

Before the

**Federal Communications Commission**

Washington, D.C. 20554

RECEIVED

JAN 20 1998

In the Matter of )  
 )  
 Interconnection and Resale )  
 Obligations Pertaining to )  
 Commercial Mobile Radio Services )  
 )  
 Automatic Roaming Proposals )  
 for Cellular, Broadband PCS, )  
 and Covered SMR Networks )

CC Docket No. 94-54

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

DA 97-2558

**REPLY COMMENTS OF  
AIRTOUCH COMMUNICATIONS, INC.**

Kathleen Q. Abernathy  
 David A. Gross  
**AIRTOUCH COMMUNICATIONS, INC.**  
 1818 N Street, N.W.  
 Washington, D.C. 20036  
 (202) 293-3800

January 20, 1998

No. of Copies rec'd \_\_\_\_\_  
 List A B C D E \_\_\_\_\_

024

**Table of Contents**

	<b>Page</b>
INTRODUCTION AND SUMMARY .....	1
DISCUSSION .....	3
I. The Comments Confirm That The Marketplace Is Working and That Government Intervention In Inter-Carrier Dealings Is Inappropriate .....	3
II. There Is No Basis to Require Direct Competitors in A Competitive Industry to Engage in Facilities-Sharing ( <i>a.k.a.</i> , “In-Market Roaming”) .....	10
III. TRA’s Reseller/Roaming Proposal Is Unnecessary, May Be Technically Difficult to Implement, And Would Impose Large Administrative Costs .....	17
IV. Assuming <i>Arguendo</i> That Regulation Were Appropriate, A Five-Year Sunset Is Much Too Long .....	21
CONCLUSION .....	21

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

In the Matter of	)	
	)	
Interconnection and Resale	)	CC Docket No. 94-54
Obligations Pertaining to	)	
Commercial Mobile Radio Services	)	
	)	
Automatic Roaming Proposals	)	DA 97-2558
for Cellular, Broadband PCS,	)	
and Covered SMR Networks	)	

**REPLY COMMENTS OF  
AIRTOUCH COMMUNICATIONS, INC.**

AirTouch Communications, Inc. ("AirTouch") submits this reply in response to the comments filed in this proceeding on January 5, 1998.

**INTRODUCTION AND SUMMARY**

The most recent set of comments indicate that the focus of this proceeding has now changed somewhat. No longer at issue is the availability of automatic roaming; the record evidence establishes conclusively that new CMRS entrants have been successful in executing extensive automatic roaming contracts. Instead, a handful of commenters urge the Commission to mandate and regulate the *prices* of inter-carrier automatic roaming contracts. Such new price regulation, however, is unnecessary in a market as competitive as CMRS, would be anticompetitive, and would negatively impact consumer prices.

The real issue in this proceeding has become whether to mandate — for the first time — the provision of so-called "in-market" or "home roaming." A few CMRS providers like AT&T Wireless and Sprint Spectrum contend that "home roaming" is essential to their survival

and that carriers which refuse to enter into such arrangements are engaged in anti-competitive behavior. However, these types of arrangements are not roaming agreements at all, but rather involve facilities-sharing arrangements among direct competitors in a competitive market. Further, mandatory in-market facilities-sharing is not “essential.” PCS licensees voluntarily participated in the auction and purchased licenses with full awareness of, and based their valuations on, the “rules of the game” — rules that did not include mandatory in-market facilities-sharing. Moreover, it is not “anti-competitive” for one competitor to decide not to affirmatively assist another competitor; in fact, serious antitrust issues would be raised by facilities-sharing among competitors in this circumstance.

A Commission order requiring one competitor to share its facilities in a competitive market with other competitors would contravene basic tenets of law, public policy, and equity. This is not a case of a monopolist controlling an essential facility. Rather, at issue is whether the Commission is going to require one competitor to make its facilities available to other competitors when those competitors are fully capable of deploying their own, competitive facilities. The public interest would not be served by mandatory facilities-sharing here because such a requirement would eliminate local coverage as a basis for competition and would undermine the Congressional and Commission objective that multiple CMRS networks be deployed expansively and expeditiously so consumers have a greater range of choices.

Moreover, mandatory facilities-sharing would enable new entrants to control an incumbent’s use of its own network, placing the incumbent, which took significant risks and made substantial investments in building its network, at a major competitive disadvantage. An in-market facilities-sharing requirement could also cause the quality of an incumbent’s service to

deteriorate to its own customers (*e.g.*, increased call blocking) and/or would require the incumbent to make new investments in capacity — investments that would become stranded once new entrants decide to build out their own networks.

New entrants have a right to compete in the marketplace. However, an opportunity to compete does *not* include a government guarantee of parity, much less success in the marketplace. And, the public does not benefit if the government directs one competitor to provide a helping hand to its direct competitors.

