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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services	)	CC Docket No. 94-54
	)	
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
	)	
Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Services	)	GN Docket No. 94-33

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: September 15, 1999 **Released:** September 27, 1999

By the Commission: Commissioners Furchtgott-Roth and Powell concurring in part, dissenting in part and issuing separate statements.

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I. INTRODUCTION

1. On June 12, 1996, the Commission adopted a *First Report and Order* in this docket, promulgating a rule that prohibits certain providers of Commercial Mobile Radio Services (CMRS) from restricting the resale of their services during a transitional period.[1] This resale rule, which previously had applied only to cellular providers, was extended to broadband personal communications services (PCS) and certain specialized mobile radio ("covered SMR") services.[2] The Commission decided to sunset this resale rule five years after the date of the award of the last group of initial licenses for broadband PCS, which the Commission subsequently determined to be November 25, 1997.[3] Accordingly, the resale rule is currently set to expire at the close of November 24, 2002.

2. Upon reconsideration here, we generally affirm our decisions in the *First Report and Order* to extend the cellular resale rule[4] to include certain broadband PCS and SMR providers and to sunset the rule as of November 24, 2002. However, we are modifying our initial decision in three key respects. First, we are removing customer premises equipment (CPE) and CPE in bundled packages from the scope of the resale rule. Second, we are revising the scope of the resale rule to exclude all C, D, E, and F block PCS licensees that do not own and control and are not owned and controlled by cellular or A or B block PCS licenses. Third, we are exempting from the rule all SMR (and other CMRS) providers that do not utilize in-network switching facilities. In addition, we are clarifying certain other aspects of the resale rule.

3. We also deny a Petition for Reconsideration of our denial of a request for forbearance from the resale rule filed by the Broadband Personal Communications Services

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[1] Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, First Report and Order, 11 FCC Rcd 18455 (1996) (*First Report and Order*), *aff'd sub nom.* Cellnet Communications v. FCC, 149 F.3d 429 (6th Cir. 1998) (*Cellnet*).

[2] *First Report and Order*, 11 FCC Rcd at 18459-60 (para. 7).

[3] *Id.* at 18468-69 (para. 24). On July 2, 1998, a Public Notice was issued announcing that the five-year period had commenced as of November 25, 1997, the date on which the Commission completed its award of the last group of initial licenses for currently allocated broadband PCS spectrum. The Public Notice states that the resale rule will terminate at the close of November 24, 2002. Commencement of Five-Year Period Preceding Termination of Resale Rule Applicable to Certain Covered Commercial Mobile Radio Service Providers, CC Docket No. 94-54, 13 FCC Rcd 17427 (1998).

[4] In the *Cellular Order*, the Commission established rules to authorize commercial cellular communications and extended the resale rule policy developed in the wireline telecommunications market to cellular service. Cellular Communications Systems, 86 FCC 2d 469 (1981) (*Cellular Order*).

Alliance of the Personal Communications Industry Association (PCIA), pursuant to Section 10(a) of the Communications Act (Act).[5]

II. BACKGROUND

4. The CMRS Resale Proceeding was initiated in 1994 by a Notice of Proposed Rulemaking and Notice of Inquiry addressing a broad range of CMRS regulatory issues, including resale.[6] The Commission's proposal concerning resale was refined in a subsequent *Second NPRM*.[7] In the *Second NPRM*, the Commission tentatively concluded that the existing obligation of cellular providers to permit unrestricted resale should be extended to other CMRS providers, absent a showing that resale would not be technically feasible or economically reasonable for a specific class of CMRS providers.[8]

5. In the *First Report and Order*, the Commission extended the resale rule to providers of broadband PCS and certain "covered" SMR services in order to promote competition in the wireless telephony market.[9] The resale rule bars carriers from unreasonably restricting the resale of their services, subject to the five-year sunset provision.[10] Thus, no carrier may offer like communications services to a reseller at less favorable prices, or on less favorable terms or conditions, than are available to similarly situated customers, absent reasonable

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[5] 47 U.S.C. § 160(a)(1)-(3). Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services; Biennial Regulatory Review - Elimination or Streamlining of Unnecessary or Obsolete CMRS Regulations; Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, WT Docket No. 98-100; Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, GN Docket No. 94-33; GTE Petition for Reconsideration or Waiver of a Declaratory Ruling, MSD-92-14, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857 (1998) (*Forbearance Memorandum Opinion and Order*).

