

cost of wireless local loop service is estimated to range from \$500 to \$1,000, and these figures are declining. By contrast, the costs of wireline telephone provisioning often run as high as \$2,500 per line.<sup>42</sup>

The cost savings and relative ease of deployment of wireless local loop services keenly situate these offerings for the effective delivery of advanced telecommunications capability in accordance with Section 706. LMDS, for example, offers a low-cost alternative to fiber in the race to deliver digital broadband data (including Internet access) and telephony services to business and residential consumers. Indeed, one of the most attractive features of LMDS is the fact that it permits broadband access to end users without the need for copper or cable-based facilities covering the “last mile.” Similar advantages can be expected at 39 GHz, as well as other spectrum homes suitable for the provision of wireless local loop service.<sup>43</sup>

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<sup>42</sup> Patrick Flanagan, *This Year's 10 Hottest Technologies in Telecom: Industry Trend or Event*, Telecommunications, May 1998, ¶ 17.

<sup>43</sup> In a number of contexts, the Commission and members of the staff have underscored the competitive potential of wireless local loop services vis-à-vis wireline local exchange offerings and stressed the importance of facilitating the development of wireless local loop alternatives. *See, e.g., CMRS Flex First Report and Order and Further Notice*, at 8967. *See also* FCC News Release, “Wireless Bureau Chief David Phythyon Hails Success of Market-Based Spectrum Policies” (rel. Sept. 11, 1997) (citing as an accomplishment the Commission’s rule changes permitting commercial mobile radio service providers to offer fixed wireless services on a co-primary basis with mobile services and underscoring that these offerings are particularly focused on the provision of wireless local loop services that could provide direct competition to traditional landline service); Remarks of Michele C. Farquhar, Former Chief of the FCC’s Wireless Telecommunications Bureau, Before the Metropolitan Washington Council of Governments (rel. Aug. 2, 1996) (stressing the competitive potential of wireless local loop services). *See also* Remarks of Commissioner Susan Ness Before the Economic Strategy Conference, Washington, D.C. (rel. Mar. 5, 1998) (“Congress clearly hoped that new entrants would construct their own infrastructure, over time, using the cable plant, wireless local loop, or even partnerships with electric companies.”). *See also* Introductory Remarks of Michele C. Farquhar, Former Chief of the FCC’s Wireless Telecommunications Bureau, at the Public Forum on Wireless Facilities Siting Issues, at 2 (rel. Feb. 12, 1997) (noting that wireless local loop services enable members of the public “to rapidly get basic telephone service to their private residences . . . instead of waiting for the local exchange carrier to lay wire”).

Analysts predict that wireless local loop services will be deployed primarily as office solutions, permitting members of the workforce to be reached anytime over a portable handset anywhere within the coverage area. When the user leaves the coverage area, the handset will continue to function by being handed off to a public wireless carrier.<sup>44</sup> In residential areas, wireless local loop service is being marketed as an alternative to wire-based telephone service with increased bandwidth to support data applications.<sup>45</sup> Although most carriers and regulators envision wireless local loop as a replacement for traditional wireline service, these offerings also have significant potential as a complement to existing copper loops, particularly in rural environments or in those instances where copper wiring has decayed and refurbishment of existing copper systems is cost-prohibitive.

**E. Third Generation Mobile Wireless Systems Present Significant Potential Advanced Telecommunications Capabilities**

Third Generation (“3G”) mobile systems are characterized by high-speed, high-bandwidth services that support a variety of applications ranging from toll quality voice services to phase II services (large video and data file transfers and high-fidelity and high-resolution video with transfer rate ranges from 2 to 10 Megabits per second (“Mbps”). Increasingly, users of wireless systems desire not only voice communications, but also applications such as accessing local area networks (“LANs”), Internet access, video conferencing, and the ability to send and retrieve high-quality pictures. As discussed above, the existing capabilities of wireless networks must be

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<sup>44</sup> Flanagan, ¶ 18.

<sup>45</sup> *Id.*

improved in order to facilitate high-quality, high-speed functions of this nature – a process that is already underway.

Future developments in existing wireless systems are expected to permit digital networks to handle circuit and packet switched services at rates of up to 384 kilobits per second (“kbps”). This compares favorably with existing wired services that deliver Internet access at 56 kbps. To develop advanced services and technology capability fully, however, wireless networks must be able to deliver data at a rate of 2 to 10 Mbps. Just as analog cellular was considered the first generation of wireless systems, and digital cellular and PCS are considered the second, these new requirements are referred to as the “third generation” wireless system requirements.

In recognition of growing consumer demand for mobile computing and other advanced offerings, such as CD quality sound delivery, interactive news, and distance learning capabilities, wireless equipment manufacturers and service providers have begun the process of determining the 3G standards for radio networks and other infrastructure. Third generation system goals are still being discussed, but currently include the following:

- ◆ high voice quality comparable to wireline services;
- ◆ high security comparable to the fixed telecommunications network;
- ◆ a phased approach for data rates up to 10 Mbps for local or slow-moving access and 384 kbps for wide area access;
- ◆ support for several simultaneous connections, so, for example, a user can browse the Internet at the same time as making a telephone call to a different destination;
- ◆ a common infrastructure to support multiple public/private/residential operators in the same locality;
- ◆ interconnection to other mobile or fixed users;
- ◆ national and international roaming;
- ◆ ability to handle packet and circuit switched services, including Internet and video conferencing;
- ◆ high spectral efficiency;
- ◆ co-existence and interconnection with satellite-based services; and
- ◆ new charging mechanisms related to data volumes, quality of service, and time, rather than distance.