Finally, the Telecommunications Resellers Association (“TRA”) “reseller-roaming” proposal is unnecessary; may be technically difficult to implement; and would impose large administrative costs — which would adversely impact roaming prices. Moreover, the TRA proposal attempts to fix a problem that does not exist. Given the extensive and intense facilities-based competition which already exists in the CMRS marketplace, now is not the time to expand the scope of the resale rules and to impose new costs on CMRS providers.

## **DISCUSSION**

### **I. The Comments Confirm That The Marketplace Is Working and That Government Intervention In Inter-Carrier Dealings Is Inappropriate**

Most commenters oppose new government rules, noting that automatic roaming arrangements among CMRS providers have developed without government intervention and that there is no reason for the Commission to begin regulating such arrangements now that the CMRS market is more competitive than ever.<sup>1</sup> Incumbent cellular carriers have documented their

---

<sup>1</sup> See, *e.g.*, 360 Communications (“360”); AirTouch Communications; American Mobile Telecommunications Association (“AMTA”); BellSouth Corporation; Centennial Cellular; GTE Service Corporation (“GTE”); Nextel Communications; Personal

willingness to execute automatic roaming contracts with other CMRS providers, including new entrants.<sup>2</sup> Further, AT&T Wireless, the largest cellular carrier and the second largest PCS licensee, states its willingness to enter into roaming arrangements with new entrants in *any* of its many markets.<sup>3</sup>

In this regard, even the proponents of some form of new government regulations concede that the marketplace is working. Sprint Spectrum states that “CMRS carriers generally have found that it is in their best interests to enter into automatic roaming agreements.”<sup>4</sup> Although a new entrant, Sprint notes that it has already successfully concluded roaming contracts with “several dozen CMRS carriers across the country,” that these contracts provide coverage for “over seventy-five percent of the United States,” and that it expects to finalize shortly additional agreements to extend its coverage further.<sup>5</sup> Another new entrant, Omnipoint,

---

Communications Industry Association (“PCIA”); the Rural Telecommunications Group (“RTG”); Southwestern Bell Mobile Systems and Pacific Bell Mobile Services (“SBMS”); and United States Cellular Corporation (“USCC”).

<sup>2</sup> For example, 360 states that it has executed agreements with five PCS carriers; USCC states it has six PCS agreements; GTE represents it has nine PCS agreements; and SBMS states it has entered agreements or is still in negotiations with every PCS carrier making a request. RTG states that its members have not yet been approached by PCS carriers.

<sup>3</sup> See AT&T Wireless at 10 and n.20.

<sup>4</sup> Sprint Spectrum at 2.

<sup>5</sup> *Id.* at 2-3. Sprint identifies a dozen major cellular carriers which have expressed interest in negotiating automatic roaming contracts with it. See *id.* at 3 n.6.

similarly represents that it has executed automatic roaming requirements “with over 70 CMRS providers.”<sup>6</sup>

For its part, CTIA documents the success new entrants have enjoyed in negotiating — without government intervention — roaming agreements with each other and with incumbents.<sup>7</sup> In turn, PCIA, whose members consist primarily of PCS and SMR licensees, states that new rules are unnecessary because its members have “successfully been able to negotiate automatic roaming agreements at market rates and with competitive terms and conditions of service for their customers.”<sup>8</sup> PCIA notes that PCS licensees, which already have operational systems “in more than 200 markets,” have executed roaming contracts with other PCS licensees.<sup>9</sup> It further notes that PCS licensees have also had success in reaching roaming agreements with cellular carriers.<sup>10</sup>

---

<sup>6</sup> Omnipoint at 6. Notwithstanding this success, Omnipoint still favors some Commission intervention into the marketplace — although it simultaneously cautions the Commission not to over regulate competitive markets. *See id.* at 2 (“[T]he Commission should refrain from a plethora of regulations micro-managing every detail of roaming arrangements. Carriers and the public are far better served by leaving some contractual flexibility between the parties.”).

<sup>7</sup> *See* CTIA at 3-8.

<sup>8</sup> PCIA at 3.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 3 (“[A]utomatic roaming agreements have been negotiated both to allow new PCS subscribers to utilize existing cellular networks while roaming and to allow cellular subscribers the benefits of PCS roaming. . . . Despite fierce competition for customers between incumbents and new entrants, no carriers to date have brought to PCIA’s attention any situations where existing carriers have refused to negotiate automatic roaming agreements, negotiated in bad faith, or insisted upon discriminatory contractual provisions.”).

