

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

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In the Matter of)
)
Assessment and Collection of Regulatory Fees)
for Fiscal Year 1999)

MD Docket No. 98-200

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To: The Commission

COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation, on behalf of itself and its affiliates (collectively "BellSouth"), by its attorneys, hereby submits these comments in response to the Commission's *Notice of Proposed Rulemaking*, MD Docket No. 98-200, FCC 99-44 (March 24, 1999), 64 Fed. Reg. 16661 (April 6, 1999) (*NPRM*). BellSouth provides herein additional comments in support of its request to reclassify 900 MHz specialized mobile radio ("SMR") services into the commercial mobile radio services ("CMRS") Messaging Service regulatory fee category. As shown below, there has been consistent support for BellSouth's proposal among those parties previously addressing this issue. BellSouth also comments on more basic issues regarding the Commission's cost methodology and its apportionment of fees assessed upon CMRS carriers.

DISCUSSION

I. THE RECORD REFLECTS CONSISTENT SUPPORT FOR BELLSOUTH'S REQUEST TO RECLASSIFY 900 MHZ SMR INTO THE CMRS MESSAGING SERVICES FEE CATEGORY

As it has done since FY 1997,¹ the Commission's FY 1999 *NPRM* proposes once again to classify CMRS radio services in either one of two categories for regulatory fee purposes: (1) CMRS

¹ See *Assessment and Collection of Regulatory Fees for Fiscal Year 1997*, MD Docket No. 96-186, *Report and Order*, 12 F.C.C.R. 17161, 17184-86 (1997) (*1997 R&O*); *Assessment and Collection of Regulatory Fees for Fiscal Year 1998*, MD Docket No. 98-36, *Report and Order*, 13 F.C.C.R. 19820, 19833-35 (1998) (*1998 R&O*).

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Mobile Services, which the Commission defines as those wireless services offered over broadband spectrum, irrespective of how the spectrum is actually used and what service offerings are provided, or (2) CMRS Messaging Services, which the Commission defines as those wireless services offered over narrowband spectrum.² For FY 1999, the Commission has proposed an increased regulatory fee of \$0.32 per unit for CMRS Mobile licensees. This fee is now *eight times more* than the regulatory fee of \$0.04 per unit for CMRS Messaging licensees, which the Commission proposed to leave unchanged.³

BellSouth, through its affiliate BellSouth Wireless Data, L.P. (“BellSouth WD”) (formerly RAM Mobile Data USA Limited Partnership), has previously requested reconsideration of the Commission’s FY 1997 and 1998 decisions to classify 900 MHz SMR services as CMRS Mobile Services subject to the higher fee simply because they use broadband spectrum.⁴ BellSouth proposed the reclassification of 900 MHz SMR service into the CMRS Messaging Services so that this service would be regulated in a manner similar to that of services against which it competes.⁵ The ARDIS Company submitted comments in support of BellSouth’s proposal.⁶ BellSouth also filed additional comments in support of its proposal in response to the Commission’s FY 1999 *Notice of Inquiry*

² See *NPRM*, Att. F at ¶¶ 14-15.

³ See *NPRM*, Att. E.

⁴ See *Assessment and Collection of Regulatory Fees for Fiscal Year 1997*, MD Docket No. 96-186, Petition for Reconsideration of RAM Mobile Data USA Limited Partnership (filed July 28, 1997) (“RAM Petition”); *Assessment and Collection of Regulatory Fees for Fiscal Year 1998*, MD Docket No. 98-36, Petition for Reconsideration of BellSouth Wireless Data, L.P. (filed July 31, 1998) (“BellSouth WD Petition”).

⁵ BellSouth’s petitions also suggested that the Commission could opt to create a new CMRS Broadband Messaging Services fee category in lieu of reclassifying 900 MHz SMR into the CMRS Messaging Services fee category. Because the Commission seeks additional comment only on the proposed reclassification, see *NPRM* at ¶21 n.21, BellSouth does not further discuss the option to create a new fee category herein.

⁶ See *Assessment and Collection of Regulatory Fees for Fiscal Year 1998*, MD Docket No. 98-36, Comments of ARDIS Company (filed Sept. 4, 1998) (“ARDIS Comments”).

(NOI),⁷ after the Commission deferred consideration of the arguments raised in its petitions. 8

Among the parties addressing BellSouth's proposal, support was unanimous.⁹

Once again, however, the Commission has deferred consideration of BellSouth's proposal and the comments in support to the instant proceeding. Although BellSouth hereby incorporates by reference its FY 1997 and 1998 petitions for reconsideration, and its FY 1999 NOI comments and reply comments, it submits these comments to emphasize that the time is now to act upon BellSouth's proposal to reclassify 900 MHz SMR. Not only does the federal mandate in 47 U.S.C. § 332 to promote regulatory parity compel such reclassification, the Commission's concerns about the administrative feasibility of doing so have been addressed in the record, as shown below.