[6] Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408 (1994) (*Interconnection NOI*).

[7] 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) (*Second NPRM*).

[8] *Id.* at 10707-09 (paras. 83-87).

[9] *First Report and Order*, 11 FCC Rcd at 18459-62 (paras. 7, 10-12).

[10] *Id.* at 18468-69 (para. 24); *see* 47 C.F.R. § 20.12.

justification. In addition, no carrier may directly or indirectly restrict resale in a manner that is unreasonable in light of the policies enunciated in the *First Report and Order*.[11]

6. In the *First Report and Order*, the Commission analyzed the costs and benefits of the proposed rule with respect to each class of providers, and concluded that the potential benefits of the rule with respect to broadband PCS and covered SMR providers exceeded its potential costs.[12] The Commission found that other CMRS services, including paging services, were subject to relatively mature competition and that a resale rule was unnecessary for these services.[13] The Commission decided to sunset the resale rule at the end of the five-year period following the award of the last group of broadband PCS licenses, based on its finding that there will be sufficient competitive development of broadband PCS and covered SMR service at that point to obviate the need for a resale rule in the cellular, broadband PCS, and covered SMR markets.[14] In the *First Report and Order*, the Commission also found that the resale rule should apply to bundled packages that include non-Title II components[15] and to services that include proprietary equipment or technology.[16] In addition, the Commission eliminated a prior exception in the cellular resale rule under which cellular licensees had been permitted to restrict resale by competing, fully operational cellular licensees in the same geographic market.[17] Before us now are eight petitions for reconsideration or clarification of the *First Report and Order*, eleven oppositions or comments on these petitions, and six reply comments. A list of petitioners and commenting parties (together with short form references used to cite the filing parties in this Order) appears at Appendix A.

7. The CMRS Forbearance Proceeding was initiated by a Petition for Forbearance filed by PCIA on May 22, 1997, pursuant to Section 10 of the Act.[18] In that Petition, PCIA requested, *inter alia*, that we forbear from the CMRS resale rule with respect to broadband PCS providers. The Petition was subsequently designated as an initiative to be considered

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[11] *First Report and Order*, 11 FCC Rcd at 18462 (para. 12).

[12] *See id.* at 18461-63 (paras. 10-14).

[13] *Id.*

[14] *Id.* at 18468-69 (para. 24).

[15] *First Report and Order*, 11 FCC Rcd at 18471-72 (para. 31).

[16] *Id.* at 18472 (para. 32).

[17] *Id.* at 18471 (para. 30).

[18] 47 U.S.C. § 160(a)(1)-(3).

under the Commission's 1998 biennial review of regulations pursuant to Section 11 of the Act,[19] and denied, as it relates to CMRS resale, on July 2, 1998, in the *Forbearance Memorandum Opinion and Order*.[20] A list of commenting parties (together with short form references used to cite the filing parties in this Order) appears at Appendix A.

III. DISCUSSION

A. Retention of Resale Rule

8. Several petitioners request that we reconsider our extension of the resale rule to broadband PCS and covered SMR providers,[21] arguing that the costs of the resale rule outweigh its benefits and that competition among CMRS providers makes a resale rule unnecessary.[22] These parties largely reiterate arguments that were made in response to the *Second NPRM* and were considered and rejected in the *First Report and Order*.[23] We do not find that circumstances have changed since the adoption of the *First Report and Order* in a way that would warrant elimination of the resale rule. We continue to believe that, as a general matter, the benefits of the resale rule outweigh its costs during this transitional period as the marketplace becomes more competitive, and we therefore have decided to retain the rule with certain modifications and clarifications.

