Appendix A

LIST OF PARTIES IN CC DOCKET NO. 94-54

Petitions for Reconsideration or Clarification:

American Mobile Telecommunications Association, Inc. (AMTA)
AT&T Corp. (AT&T)
Cellular Resellers Association (CRA)
Connecticut Telephone and Communications Systems, Inc. (Connecticut Telephone)
National Wireless Resellers Association (NWRA)
Nextel Communications, Inc. (Nextel)
Personal Communications Industry Association (PCIA)

Petition for Reconsideration or Clarification (Filed August 30, 1996):

Small Business in Telecommunications, Inc. (SBTI)

Oppositions and Comments to Petitions for Reconsideration or Clarification:

ARDIS Company (ARDIS)
AT&T
Bell Atlantic NYNEX Mobile, Inc. (BANM)
Cable & Wireless, Inc. (Cable & Wireless)
Cellular Telecommunications Industry Association (CTIA)
MCI Telecommunications Corporation (MCI)
NWRA
Paging Network, Inc. (PageNet)
RAM Mobile Data USA Limited Partnership (RAM)
Rural Cellular Association (RCA)
Telecommunications Resellers Association (TRA)

Reply Comments:

AT&T
GTE Service Corporation (GTE)
PCIA
RAM
Sprint Spectrum L.P. (Sprint)
TRA

LIST OF PARTIES IN WT DOCKET NO. 98-100 AND GN DOCKET NO. 94-33

Petition for Reconsideration

Broadband Personal Communications Services Alliance of the Personal Communications Industry Association (PCIA)

Oppositions to Petition for Reconsideration

America One Communications, Inc. (America One)
Telecommunications Resellers Association (TRA)

Reply Comment

PCIA

Appendix B

FINAL RULES

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

1. Section 20.12 is amended by revising paragraphs (a) and (b) to read as follows:

§ 20.12 Resale and roaming.

(a) *Scope of Section.* This section is applicable as follows:

(1) *Scope of Resale Requirement.* Paragraph (b) of this section, concerning resale, is applicable to the following, if such providers offer real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls:

(i) Providers of Broadband Personal Communications Services (Part 24, Subpart E of this chapter), except those C, D, E, and F block PCS licensees that do not own and control and are not owned and controlled by firms also holding cellular, A or B block licenses.

(ii) Providers of Cellular Radio Telephone Service (Part 22, Subpart H of this chapter); and

(iii) Providers of Specialized Mobile Radio Services (Part 90, Subpart S of this chapter).

(2) *Scope of Roaming Requirement.* Paragraph (c) of this section, concerning roaming, is applicable only to providers of Broadband Personal Communications Services (Part 24, Subpart E of this chapter), providers of Cellular Radio Telephone Service (Part 22, Subpart H of this chapter), providers of Specialized Mobile Radio Services in the 800 MHz and 900 MHz bands that hold geographic licenses and offer real-time, two-way voice service that is interconnected with the public switched network (included in Part 90, Subpart S of this chapter) and Incumbent Wide Area SMR Licensees.

(b) *Resale.* The resale requirement is applicable as follows:

(1) Each carrier identified in paragraph (a)(1) of this section shall not restrict the resale of its services, including enhanced services, unless the carrier demonstrates that the restriction is reasonable.

(2) The resale requirement shall not apply to customer premises equipment, whether or not it is bundled with services subject to the resale requirement in this paragraph.

(3) This paragraph shall cease to be effective five years after the last group of initial licenses for broadband PCS spectrum in the 1850-1910 and the 1930-1990 MHz bands is awarded; *i.e.*, at the close of November 24, 2002.

2. Section 20.12 is further amended by revising the first clause in paragraph (c) to read as follows:

(c) *Roaming*. Each licensee identified in paragraph (a)(2) of this section must provide mobile radio service upon request to all subscribers in good standing to the services of any carrier subject to this section, ***

Appendix C

SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act, 5 U.S.C. § 604 (RFA),[1] a Final Regulatory Flexibility Analysis (FRFA) was incorporated into the *First Report and Order* issued in this proceeding.[2] The Commission's Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) in this Memorandum Opinion and Order on Reconsideration and Order Denying Petition for Forbearance (*Order on Reconsideration*) contains information additional to that contained in the FRFA and is limited to matters raised on reconsideration with regard to the *First Report and Order* and addressed in this *Order on Reconsideration*. This Supplemental FRFA conforms to the RFA.