On the other hand, proponents of new automatic roaming rules support their position with generalized claims only.<sup>11</sup> For example, AT&T Wireless asserts that “a significant number of incumbent cellular carriers . . . refuse to negotiate automatic roaming arrangements with new PCS entrants”<sup>12</sup> — yet it identifies *only one* carrier which allegedly “refuses to allow any PCS subscribers to roam on its cellular system.”<sup>13</sup> Similarly, Cincinnati Bell supports government intervention even though it acknowledges that it is “just entering the discussion stages with incumbent operators for roaming services” and does not identify even one CMRS provider which has refused to consider its roaming offers.<sup>14</sup> The remaining rule proponents, Omnipoint and Merotel, likewise do not identify a single CMRS provider which has refused to

---

<sup>11</sup> Generalized statements of need, unsupported by facts, are not sufficient to justify new government regulations. *See, e.g., AT&T v. FCC*, 974 F.2d 1351, 1354 (D.C. Cir. 1992) (“An agency must nevertheless ‘examine the relevant data and articulate a satisfactory explanation for its action.’ Accordingly, we will not uphold an agency’s action where it has failed to offer a reasoned explanation that is supported by the record.”).

<sup>12</sup> AT&T Wireless at 1. *See also id.* at 3.

<sup>13</sup> *Id.* at 4 n.8. The evidentiary value of this base allegation is not apparent. The fact that AT&T may have difficulty negotiating an automatic roaming agreement with one carrier does not mean that it will be unable to provide automatic roaming in the desired market; it simply means that AT&T may have to negotiate an agreement with another carrier serving the market. Moreover, Commission intervention would be inappropriate even if a CMRS provider could demonstrate that it was unable to execute a roaming agreement with any of the carriers serving a given market.

<sup>14</sup> Cincinnati Bell at 6.

consider a roaming arrangement with them.<sup>15</sup> Proponents of new government regulations have thus demonstrated no need, much less a compelling need, for burdensome new regulations.<sup>16</sup>

A closer examination of the comments reveals that the real issue for some CMRS providers is *not* the availability of automatic roaming arrangements, *but rather the terms and conditions under which automatic roaming is available*. Omnipoint makes the point most directly, stating that the Commission should require “[e]very CMRS carrier [to] provide equal prices, as well as terms and conditions for roaming service to any other CMRS provider.”<sup>17</sup> Similarly, AT&T Wireless complains about the “prohibitive” and “excessively high” roaming

---

<sup>15</sup> Meretel’s real complaint is that it paid “exorbitant prices” for its licenses (an average of \$34.13 per POP) and that, in its opinion, it is at “a competitive disadvantage” because of “the limited coverage areas” of its BTA licenses. Meretel at 2. This second complaint is nothing less than a collateral attack on the Commission’s PCS licensing orders. The Commission decided to use BTAs for C block licenses precisely to make market entry more affordable for smaller firms and to facilitate the rapid build out of their networks. Having decided *voluntarily* to participate in the C block BTA auction and to pay what it did for its five licenses, Meretel cannot now legitimately complain about either the prices it paid or the size of its license areas.

<sup>16</sup> See, e.g., *CMRS Resale Order*, 11 FCC Rcd 18455, 18463 ¶ 14 (1996)(New CMRS regulations should not be imposed “unless clearly warranted.”); *Connecticut CMRS Rate Regulation Order*, 10 FCC Rcd 7025, 7031 ¶ 9 (1995)(New CMRS regulations inappropriate absent “a clear cut need.”); President Clinton Executive Order 12866, § 1(a)(Sept. 30, 1993)(“Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need . . .”).

<sup>17</sup> Omnipoint at 6. See also *id.* at 1-2 (“Omnipoint suggests that any carrier offering roaming service must charge the same price to all other carriers seeking roaming service on their network.”).

rates charged by some carriers, apparently inviting the Commission to engage in some sort of price control regulation.<sup>18</sup>

The Commission has not engaged in price regulation of the CMRS industry in the past,<sup>19</sup> and it should decline the invitation of a few to engage in such regulation now that the market is more competitive. Regulation of the prices, terms, and conditions of complex automatic roaming agreements would reduce competition by eliminating roaming as a basis for competition. The Commission has noted that CMRS providers compete against each other on many factors, including their respective roaming footprint and roaming rates.<sup>20</sup> This competition, as the Commission advised Congress last year, has reduced the prices consumers pay for roaming services.<sup>21</sup> This competition has also benefitted consumers who do not roam because carriers with smaller footprints often respond with “aggressive competitive pricing” and

---

<sup>18</sup> AT&T Wireless at 4 and n.8. In addition, Merotel complains that smaller carriers may be unable to obtain volume discounts available to larger carriers (Merotel at 2) — although the Commission has held repeatedly that volume discounts promote competition and the public interest. *See, e.g., Pay Telephone Reclassification Order*, 11 FCC Rcd 20541, 30655 ¶ 227 (1996) (“Volume discounts are common in the business world, and typically represent a recognition by the seller of the economies of scale it realizes from the transaction. If these volume discounts are passed through to the end user, consumers benefit. Even if they are not passed on to consumers, the pre-existing level of competition is not injured because prices remain the same to end users. The only resulting injury is to competitors, not competition.”).

