosure requirements should be imposed because they are fully addressed in Section 251.²²⁶

97. We agree with the commenters that incumbent LECs are required to "provide public notice of changes in the information necessary for the transmission and routing of services" using the incumbent LEC's CMRS facilities or networks, pursuant to Section 251(c)(5). The Communications Act imposes on incumbent LECs the duty to provide reasonable public notice of changes in the information needed to transmit and route services using a LEC's facilities or networks. Incumbent LECs must provide reasonable public notice of any other changes that would affect the interoperability of those facilities or networks. The Commission has specified how these public notices must be made in the *Second Local Competition Order*.²²⁷ Moreover, Section 51.325(c) provides that until public notice has been given, an incumbent LEC may not disclose information about planned network changes to "separate affiliates, separated affiliates, or unaffiliated entities."²²⁸ We accordingly adopt the conclusion in the *Notice* that no specific Part 22 rule pertaining to network information disclosure by the BOCs is needed.

VI. CONCLUSION

98. In this proceeding, we have attempted to modify our rules to reflect the Congressionally mandated goal of consistent treatment of like services and to afford telecommunications providers flexibility in structuring service offerings in response to changing consumer demand. In so doing, we have considered the increasing convergence of regulated wireline services and nonregulated wireless services and consumer demand for "one-stop shopping" for telecommunications customers. At the same time, we are mindful of concerns that incumbent wireline providers, seeking to offer wireless services, may take advantage of their wireline market power to allocate costs improperly, discriminate against competitors, or engage in a predatory price squeeze, all to the detriment of consumers. We believe that the approach we have adopted in this Report and Order, including requiring incumbent LECs to offer in-region broadband CMRS through a separate CMRS affiliate, appropriately balances the LECs' need for flexibility in an evolving marketplace with competitors' concerns regarding the incentive for anticompetitive behavior by incumbent LECs. Further, we believe that the goals of Section 22.903 are fulfilled through the separate CMRS affiliate requirement and through other factors in the marketplace, including increasing competition and convergence, our accounting safeguards, price cap regulation, new interconnection requirements and other existing rules. Rural telephone companies are exempt

²²⁶ BellSouth Comments at 41; AT&T Wireless Comments at 24-25.

²²⁷ *Second Local Competition Order*, 11 FCC Rcd 19392 (1996).

²²⁸ 47 C.F.R. § 51.325(c).

from the separate affiliate requirement, and companies serving fewer than two percent of the nation's subscriber lines that seek to provide broadband CMRS without forming a separate affiliate may petition the Commission for suspension or modification of that requirement.

99. The separate affiliate requirement will sunset on January 1, 2002, unless the Commission determines that the competitive conditions in the local exchange market are such that continuation of these safeguards is in the public interest.

VII. PROCEDURAL ISSUES

A. Regulatory Flexibility Analysis

100. The Final Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix C.

B. Paperwork Reduction Act Analysis

101. This Report and Order contains a modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this Report and Order, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 30 days from date of publication of this NPRM in the Federal Register; OMB comments are due 60 days from date of publication of this Report and Order in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

C. Paperwork Reduction Act Comment Filing Procedures

102. Written comments by the public on the proposed and/or modified information collections are due on or before 30 days after date of publication in the Federal Register. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov. To file the Final OMB Desk Office

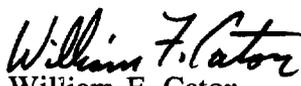
10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

D. Ordering Clauses

103. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), this Report and Order is hereby ADOPTED, and Section 20.20 of the Commission's Rules, 47 C.F.R. § 20.20, IS ADDED and Section 22.903 of the Commission's Rules, 47 C.F.R. § 22.903, IS AMENDED as set forth in Appendix B, effective 70 days after publication of a summary in the Federal Register. The information collections contained in these rules become effective 70 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

104. IT IS FURTHER ORDERED that the Secretary shall send a copy of this REPORT AND ORDER, including the final regulatory flexibility analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 605(b) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A
List of Commenters