I. Need for and Purpose of This Action

In this *Order on Reconsideration*, the Commission affirms its decision to extend the cellular resale rule to broadband personal communications services (PCS) and certain specialized mobile radio (SMR) providers, and to sunset the rule in five years. However, the Commission has exempted from customer premises equipment (CPE) from the scope of the resale rule and has modified its initial decision with respect to broadband PCS providers and SMR providers. In addition to exempting bundled CPE, the Commission has excluded from the coverage of the resale rule all C, D, E, and F block PCS licensees that do not own and control and are not owned and controlled by firms also holding cellular, A or B block licenses. On the other hand, the Commission has expanded the scope of the resale rule to include SMR providers that offer real-time, two-way data service that is interconnected with the public switched network (PSTN). However, the Commission has excluded from coverage any SMR provider offering real-time, two-way PSTN-interconnected voice or data service that does not utilize an in-network switching facility. The Commission has adopted a comparable scope of coverage for cellular and broadband PCS providers that do not utilize in-network

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAA). Title II of the CWAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[2] Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, First Report and Order, 11 FCC Rcd 18455 (1996), at Appendix B (*First Report and Order*). An Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking and Notice of Inquiry in CC Docket No. 94-54. Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, FCC 94-145, Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408 (1994) at Appendix B. The Commission's proposal concerning resale was refined in a Second Notice of Proposed Rulemaking (*Second NPRM*) issued in the same docket, and a second IRFA was incorporated in the *Second NPRM*. Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, Second Notice of Proposed Rulemaking, 10 FCC Rcd 10666 (1995) at Appendix B.

switching facilities. Thus, as a result of the modifications adopted in the *Order on Reconsideration*, the resale rule will now apply to all SMR providers (as well as cellular and certain broadband PCS providers) that offer real-time, two-way switched service (voice or data) that is interconnected with the PSTN, so long as the provider utilizes an in-network switching facility.

By resolving the pending petitions for reconsideration or clarification of the *First Report and Order*, the actions taken in this *Order on Reconsideration* will affirm and clarify the Commission's CMRS resale policy, which is intended to help bring the benefits of competition to the market for these services while the market is in transition to a fully competitive state. In addition, the Commission's resale policy is intended to help promote competition by allowing new entrants to enter the marketplace quickly by reselling their competitors' services during the time needed to construct their own facilities.

II. Summary of Significant Issues Raised by the Public in Response to the Final Regulatory Flexibility Analysis

No petitions for reconsideration were filed in direct response to the FRFA. In petitions for reconsideration or clarification, however, and in responsive pleadings, as well, some issues were raised that might affect small entities.[3] Specifically, some commenters argued that the term covered SMR should be limited to systems that have an in-network switching facility or that serve at least a minimum number of mobile units, *e.g.*, at least 100,000 mobile units that provide real-time, two-way interconnected voice services or that serve at least 20,000 or more subscribers nationwide.

Several other commenters contended, however, that the number of units served bears no necessary relation to the purposes of limiting SMR coverage and that coverage should be determined based on services that compete with SMR providers. Other commenters contended that SMR systems should be subject to the same rules as cellular and broadband PCS in order to preserve regulatory parity in the CMRS market, and that, if small SMR systems are excluded from the rule, small cellular and broadband PCS systems should also be excluded.

III. Description and Estimates of the Number of Entities Affected by This Order on Reconsideration

The RFA directs agencies to provide a description of and, where feasible, an estimate of, the number of small entities that may be affected by the proposed rules, if adopted.[4] The

[3] We discuss these issues further in Section V, *infra*.

[4] 5 U.S.C. § 603(b)(3).