<sup>19</sup> The Commission has chosen to forbear from rate regulation of wireless services. *See, e.g. Second CMRS Report and Order*, 9 FCC Rcd 1411, 1478-79 ¶¶ 174-75 (1994).

<sup>20</sup> *See, e.g., CMRS Manual Roaming Order*, 11 FCC Rcd 9462, 9469-70 ¶ 11 (1996).

<sup>21</sup> *See Second Annual CMRS Report to Congress*, 12 FCC Rcd 11266, 11284-85 (1997).

the provision of “value added features, such as a built-in pager, caller ID, voice mail, and service quality.”<sup>22</sup>

Significant public interest benefits would be lost if the Commission decided to begin regulating the prices, terms, and conditions of inter-carrier roaming arrangements.<sup>23</sup> Carriers will have little incentive to reduce their roaming charges to the public if all carriers are required by the government to charge the same (or even comparable) prices for roaming. Thus, the public interest would not be served by Commission regulation of inter-carrier roaming prices, terms, and conditions.

Commission intervention into the complex subject of roaming would, moreover, create endless controversies among carriers and would inevitably result in numerous complaints being lodged with the Commission.<sup>24</sup> For example, the Commission acknowledges that not all CMRS providers are similarly situated and that any new regulations would have to recognize this fact.<sup>25</sup> However, when price, terms, and conditions are involved, carriers will rarely agree whether one carrier is similarly situated to another carrier. The only way to prove to a carrier seeking a roaming agreement that it is not similar situated to its direct competitors which have an

---

<sup>22</sup> *Id.* at 11319.

<sup>23</sup> *See, e.g.*, Separate Statement of Commissioner Rachelle Chong, *Automatic Roaming NPRM*, 11 FCC Rcd at 9500 (“If we mandate an automatic roaming requirement, CMRS providers may not be able to differentiate their roaming products as they do today. This may actually serve to lessen overall competition in the CMRS market.”).

<sup>24</sup> *See generally* President Clinton Executive order 12866 § 1(b)(12) (Sept. 30, 1993) (“Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.”).

<sup>25</sup> *See Automatic Roaming NPRM*, 11 FCC Rcd at 9475 ¶ 22.

agreement, would be for the providing carrier to share with the requesting carrier its roaming contract with the requesting carrier's direct competitors. However, competitive goals would be ill-served if carriers know the details of each other's roaming agreements, including those of their direct competitors.

Eighteen months ago the Commission concluded that there was "no specific evidence in the record" of unreasonable discrimination against PCS licensees concerning the availability of automatic roaming."<sup>26</sup> The only specific evidence that has been introduced in the record since then is that PCS licensees have been successful in entering into numerous roaming contracts, including agreements with incumbent cellular carriers — at a more rapid pace than the cellular industry was able to conclude such agreements. The marketplace is working, and there is no need, and certainly not a compelling need, for the Commission to intervene now that the market is even more competitive.

## **II. There Is No Basis to Require Direct Competitors in A Competitive Industry to Engage in Facilities-Sharing (a.k.a., "In-Market Roaming")**

The real focus of those few commenters favoring new government regulations is not on automatic roaming, but on what is termed as "in-market" or "home-to-home" roaming. AirTouch demonstrated in its comments that this proposed "in-market" arrangement between direct competitors *does not involve roaming at all*; such an arrangement rather involves a form of *facilities-sharing* whereby one competitor would be forced to share its facilities with its direct competitors.<sup>27</sup> A Commission order imposing facilities-sharing among direct competitors in the

---

<sup>26</sup> *Automatic Roaming NPRM*, 11 FCC Rcd at 9474 ¶ 20.

<sup>27</sup> *See* AirTouch at 12-16.

competitive CMRS market would be inconsistent with settled principles of law, public policy, and equity.<sup>28</sup> In effect, these proponents want to impose regulations, at most, applicable to incumbent LECs (with monopoly facilities) to the competitive CMRS industry.

Proponents of an in-market facilities-sharing requirement all begin from the same premise: facilities-sharing is said to be “essential” to the ability of new entrants to compete in the marketplace and that without such sharing the public will not have “a realistic choice among carriers.”<sup>29</sup> Putting aside that the proponents do not present any evidence to support their claims, these assertions are not credible on their face. If, in fact, mandatory in-market facilities-sharing were truly “essential” as these commenters now claim, these firms would have never acquired their licenses, much less paid what they did for them.

Not only are these assertions unsupported, they are wrong. Take, for instance, Meretel, which asserts that without facilities-sharing “C-Block licensees are . . . unable to compete.”<sup>30</sup> However, it is instructive to compare these regulatory claims to what Meretel tells its potential customers, the public:

---

<sup>28</sup> Indeed, the Commission has never required “home” or “in-market” manual roaming. *See, e.g., Baton Rouge MSA Limited Partnership*, 6 FCC Rcd 5948 (1991), *aff’d*, 8 FCC Rcd 2889 (1993)(cellular carrier required to provide manual roaming to an in-market competitor within an extension area but not within its home market.). In addition, the Commission refused to require joint construction between cellular carriers precisely to prevent the systems from having an identical footprint. *See Cellular Communications System Reconsideration Order*, 89 FCC 2d 58, 63 ¶ 10 (1982).