Initial Comments

1. AirTouch Communications, Inc. (AirTouch)
2. ALLTEL Corporation
3. Ameritech
4. AT&T Wireless Services, Inc. (AT&T Wireless)
5. Bell Atlantic Corporation and NYNEX Corporation (Bell Atlantic/NYNEX)
6. BellSouth Corporation
7. Cincinnati Bell Telephone Company (CBT)
8. CMT Partners (CMT)
9. Comcast Cellular Communications, Inc. (Comcast)
10. Cox Communications, Inc. (Cox)
11. GTE Service Corporation (GTE)
12. MCI Telecommunications Corporation (MCI)
13. National Telephone Cooperative Association (NTCA)
14. Pacific Bell, Nevada Bell, Pacific Bell Mobile Services and Pacific Telesis Mobile Services (Pacific Bell)
15. Public Utilities Commission of Ohio (PUCO)
16. Radiofone, Inc.
17. Rural Cellular Association (RCA)
18. Rural Telecommunications Group (RTG)
19. SBC Communications, Inc. (SBC)
20. US West, Inc.

Reply Comments

1. ALLTEL Corporation
2. Ameritech
3. AT&T Wireless
4. Bell Atlantic/NYNEX
5. BellSouth Corporation
6. Comcast
7. Cox
8. CMT
9. GTE
10. MCI
11. Pacific Bell
12. Radiofone, Inc.
13. US West, Inc.

Ex Parte Comments

Bell Atlantic/NYNEX, November 4, 1996

BellSouth, January 27, 1997

GTE, January 30, 1997

Independent Telephone & Telecommunications Alliance (ITTA), May 12, 1997

Pacific Bell, December 4, 1996

US West, November 19, 1996 and December 20, 1996

APPENDIX B
Final Rules

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

1. Part 20 of Title 47 of the Code of Federal Regulations is amended as follows

PART 20 -- COMMERCIAL MOBILE RADIO SERVICES

2. The authority citation for Part 20 continues to read as follows:

AUTHORITY: Secs. 4, 251-52, 303, and 332, 48 Stat. 1066, 1062, as amended; 47 U.S.C. 154, 251-52, 303, and 332 unless otherwise noted.

3. Section 20.20 is added to read as follows:

§ 20.20 Conditions applicable to provision of CMRS service by Incumbent Local Exchange Carriers

(a) *Separate affiliate.* An incumbent LEC providing in-region broadband CMRS shall provide such services through an affiliate that satisfies the following requirements:

(1) The affiliate shall maintain separate books of account from its affiliated incumbent LEC. Nothing in this section requires the affiliate to maintain separate books of account that comply with Part 32 of this chapter;

(2) The affiliate shall not jointly own transmission or switching facilities with its affiliated incumbent LEC that the affiliated incumbent LEC uses for the provision of local exchange service in the same in-region market. Nothing in this section prohibits the affiliate from sharing personnel or other resources or assets with its affiliated incumbent LEC; and

(3) The affiliate shall acquire any services from its affiliated incumbent LEC for which the affiliated incumbent LEC is required to file a tariff at tariffed rates, terms, and conditions. Other transactions between the affiliate and the incumbent LEC for services that are not acquired pursuant to tariff must be reduced to writing and must be made on a compensatory, arm's length basis. All transactions between the incumbent LEC and the affiliate are subject to Part 32 of this chapter, including the affiliate transaction rules. Nothing in this section shall prohibit the affiliate from acquiring any unbundled network elements or exchange services for the provision of a telecommunications service from its affiliated incumbent LEC, subject

to the same terms and conditions as provided in an agreement approved under section 252 of the Communications Act of 1934, as amended.

(b) *Independence.* The affiliate required in paragraph (a) of this section shall be a separate legal entity from its affiliated incumbent LEC. The affiliate may be staffed by personnel of its affiliated incumbent LEC, housed in existing offices of its affiliated incumbent LEC, and use its affiliated incumbent LEC's marketing and other services, subject to paragraphs (a)(3) and (c) of this section.