9. In the *First Report and Order* the Commission undertook an analysis of the costs and benefits associated with the proposed extension of the resale rule and concluded that prohibiting restrictions on resale confers a number of public benefits in markets that are less than fully competitive.[24] The Commission noted that the economic literature regarding resale price maintenance indicates that prohibiting resale restrictions may reduce the likelihood of

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[19] 47 U.S.C. § 161.

[20] *See Forbearance Memorandum Opinion and Order*, 13 FCC Rcd at 16872-80 (paras. 32-44).

[21] *See, e.g.*, Nextel Petition at 1-3; PCIA Petition at 2, 5.

[22] PCIA identified those costs associated with the resale rule as administrative costs to review contracts for compliance and litigate disputes, deterrence of aggressive pricing and innovative marketing, impediments to negotiations, and technical costs of modifying certain technologies in order to facilitate proper resale billing without exposure to fraud. PCIA Petition at 9.

[23] *See First Report and Order*, 11 FCC Rcd at 18460-61 (para. 9); Nextel Petition at 2-3; PCIA Petition at 4-5. *See also* BANM Opposition at 5-6 & n.7; Sprint Reply Comments at 2-4.

[24] *See First Report and Order*, 11 FCC Rcd at 18461-62 (para. 10).

systematic price discrimination and cartel behavior.[25] With respect to the wireline telecommunications industry, in particular, the Commission noted that prohibiting resale restrictions had promoted the public interest in a number of ways.[26]

10. Focusing on wireless services, the Commission determined that resale can accelerate the development of competition by facilitating "one-stop shopping" and by permitting new entrants to begin offering service to the public before their own facilities have been completed.[27] The Commission concluded that an appropriately targeted resale rule can achieve these benefits at relatively limited cost, because the rule does not require providers to structure their operations or offerings in any particular way, such as providing special service packages for resale or establishing wholesale prices that include margins for resellers.[28] In the *Forbearance Memorandum Opinion and Order* adopted a year ago, the Commission, while applying the specific statutory criteria of Section 10 of the Act, effectively reaffirmed its conclusions concerning the benefits for competition and consumers associated with resale and concluded that the resale rule continues to be in the public interest.[29]

11. We observe that new entry is continuing to occur and that competition, in general, is gradually increasing in the mobile telephony market. However, we do not believe that competitive conditions in the CMRS marketplace differ qualitatively from those that obtained one year ago. Hence, we conclude that public interest benefits continue to result from a resale requirement sufficient to warrant its retention until the elimination of the resale rule in 2002.

B. Sunset of Resale Rule

12. Those parties advocating retention of the resale rule contend that we should refrain from sunsetting the rule at the end of the five-year period because the market for cellular and substitute services is not yet fully competitive and will remain at this level for the foreseeable

[25] *Id.*

[26] These benefits include: (1) encouraging competitive pricing; (2) discouraging unjust, unreasonable, and unreasonably discriminatory carrier practices; (3) reducing the need for detailed regulatory intervention and the administrative expenditures and potential for market distortions that may accompany such intervention; (4) promoting innovation and the efficient deployment and use of telecommunications facilities; (5) improving carrier management and marketing; (6) generating increased research and development; and (7) affecting positively the growth of the market for telecommunications services. *Id.*

[27] *See id.*

[28] *Id.* at 18462-63 (para. 12).

[29] *Forbearance Memorandum Opinion and Order*, 13 FCC Rcd at 16874-75 (para. 35).

future,[30] and because the costs of the resale rule in an insufficiently competitive market are minimal in comparison to its competitive benefits.[31] These parties also propound several procedural arguments for eliminating the sunset provision. We address these arguments below.