<sup>29</sup> *See* AT&T Wireless at 2 (“[B]y offering a realistic choice among carriers, the rule will benefit consumers”); *id.* at 10 (mandatory in-market facilities-sharing “is essential”); Meretel at 1 (mandatory in-market facilities-sharing “is essential”); Sprint Spectrum at 7 (mandatory in-market facilities-sharing “can be essential”).

<sup>30</sup> Meretel at 1.

“PCS is truly superior to traditional cellular technology and more affordable,” says [company president] Czerwinski. “Consumers in our licensing areas can expect to enjoy a feature-rich, wireless communications service, the likes of which they have never seen before.”<sup>31</sup>

According to Meretel, it has introduced PCS in Baton Rouge, Louisiana “ahead of national competitors.”<sup>32</sup> The company’s president has further compared its new PCS network to the networks operated by its competing cellular carriers as “what the compact disk is to vinyl records.”<sup>33</sup> Meretel’s promotional materials also identify numerous ways in which it claims its PCS service is “superior to traditional cellular service.”<sup>34</sup>

CMRS providers compete on many variables, and one of these variables is the size of one’s local footprint or coverage area. However, as Meretel’s advertising demonstrates, it cannot be credibly said that new entrants are at a competitive disadvantage *vis-a-vis* cellular carriers and that access to competitor facilities is necessary for PCS “survival.”<sup>35</sup> In fact, the Commission advised Congress just last year that “it *is* possible [for a new entrant] to offer a

---

<sup>31</sup> Meretel Press Release, “EATEL Secures PCS Financing, Sets Service Date,” <http://www.eatel.com/finance.htm>.

<sup>32</sup> Meretel Press Release, “EATEL Announces PCS Launch,” <http://www.eatel.com/launch.htm>.

<sup>33</sup> *Id.*

<sup>34</sup> Among other things, Meretel claims that its network has “more capacity to handle calls than cellular,” has “enhanced privacy and fraud protection,” offers “superior voice quality” with “no dropped calls,” uses handset with “longer battery life, and offers “feature rich services,” including “Caller ID, paging, voice mail, fax, e-mail messaging and text messages such as news report, traffic and weather updates and stock quotes.” Meretel, “PCS vs. Cellular, More than cellular . . . for less,” <http://www.eatel.com/PvsC.htm>.

<sup>35</sup> Meretel at 1.

competitive service even if the area in which the licensee can make service available to its customers is smaller than its competitor's."<sup>36</sup> This conclusion was confirmed by a J.D. Power & Associates market study released last week demonstrating that new entrants have captured one-third of all new customers.<sup>37</sup>

Proponents of mandatory in-market facilities-sharing further contend that the refusal of incumbents to share their facilities with their competitors is "unreasonable" and constitutes "anti-competitive conduct" because the decision is made for "the sole purpose of impeding entry of a new PCS competitor in their market."<sup>38</sup> According to these proponents, the government should intervene to ensure that all CMRS providers have the identical coverage because this would "promot[e] CMRS competition."<sup>39</sup>

A competitor is not required to affirmatively assist its competitors so the competitors can improve their product or service. To the contrary, the Supreme Court has held that a business "of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently."<sup>40</sup> In this regard, courts have held that even "a firm with

---

<sup>36</sup> *Second Annual CMRS Report to Congress*, 12 FCC Rcd 11266, 11319 (1997)(emphasis added).

<sup>37</sup> *Communications Daily* at 6 (Jan. 14, 1997).

<sup>38</sup> AT&T Wireless at 4 and n.6; Cincinnati Bell at 3; Sprint Spectrum at 3-6.

<sup>39</sup> AT&T Wireless at 4. Actually, rule proponents, all new entrants, want the opportunity to have better coverage than each cellular carrier by using the facilities of both cellular carriers. For example, Meretel wants the ability to claim that its service has "more coverage than cellular carriers." Meretel, "PCS vs. Cellular, More than cellular . . . for less," <http://www.eatel.com/PvsC.htm>.

<sup>40</sup> *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). See also *United States v. Colgate & Company*, 250 U.S. 300, 307 (1919)(The antitrust laws do "not

lawful monopoly power has no general duty to help its competitors . . . [or] to extend a helping hand to new entrants:”

[T]here is no more duty to give or continue such assistance [to a competitor] than there is to lend money to a competitor. . . [C]learly a firm . . . is not required to lend money to a competitor merely because the loan would increase competition.<sup>41</sup>

However, whatever the rules applicable to monopolists, no CMRS provider has the legal obligation to assist one of its competitors. And under no circumstances can it be said that one CMRS provider is acting “anti-competitively” simply because it chooses not to affirmatively assist its competitors.