International discussions among manufacturers and wireless service providers, aimed at ensuring that wireless networks of the future will be interoperable, are ongoing. Through the International Telecommunications Union (“ITU”), the wireless industry is working toward the adoption of a “family” of 3G standards that is inclusive of varying technologies and platforms, best enabling existing systems to operate with the next generation of wireless standards.<sup>46</sup>

**IV. UNDER WELL SETTLED PRECEDENT, THE FCC HAS JURISDICTION OVER FIXED AND MOBILE WIRELESS SERVICES, INCLUDING WIRELESS OFFERINGS THAT FALL WITHIN THE DEFINITION OF “ADVANCED TELECOMMUNICATIONS CAPABILITY”**

PCIA recognizes that Section 706(a) mandates cooperation between the Commission and state regulators in promoting the availability of advanced services. For purposes of Section 706, however, the FCC must recognize that it has *jurisdiction* over mobile and fixed wireless services, including CMRS and LMDS offerings, even if it should not prove necessary to exert that jurisdiction.

As described in PCIA’s comments and reply comments filed in the course of the Commission’s *CMRS Flex* proceeding, in the case of offerings classified as CMRS, this federal jurisdiction stems from three sources: Section 332(c) of the Communications Act, the inseverability doctrine, and Section 253 of the Communications Act.

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<sup>46</sup> The *NOI* asks whether the optimism expressed by many companies regarding plans in the near term to deploy advanced technologies is realistic. As a general matter, at least with respect to wireless advances, the answer is yes. While it is always difficult to predict with precision when the development of an innovation will be complete to the point of commercial deployment, the progress that is being made is real, and the pace of development is rapid.

First, under Section 332(c), and its conforming amendment to Section 2(b),<sup>47</sup> “no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . . .”<sup>48</sup> Congress determined that this broad grant of federal jurisdiction was necessary to provide a uniform regulatory framework for all CMRS offerings, which, “by their nature, operate without regard to state lines . . . .”<sup>49</sup> Thus, Section 332(c) creates a “[f]ederal regulatory framework governing the offering of all commercial mobile service.”<sup>50</sup> The 1996 Act explicitly preserves Section 332(c)’s preemption provisions.<sup>51</sup>

The Commission’s decision to permit CMRS licensees to offer fixed, mobile, and hybrid services on their assigned spectrum was premised on the agency’s authority under Section 332(c). Congress’s mandate that the Commission encourage “the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans”<sup>52</sup> is similarly consistent with the establishment of a federal regulatory framework to govern fixed and mobile wireless services. The wireless industry has become accustomed to and has flourished under the regulatory paradigm set forth in Section 332(c). As wireless providers begin to offer more advanced

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<sup>47</sup> “*Except as provided in . . . section 332 . . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction . . . with intrastate communication service.*” 47 U.S.C. § 152(b) (emphasis added).

<sup>48</sup> 47 U.S.C. § 332(c)(3).

<sup>49</sup> H.R. Rep. No. 103-111, at 260 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 587.

<sup>50</sup> H.R. Rep. No. 103-213, at 490 (1993), reprinted in 1993 U.S.C.C.A.N. 1088, 1179.

<sup>51</sup> See 47 U.S.C. § 253(e) (“[n]othing in this section shall affect the application of section 332(c)(3) . . . to commercial mobile service providers”).

<sup>52</sup> 47 U.S.C. § 706(a).

telecommunications capabilities, on either a fixed or a mobile basis, sound policy calls for the continuation of this regulatory scheme.

Second, under the inseverability doctrine set forth in *Louisiana PSC v. FCC*,<sup>53</sup> because “it is not possible to separate the interstate and intrastate components” of wireless regulation, federal regulation of fixed and mobile wireless services must preempt state law.<sup>54</sup> In particular, there are a number of technical and economic reasons why the interstate and intrastate components of the regulation of wireless services are inseparable.

Foremost among these is the fact that wireless service areas – including Major Trading Areas for broadband PCS,<sup>55</sup> the Department of Commerce’s Economic Areas for wide-area SMR systems,<sup>56</sup> and Basic Trading Areas (“BTAs”) for LMDS<sup>57</sup> – were drawn without regard to state

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<sup>53</sup> 476 U.S. 355 (1986) (“*Louisiana PSC*”)

<sup>54</sup> *Id.* at 376 n.4 (emphasis omitted). See also *Public Service Commission of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990) (based on inseverability, FCC has the power to preempt state regulation of the fees charged by LECs to discontinue interstate *and* intrastate telephone service); *Public Utility Commission of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989) (state regulations limiting the ability of private microwave network users to interconnect to the LEC of their choice preempted based on inseverability); *Illinois Bell Telephone Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989) (state regulations denying independent vendors the opportunity to market their customer premises equipment along with Bell Operating Company Centrex services preempted based on inseverability); *People of the State of California v. FCC*, 75 F.3d 1350 (9<sup>th</sup> Cir.) (state regulations concerning per line blocking of caller ID services preempted based on inseverability), *cert denied*, 517 U.S. 1216 (1996).

<sup>55</sup> *Amendment of the Commission’s Rules to Establish New Personal Communications Services*, 8 FCC Rcd 7700 (1993) (Second Report and Order).

<sup>56</sup> *Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of an SMR System in the 800 MHz Frequency Band*, 11 FCC Rcd 1463 (1996) (Eighth Report and Order and Second Further Notice of Proposed Rule Making).