First, the Omnibus Budget Reconciliation Act of 1993, which added Section 9 to the Communications Act authorizing the Commission to recover regulatory fees, mandated that similar CMRS services be accorded similar regulatory treatment under the Commission's rules.¹⁰ The Commission applied this mandate to regulatory fees in its regulatory parity docket when it concluded that "*we believe that principles of regulatory parity dictate that [regulatory] fees for similar services*

⁷ See *Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, MD Docket No. 98-200, Comments of BellSouth Corporation (filed Jan. 7, 1999) (BellSouth NOI Comments"); *Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, MD Docket No. 98-200, Reply Comments of BellSouth Corporation (filed Jan. 19, 1999) (BellSouth NOI Reply").

⁸ See *Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, MD Docket No. 98-200, *Notice of Inquiry*, FCC 98-298, at ¶¶ 7, 9 (rel. Dec. 4, 1998) (NOI).

⁹ See *Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, MD Docket No. 98-200, Comments of American Mobile Telecommunications Association, Inc. at 7 (filed Jan. 7, 1999) ("AMTA NOI Comments"); ARDIS Company at 3 (filed Jan. 7, 1999) ("ARDIS NOI Comments"); Paging Network, Inc. at 6 n.15 (filed Jan. 7, 1999) ("PageNet NOI Comments").

¹⁰ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312, 392 ("1993 Budget Act"); see H.R. Conf. Rep. No. 103-213 at 494 (1993) ("[S]imilar services are accorded similar regulatory treatment.") ("1993 Conference Report"); H.R. Rep. No. 103-111 at 259-60 (1993) ("[S]ervices that provide equivalent mobile services are regulated in the same manner.") ("1993 House Report"); see also *Cincinnati Bell Telephone Company v. FCC*, 69 F.3d 752, 767 (6th Cir. 1995).

be equivalent.”¹¹ In that same docket, the Commission made clear that the determinant for whether services are substantially similar, and thus must be accorded similar regulatory treatment, is whether they compete with one another.¹²

In its earlier pleadings, BellSouth demonstrated that its 900 MHz SMR services do *not* compete with the real-time, two-way voice services offered by other CMRS carriers in the Mobile Services fee category, such as cellular, broadband personal communications services (“PCS”), and even enhanced SMR, nor do they have sufficient bandwidth to do so.¹³ To the contrary, BellSouth’s 900 MHz SMR services offer data only services that compete against services assessed fees under the Messaging Services fee category, such as paging and narrowband PCS.¹⁴ BellSouth further showed that the Commission has recognized the uniqueness of data-only SMR services in its *Third Annual CMRS Competition Report*¹⁵ and several recent rulemaking proceedings.¹⁶ Accordingly,

¹¹ See *Implementation of Sections 3(n) and 332 of the Communications Act*, GEN Docket No. 93-252, *Third Report and Order*, 9 F.C.C.R. 7988, 8129 (1994) (emphasis added) (*CMRS Third Report and Order*); see also BellSouth NOI Comments at 3; BellSouth WD Petition at 5.

¹² See *CMRS Third Report and Order*, 9 F.C.C.R. at 7996 (“[W]e begin . . . with our conclusion that mobile services will be treated as substantially similar if they compete against each other.”).

¹³ See BellSouth NOI Comments at 3-4; BellSouth WD Petition at 6-7; RAM Petition at 2-4; see also *Assessment and Collection of Regulatory Fees for Fiscal Year 1998*, MD Docket No. 98-36, Comments of BellSouth Wireless Data, L.P. at 1-2 (“BellSouth WD 1998 Comments”); Reply Comments of BellSouth Corporation at 5-6 (“BellSouth 1998 Reply Comments”).

¹⁴ See *id.*

¹⁵ See BellSouth WD Petition at 6-7, citing *Third Annual CMRS Competition Report*, 13 F.C.C.R. 19746, 19802, 19812 (1998).