1. Procedural Arguments Against Sunset

13. NWRA asserts that the sunset for cellular providers was promulgated without sufficient notice because the Commission failed to indicate in either the first or the second notice of proposed rulemaking that it was considering the adoption of a sunset provision for the cellular resale requirement.[32] We reject this contention and conclude that the adoption of the resale rule was consistent with the notice and comment requirements established by the Administrative Procedure Act.[33]

14. An agency may promulgate a final rule that differs from the one initially proposed, and it may incorporate suggestions from commenting parties, if the final rule is a "logical outgrowth" of the proposed rule.[34] The *Second NPRM* indicated clearly that the Commission was trying to promote competition in the CMRS market and that the resale obligations of CMRS providers, including cellular licensees, would depend on the state of competition in particular markets.[35] We agree with the argument advanced by BANM that the Commission provided sufficient notice for establishing a sunset provision because the *Second NPRM* clearly raised the question of whether the rule should be abolished entirely.[36] The sunset provision was a logical outgrowth of this original proposal, since it is based upon the Commission's conclusion that the development of competitive conditions obviates the need for a resale requirement.

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[30] *See* MCI Opposition at 2; TRA Opposition at 6-9. Although MCI and TRA are the only parties who argue explicitly against immediate termination of the resale rule, this argument is implicit in the arguments of all parties who favor reconsideration of the sunset provision.

[31] MCI Opposition at 2; TRA Opposition at 6, 9-10.

[32] NWRA Petition at 9-10; TRA Opposition at 9-10.

[33] *See* 5 U.S.C. §§ 551-559.

[34] *See, e.g.*, Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983). *See also* International Harvester v. Ruckelshaus, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973).

[35] *See Second NPRM*, 10 FCC Rcd at 10709 (para. 86) (tentatively concluding that "a mandatory general resale requirement is necessary because it will serve as an effective means of promoting competition in the CMRS marketplace").

[36] BANM Opposition at 4-5.

15. It was also clear that the Commission contemplated refraining from a resale requirement in markets where it would be unnecessary, *i.e.*, where competition exists.[37] Comments filed in response to the *Second NPRM* demonstrate that the proposal in fact alerted parties that the cellular resale rule was being reviewed in the proceeding. Several commenters argued that the cellular resale policy should not be extended, but rather should be eliminated or reexamined.[38] Consequently, we conclude that any suggestion that the sunset provision was promulgated without sufficient notice in the *Second NPRM* is without merit.

16. Finally, even if we assume *arguendo* that the *Second NPRM* did not provide sufficient notice, any such deficiency has been cured by the fact that parties opposing the sunset of the cellular resale rule have had an opportunity to raise their objections thoroughly in this reconsideration proceeding.[39] The Commission has considered these arguments in reaching its decision to uphold the sunset provision in this Memorandum Opinion and Order.

2. Statutory Criteria and Hush-A-Phone Decision

17. Citing the D.C. Circuit's decision in *Hush-A-Phone*,[40] NWRA asserts that any restriction on resale violates Sections 201(b) and 202(a) of the Communications Act,[41] unless the restricting party proves that resale would cause public harm. NWRA contends that the Commission's reliance on *Hush-A-Phone* in its early resale decisions has created a subscriber right to be free from any restrictions on resale so long as it creates no concrete "public detriment," and that application of a cost-benefit analysis by the Commission in the *First*

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[37] *Second NPRM*, 10 FCC Rcd at 10700 (para. 67) (discussing contentions of some commenters that no CMRS resale obligation is necessary because competition is sufficient to ensure consumer choice and prevent price discrimination).

[38] *See, e.g.*, Western Wireless Corp. Comments on *Second NPRM* at 5; Nextel Comments on *Second NPRM* at 9, n.13; AMTA Comments on *Second NPRM* at 9, n.8. *See also* BANM Comments on *Second NPRM* at 11-12; AirTouch Comments on *Second NPRM* at 15-17.