(c) *Joint marketing.* Joint marketing of local exchange and exchange access service and CMRS services by an incumbent LEC shall be subject to Part 32 of this chapter. In addition, such agreements between the affiliate and the incumbent LEC must be reduced to writing and made available for public inspection upon request at the principle place of business of the affiliate and the incumbent LEC. The documentation must include a certification statement identical to the certification statement currently required to be included with all Automated Reporting and Management Information Systems (ARMIS) reports. The affiliate must also provide a detailed written description of the terms and conditions of the transaction on the Internet within 10 days of the transaction through the affiliate's home page.

(d) *Exceptions.*

(1) *Rural Telephone Companies.* Rural telephone companies are exempted from the requirements set forth in paragraphs (a), (b) and (c) of this section. A competing telecommunications carrier, interconnected with the rural telephone company, however, may petition the FCC to remove the exemption, or the FCC may do so on its own motion, where the rural telephone company has engaged in anticompetitive conduct.

(2) *Incumbent LECs with fewer than 2 percent of subscriber lines.* Incumbent LECs with fewer than 2 percent of the nation's subscriber lines installed in the aggregate nationwide may petition the FCC for suspension or modification of the requirements set forth in paragraphs (a), (b) and (c) of this section. The FCC will grant such a petition where the incumbent LEC demonstrates that suspension or modification of the separate affiliate requirement is (A) necessary to avoid a significant adverse economic impact on users of telecommunications services generally or to avoid a requirement that would be unduly economically burdensome, and (B) consistent with the public interest, convenience, and necessity.

- (e) *Definitions.* Terms used in this section have the following meanings:

Affiliate. "Affiliate " means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership with, another person. For purposes of this section, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.

Broadband Commercial Mobile Radio Service (Broadband CMRS). For the purposes of this section, "broadband CMRS" means Domestic Public Cellular Radio Telecommunications Service (Part 22, Subpart H of this chapter), Specialized Mobile Radio (Part 90, Subpart S of this chapter), and broadband Personal Communications Services (Part 24, Subpart E of this chapter).

Incumbent Local Exchange Carrier (Incumbent LEC). "Incumbent LEC" has the same meaning as that term is defined in § 51.5 of this chapter.

In-region. For the purposes of this section, an incumbent LEC's broadband CMRS service is considered "in-region" when 10 percent or more of the population covered by the CMRS affiliate's authorized service area, as determined by the 1990 census figures, is within the affiliated incumbent LEC's wireline service area.

Rural Telephone Company. "Rural Telephone Company" has the same meaning as that term is defined in § 51.5 of this chapter.

- (f) *Sunset.* This section will no longer be effective after January 1, 2002.

4. Subpart H, of Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

Subpart H -- Cellular Radiotelephone Service

5. The authority citation for Part 22 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, unless otherwise noted.

6. Section 22.903 is amended as follows:

§ 22.903 Conditions applicable to former Bell Operating Companies

Ameritech Corporation, Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, Pacific Telesis Group, Southwestern Bell Corporation, U.S. West Inc., their successors in interest and affiliated entities (BOCs) may engage in the provision of cellular service only in accordance with the conditions in this section and section 20.20, unless otherwise authorized by the FCC. BOCs may, subject to other provisions of law, have a controlling or lessor interest in or be under common control with separate corporations that provide cellular service only under the following conditions:

- (a) Reserved.
- (b) Reserved.
- (c) Reserved.
- (d) Reserved.
- (e) Reserved.
- (f) *Proprietary information.* BOCs must not provide to any such separate corporation any customer proprietary information, unless such information is publicly available on the same terms and conditions.
- (g) Reserved.

APPENDIX C
FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (*Notice*) in WT Docket No. 96-162.²²⁹ The Commission sought written comments on the proposals in the *Notice*, including the IRFA. The Commission's Final Regulatory Flexibility Analysis for the Report and Order conforms to the RFA, as amended by the Contract With America Advancement Act of 1996.²³⁰

A. Need for and purpose of the action

The Report and Order in this docket sets forth a consistent regulatory framework for the provision of commercial mobile radio services (CMRS) by incumbent local exchange carriers (LECs) and their affiliates. This framework will treat all broadband CMRS, including cellular services, uniformly and is narrowly tailored to address specific concerns about potential anticompetitive use of bottleneck wireline local exchange facilities.