<sup>57</sup> Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, 12 (Continued...)

boundaries, based on the needs of the marketplace. Given these interstate service areas, wireless carriers have no reason to monitor the jurisdictional nature of each call. Moreover, even if it were technically possible to engage in such a classification of calls, it would be prohibitively expensive to do so.

Third and finally, state regulation of fixed and mobile wireless offerings could violate the pro-competitive purpose of Section 253 of the Communications Act. Section 253 prohibits states from erecting “barriers to entry” into the telecommunications market by forbidding the promulgation of legal requirements that “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>58</sup> Both fixed and mobile wireless operators are protected by this provision. With regard to LMDS providers, the FCC has specifically indicated that it will, pursuant to Section 253(a) of the Act, preempt state barriers to entry.<sup>59</sup>

## **V. CERTAIN REGULATIONS ACT AS BARRIERS TO THE EFFECTIVE PROVISION OF ADVANCED TELECOMMUNICATIONS CAPABILITY BY WIRELESS OPERATORS**

PCIA now responds to the Commission’s request for comment concerning regulatory barriers that stand in the way of greater use of wireless spectrum, in both fixed and mobile applications, for advanced telecommunications capability and services.<sup>60</sup> PCIA submits that the

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(...Continued)

FCC Rcd 12545, 12604 (1997) (Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking) (“*LMDS Second Report and Order*”).

<sup>58</sup> 47 U.S.C. § 253(a).

<sup>59</sup> *LMDS Second Report and Order*, at 12702.

<sup>60</sup> *NOI*, ¶ 50.

regulatory requirements identified below are unnecessary in today's competitive wireless marketplace and serve no valid purpose. In addition, each of these requirements results in compliance and other costs that divert resources from the construction of system infrastructure and frustrate deployment of advanced telecommunications capabilities. As such, these are precisely the sort of regulatory barriers that Section 706, and other statutory provisions such as Sections 10 and 11 of the Communications Act, direct the Commission to remove.

**A. A Number of Existing Administrative Regulations Applicable to Wireless Services Raise Costs, Create Delays, and Impede Competition**

On July 31, 1998, in an *ex parte* filing submitted in the Universal Licensing System proceeding,<sup>61</sup> PCIA identified 71 administrative regulations that should be eliminated or streamlined in accordance with Section 11 of the Communications Act.<sup>62</sup> Section 11 requires the Commission to review the regulations applicable to providers of telecommunications services and to determine whether any rule is no longer in the public interest as a result of meaningful economic competition in the telecommunications marketplace.<sup>63</sup> PCIA submits that the regulatory requirements described in its *ex parte* submission impose unnecessary costs and burdens on the wireless industry that, in conjunction with other regulatory requirements, could deter effective deployment of advanced telecommunications capability. Consistent with the mandate of Section

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<sup>61</sup> See PCIA Letter to Mr. Daniel B. Phythyon, "Section 11 Wireless Telecommunications Bureau Biennial Review – Removal or Streamlining of Regulations" (filed July 31, 1998). See also *Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services*, 13 FCC Rcd 9672 (1998) (Notice of Proposed Rule Making).

<sup>62</sup> 47 U.S.C. § 161.

<sup>63</sup> *Id.*

706, PCIA urges the Commission promptly to remove these barriers to the development of competition and investment in system infrastructure.

**B. The FCC's Regulations Implementing Certain Statutory Requirements Are Unnecessary, Result in Increased Costs and Delays, and Impede Competition**

On May 22, 1997, PCIA filed a Petition for Forbearance in accordance with Section 10 of the Communications Act,<sup>64</sup> seeking forbearance from continued enforcement of several statutory provisions, at least as applied to broadband PCS operators.<sup>65</sup> In particular, PCIA sought forbearance from the CMRS resale rule codified at 47 C.F.R. § 20.12(b), and from Sections 201 and 202, 214, 226 (the Telephone Operator Consumer Services Improvement Act ("TOCSIA")), and 310(d). In its Petition, PCIA demonstrated that the level of competition in the wireless marketplace renders continued enforcement of these requirements unnecessary and inappropriate under the standard set forth in Section 10.

In a Memorandum Opinion and Order issued February 4, 1998, the Commission granted in part that portion of PCIA's Petition concerning the requirements of Section 310(d) as applied to *pro forma* assignments of licenses and transfers of control of wireless licensees.<sup>66</sup> The

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<sup>64</sup> *Id.*, § 160.

<sup>65</sup> Broadband Personal Communications Services Alliance of the Personal Communications Industry Association Petition for Forbearance (filed May 22, 1997).

<sup>66</sup> *Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers*, 13 FCC Rcd 6293 (1998) (Memorandum Opinion and Order).

Commission issued a second order on July 2, 1998, granting in part and denying in part the remainder of PCIA's Petition.<sup>67</sup>

In the July 2nd order, the Commission declined to forbear from enforcing Sections 201 and 202, the international authorization requirement of Section 214, and the CMRS resale rule. The Commission granted partial forbearance from the requirement that CMRS providers file tariffs for their international services and from Section 226 as applied to CMRS providers of operator services and aggregators.<sup>68</sup> In a Notice of Proposed Rule Making issued as part of its decision, the Commission solicited comment on further forbearance from various aspects of TOCSIA and its implementing regulations. The Commission also issued a separate Notice of Proposed Rule Making seeking comment on further forbearance or streamlining of various requirements stemming from Section 214.<sup>69</sup>

As outlined in its comments responding to the Commission's Notice of Proposed Rule Making concerning further forbearance from TOCSIA and its implementing regulations, PCIA strongly urges the Commission to forbear from imposing the remaining TOCSIA obligations on CMRS carriers acting as operator service providers.<sup>70</sup> In its comments, PCIA demonstrates that

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<sup>67</sup> *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services*, FCC 98-134 (combining dockets: WT Docket No. 98-100, GN Docket No. 94-33, MSD-92-14) (rel. July 2, 1998) (Memorandum Opinion and Order and Notice of Proposed Rule Making).