[39] *See* Reeder v. FCC, 865 F.2d 1298, 1305 (D. C. Cir. 1989); McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1323 (D. C. Cir. 1988) (citing Forester v. Consumer Products Safety Comm'n, 559 F.2d 774, 788 & n.19 (D. C. Cir. 1977), National Ass'n of Farmworkers Organizations v. Marshall, 628 F.2d 604, 621-22 (D.C.Cir. 1980), National Tour Brokers Ass'n v. United States, 591 F.2d 896, 901-02 (D. C. Cir. 1978)).

[40] Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956) (*Hush-A-Phone*). In the *Hush-A-Phone* decision, the court overturned a Commission decision upholding the lawfulness of an AT&T tariff that prohibited subscribers from attaching a cup-like device to their telephones in order to ensure privacy.

[41] 47 U.S.C. §§ 201(b), 202(a).

Report and Order was an arbitrary departure from precedent.[42] NWRA also contends that the resale policy cannot be abandoned, even if the Commission finds that there are insufficient public benefits, because *Hush-A-Phone* entitles members of the public to use a carrier's services and facilities in ways that are privately beneficial without being publicly detrimental.[43] NWRA reasons that we may not abandon our resale policy under Sections 201(b) and 202(a) of the Act because resale is privately beneficial to resellers and the *First Report and Order* failed to identify a specific public detriment attributable to a resale rule.[44]

18. We disagree with NWRA that Sections 201(b) and 202(a) of the Communications Act, the *Hush-A-Phone* decision, or subsequent Commission decisions require the Commission to impose resale obligations on CMRS providers or prevent our abolishing the resale rule at the end of the prescribed five-year period. Both Sections 201(b) and 202(a) establish a "just and reasonable" standard against which the charges, practices, classifications, regulations, and services of carriers, as well as any discrimination or preferences by carriers in such areas, are measured. The Commission applied this standard in determining to extend the resale rule to CMRS providers other than cellular providers, and in deciding to sunset the rule at the end of the five-year period.

19. We conclude that NWRA has misconstrued the obligations imposed by Sections 201(b) and 202(a) of the Act, has overstated the reach of the decision in *Hush-A-Phone*, and has misinterpreted the Commission's earlier decisions in maintaining that these decisions created a subscriber right to be free from any restrictions on resale so long as it entails no "public detriment." Our position has recently been affirmed by the Sixth Circuit Court of Appeals in the *Cellnet* decision. The court in *Cellnet* specifically stated as follows:[45]

> We reject the notion that the *Hush-a-Phone* decision set out a "public detriment/private benefit" test for FCC action . . . . The justness and reasonableness requirements set out in §§ 201 and 202 remain the criteria for FCC action. Thus, the *Hush-a-Phone* decision neither set forth other, more restrictive principles, nor did it recognize the existence of a customer's right to resell services as long as such was not publicly detrimental.

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[42] *See* NWRA Petition at 13-16.

[43] *Id.* at 14-15.

[44] *Id.* at 16.

[45] *Cellnet*, 149 F.3d at 437.

Based upon our review of the record and our reading of the *Cellnet* decision, we conclude that the statutory arguments advanced by NWRA and its construction of the *Hush-A-Phone* case are without merit.

3. Elimination of Sunset Provision

20. NWRA, CRA and Connecticut Telephone argue that the "sunset" provision should be eliminated from the resale rule because the rule promotes substantial benefits at minimal cost in markets that are not perfectly competitive[46] and may not be sufficiently competitive in five years.[47] Connecticut Telephone points out that a resale rule is necessary because many resellers that are small businesses lack the resources to file case-by-case complaints under Section 208 and wait for those complaints to be resolved.[48]

21. The Petitioners fail to present any new facts or arguments to persuade us that the decision to sunset the resale rule made by the Commission in the *First Report and Order* should be revised in any way. Moreover, the *Cellnet* decision upheld the reasonableness of our conclusions in the *First Report and Order* that "as markets become more competitive, the benefits to be attained through a resale rule generally diminish because carriers have less opportunity and incentive anticompetitively to restrict resale"[49] and that "the competitive development of broadband PCS service will obviate the need for a resale rule in the cellular and broadband PCS market sector."[50] We therefore affirm our decision to terminate the resale rule at the end of the sunset period.[51]

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[46] NWRA Petition at 19-20; CRA Petition at 1-2; Connecticut Telephone Petition at 4-10; *see also* MCI Opposition at 2; TRA Comments at 12-14; TRA Reply Comments at 3-9.