Nor would a mandatory facilities-sharing rule be consistent with sound public policy. The public’s interest is served by having choices among facilities-based carriers. Many PCS licensees meet their five-year build out requirement — one-third of POPs for 30 MHz licenses; one-fourth of POPs for 10 MHz licenses — at the time they commence commercial

---

restrict the long recognized right of a trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to the parties with whom he will deal.”).

<sup>41</sup> *Olympia Equipment Leasing v. Western Union Telegraph*, 797 F.2d 370, 375-76 (7th Cir. 1986), *reh. denied en banc*, 802 F.2d 217 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987). Of course, the antitrust laws require a monopolist controlling an “essential facility” (like an incumbent LEC) to make that facility available to competitors. However, cellular carriers are neither monopolists nor do they exercise market power. *See Metro Mobile v. NewVector Communications*, 661 F. Supp. 1504, 1523 (E.D. Az. 1987), *aff’d*, 892 F.2d 62 (9th Cir. 1987)(cellular carrier does not possess monopoly power even in the old head start days). Besides, a cellular carrier’s radio facilities are not essential; not only can these facilities be duplicated, but PCS licensees are doing just that. Finally, even under the essential facilities doctrine, a monopolist is not required to make investments to expand its capacity to meet the needs of its competitors. *See, e.g., City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373 (9th Cir. 1992).

service. If these licensees can use their competitors' facilities to serve in-market areas not reached by their own network, they will have little incentive to expand the coverage of their networks until the eve of the 10-year build out requirement.<sup>42</sup> The public interest would not be served if PCS licensees effectively stopped expanding their networks.

In addition, requiring incumbents to actively assist new entrants would encourage economic inefficiencies and promote inequity. Cellular carriers have invested significant amounts of capital over time and that investment required initiative and involved risks. In these circumstances, there is no reason why a firm having made this investment and having taken this risk should be required to provide unilateral market access for every new competitor. Such a policy would be unfair to those firms and would discourage all firms in the market from taking initiative, assuming risk, and making investments of capital in the first place. Again, inter-carrier roaming arrangements are based on a mutual advantage obtained by both carriers — the respective provision to each other of service *outside* the licensees' market areas. No such mutual benefit exists with in-market facilities-sharing arrangements.

Rule proponents respond by claiming their willingness to pay “a reasonable price” for their use of their competitor's network<sup>43</sup> — although closer examination reveals that

---

<sup>42</sup> It is no answer to say that an incentive to expand would remain intact because a new entrant may decide to “buy down” the facilities-sharing charges. *See Cincinnati Bell* at 5; *AT&T Wireless* at 8-9. First of all, the decision whether or not to “buy down” roaming charges is a decision made by each licensee. Second, from a cash flow perspective, it may make more sense to “buy down” a competitor's facilities-sharing charges rather than to invest more significant capital in network expansion.

<sup>43</sup> *Meretel* at 4. *See also Cincinnati Bell* at 6.

they actually want to receive subsidized service from their competitor.<sup>44</sup> At issue are rural and certain suburban areas not covered by a new entrant's initial network. Incumbents have sized their networks in these "non-core" areas to meet the service needs of their own customers. If the Commission were to impose a facilities-sharing requirement, an incumbent may very well be required to re-size (*i.e.*, increase) its network capacity so it can adequately handle both its own customers' traffic *and* the traffic of its competitors.<sup>45</sup> What is more, new entrants expect incumbents to provide them with capacity using analog technologies so their customers' dual band/mode handsets will work. But the biggest "rub" is that new entrants will eventually decide to extend their networks to these same "non-core" areas, at which time incumbents will face excess capacity over their own networks.<sup>46</sup>

---

<sup>44</sup> The arrangement AT&T and Sprint demand would be non-reciprocal — that is, the incumbent would receive no corresponding benefit because it has no need to use the networks of its in-market competitors. Yet, these carriers claim entitlement to receive the same roaming rates contained in reciprocal arrangements. *See* AT&T Wireless at 10; Sprint Spectrum at 5-6. Roaming is based upon the mutual advantage each operator realizes in offering customers service *outside* their home territory.

<sup>45</sup> In claiming that "preexisting capacity is likely to be available" in non-core areas, AT&T confuses spectrum capacity with facilities capacity. AT&T Wireless at 7. Most non-core areas have adequate spectrum capacity. However, in these areas licensees use only a portion of this spectrum. Mandatory in market facilities-sharing would almost certainly require incumbents to expend capital to increase the capacity of their networks serving non-core areas through the addition of radio channels and associated facilities investments.