RFA generally defines the term "small entity" as having the same meaning as the term "small business." [5] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[6] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[7]

SMR Licensees. Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small business" for purposes of auctioning 900 MHz SMR licenses,[8] 800 MHz SMR licenses for the upper 200 channels,[9] and 800 MHz SMR licenses for the lower 230 channels[10] as a firm that has had average annual gross revenues of $15 million or less in the three preceding calendar years. This small business size standard for the 800 MHz and 900 MHz auctions has been approved by the SBA. The rule amendment adopted in this *Order on Reconsideration* affects geographic and wide area SMR providers that were not previously subject to the resale rule because they do not offer real-time, two-way PSTN-interconnected voice service. Such SMR providers will now be subject to the CMRS resale rule if they offer real-time, two-way voice or data service that is interconnected with the public switched network, provided they use an in-network switching facility.

Sixty winning bidders for geographic area licenses in the 900 MHz SMR band qualified as small business under the $15 million size standard. It is not possible to determine

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[5] 5 U.S.C. § 601(6).

[6] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. 601(3).

[7] Small Business Act, 15 U.S.C. § 632 (1996).

[8] *See* Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639 (1995).

[9] *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz frequency Band, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

[10] *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz frequency Band, PR Docket No. 93-144, Second Report and Order, 12 FCC Rcd 19079 (1997).

which of these licensees were not covered by the previous rule but intend to offer real-time, two-way PSTN-interconnected voice or data service utilizing an in-network switching facility. Therefore, we conclude that the number of 900 MHz SMR geographic area licensees affected by this rule modification is at least 60.

The auction of the 525 800 MHz SMR geographic area licenses for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten winning bidders for geographic area licenses for the upper 200 channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. It is not possible to determine which of these licensees were not covered by the previous rule but intend to offer real-time, two-way PSTN-interconnected voice or data service utilizing an in-network switching facility. Therefore, we conclude that the number of 800 MHz SMR geographic area licensees for the upper 200 channels affected by this rule modification is at least ten.

The Commission has determined that 3325 geographic area licenses will be awarded in the 800 MHz SMR auction for the lower 230 channels.[11] Because the auction of these licenses has not yet been conducted, there is no basis to estimate how many winning bidders will qualify as small businesses under the Commission's $15 million size standard. Nor is it possible to determine which of these licensees would not have been covered by the previous rule but will offer real-time, two-way PSTN-interconnected voice or data service utilizing an in-network switching facility. Therefore, we conclude that the number of 800 MHz SMR geographic area licensees for the lower 230 channels that may ultimately be affected by this rule modification is at least 3325.

With respect to licensees operating under extended implementation authorizations, approximately 6800 such firms provide 800 MHz or 900 MHz SMR service. However, we do not know how many of these were not covered by the previous rule but intend to offer real-time, two-way PSTN-interconnected voice or data service utilizing an in-network switching facility or which of this subset qualify as small businesses under the $15 million size standard.[12] We assumed, for purposes of the FRFA, and continue to assume for purposes of this Supplemental FRFA, that *all* of the remaining existing authorizations are held by licensees qualifying as small businesses under the $15 million size standard. Of these, we assume, for purposes of our evaluations and conclusions in this Supplemental FRFA, that *none* of these licensees was covered by the previous rule but that *all* of them intend to offer real-time, two-way PSTN-interconnected voice or data service utilizing an in-network switching facility. Therefore, we conclude that the number of SMR licensees operating in the

[11] *Id.*

[12] Because the RFA amendments were not in effect until the record compiled in response to the *Second NPRM* was closed, the Commission did not request information regarding the number of small businesses in this category.

800 MHz and 900 MHz bands under extended implementation authorizations that may be affected by this rule modification is up to 6800.

Cellular Licensees. Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of a small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies. This provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[13] According to the Bureau of the Census, only twelve radiotelephone firms from a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.[14] Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. In addition, we note that there are 1,758 cellular licenses; however, a cellular licensee may own several licenses. In addition, according to the most recent *Trends in Telephone Service* data, 732 carriers reported that they were engaged in the provision of either cellular service or Personal Communications Service (PCS) services, which are placed together in the data.[15] We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 732 small cellular service carriers that may be affected by the policies adopted in this *Order on Reconsideration.*

Broadband Personal Communications Service (PCS). The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity"for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[16] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[17] These regulations defining "small

[13] 13 C.F.R. §121.201, SIC code 4812.