<sup>68</sup> With respect to Section 226, the Commission decided to forbear from applying the unblocked access requirements to CMRS aggregators and operator service providers ("OSPs") and from the requirement that CMRS OSPs file informational tariffs. *Id.*, ¶¶ 75-85.

<sup>69</sup> *1998 Biennial Regulatory Review – Review of International Common Carrier Regulations*, IB Docket No. 98-118, FCC 98-149 (rel. July 14, 1998) (Notice of Proposed Rule Making).

<sup>70</sup> Comments of the Personal Communications Industry Association, WT Docket No. 98-100 (filed Aug. 3, 1998).

forbearance from enforcement of these obligations as applied to CMRS OSPs is required under Section 10 because the regulations in question are neither necessary to ensure that rates and practices are just, nor are they needed for the protection of consumers. Furthermore, PCIA's comments show that continued application of TOCSIA requirements to CMRS OSPs disserves the public interest by creating consumer confusion, generating substantial compliance costs with little or no offsetting benefits, and endorsing bad precedent through the continued application of rules that make no sense in the CMRS context.

Likewise, in its comments in IB Docket No. 98-118, PCIA demonstrates that forbearance from enforcement of the international Section 214 authorization requirements as applied to CMRS operators serving unaffiliated markets is necessary and appropriate.<sup>71</sup> As outlined in PCIA's comments, competition in the international marketplace will ensure that rates and practices are just, reasonable, and not unreasonably discriminatory, and will safeguard consumers' interests. Simply put, CMRS operators serving unaffiliated markets do not raise any anticompetitive threat; consequently, imposition of Section 214 requirements on these operators is unnecessary and does not serve any valid purpose. Enforcement of the Section 214 requirements does, however, hamper competition, delay the introduction of new services, and place unnecessary burdens on CMRS carriers and the FCC staff.

For similar reasons, PCIA demonstrates in its comments that the Commission should forbear from enforcing the Section 214 authorization requirements as applied to CMRS providers that resell the long distance services of unaffiliated U.S. carriers to affiliated routes. Because these

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<sup>71</sup> Comments of the Personal Communications Industry Association, IB Docket No. 98-118 (filed Aug. 13, 1998).

providers lack control over underlying facilities and, therefore, cannot engage in anticompetitive behavior, imposition of Section 214 requirements on them is wholly unnecessary.

Finally, PCIA is seeking reconsideration of the Commission's decision declining to forbear from enforcement of the CMRS resale rule.<sup>72</sup> In its reconsideration petition, in addition to showing that the Section 10 test for forbearance has been satisfied, PCIA points out that market forces are already producing all of the public interest benefits cited by the Commission as reasons warranting retention of the resale rule. PCIA further demonstrates that continued enforcement of the resale rule creates substantial compliance costs for CMRS operators, causes confusion among resellers and CMRS operators, interferes with the negotiation of contracts in the free market, and chills innovative pricing schemes.<sup>73</sup>

In short, each of the requirements outlined above – TOCSIA, Section 214, and the CMRS resale rule – is a classic example of a regulatory burden that has imposed substantial costs on wireless service providers without producing any corresponding benefit. PCIA submits that these regulations are precisely the type of impediment that Section 706 seeks to eliminate by directing the Commission to use “regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”

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<sup>72</sup> See The Broadband Personal Communications Services Alliance of the Personal Communications Industry Association, Petition for Reconsideration, WT Docket No. 98-100 (filed Sept. 10, 1998).

<sup>73</sup> *Id.*, at 18.

**C. The Commission's New CPNI Rules Present a Barrier to the Development of Wireless Advanced Telecommunications Capability**

Certain policies adopted in the Commission's *Second CPNI Order*<sup>74</sup> make it more difficult for wireless providers to offer advanced telecommunications services because these policies upset the wireless industry's well-established marketing practices.<sup>75</sup> Three requirements in particular will retard wireless advanced telecommunications capabilities by placing severe restrictions on the use of CPNI to: (1) market the customer premises equipment ("CPE") required for advanced wireless offerings; (2) win back customers who have terminated service; and (3) market the information services that form an integral part of advanced wireless capabilities.

First, the CPE restrictions negatively impact one-stop shopping critical to the successful marketing of wireless services. Customers expect wireless carriers to offer the convenience of one-stop-shopping for services and the CPE necessary to access those services.

Further, due to the highly competitive and rapidly evolving nature of the wireless marketplace, wireless customers, unlike landline customers, have had little occasion to develop "brand loyalty." Wireless customers are often willing to sign up for a new carrier's product if the price is better or the service is more innovative. Sensing this, CMRS providers are constantly advertising new and better products, including other services, in an effort to capture another carrier's customers. To survive in this environment, wireless providers have developed marketing

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<sup>74</sup> Implementation of the Telecommunications Act of 1996: *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, 13 FCC Rcd 8061 (1998) (Second Report and Order and Further Notice of Proposed Rule Making), *recon. pending*.