¹⁶ See BellSouth NOI Comments at 4, citing *Telephone Number Portability*, CC Docket 95-116, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 8352, 8433 (1996), *recon.*, 12 F.C.C.R. 7236, 7312 (1997), *further recon.*, 13 F.C.C.R. 21204 (1998), *appeals pending*; BellSouth WD Petition at 9, citing *Interconnection and Resale Obligations Pertaining to CMRS*, CC Docket 95-54, *First Report and Order*, 11 F.C.C.R. 18,455, 18,466 (1996), *recon. pending*; *Enhanced 911 Emergency Calling Systems*, CC Docket 94-102, *Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 18,676, 18,716-17 (1996), *recon.*, 12 F.C.C.R. 22665 (1997), *further recon. pending*; *Interconnection and Resale Obligations Pertaining to CMRS*, CC Docket 94-54, *Second Report and Order and Third Notice of Proposed Rulemaking*, 11 F.C.C.R.

regulatory parity dictates that any 900 MHz SMR mobile data service like that offered by BellSouth WD be reclassified for regulatory fee purposes into the CMRS Messaging fee category, in accordance with Section 9(b)(3) of the Communications Act.¹⁷

Second, the Commission's concerns about the administrative feasibility of reclassifying 900 MHz SMR services into the CMRS Messaging fee category have been addressed in the record. The Commission has previously expressed concern that such reclassification on the basis of services offered would result in an "undue expenditure of administrative resources" because of a lack of records to facilitate such reclassification.¹⁸ The Commission seemed particularly disinclined to have to determine regulatory fee assessments on a licensee-by-licensee basis.¹⁹ In the *NOI*, the Commission stated it was unaware of any records or other sources of information that would allow it to be able to determine the number of feeable units associated with such reclassified licensees for purposes of assessing their pro rata share.²⁰

BellSouth has previously offered a solution to the Commission's stated concern of avoiding licensee-by-licensee evaluations. Specifically, it stated that "[a]s a technical matter, no single 900 MHz SMR licensee is authorized to use the minimum number of channels or spectrum to offer a competitive 'broadband' service," and that it would be a rare case, if ever, that a 900 MHz SMR licensee would be able to amass sufficient contiguous spectrum capacity (at least 42 channels or 2.1

9462, 9464, 9470 (1996).

¹⁷ 47 U.S.C. § 159(b)(3) ("[T]he Commission shall add, delete, or *reclassify services* in the Schedule [of Regulatory Fees] to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law.") (emphasis added); see BellSouth *NOI* Comments at 4.

¹⁸ See *1998 R&O*, 13 F.C.C.R. at 19835.

¹⁹ See *id.*

²⁰ See *NOI* at ¶ 9.

MHz of spectrum) to compete with true broadband voice services.²¹ Accordingly, BellSouth suggested that the Commission “should reclassify the entire 900 MHz SMR service as a CMRS Messaging Service based upon the predominate use of the band.”²² AMTA has made a similar suggestion.²³ Once reclassified, the number of feeable units can be obtained by examining industry and trade group publications, such as *The State of SMR and Digital Mobile Radio* suggested by AMTA, which provides historical usage figures and future usage projections.²⁴

Alternatively, if the Commission does not wish to reclassify the entire 900 MHz SMR band, ARDIS suggests that the Commission could develop a method for noting authorizations that are used exclusively for the provision of non-voice services.²⁵ As BellSouth suggested in response to the *NOI*, this process could be facilitated by Commission’s Universal Licensing System (“ULS”), which should be able to provide the Commission with “all of the information it needs to determine the utilization of the 900 MHz SMR spectrum for purposes of categorizing those services into the CMRS Messaging Services fee category.”²⁶ In any event, BellSouth agrees with ARDIS that “it is critical that the Commission not summarily conclude that revision of the CMRS fee categories . . . is too difficult from an administrative standpoint.”²⁷ The federal mandate to promote regulatory parity, Commission orders interpreting that mandate, and the record submitted by BellSouth and

²¹ RAM Petition at 2, 5; *see also* BellSouth WD 1998 Comments at 2.

²² BellSouth WD 1998 Comments at 2; *see also* RAM Petition at 5.

²³ AMTA NOI Comments at 8.

²⁴ AMTA NOI Comments at 8-9.

²⁵ ARDIS NOI Comments at 6-7.

²⁶ BellSouth NOI Comments at 5.

²⁷ ARDIS NOI Comments at 7.

others cannot be ignored because of perceived administrative difficulties which can surely be solved if affected industry members and Commission staff work together.²⁸

II. THE COMMISSION SHOULD DISCLOSE ITS COST ACCOUNTING METHODOLOGY AND RE-EXAMINE ITS PROPOSED ASSESSMENT OF FEES FOR CMRS MOBILE SERVICES

As in previous years, the Commission's *NPRM* is once again silent about providing details concerning its cost accounting methodology, which remains shrouded in mystery despite concerns expressed repeatedly over the last several years. BellSouth reiterates its support for PCIA's previous comments in FY 1998 and in response to the FY 1999 *NOI* that the Commission provide further explanation or enumeration of the regulatory costs used in calculating regulatory fees for CMRS services.²⁹ The lack of detailed information in the *NPRM* continues to preclude entities from accurately determining the types of costs included or excluded in the calculation of regulatory costs for which fees must be recovered.