[14] *1992 Census,* Series UC92-S-1, at Table 5, SIC code 4812.

[15] *Trends in Telephone Service,* Table 19.3 (Feb. 19, 1999).

[16] *See* Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, GN Docket 90-314, Report and Order, 11 FCC Rcd 7824, 7850-52 (paras. 57-60) (1996); *see also* Section 24.720(b) of the Commission's Rules, 47 C.F.R. §24.720(b).

[17] *See Id.* at 7852 (para. 60).

entity" in the context of broadband PCS auctions have been approved by the SBA.[18] No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[19] Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small entity PCS providers as defined by the SBA and the Commission's auction rules.

IV. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

Neither the rule adopted in the *First Report and Order* nor the rule modifications adopted in the *Order on Reconsideration* impose a reporting or recordkeeping requirement. The resale rule does, however, operate as a negative prohibition forbidding restrictions on the resale of covered services. The only compliance costs likely to be incurred, as a result, are administrative costs to ensure that an entity's practices are in compliance with the rule.

V. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

It is important to note, in the first instance, that the imposition of a resale requirement confers substantial benefits on small entities, because a substantial number of those wireless resellers it is designed to protect are small.[20] Moreover, the exemption from its requirements for certain C, D, E and F block licensees also benefits smaller entities because it exempts from the obligations of the resale rule, smaller, new entrant competitors that have little market share and little or no incentive to restrict resale unreasonably.

The Commission has also reduced the potential impact of the resale rule on small entities by continuing to exclude from its requirements those entities that have, traditionally, constituted the smallest of the SMR licensees, *i.e.*, those licensees that do not provide services

[18] *See, e.g.*, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (paras. 114-20) (1994).

[19] FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (released Jan. 14, 1997).

[20] As the Commission noted in the *Order on Reconsideration,* an NWRA survey submitted in the *PCIA Forbearance Proceeding* suggests that resellers may be encountering significant difficulties in their negotiations with CMRS carriers. *See* NWRA Forbearance Comments at 4, 19; 1997 Survey of Wireless Resellers, National Wireless Resellers Association, at 22. *See also* Letter from E. Kelley, Telecom Resellers Ass'n, to D. Phythyon, Chief, Wireless Telecommunications Bureau, FCC, Dec. 10, 1997.

on an interconnected basis. In the *Order on Reconsideration*, the Commission has adopted an alternative definition of covered SMR that includes only those systems that have an in-network switching facility. This exception to coverage addresses the concerns of SMR providers that primarily offer traditional dispatch services but whose offer of limited interconnection capability might otherwise subject them to the resale rule as previously drafted. Such a result would have been inconsistent with the Commission's determination that only SMR providers that compete directly with cellular and broadband PCS should be subject to the resale rule, because an important indicator of a provider's ability to compete with traditional cellular and broadband PCS providers is whether the provider's system has "in-network" switching capability.

In evaluating the merits of those arguments made on reconsideration of the *First Report and Order*, and electing to adopt the in-network switching criterion, the Commission has rejected a definition of SMR covered services that would exempt SMR providers based on their particular number of mobile units or on capacity. The number of subscribers to an SMR system is not a reliable indicator of the system's capacity. Nor is it a reliable indicator of a system's ability to compete with cellular and broadband PCS providers. Thus, defining the term covered SMR in terms of its number of subscribers or its capacity could exempt from the resale requirement services that compete in markets where competitive conditions do not yet sufficiently protect against unreasonable restrictions on resale. As we observed in the FRFA, our decision to extend the resale rule will not require any carrier to expand its capacity or to change its system in order to accommodate the desires of resellers.

VI. Report to Congress

The Commission will send a copy of this *Order on Reconsideration*, including a copy of this Supplemental Final Regulatory Flexibility Analysis, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. § 801(a)(1)(A). In addition, the *Order on Reconsideration* and this Supplemental FRFA will be sent to the Chief Counsel for Advocacy of the Small Business Administration. Finally, the *Order on Reconsideration* and Supplemental FRFA (or summaries thereof) and will be published in the Federal Register. *See* 5 U.S.C. § 604(b).