<sup>75</sup> See Petition for Forbearance of the Personal Communications Industry Association, CC Docket No. 96-115 (filed June 29, 1998); see also Petition for Reconsideration of the Personal Communications Industry Association, CC Docket No. 96-115 (filed May 26, 1998).

programs that present existing customers with the “latest and greatest” advanced service offerings as soon as they become available. As members of a highly competitive industry that affords no opportunities for misdirected marketing programs, it is crucial that wireless providers be permitted to use CPNI so that they may market their offerings effectively.

Second, the anti-win back rule will limit wireless carriers’ ability to win back lost business through the offering of advanced services and/or lower rates to former customers. Indeed, it is the essence of a competitive market for a carrier to meet or beat a competitor’s offering to win back a customer. Ironically, the anti-win back rule disadvantages consumers by impairing their ability to gain access to information regarding top-of-the-line services or lower rates offered by their former carriers. Additionally, the anti-win back rule has no basis in the 1996 Act and may very well be inconsistent with that provision of the Act allowing the use of CPNI to render service to customers.<sup>76</sup>

Finally, the Commission should forbear from enforcing its CPNI rules to the extent that they forbid the marketing of information services integral to advanced wireless capabilities and services with which they are combined. In the wireless context, such information services are nearly indistinguishable from underlying telecommunications services, and consumers expect these services to be offered as a complete package. In addition, because these new and innovative service offerings are among the most popular wireless products on the market today, joint marketing of information services and advanced wireless services should be encouraged as consistent with the pro-competitive intent of the 1996 Act. Unfortunately, the Commission’s

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<sup>76</sup> See 47 U.S.C. § 222(d)(1).

rules, as currently drafted, will promote consumer confusion and inconvenience that will damage the ability of the wireless industry to market these new, advanced products.

**D. The FCC's Rate Integration Rules Constitute Barriers to the Effective Provision of Advanced Telecommunications Services by CMRS Operators**

The CMRS industry is also burdened by the Commission's rate integration rules.<sup>77</sup> For the first time ever and with no explanation, the Commission last year determined that CMRS providers are subject to its rate integration requirements.<sup>78</sup> Under these rules, CMRS providers must integrate their interstate, interexchange rates for CMRS services across affiliates.<sup>79</sup> The record in the Commission's rate integration proceeding firmly establishes that such requirements are wholly unnecessary in the wireless context. Moreover, the record demonstrates that serious unanticipated consequences and practical difficulties arise from applying these rules to CMRS providers. For example, the Commission's rules effectively would require all CMRS carriers that are commonly owned or controlled (which is a large percentage of the industry) to agree to charge the same price in every state for each interstate, interexchange service they offer. Such coordinated pricing creates antitrust exposure and certainly cannot be what Congress intended. In addition, imposing rate integration obligations on CMRS providers threatens to eliminate wide-

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<sup>77</sup> See 47 C.F.R. § 64.1801.

<sup>78</sup> See *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, 12 FCC Rcd 11812, 11821 (1997) (First Memorandum Opinion and Order on Reconsideration) ("First MO&O").

<sup>79</sup> *Id.* The Commission's rate integration rules are currently the subject of a number of pending petitions for reconsideration and forbearance filed in October 1997. The parties seeking reconsideration or forbearance include PCIA, Bell Atlantic Mobile, Inc., BellSouth Corporation, the Cellular Telecommunications Industry Association, and PrimeCo Personal Communications, L.P.

area local calling plans<sup>80</sup> and leads to ambiguity regarding the types of CMRS rates that must be integrated.<sup>81</sup>

Recognizing the significant burdens and complexities associated with applying its rate integration rules to CMRS providers, the Commission granted a limited stay of its rules pending reconsideration.<sup>82</sup> Although the pending stay offers some temporary relief to CMRS providers, it does not go far enough. As the record demonstrates, there is substantial evidence that the Commission's rate integration rules: (1) should never have been applied to CMRS carriers; (2) result in absurd and anticompetitive results; (3) impose unnecessary costs on carriers; and (4) diminish consumer choice. The Commission's continued desire to regulate an already competitive market makes no sense and does nothing more than threaten to stifle growth in a market characterized by increased service offerings and declining prices.

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<sup>80</sup> Under these plans, customers are permitted to extend their local toll-free calling area to larger or multi-state regions.

<sup>81</sup> In the CMRS industry, interstate rates (other than local calling options) typically include two rate elements, toll and airtime charges. Airtime charges often vary from market to market. Even if the Commission were to require the integration of interstate toll charges, customers in different geographic markets would still pay different rates for interexchange calls because of varying airtime charges. The Commission has yet to offer any guidance on this matter. In addition, there has been no guidance on whether roaming charges would have to be integrated with the rates of the roamed-upon system or those of the home system.

<sup>82</sup> See *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, 12 FCC Rcd 15739 (1997) (Order). The Commission suspended enforcement of the requirement that CMRS providers integrate rates across affiliates and stayed application of the rate integration rules to wide-area rate plans.

**VI. THE COMMISSION SHOULD BREAK DOWN REGULATORY BARRIERS CAUSED BY CONSTRAINTS ON ACCESS TO ESSENTIAL SITES AND INTERCONNECTION RIGHTS**

PCIA urges the Commission to use its Section 706 authority to break down regulatory barriers that constrain facility siting and interconnection rights for wireless carriers. In order for wireless carriers to compete with other telecommunications carriers in the provision of advanced telecommunications capability and services, a number of regulatory roadblocks must be removed. These include lack of access to the sites necessary to construct wireless facilities, right-of-way fees and restrictions that discriminate against wireless carriers, and interconnection policies that do not afford wireless providers the same rights as wireline carriers.

