August 27, 1999 ***EX PARTE***

FILED ELECTRONICALLY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

PCIA
Personal Communications Industry Association

Re: Ex Parte Presentation
WT Docket No. 98-100 – Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers
CC Docket No. 94-54 – Wireless Resale

Dear Ms. Salas:

On August 26, 1999, the Personal Communications Industry Association (PCIA), represented by Mary McDermott and Mary Madigan, met with Kris Monteith, Walter Strack, Dan Grosh, Stacy Jordan, and Jane Phillips of the Wireless Telecommunications Bureau. The points addressed in the meeting are set forth in the attached handout and are consistent with PCIA's previous filings in this docket.

Pursuant to Section 1.1206 of the Commission's Rules, an original and one copy of this letter are being filed with your office. If you have any questions regarding this filing, please feel free to contact me.

Sincerely,

/s/ Mary Madigan Jones

Mary Madigan Jones
Vice President, External Affairs

Attachment

cc: Kris Monteith
Walter Strack
Dan Grosh
Stacy Jordan
Jane Phillips

August 26. 1999

THE FCC SHOULD FORBEAR FROM MANDATORY WIRELESS RESALE REQUIREMENTS

1. PCIA has asked for forbearance from enforcement of the resale rule.

- PCIA is not opposed to resale per se, only to mandated resale. PCIA is confident that voluntary resale would flourish.

- In a pending petition for reconsideration of the denial of our request for forbearance from continued enforcement of this rule, PCIA points out that the resale rule is unnecessary given the facilities-based networks now being built by PCS carriers.

- The rule cannot be justified because all of the benefits it seeks to produce, chief among which is introduction of new competition in the market for mobile services, are already occurring without the need for regulatory intervention.

- In fact, it was not until the introduction of PCS that any significant changes in occurred with respect to wireless pricing.

- There is no evidence that resale would not flourish in the marketplace absent government compulsion (as it has in the paging marketplace where mandatory resale rules are not imposed) or that the absence of mandatory resale would harm consumers or impinge upon opportunities for small business.

- The rule discourages market-based negotiations and inhibits the introduction of innovative pricing plans. It creates uncertainty and litigation. Therefore, removing the mandate could well increase resale.

- There are costs of a resale requirement:

- FCC enforcement costs,
- Litigation costs on the part of the parties,
- Limits on freedom of CMRS carriers to contract with resellers.

- Resale is common in many unregulated markets. All that is required is a sufficient number of carriers to recognize that they might lose market share if they refuse to cooperate with efficient resellers. Also, resale will be a distribution channel of choice for many facilities-based carriers.

2. In the event that the FCC does not grant forbearance, a simple market-by-market test would be appropriate.

- The FCC's forbearance test, as described in its order responding to the PCIA forbearance petition, is too vague and burdensome.

- The Commission's forbearance test may lead to a flood of market-by-market filings, and consume valuable Commission resources.

- Automatic forbearance should occur in markets where four CMRS licensees are operational.

3. At a minimum, the Commission should forbear from enforcing the CMRS resale rule as applied to C, D, E, and F-block broadband PCS licensees.

- One of the principal reasons the Commission adopted the CMRS resale rule – to enable new entrants to begin providing service before their facilities are fully constructed – is wholly inapposite as applied to C, D, E, and F-block licensees. These are the "new entrants" whose participation the Commission sought to facilitate. Enforcement of the resale rule on these licensees serves no valid purpose and is entirely unnecessary.

- In its June, 1998, decision ruling on PCIA's Petition for Forbearance, the Commission observed that "[o]ne of [the] major reasons for adopting the CMRS resale rule . . . was to speed the development of competition in the mass market for two-way switched mobile voice services by permitting new entrants to begin offering service to the public before building out their facilities." The Commission reiterated its reasoning that this capability would help new entrants overcome the advantages enjoyed by two types of earlier entrants: (1) "cellular firms that in many instances ha[ve] been in the market for a decade or more, and therefore enjoy[ ] substantial advantages of incumbency;" and (2) "A and B block licensees" that "in some areas will have a licensing headstart of three years or more over some of their competitors."

- The "new entrants" the Commission sought to benefit are C, D, E, and F-block licensees. There is no justification for applying the resale rule to these entities; they are the intended beneficiaries of the rule.

- Significantly, by the time most C, D, E, and F-block licensees complete system construction, the sunset of the resale rule will be near. The sunset date was chosen because the FCC determined that the networks of C, D, E, and F-block licensees will be significantly built out by that date (i.e. within five years after their licenses are awarded).

4. Recent arguments presented by resellers regarding elimination of the sunset date are unfounded.

- At present, the broadband CMRS resale requirement will sunset on November 24, 2002.

- As noted in the Commission's Order, this sunset plan was premised on the Commission's conclusion that "the competitive development of broadband PCS and covered SMR services, as alternatives to cellular, would obviate the need for an express CMRS resale requirement."

- The Burton, Kaserman, and Mayo paper assumes that parties opposing the resale rule oppose resale altogether. As PCIA has repeatedly indicated, however, it does not oppose resale *per se* nor has it ever sought to eliminate the existence of a resale market. PCIA's position is that the *mandatory CMRS resale rule* does not serve any valid purpose while imposing significant burdens on affected carriers and consumers.

- As PCIA has discussed in numerous pleadings on the issue, the rule has prompted resellers to assume that they are entitled to wholesale rates (which they are not), and has chilled innovative pricing schemes and increased carriers' compliance costs.

- While the 4th Annual Report acknowledges that cellular providers have approximately 86 percent of the mobile telephone subscribers (broadband PCS has nearly 10 percent and SMRs have more than four percent), it also concludes that "there are specific geographic markets in which the non-cellular operators have achieved market share greater than the national average."

- Contrary to the theories espoused in the study, the 4th Annual Report also indicates that "the average price of mobile telephone service has fallen substantially during the year since the Third Report, continuing the trend of the last several years."

- The study conveniently ignores the fact that the CMRS spectrum cap prevents any single provider from dominating the market by restricting the amount of spectrum a single carrier may hold in a given market. PCIA supports the spectrum cap, as a means of assuring that multiple, independent, facilities-based networks will be built and operated.

- Attempts to analogize the CMRS marketplace to the long distance market ignore important historical differences between the markets. In particular, the long distance market was for decades dominated by one monopoly provider (which also dominated the local market).

- Circumstances in the wireless market have changed since the resale requirement was imposed.

- The requirements were originally put in place for a cellular duopoly.
- Spectrum capacity was limited.
- Spectrum auctions and trading rights were significantly less developed.
- The wireline cellular carriers were given a head start.
- Resale allowed non-wireline bidders to attract a customer base prior to construction.

- The best evidence illustrating that the resale rule is a “fix” to a non-existent problem is the low number of complaints filed by resellers in the CMRS context. The study ignores this practical, real-life evidence as well as the fact that, even after the resale rule sunsets or is eliminated, resellers will still be able file complaints if carriers breach their obligations under Sections 201 and 202.

- No evidence has been provided to back up the broad statements that have been made asserting that facilities based carriers are engaging in price discrimination and that resellers in the marketplace are a necessary discipline against such discrimination.

- The TRA reliance on PCIA’s spectrum cap comments is misplaced.

- PCIA’s comments say that the market, although concentrated, has become more competitive and there is potential for even more competition.
- The spectrum cap is needed to maintain that state of the world, not because the market is overly concentrated now.
- If there were too much concentration now, a tighter cap would be needed and that is not what was proposed.