Statement of Commissioner Harold W. Furchtgott-Roth
Concurring in Part and Dissenting in Part

In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, *Memorandum Opinion and Order on Reconsideration*

Last year, I dissented from the Commission's decision not to forbear from the mandatory resale requirement for CMRS carriers. I wrote that I believed that the question regulators need to ask is not whether there is sufficient justification to deregulate, but rather whether there is continuing justification to regulate. I viewed the CMRS market, as did my colleagues, as "fiercely competitive." In such an environment, I considered the benefits of a mandatory resale rule as being far outweighed by its deleterious impact on the proper functioning of the marketplace and the benefits flowing from such functioning to consumers.[1]

Fourteen months have passed and, not surprisingly, the case for the mandatory resale requirement is even weaker today than in was in July of 1998. Let me illustrate the point. In my dissent last year, I pointed out that evidence in the Commission's *Third Annual CMRS Competition Report* indicated that in at least eight areas of the country, there were six mobile telephone operators.[2] Where are we a year later? The Commission's *Fourth Annual CMRS Competition Report* released this June indicates that while there were no areas with seven mobile operators in service a year ago, now there are eight such new areas, covering 10 million POPs. Further, the number of areas now with six mobile operators is 45 (covering 82 million POPs).[3]

These are astounding developments. Yet, perhaps even more astounding, is this Commission's conclusion today that it "does not believe that competitive conditions in the CMRS marketplace differ significantly from those that obtained one year ago."[4] On the contrary, I certainly do. Further, I firmly believe that the dramatic growth of CMRS

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[1] Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services, Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, WT Docket No. 98-100, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 98-134, rel. July 2, 1998 (Dissenting Statement of Commissioner Harold W. Furchtgott-Roth).

[2] *Id., citing* Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Third Report*, 13 FCC Rcd 19746 (1998).

[3] Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Fourth Report*, FCC 99-136 (rel. June 24, 1999) at pp.19-20.

[4] *Memorandum Opinion and Order on Reconsideration* at ¶ 11.

competition happens in spite of -- not as a result of -- this Commission's rules, and that we would see even more dramatic growth were we to take decisive steps to unshackle this industry from unnecessary regulation.

Nevertheless, I do support the modest steps the Commission takes today to relax the resale requirement by removing from the scope of the rule customer premises equipment in bundled packages; C, D, E, and F Block PCS licensees; and SMR licensees not utilizing in-network switching facilities. However, I would have gone much further than my colleagues are willing to go today. In my view, the case for continuing regulation of the CMRS industry, in today's as in a number of recent Commission decisions affecting CMRS providers, is simply unpersuasive. I remained puzzled by our continuing reluctance to take the deregulatory steps warranted by the data, and I am left wondering how much competition is enough to satisfy this agency. Unfortunately, today's order does not shed any light on that question.

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SEPARATE STATEMENT OF COMMISSIONER MICHAEL POWELL, CONCURRING IN PART AND DISSENTING IN PART

Re: *In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services,* WT Docket No. 98-100 and GN Docket No. 94-33, *Memorandum Opinion and Order on Reconsideration.*

I generally concur in this decision to the extent it (1) affirms the November 24, 2002 sunset of the resale rule for Commercial Mobile Radio Services (CMRS); (2) removes customer premises equipment (CPE) and CPE in bundled packages from the scope of the CMRS resale rule; (3) attempts to narrow the scope of the resale rule to exclude certain C, D, E, and F block broadband PCS licensees; and (4) exempts from the rule all Specialized Mobile Radio (SMR) (and other CMRS) providers that do not utilize in-network switching facilities. For the reasons discussed below, I dissent from the majority's refusal to reconsider certain aspects of the Commission's earlier denial of forbearance relief from the CMRS resale rule.

The portion of this Order affirming the forbearance denial perpetuates the prior misconceptions of competitive and deregulatory principles in the Commission's evaluation of forbearance petitions. Specifically, the Order says, "competition in the wireless telephony market is not yet at a state where the resale obligation should be eliminated." Order at ¶ 69 (emphasis added). It affirms the forbearance denial from "just last year" because competitive conditions in the CMRS marketplace have not changed "so dramatically in the last year to cause us to reverse course on the continued utility of the resale rule in this market." *Id.* However, the majority fails to come to grips with the respective and interrelated roles of deregulation and competition and how these concepts should govern our treatment of forbearance petitions under section 10 of the Communications Act. This Order, and the prior decision, regard competition as a destination reached on some sort of regulation-driven chariot and deregulation as the prize at the end of the race. I do not read our mandate under section 10 of the Act that way.