One of the most intractable regulatory issues faced by the wireless industry is the existence of a complex web of state and local statutes and regulations that effectively prevent wireless carriers from constructing the antennas and transmitters necessary to provide advanced wireless services. This problem is particularly acute for PCS carriers, who must construct their entire digital network from scratch. Cellular carriers are also adversely affected as they attempt to construct the infrastructure necessary to convert their systems from analog to digital technologies.

State and local barriers to the construction of wireless infrastructure generally take two forms: outright bans on tower construction, which may be of definite or indefinite duration, and restrictions on radiofrequency ("RF") emissions that are more stringent than those required by federal law. In enacting Section 332(c)(7) of the Communications Act, Congress intended to preempt both of these types of provisions. In particular, Section 332(c)(7) prohibits tower siting regulations that: (1) unreasonably discriminate among providers of functionally equivalent

services;<sup>83</sup> (2) prohibit or have the effect of prohibiting the provision of personal wireless services;<sup>84</sup> or (3) prescribe limitations on radio frequency emissions that exceed the federal RF standards.<sup>85</sup> States and localities are further required to produce substantial evidence and a written record supporting any decision denying an entity the right to construct a personal wireless service facility.<sup>86</sup>

Unfortunately, the relief that Congress intended through the passage of Section 332(c)(7) has yet to be realized. Rather than opening the door to the construction of wireless infrastructure, the statute has become the subject of a seemingly endless cycle of litigation. The inconsistent outcomes of these cases – some of which favor the wireless industry,<sup>87</sup> and some of which favor states and localities<sup>88</sup> – have made the tower siting process increasingly uncertain for wireless

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<sup>83</sup> 47 U.S.C. § 332(c)(7)(B)(i)(I).

<sup>84</sup> *Id.*, § 332(c)(7)(B)(i)(II).

<sup>85</sup> *Id.*, § 332(c)(7)(B)(iv).

<sup>86</sup> *Id.*, §§ 332(c)(7)(B)(ii), (iii).

<sup>87</sup> See, e.g., *Sprint Spectrum L.P. v. Town of Farmington*, 1997 WL 631104 (D. Conn. 1997) (by prohibiting Sprint from constructing a telecommunications facility or even submitting an application for approval for 270 days, a local moratorium unreasonably delayed consideration of Sprint's implementation requests and effectively prohibited wireless telecommunications services); *Smart SMR of New York, Inc. v. Zoning Comm'n of Town of Stratford*, 995 F. Supp. 52 (D. Conn. 1998) (ordinance generally disfavoring approval of placing personal wireless service facilities in residential zones has the effect of prohibiting the provision of personal wireless services).

<sup>88</sup> See, e.g., *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 1998 U.S. App. LEXIS 21367 (4<sup>th</sup> Cir. 1998) (reversing district court decision in favor of wireless carriers based on alleged violation of Section 332(c)(7) and granting summary judgment in favor of city council in case involving council decision denying application to construct communications towers in a residential area); *Cellco Partnership v. Russell*, 1998 U.S. Dist. LEXIS 11639 (granting local government summary judgment in action challenging moratorium and tower ordinance, and finding that the reservation of local regulatory authority contained in Section 332(c)(7) indicates an intent that the limitations on that power not be given an overly expansive construction by the courts); *Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036 (W.D. Wa. 1996) (*bona fide* moratoria of limited duration are not actionable); *AT&T Wireless Servs., Inc. v. Orange County*, (Continued...)

operators. This uncertainty, in turn, makes it extremely difficult for wireless carriers to make rational business decisions concerning the commitment of resources necessary to construct system infrastructure.

The Commission has instituted a number of proceedings,<sup>89</sup> and issued a number of advisory opinions,<sup>90</sup> intended to clarify the meaning of Section 332(c)(7). The most recent action is the Consensus Agreement brokered by the FCC's Local and State Government Advisory Committee ("LSGAC") between the wireless industry and state and local governments. Pursuant to this agreement, wireless carriers and local governments have agreed: (1) to work cooperatively to

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994 F. Supp. 1422, 1431 (1997) (denial of tower siting permit supported by substantial record evidence) (M.D. Fla. 1997) (denying relief to a wireless service provider under Section 332(c)(7)(B)(i)(II) because it could not demonstrate that the city council had a general bias against a communications tower in a residential area); *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732 (C.D. Ill. 1997) (taking six months to make a decision did not necessarily violate the Communications Act).

<sup>89</sup> See, e.g., *FCC Public Notice*, "Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling of 360° Communications Company," DA 97-2539 (Dec. 3, 1997); *FCC Public Notice*, "Commission Seeks Comment on Petition for Declaratory Ruling of the Cellular Telecommunications Industry Association," DA 96-2140 (Dec. 18, 1996); *FCC Public Notice*, "Supplemental Pleading Cycle Established for Comments on Petition for Declaratory Ruling of the Cellular Telecommunications Industry Association," FCC 97-264 (July 28, 1997); *Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934* (Second Memorandum Opinion and Order and Notice of Proposed Rule Making), 12 FCC Rcd 13494 (1997).