<sup>46</sup> In-market facilities-sharing is not like in-market resale, as AT&T claims. *See* AT&T Wireless at 7. With resale, a facilities-based carrier can require minimum levels of usage (allowing it to plan the use of its network) and can impose significant early termination penalties. *See CMRS Resale Order*, 11 FCC Rcd at 18463 ¶ 13. These business restrictions are difficult to include in automatic roaming agreements, which necessarily involve unpredictable daily traffic.

An incumbent would have an alternative, at least in theory: it could always decline to make additional capital investment that will soon become stranded. But this alternative would deteriorate the quality of the incumbent's service to its *own* customers (because a network sized for its customers would now be used by its customers and the customers of its competitors). New entrants would certainly use this deteriorated service to their advantage in their own advertising campaigns. No competitor should be forced into the Hobson's choice of allowing service to its own customers to deteriorate or making capital investments that will become stranded simply to help a competitor — especially where, as here, the competitor is fully capable of constructing its own network.

### **III. TRA's Reseller/Roaming Proposal Is Unnecessary, May Be Technically Difficult to Implement, And Would Impose Large Administrative Costs**

The Telecommunications Resellers Association ("TRA") raises an issue which warrants a separate response. According to TRA, the Commission should "require facilities-based CMRS carriers to provide CMRS resellers the capabilities that they need in order to offer competitive roaming service."<sup>47</sup> While TRA does not detail the precise functions it seeks from facilities-based carriers, it apparently would include certain unspecified "billing and call-tracking capabilities."<sup>48</sup>

TRA's fundamental premise is erroneous. TRA claims that Sections 201(b) and 202(a) of the Communications Act "require" CMRS providers to enter into automatic roaming

---

<sup>47</sup> TRA Summary at ii.

<sup>48</sup> TRA at 12.

contracts with each other, including with resellers.<sup>49</sup> If that were true, this rulemaking would be unnecessary.<sup>50</sup> However, as AirTouch has already explained,<sup>51</sup> Title II of the Communications Act does not apply to billing arrangements between carriers such as automatic roaming contracts because these inter-carrier agreements do not constitute a communications service and, in any event, are not executed on a common carrier basis.<sup>52</sup>

Second, the factual predicate underlying TRA's proposal is flawed. TRA contends that consumers are "captive" when they roam in distant markets because they can effectively use only one carrier.<sup>53</sup> This arrangement, TRA continues, gives this carrier "effective market power" and enables the carrier to then charge the consumer "exorbitant" roaming rates.<sup>54</sup> However, this argument ignores the fact that the network used in automatic roaming is selected, *not* by the consumer, but by the consumer's home carrier. Moreover, the roaming charges the consumer pays (if any) are determined by its own home carrier and *not* the carrier providing the

---

<sup>49</sup> *Id.* at 5-7 (emphasis in original).

<sup>50</sup> TRA concedes as much when it asserts that the Commission has little flexibility in this rulemaking because Sections 201 and 202 "*compel* the answers" to the questions the Commission has posed. TRA at 5 (emphasis added).

<sup>51</sup> *See* AirTouch at 8-12.

<sup>52</sup> TRA's legal position does not help it in any event. Even if Section 202(a) did apply, that provision only prohibits "*unreasonable*" discrimination. A reciprocal roaming arrangement is not "like" a non-reciprocal roaming arrangement, and therefore it is *not* unreasonable to impose different charges for reciprocal and non-reciprocal arrangements.

<sup>53</sup> TRA at 3.

<sup>54</sup> *Id.*

roaming service.<sup>55</sup> In addition, as recent experience confirms, carriers are discovering that it is in their mutual interest to lower their respective roaming charges, because lower charges result in increased usage, thereby providing increased revenues for all carriers involved.<sup>56</sup> Both operators offering lower rates are advantaged in roaming contracts.<sup>57</sup> Thus, the problem which TRA's proposal attempts to solve does not exist.

Third, TRA asserts (without explanation) that resellers "need" the ability "to obtain their own roaming arrangements directly from carriers in distant markets."<sup>58</sup> This "need" is not apparent because resellers generally receive the benefit of any roaming arrangements executed by their underlying facilities-based carriers. Through these "piggyback-type" arrangements resellers are able to secure a better roaming price because the price is based not only on the reseller's minutes but also the minutes of its underlying facilities-based carrier.<sup>59</sup> In any event, if resellers do not like the roaming arrangements which have been executed, they have the same options available to all consumers: use another home carrier.

---

<sup>55</sup> As AirTouch and others have noted, carriers often "buy-down" or increase the roaming charges the providing carrier imposes on the home carrier.

<sup>56</sup> See *Second Annual CMRS Report to Congress*, 12 FCC Rcd 11266, 11284-85 (1997).

<sup>57</sup> Again, this benefit applies *only* in connection with out-of-market roaming arrangements between carriers. See discussion *supra*.

<sup>58</sup> TRA at 8.