B. Issues raised in response to the IRFA

The Commission sought comment generally on the IRFA. No comments were submitted specifically in response to the IRFA.

C. Description and estimates of the number of small entities to which the rules adopted in this Report and Order will apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by our rules.²³¹ The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction," and the same meaning as the term "small business concern" under the Small Business Act,²³² unless the Commission has

²²⁹ 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, *Notice of Proposed Rulemaking, Order on Remand, and Waiver Order*, 11 FCC Rcd 16639 (1996).

²³⁰ Pub. L. No. 104-121, 110 Stat. 847 (1996), Title II of the CWAAA is the "Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA), *codified at* 5 U.S.C. § 601 *et seq.*

²³¹ 5 U.S.C. §§ 603(b)(3), 604(a)(3).

²³² 5 U.S.C. § 601(3).

developed one or more definitions that are appropriate to its activities.²³³ Under the Small Business Act, a "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).²³⁴ The SBA has defined a small business for Standard Industrial Classification (SIC) category 4813 (Telephone Communications, Except Radiotelephone) to be small entities having fewer than 1,500 employees.²³⁵ This FRFA discusses generally the total number of small telephone entities potentially affected by this Report and Order.

The rules adopted in this Report and Order apply to all incumbent LECs offering in-region broadband CMRS. Incumbent LEC is defined in Section 251(h)(1) of the Communications Act of 1934, as amended (Communications Act), 47 U.S.C. § 251(h)(1), with respect to an area, as "the local exchange carrier that (A) on the date of enactment of the Telecommunications Act of 1996,²³⁶ provided local exchange service in such area; and (B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to Section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or (ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i)." Rural telephone companies²³⁷ are exempt from the structural safeguards imposed in this Report and Order; however, a competing carrier, interconnected with the rural telephone company, may petition the Commission to remove the exemption, or

²³³ Pursuant to 5 U.S.C. § 601(3), the statutory definition of small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definitions in the Federal Register."

²³⁴ 15 U.S.C. § 632.

²³⁵ 13 C.F.R. § 121.201.

²³⁶ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act).

²³⁷ Rural telephone company is defined in Section 3(37) of the Communications Act, 47 U.S.C. § 153(37), as follows: "The term "rural telephone company" means a local exchange carrier operating entity to the extent such entity -

- (A) provides common carrier service to any local exchange carrier study area that does not include either -
 - (i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or
 - (ii) any territory, incorporated or incorporated, included in an urbanized area, as defined by the Bureau of Census as of August 10, 1993;
- (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;
- (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or
- (D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996."

the Commission may do so on its own motion, where the rural telephone company has engaged in anticompetitive conduct. In addition, companies serving fewer than two percent of the nation's subscriber lines may petition the Commission for suspension or modification of the separate affiliate requirement.

Small incumbent LECs subject to these rules are either dominant in their field of operation or are not independently owned and operated, and, consistent with our prior practice, they are excluded from the definition of "small entity" and "small business concerns." Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this analysis and use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by the SBA as "small business concerns."²³⁸

The United States Bureau of the Census ("the Census Bureau") reports that at the end of 1992 there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.²³⁹ This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, wireless carriers, operator service providers, pay telephone operators, and resellers. It seems certain that some of the 3,497 telephone service firms may not qualify as small incumbent LECs because they are not incumbent LECs or they are not independently owned and operated. It seems reasonable to conclude that fewer than 3,497 telephone service firms would qualify as small incumbent LECs that may be affected by this Report and Order.