[47] NWRA Petition at 16-20; Connecticut Telephone Petition at 8-10; *see also* Cable & Wireless Comments at 3-4; TRA Reply Comments at 3-4, 8. MCI suggests that the Commission commit itself to begin a new proceeding in four years in order to examine the need for the resale rule. MCI Opposition at 2. *See also* TRA Reply Comments at 8 (advocating commencement of a new proceeding in five years).

[48] Connecticut Telephone Petition at 7-8; *see also* Cable & Wireless Comments at 4; TRA Reply Comments at 8-9.

[49] *First Report and Order*, 11 FCC Rcd at 18463 (para. 14).

[50] *Id.* at 18468 (para. 24). We recognize that the court in *Cellnet* noted that "[i]f the FCC's predictions about the level of competition do not materialize, then it will of course need to reconsider its sunsetting provision in accordance with its continuing obligation to practice reasoned decision-making." *Cellnet*, 149 F.3d at 442.

[51] We note, however, that resellers may still be able to file complaints under Section 208 of the Act alleging that certain restrictions on the resale of interstate CMRS violate Sections 201(b) and 202(a).

22. Although we have acted in this Order to maintain the sunset of the resale rule, our decision to do so should not be construed as a lack of commitment to ensuring compliance with the resale obligation during the period in which it is in force. On the contrary, we intend to take effective and expeditious enforcement action against any carrier that fails to comply with its obligations under the resale rule.[52]

23. We note in this regard that resellers have asserted, in this and other proceedings, that carriers subject to the resale rule have refused to make resale arrangements available to prospective resellers.[53] We find this particularly troubling because a substantial number of CMRS resellers are small businesses, and Congress has signalled its support for small business entry into the telecommunications industry, *inter alia*, by charging the Commission in Section 257 of the Communications Act with responsibility for removing regulatory barriers to market entry by small businesses. The resale rule represents another means to facilitate CMRS market entry by such firms.

24. We are also cognizant of the fact that, in addition to simple refusals to offer resale agreements, violations of the resale requirements may take a variety of forms, including a carrier's unreasonable refusal to offer resellers the same bundled packages of airtime and enhanced services or the same volume discounts that the carrier offers to its retail customers. In light of the various means by which the purposes of the resale rule may be frustrated or circumvented by the practices of covered carriers, we intend to look closely at allegations of unreasonable restrictions on resale and to resolve expeditiously complaints about whether the challenged restriction on resale is reasonable. In this way, we seek to ensure the viability of the resale rule in the CMRS market during this transitional period, which we believe will help to foster competition and facilitate service to the public.

25. In the first instance, we intend to initiate a stepped-up mediation program under which we will first attempt to resolve any formal or informal complaints filed by a reseller through negotiation. We believe that an informal negotiation process will help to facilitate a rapid resolution of disputes regarding resale, if such resolution is possible on a voluntary basis. In those instances where the parties cannot reach agreement or where negotiation does not appear to be a viable approach, we will expedite the complaint proceeding, to the fullest

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[52] *See* 47 U.S.C. §§ 151, 303 and 332.

[53] For example, an NWRA survey submitted in the *PCIA Forbearance Proceeding* suggests that resellers may be encountering significant difficulties in their negotiations with broadband PCS carriers. NWRA sent its survey to 91 resellers. Of the 46 wireless resellers responding to the survey, 61 percent of the respondents reported that they had been unable to obtain resale arrangements with broadband PCS carriers within the past year. 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.

extent possible, in order to ascertain whether the carrier in question is acting in derogation of the resale rule requirement. We intend to conduct both the mediation and any ensuing formal complaint proceeding on an expedited basis. In cases in which we determine that a violation of the rule has occurred, we intend to impose rigorous enforcement measures, including, in appropriate cases, the revocation of licenses and the imposition of forfeiture penalties.