Regulations generally tend more to distort the competitive process, for such regulation attempts to pronounce appropriate conditions and pick winning business models rather than letting the competitive process determine them. Thus, instead of waiting for a certain utopian state of competition to arrive (or setting an artificial date on which we think it might be here), I believe we should be using our deregulatory tools, such as forbearance, to *promote* competitive conditions by eliminating rules that are unnecessary. Indeed, our mandate under section 10(b) of the Act is to examine whether forbearance is in the public interest because it *will* promote competitive market conditions, including the extent to which forbearance *will* enhance competition among providers of telecommunications services.[1] That is why I support the carve-out in this Order to exclude from the resale rule the newest broadband PCS licensees who got a much later start. This decision should promote facilities-based competition by these carriers to

[1] *See* 47 U.S.C. § 160(b); *compare* section 11 of the Act (47 U.S.C. § 161), under which the existence of meaningful economic competition provides the public interest basis for deregulating.

the extent that they are freed from a mandatory resale requirement. This, of course, does not mean that resale opportunities with these licensees will be precluded. This means that resale relationships will be largely governed and "regulated" by competitive market forces, not government fiat.

Finally, I also object to this Order's refusal to reconsider the market-by-market forbearance criteria set forth in the *Forbearance Memorandum Opinion and Order*. Not only do these criteria disregard the explicit forbearance mandate in section 10 of the Act that *the Commission* shall determine that the rule is not necessary, they include a new requirement regarding "the value of service to previously unserved or underserved markets." Order at ¶ 70. I would have preferred a compromise approach replacing this innocuous standard with a clearer presumption in favor of forbearance in the top 50 markets or in geographic markets where there are at least four facilities based CMRS competitors offering service. This Order just blindly asserts without discussion that "[i]t would be difficult to establish a meaningful bright-line test to be applied across the board in all forbearance proceedings." Order at ¶ 71. I do not think we should shy away from tasks that we think "difficult" and I cannot reconcile this reluctance with our recent efforts establishing "bright line" regulations based on specified geographic areas or markets.[2]

Accordingly, based on the forgoing, I respectfully dissent in part from this Order.

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[2] *See, e.g.*, "FCC Promotes Local Telecommunications Competition: Adopts Rules on Unbundling of Network Elements," Report No. CC-99-41, FCC No. 99-238 (September 15, 1999) (announcing decision that incumbent LECs need not provide access to unbundled local circuit switching for customers with four or more lines that are located in the densest parts of the top 50 Metropolitan Statistical Areas (MSAs)); 1998 Biennial Regulatory Review -- Spectrum Aggregation Limits for Wireless Telecommunications Carriers, *Report and Order*, WT Docket No. 98-205, WT Docket No. 96-59, GN Docket No. 93-252, FCC 99-244 (released September 22, 1999) (retaining limitations on CMRS spectrum holdings in overlapping cellular geographic service areas (CGSAs), major trading areas (MTAs), basic trading areas (BTAs) and other geographic license areas; relaxing the spectrum cap for licensees in rural service areas (RSAs)); Review of the Commission's Regulations Governing Television Broadcasting and Television Satellite Stations Review of Policy and Rules, *Report and Order*, MM Docket Nos. 99-221, 87-8, FCC 99- 209 (released August 6, 1999) (narrowing scope of local television ownership duopoly rule by permitting common ownership of two television stations without regard to contour overlap if stations are in separate Nielsen Designated Market Areas (DMAs); allowing common ownership of two stations in same DMA if Grade B contours do not overlap or if eight independently owned, full-power and operational television stations will remain, and one of the stations is not among top four-ranked stations in market); Telephone Number Portability, *Third Report and Order*, CC Docket No. 95-116, 13 FCC Rcd 11701 (1998) (implementation schedule for long term number portability in top 100 MSAs).