<sup>90</sup> See, e.g., Letter from Reed E. Hundt, Chairman of the FCC, to Honorable Susan Golding, Mayor of the City of San Diego, California, March 15, 1996 (advising the Mayor of San Diego that Section 332(c)(7) expressly preempts local government actions concerning the siting of wireless facilities that are in compliance with the Commission's RF guidelines); Letter from Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, to the Honorable Richard Hurt, Mayor of Bedford, Texas (released June 14, 1996) (advising that a local moratorium on tower construction is inconsistent with Section 332(c)(7) because it is based on the environmental effects of RF, and would ban facilities that comply with the Commission's RF regulations); Letter from Michele C. Farquhar, Chief, Wireless Telecommunications Bureau to Thomas E. Wheeler, President and CEO, Cellular Telecommunications Industry Association (released January 17, 1997) (state governments are not prevented from studying the effects of RF emissions but that siting decisions that are based upon the effects of RF emissions may be inconsistent with Section 332(c)(7)).

facilitate the siting of wireless facilities; (2) if a tower siting moratorium is adopted, to work together to resolve the issues necessary to lift the moratorium; (3) to ensure that tower siting applications continue to be processed during a moratorium; and (4) to participate in an informal dispute resolution process when moratoria or other delays adversely affect the siting of wireless facilities or when either industry members or local governments believe that the negotiation process has become unproductive.<sup>91</sup>

Despite the Commission's best efforts to date, there are still many state and local regulations that present barriers to the construction of wireless facilities. While the LSGAC Consensus Agreement is a promising start, wireless carriers are still in the untenable position of not knowing whether or when tower siting applications will be approved or disapproved, making it virtually impossible to construct a wireless network in an organized fashion. The Commission, the wireless industry, and state and local governments must continue their effort to find effective solutions that enable wireless carriers to develop infrastructure facilities necessary for the provision of ubiquitous, seamless nationwide coverage.

The Commission should also promote policies that preempt state and local laws that require a franchise or assess a franchise fee for use of rights-of-way from carriers that do not physically use these rights-of-way. One of the great advantages of wireless technologies is the fact that a wireless network can be constructed without having to tear up streets, highways, and bridges in order to bury cable. States and localities should not be permitted to negate this technological

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<sup>91</sup> See *FCC News Release*, "Chairman William E. Kennard Announces Historic Agreement by Local and State Governments and Wireless Industries on Facilities Siting Issues" (Aug. 5, 1998).

advantage by requiring wireless carriers, who do not physically disturb rights-of-way, to pay right-of-way fees.

Similarly, the Commission should promote policies that allow carriers equal and non-discriminatory rights to, and equal and non-discriminatory terms and conditions for, access to building rooftops, conduits, and inside wiring. By placing all telecommunications industry segments on equal footing, the Commission will help facilitate full and fair competition in the race to fulfill Congress's Section 706 mandate.

Finally, because access to the public switched network is essential to all carriers offering advanced telecommunications capability, the Commission should further promote and strictly enforce policies that ensure fair rates, terms, and conditions for interconnection with LEC facilities. At a minimum, the steps the Commission should take to facilitate fair and reasonable interconnection for wireless carriers include the following:

- ◆ Modify the formal complaint rules to provide explicitly that complaints filed against LECs alleging violations of interconnection obligations – regardless of whether the complaints arise under Sections 201, 202, 332, 252, or elsewhere – shall be subject to the five-month decision making timetable specified in Section 208(b) of the Act.
- ◆ Exercise its jurisdiction under Section 332 by ruling that terminating compensation paid by a LEC to a CMRS provider represents a rate charged by a CMRS carrier that is subject to federal (as opposed to state) authority.
- ◆ Confirm that the ruling in paragraph 1042 of the *Local Competition First Report* that LECs must, “effective immediately,” cease charging CMRS carriers for the portion of interconnection facilities used to deliver LEC-originated traffic for local termination, was intended to preempt inconsistent state tariffs.
- ◆ Act upon and grant the pending petitions for reconsideration filed by the wireless industry with respect to the *Local Competition First Report*.<sup>92</sup>

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<sup>92</sup> See, e.g., Comments of the Personal Communications Industry Association on Petitions for Reconsideration, CC Docket Nos. 96-98, 95-185 (filed Oct. 31, 1996) (supporting the Petition for Reconsideration and/or Clarification filed jointly by AirTouch Paging, Cal-AutoFone, and Radio (Continued...))

Thus, any advantages granted to broadband wireline technologies – including access to unbundled network elements and resale discounts – should extend to wireless carriers as well.<sup>93</sup>

## **VII. THE COMMISSION SHOULD ENDEAVOR TO REMOVE BARRIERS CAUSED BY THE IMPOSITION OF UNWARRANTED COSTS**

Wireless carriers confront significant barriers to deployment of advanced telecommunications capabilities resulting directly from never-ending costs imposed by federal, state, and local regulatory officials. These “costs” take the form of direct and indirect taxes, fees, and public policy assessments. For many governmental bodies, telecommunications providers generally and wireless service operators specifically are viewed as a source of significant funds – a veritable cash cow. To the extent these costs could be avoided, however, they represent a diversion of wireless carriers’ resources away from the expansion and enhancement of systems, the deployment of advanced telecommunications facilities, and successful competition with existing local exchange carrier offerings.

Wireless carriers confront general obligation taxes and charges as well as charges directly applied only to the wireless industry. For example, wireless carriers must pay franchise taxes,

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Electronic Products Corporation on Sept. 30, 1996, the Petition for Limited Reconsideration filed by Paging Network, Inc., on Sept. 30, 1996, and the Petition for Limited Reconsideration filed by Arch Communications Group, on Sept. 30, 1996, and opposing various requests for changes filed by local exchange carriers).