This lack of information is compounded by the inexplicable proposed increased fee assessment for CMRS Mobile Services. It is difficult to understand why the fees should be increased *at all* when the industry is increasingly deregulated and thus requires fewer FCC services.³⁰ It is even more difficult to understand why the fees for this service should go up on a per-unit basis by more than 10 percent (from \$0.29 to \$0.32) when the Commission has only been charged by

²⁸ See, e.g., ARDIS *NOI* Comments at 7.

²⁹ See *Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, MD Docket No. 98-200, Comments of the Personal Communications Industry Association at 3-5 (filed Jan. 7, 1999) ("PCIA *NOI* Comments"); *Assessment and Collection of Regulatory Fees for Fiscal Year 1998*, MD Docket No. 98-36, Comments of the Personal Communications Industry Association at 1-15 (filed Apr. 22, 1998) ("PCIA 1998 Comments"). Detailed requests for specific information can be found in PCIA's prior filings and BellSouth's 1998 Reply Comments. See *id.*; see also 1998 Reply Comments of BellSouth at 2-5.

³⁰ See PCIA 1998 Comments at 16.

Congress with a 6 percent overall increase in regulatory fees. Moreover, this increase becomes completely inexplicable when the dramatic rise in the number of subscribers is taken into account, which should cause the per-unit fee to *decrease*.³¹ As the Commission itself notes, “when the number of payment units in a service increase from one year to another, fees do not have to rise as much as they would if payment units had decreased or remained stable.”³² The proposed increase in CMRS Mobile fees belies this assertion, however. This may be due, in part, to the fact that the Commission has underestimated the number of CMRS Mobile units at 55 million (last year’s figure), when the actual number according to recent CTIA figures is 69 million.³³ At a minimum, the Commission must revise its CMRS Mobile subscriber estimates to reflect this more recent subscriber data, and to explain and justify the 10 percent increase in CMRS Mobile fees.

³¹ See *Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, MD Docket No. 98-200, Comments of the Cellular Telecommunications Industry Association at 1-5 (filed Apr.1, 1999 (“CTIA Comments”).

³² See *NPRM* at n.18.

³³ See CTIA Comments at 5, 7.

CONCLUSION

For the foregoing reasons, BellSouth urges the Commission to adopt the rules and policies set forth herein, as well as in BellSouth's previous petitions for reconsideration and regulatory fee comments, by reclassifying 900 MHz SMR services as CMRS Messaging Services and disclosing its cost accounting methodology.

BellSouth also respectfully requests that the Commission fully disclose its cost accounting methodology so that the fee payors can make informed comments on the Commission's fee assessment mechanism. Regardless, the Commission needs to reexamine its proposed 10 percent increase in the fee assessment for CMRS Mobile Services for the reasons set forth herein and in CTIA's comments.

Respectfully submitted,

BELLSOUTH CORPORATION

By: 

William B. Barfield
M. Robert Sutherland
David G. Richards

1155 Peachtree Street, N.E.
Suite 1800
Atlanta, GA 30309-3610

Its Attorneys

April 19, 1999

CERTIFICATE OF SERVICE

I, Brooke Wilding, hereby certify that on this 19th day of April, 1999, copies of the foregoing "Comments of BellSouth Corporation" in MD Docket No. 98-200 were served by hand on the following:

Chairman William E. Kennard
Federal Communications Commission
445 12th Street, S.W., Room 8-B201
Washington, D.C. 20024

Terry Johnson*
Office of Managing Director
Federal Communications Commission
445 12th Street, S.W., Room 1-C807
Washington, D.C. 20024

Commissioner Gloria Tristani
Federal Communications Commission
445 12th Street, S.W., Room 8-C302
Washington, D.C. 20024

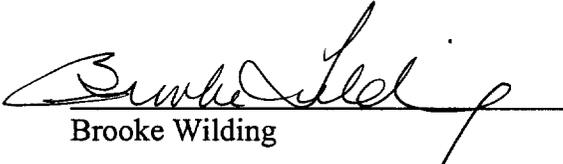
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Federal Communications Commission
445 12th Street, S.W., Room 8-A302
Washington, D.C. 20024

Commissioner Susan Ness
Federal Communications Commission
445 12th Street, S.W., Room 8-B115
Washington, D.C. 20024

*With diskette


Brooke Wilding