<sup>59</sup> Moreover, if there truly were a "need" for direct roaming/reseller arrangements of the type advocated by TRA, the market would ordinarily meet this need. The fact such agreements have not been executed in the past suggests either that the alleged "need" does not exist, or that resellers are unwilling to pay prices which would make it attractive for facilities-based carriers to enter into such arrangements.

Fourth, AirTouch cannot share TRA's undocumented optimism that "[t]echnically, it would appear to be relatively simple to implement [TRA's] concept."<sup>60</sup> It is not at all clear that it would technically be possible for resellers to execute separate roaming contracts because, to the distant carriers, the reseller's customers today appear to be customers of its underlying facilities-based carrier. One thing is clear: it would be administratively and financially burdensome for facilities-based carriers to make and update the modifications TRA seeks (including unspecified billing and call-tracking capabilities), and these increased costs would result in increased prices to reseller-only roaming agreements.

Finally, the Commission has determined that government-mandated resale requirements are unnecessary when multiple CMRS networks are operational — because competition “will obviate the need for a resale rule.”<sup>61</sup> Nextel notes that its enhanced SMR system is operational in “some 400 cites nationwide,”<sup>62</sup> and PCIA notes multiple broadband PCS systems are already operational in over 200 markets.<sup>63</sup> Given the extensive facilities-based competition which exists today, coupled with the fact that this competition will further intensify as C, D, E, and F block licensees continue to build their networks, now is not the time to expand the scope of the resale rule.

---

<sup>60</sup> *Id.* at 11.

<sup>61</sup> *See CMRS Resale Order*, 11 FCC Rcd 18455, 18468-69 ¶ 24 (1996).

<sup>62</sup> *See* Nextel at 3.

<sup>63</sup> *See* PCIA at 3.

#### **IV. Assuming *Arguendo* That Regulation Were Appropriate, A Five-Year Sunset Is Much Too Long**

Finally, the Commission has proposed that, if mandatory facilities-sharing is warranted, the requirement should sunset “five years after we award the last group of initial licenses for currently allocated broadband PCS spectrum.”<sup>64</sup> The Commission has explained that once PCS licensees have met their five-year build out requirement — one-third of POPs for 30 MHz licensees, and one-fourth of POPs for 10 MHz licensees<sup>65</sup> — “sufficient wireless capacity will be available in the market and, as a result, any roaming regulations, whether manual or automatic, likely will become superfluous.”<sup>66</sup>

The problem with this analysis is that few PCS licensees wait five years to meet their five-year build out requirement. Experience has taught that many PCS licensees meet their five-year build out requirement at the time they commence service. To ignore this reality and to apply instead a rigid five-year deadline would result in costly and burdensome regulations being in place far longer than even the Commission acknowledges is warranted.

#### **CONCLUSION**

In establishing what is now the broadband CMRS industry over 15 years ago, the Commission made a policy judgment to rely generally on market forces in lieu of regulatory intervention. Congress endorsed this market-based policy in both the 1993 and the 1996

---

<sup>64</sup> *Automatic Roaming NPRM*, 11 FCC Rcd at 9479 ¶ 32.

<sup>65</sup> *See* 47 C.F.R. § 24.203.

<sup>66</sup> *Id.* Only one commenter, TRA, opposes a sunset on the unexplained and undocumented ground that sunset requirements of the type commonly used by Congress and federal agencies are “of questionably legality.” TRA at 7.

amendments to the Communications Act. History has confirmed the validity of the Commission's early judgment. The CMRS industry has enjoyed incredible success, and the wide availability of automatic roaming agreements, coupled with decreased roaming prices, is one of the success stories of the industry.

The Commission concluded 18 months ago that there was “no specific evidence in the record of unreasonable discrimination against PCS licensees concerning the provision of [automatic] roaming.”<sup>67</sup> The only specific evidence that has now been introduced in this proceeding is that PCS licensees have entered into numerous automatic roaming agreements, including agreements with incumbent cellular carriers — at a more rapid pace than the cellular industry was able to conclude such agreements. The marketplace is working, and there is no need, much less a compelling need, for Commission intervention now.

Finally, under no circumstances should the Commission take the step of requiring one competitor to share its facilities with its direct, in-market competitors in the competitive CMRS marketplace. Such a requirement would be inconsistent with settled law, public policy,

---

<sup>67</sup> *Automatic Roaming NPRM*, 11 FCC Rcd at 9474 ¶ 20.

and equity. And such a requirement would enable new entrants to harm incumbents to their own competitive advantage.

Respectfully submitted,

**AIRTOUCH COMMUNICATIONS, INC.**

A handwritten signature in black ink that reads "Kathleen Q. Abernathy". The signature is written in a cursive style with a horizontal line drawn across the middle of the name.

Kathleen Q. Abernathy  
David A. Gross  
AirTouch Communications, Inc.  
1818 N Street, N.W.  
Washington, D.C. 20036  
(202) 293-3800

Its Attorneys

January 20, 1998