<sup>93</sup> The Commission should be guided by the leadership it has exerted in promoting interconnection between paging networks and LEC networks. In that context, the Commission has clearly ruled that paging providers must be compensated for terminating LEC-originated traffic, and has prohibited LECs from charging paging providers for the cost of LEC transmission facilities used on a dedicated basis to deliver to paging providers local telecommunications traffic that originates on the LEC network. *See Letter from Richard Metzger, Chief, Common Carrier Bureau to Mr. Davis, Ms. Abernathy, Ms. St. Ledger-Roty, Ms. Massey, and Mr. Stachiw*, 13 FCC Rcd 184 (1998).

corporate income tax, sales tax, and property tax — similar to many other businesses operating within the particular state boundaries. In some locations, wireless carriers may be required to pay fees to install antenna sites or simply to provide service to the public.

Beyond these taxes and related fees, wireless service providers must contribute to various regulatory funds, again at the federal, state, and even local level. Carriers likely are subject to fund obligations for 911 or E-911 operations, to support universal service objectives, and to fund the provision of telecommunications services to the deaf, hearing impaired, and other handicapped persons. Where carriers are permitted to do so, they may pass through the fund obligations to their customers. In the highly competitive wireless market, however, whether such obligations are collected directly or indirectly from subscribers, the imposition of these compounding federal, state, and local financial obligations impedes the effectiveness of CMRS competition as well as competition between CMRS and local exchange facilities. Moreover, diversion of funds into these multi-layered and duplicative payment programs means that funds are not available for the operator to use to expand and update its facilities as needed to offer a broad range of advanced telecommunications services.

Despite the adverse impact of these funding obligations, federal, state, and local officials continue to impose new requirements without regard to their effect, either considered individually or as part of the entire regulatory structure under which wireless carriers operate. PCIA believes it is critical for the Commission to promote policies that will reduce and remove direct and indirect taxes and fees that today increase consumers' wireless costs.

In a similar fashion, the Commission has adopted a number of regulatory regimes in recent years that are costly for the wireless industry. For example, number portability is a regulatory mandate that has consumed tremendous quantities of the wireless industry's resources.

Implementation of number portability has been costly in many ways. First, all telecommunications carriers – including wireless providers – must contribute a portion of their end user revenues to fund the regional databases required to implement number portability.<sup>94</sup> Second, in order to route calls from wireless customers to landline customers who have ported their numbers, wireless carriers must upgrade their networks to have the capability to query these number portability databases, or pay other carriers to perform these queries (or “database dips”), by December 31, 1998.<sup>95</sup> Finally, assuming the FCC does not forbear from imposing number portability obligations on wireless providers, by March 31, 2000, CMRS providers must: (1) offer service provider portability in the 100 largest MSAs, and (2) be able to support nationwide roaming.<sup>96</sup>

This last requirement is the most troublesome to the wireless industry because it will require drastic and expensive changes to wireless networks, including separating a mobile unit’s mobile directory number (“MDN”) from its mobile identification number (“MIN”).<sup>97</sup> While wireless carriers are permitted to recover from their customers any costs directly related to providing number portability, there is an upper limit to what customers will pay for wireless services, including advanced telecommunications capabilities.<sup>98</sup> The Commission should,

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<sup>94</sup> *Telephone Number Portability*, CC Docket No. 95-116, FCC 98-82, ¶¶ 105, 116 (May 12, 1998) (Third Report and Order) (“*Number Portability Third R&O*”).

<sup>95</sup> *Id.*, ¶ 18.

<sup>96</sup> *Id.*, n.66. See also *Telephone Number Portability*, CC Docket No. 95-116, DA 98-1763 (Sept. 1, 1998) (Memorandum Opinion and Order).

<sup>97</sup> See North American Numbering Council Local Number Portability Administration Working Group Report on Wireless Wireline Integration at 13-14 (May 8, 1998) (“*NANC Report*”).

<sup>98</sup> *Number Portability Third R&O*, ¶ 136.

therefore, carefully consider whether regulatory mandates such as number portability will drive the price of advanced wireless services beyond the reach of the average American consumer.

The Commission's pay telephone compensation decisions likewise have proved costly for wireless carriers.<sup>99</sup> The plan adopted by the Commission contemplates compensating payphone operators on a per-call basis. In the case of toll-free numbers dialed from a pay telephone, the long distance carrier must compensate the payphone provider; the long distance carrier, in turn, collects the fee from its customers, including CMRS operators. Some paging companies and other carriers that rely heavily on 800 numbers must find a means to collect this new amount, whether allocating the charges to the customer with whom the number is associated (assuming this is even possible) or generally raising the rates charged to all customers in order to recoup the additional charges. At its current rate of 28.4 cents, this charge is certainly significant, and risks altering the character of existing services that were purchased in many cases by consumers as flat rated, low-cost alternatives to other telecommunications offerings.

PCIA recognizes that the Commission is trying to balance a number of goals in the actions it takes in various rule making and application proceedings. Nonetheless, it is essential that the Commission give greater consideration to the effects of its regulatory and fee policies on the

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<sup>99</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541 (1996) (Report and Order), recon. granted in part, clarified *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 21233 (1996) (Order on Reconsideration), aff'd in part and vacated in part sub nom. *Illinois Public Telecommunications Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997). See also *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 13 FCC Rcd 1778 (1997) (Second Report and Order), recon. pending, remanded *MCI Telecom. Corp. v. FCC*, No. 97-1675 (D.C. Cir. May 15, 1998).