C. Application of Resale Rule to Bundled Packages

26. AT&T and PCIA petition us to reverse our decision in the *First Report and Order* that the resale rule applies to bundled packages of services such as customer premises equipment or enhanced services.[54] These petitioners argue that the resale rule is based on Sections 201 and 202 of the Communications Act[55] and cannot be extended to CPE and other components of bundled packages that are not regulated under Title II of the Act.[56] They also argue that competitive conditions in the CPE and enhanced services markets favor the exclusion of bundled services from the scope of the resale rule;[57] that it is not clear how a provider could circumvent the rule by restricting the resale of bundled packages;[58] that applying the resale rule to bundled packages deters carriers from offering creative packages desired by consumers;[59] and that the Commission provided no notice to parties that the resale requirement might be extended to bundled packages.[60]

27. Arguments that the scope of the resale rule is overbroad because it extends to non-Title II services are inapt. In the *First Report and Order*, the Commission rejected this argument[61] and specifically cited its Title III licensing authority as part of its jurisdictional

[54] AT&T Petition at 2-4; PCIA Petition at 12-13; *see also* CTIA Comments at 1-2; GTE Reply Comments at 5-7; RAM Comments at 6 n.12; Sprint Spectrum Reply Comments at 4.

[55] 47 U.S.C. §§ 201, 202.

[56] PCIA Petition at 12-14; *see also* AT&T Opposition at 6; GTE Reply Comments at 6; Sprint Spectrum Reply Comments at 5.

[57] AT&T Petition at 3-4; PCIA Petition at 16; *see also* CTIA Comments at 3; Sprint Spectrum Reply Comments at 6-7.

[58] AT&T Petition at 3.

[59] PCIA Petition at 15-16; *see also* AT&T Opposition at 6; Sprint Spectrum Reply Comments at 5-6.

[60] PCIA Petition at 14-15.

[61] *First Report and Order*, 11 FCC Rcd at 18471-72 (para. 31).

authority for the resale rule.[62] No party has challenged our explicit invocation of Title III as a basis for imposing
the resale rule.

28. We also find no merit in the claim that the proposals and tentative conclusions adopted in the *Second NPRM* gave insufficient notice to enable us to prescribe a general resale requirement that includes CPE (or enhanced services) in bundled packages.[63] While it is true that the *Second NPRM* did not specifically discuss bundled packages, the Commission was unambiguous in "tentatively [concluding] that a mandatory *general resale requirement* is necessary because it will serve as an effective means of promoting competition in the CMRS marketplace."[64] The Commission gave no indication in the *Second NPRM* that it presumed that bundled packages combining services with CPE or enhanced services would be *excluded* from the proposed general resale requirement. Indeed, the policy adopted in the *First Report and Order* with respect to bundled packages merely parallels that initially adopted with respect to cellular carriers.[65] Moreover, AT&T raised the bundling issue in its comments, presumably because it thought the Commission was considering the issue.[66]

29. Nevertheless, while we find the Petitioners' procedural arguments unconvincing, we have decided, on substantive grounds, to eliminate CPE and CPE in bundled packages from the scope of the resale rule.[67] Initially, we were concerned that, absent a resale rule, facilities-based providers could offer packages with artificially high prices for the service

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[62] *See id.* at 18459-60 (para. 7) (citing 47 U.S.C. §§ 303(r), 309). Section 303(r) authorizes the Commission to make such rules and regulations as may be necessary to carry out the provisions of the Act insofar as it relates to radio communications. 47 U.S.C. § 303(r). Section 309 authorizes the Commission to determine the conditions to be attached to radio licenses. 47 U.S.C. § 309.

[63] PCIA Petition at 14-15.

[64] *Second NPRM*, 10 FCC Rcd at 10709 (para. 86) (emphasis added).