The SBA has developed a definition of small entities for telecommunications companies other than radiotelephone (Telephone Communications, Except Radiotelephone). The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.²⁴⁰ According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing fewer than 1,500 persons.²⁴¹ Of the 2,321 non-radiotelephone companies listed by the Census Bureau, 2,295 were reported to have fewer than 1,000 employees. Thus, at least 2,295 non-radiotelephone companies might qualify as small entities or small incumbent LECs based on these statistics. As it seems certain that some of these carriers are not independently owned and operated, this

²³⁸ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *Notice of Proposed Rulemaking*, 11 FCC Rcd 14171, 16150, ¶ 12 (1996) (*Local Competition NPRM*).

²³⁹ United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (indicating only the number of such firms engaged in providing telephone service and not the size of such firms) (1995) (*1992 Census*).

²⁴⁰ *1992 Census, supra*.

²⁴¹ 13 C.F.R. § 121.201, SIC 4812.

figure necessarily overstates the actual number of non-radiotelephone companies that would qualify as small businesses under the SBA definition. Consequently, the Commission estimates that using this methodology there are fewer than 2,295 small entity telephone communications companies (other than radiotelephone companies) that may be affected by the proposed decisions and rules adopted in this Report and Order.

Neither the Commission nor the SBA has developed a definition of small providers of local exchange services. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone companies.²⁴² The most reliable source of information regarding the number of LECs nationwide of which the Commission is aware appears to be the data collected annually in the *TRS Worksheet*.²⁴³ According to the most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services.²⁴⁴ As some of these carriers have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 1,347 small incumbent LECs that may be affected by the decisions and rules adopted in this Report and Order.

D. Reporting, recordkeeping, and other compliance requirements:

The rule adopted in this Report and Order requires incumbent LECs offering in-region broadband CMRS services to do so through a separate corporate affiliate. The CMRS affiliate must:

- (1) maintain separate books of account;
- (2) not jointly own transmission or switching facilities with the affiliated LEC that the affiliated LEC uses for the provision of local exchange services in the same in-region market; and
- (3) acquire any services from the affiliated LEC on a compensatory arm's length basis, as required by our affiliate transactions rules. The affiliate will be subject to the Commission's joint cost and affiliate transaction rules. Services acquired from the

²⁴² 13 C.F.R. § 121.201, SIC 4813.

²⁴³ Federal Communications Commission, Industry Analysis Division, *Telecommunications Industry Review: TRS Fund Worksheet Data* (Average Total Telecommunications Revenue Reported by Class of Carrier) (Dec. 1996) (*TRS Worksheet*).

²⁴⁴ *TRS Worksheet* at Table 1.

affiliated LEC must be made available to all CMRS providers on the same rates, terms, and conditions.

This rule may require incumbent LECs to have additional reporting and recordkeeping with respect to transactions with the CMRS affiliate.

Affiliate transactions. Some incumbent LECs may now be required to comply with the affiliate transactions rules in Part 32 of the Commission's rules if they offer broadband CMRS through a separate affiliate and conduct transactions with the CMRS affiliate. Prior to the adoption of the rule in this Report and Order, the Commission required the Bell Operating Companies (BOCs) to establish a separate affiliate for provision of cellular services, otherwise a separate affiliate was not required for LEC provision of broadband CMRS. Therefore, LECs that previously did not have a separate affiliate for broadband CMRS, and thus did not have affiliate transactions, will now have to establish a separate affiliate and comply with the Commission's affiliate transactions rules.

Joint marketing agreements. The rule adopted in this Report and Order requires all incumbent LECs and the CMRS affiliates engaging in joint marketing of local exchange and exchange access and CMRS to reduce all such agreements to writing and make the agreements available for public inspection upon request at the principle place of business of the affiliate and the incumbent LEC. The documentation also must include a certification statement identical to the certification statement currently required to be included with all Automated Reporting and Management Information Systems (ARMIS) reports. The affiliate must also provide a detailed written description of the terms and conditions of the transaction on the Internet within ten days of the transaction through the affiliate's home page.

E. Steps taken to minimize burdens on small entities and significant alternatives considered

The Commission sought to minimize burdens on small entities by providing an exemption for rural telephone companies. Rural telephone companies are exempted from the separate affiliate requirement; however, a competing local exchange carrier, interconnected with the rural telephone company, may petition the Commission to remove the exemption, or the Commission may do so on its own motion, if the rural telephone company has engaged in anticompetitive conduct.

The Commission sought to minimize burdens on small entities by permitting incumbent LECs with fewer than two percent of the nation's subscriber lines to petition the Commission for suspension or modification of the separate affiliate requirement. The Commission will grant such a petition if the incumbent LEC can demonstrate that suspension or modification of the separate affiliate requirement is necessary to avoid a significant adverse economic impact on users of telecommunications services generally or to avoid a requirement

that would be unduly burdensome, and consistent with the public interest, convenience, and necessity.

The Commission considered and rejected the proposals in the *Notice*: (1) to retain, but sunset, Section 22.903 of the Commission's rules, or (2) to require all Tier 1 (or Class A) LECs providing in-region broadband CMRS to file a safeguards plan similar to the plan filed by PacTel. Neither of the proposals in the *Notice* would impose additional regulation on Class B LECs. The Commission instead decided to impose structural separation regulations on all incumbent LECs providing broadband CMRS because anticompetitive interconnection practices, particularly discriminatory behavior, pose a substantial threat to full and fair competition in the CMRS marketplace, and all incumbent LECs have the ability and incentive to engage in anticompetitive behavior. The Commission observed that increased competition in the CMRS market and the possibility that CMRS in the future may substitute for wireline local loops may actually increase incumbent LECs' incentive to discriminate against unaffiliated CMRS providers. The Commission concluded that it was appropriate to apply structural safeguards to all incumbent LECs. As described above, however, we have considered, and have taken measures to address, the additional burdens these requirements might have on rural telephone companies and on those entities serving two percent of the nations' subscriber lines.

G. Report to Congress

The Commission shall send a copy of this Final Regulatory Flexibility Analysis with this Report and Order in a report to Congress pursuant to Section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this Regulatory Flexibility Analysis will also be published in the Federal Register.

Separate Statement of Commissioner James Quello

Re: Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Service, WT Docket No. 96-162

October 1, 1997

I support the decision to modify our rules concerning the provision of commercial mobile radio service (CMRS) by incumbent LECs. As the CMRS market becomes more competitive, incumbent LECs may have an incentive to tilt the CMRS playing field in their favor. Our response in this Report and Order is to establish several safeguards that minimize the opportunity for incumbent LECs to recover their CMRS costs from local telephone customers. Local telephone customers should pay for local telephone service, not for CMRS service.

Importantly, this Report and Order also addresses the Sixth Circuit's decision in *Cincinnati Bell*. In that case, the court criticized the Commission's unequal treatment of similar services (cellular versus PCS) and similar providers (BOCs versus other incumbent LECs). This Report and Order fully responds to the court's concerns. First, we modify our rules to treat similar services in a similar manner. We do this by requiring incumbent LECs to provide both cellular service and PCS through structurally separate affiliates. Second, we adopt rules that treat similar carriers in a similar manner. We do this by requiring all incumbent LECs, not just BOCs, to comply with the competitive safeguards when they provide CMRS. It is necessary to apply competitive safeguards to all incumbent LECs, and not just BOCs, because all incumbent LECs have the incentive to engage in anti-competitive conduct in providing in-region CMRS.

I remain concerned, however, about the costs of imposing competitive safeguards on those incumbent LECs that previously were not subject to these requirements. I supported this aspect of the Report and Order only after careful consideration of the legal and policy implications. In the end, I placed great importance on the principle of treating BOCs and other incumbent LECs equally. I hope that the benefits of vigorous CMRS competition, especially lower prices for end users, will justify applying the competitive safeguards to non-BOC LECs. I also believe that other steps taken in this Report and Order -- including narrowing the competitive safeguards, exempting smaller LECs, and sunseting the safeguards -- demonstrate our commitment to adopting rules that go no further than necessary to protect local telephone customers and promote competition in the CMRS market.

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