[65] *See* Bundling of Cellular Customer Premises Equipment and Cellular Service, CC Docket No. 91-34, Report and Order, 7 FCC Rcd 4028, 4032 n.48 (1992) (*CMRS Bundling Order*) ("Any restrictions on resellers' ability to buy packages of CPE and service on the same basis as other customer [*sic*] would be unlawful.") *See also* 5 U.S.C. § 553(b)(3)(A) (the notice requirement of the Administrative Procedure Act is inapplicable to general statements of agency policy).

[66] AT&T *Second NPRM* Comments at 28-31.

[67] In consequence of our decision, a carrier offering basic service bundled with CPE and enhanced services such as voice mail, for example, would only be prohibited from unreasonably restricting resale of the basic service and the enhanced service components of the bundled package.

component and cross-subsidize the CPE component with those service revenues.[68] While anticompetitive cross-subsidization may be a theoretical possibility, there is no evidence in the record that it is occurring in the CMRS marketplace. Nor is there evidence that resellers are prevented from obtaining CPE from sources other than CMRS carriers or from negotiating with equipment manufacturers for discounted prices. Smaller resellers have alternatives to obtain CPE volume discounts comparable to those available to large resellers and facilities-based carriers. For example, firms in other industries have formed buying consortia. The provision of CPE below cost to attract new customers appears to be, at least in this marketplace, a legitimate promotional strategy that benefits, rather than harms, the public interest. As such, it is essentially a marketing expense that should be borne independently by resellers and facilities-based carriers alike. Were we to, in essence, exempt resellers from an expense borne by facilities-based carriers, we could discourage marketing strategies that reduce costs to consumers.

30. We retain the rule, however, for bundled packages that include enhanced services, because, at least as CMRS enhanced services are presently provided, neither subscribers nor resellers can purchase the service component of the bundle from one provider and the enhanced services component of the bundle from another provider.[69] Although AT&T and others argue that the market for enhanced services is competitive,[70] MCI points out that the technology that allows a reseller to provide enhanced services resides predominantly in the mobile carrier's network rather than in the mobile CPE. Absent extension of the resale rule to bundled packages, a provider could unilaterally deny a reseller contractual access to its enhanced services, and the reseller would be unable to recreate a bundle that includes these services. A reseller's ability to bundle packages of basic and enhanced services is essential to maintaining a competitive position in the CMRS market. We are confirmed in this conclusion by comments filed in several other Commission proceedings concerning the competitive edge

[68] *See* NWRA Opposition at 2; TRA Opposition at 11-12; *see also* MCI Opposition at 2-5.

[69] This discussion does not imply that there is no separate input market for enhanced services. The programming and assorted computer hardware that form the basis of the enhanced service can be bought from a number of firms. However, these programs and assorted hardware are sold to CMRS providers rather than to resellers or to end users because this input is attached to the provider's network.

[70] *See* AT&T Opposition at 6; AT&T Reply Comments at 6; CTIA Comments at 2; Sprint Reply Comments at 5-6. AT&T cites, in support, the Notice of Proposed Rulemaking issued in the *Computer III* inquiry. *See* AT&T Petition at 3, citing Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360, 8384-85 (paras. 32-34) (1995) (*Computer III NPRM*). Although the Commission observed in the *Computer III NPRM* that the "enhanced services marketplace has traditionally been, and appears to remain, competitive in character," this statement was made in the context of wireline local exchange network facilities. The Commission did not address the competitiveness of enhanced services delivery through the use of *wireless* network facilities in the *Computer III NPRM*. *Computer III NPRM*, 10 FCC Rcd at 8381-82 (para. 32).

accorded a provider that can offer a unique blend of services and "one stop shopping" to its customers.[71] Thus, in order to be meaningful in the present CMRS marketplace, a resale rule must encompass bundled enhanced services.

D. Modifications to the Scope of the Resale Rule

31. Parties in both proceedings have suggested modifications to the scope of the resale rule.[72] The Commission's decision in the *First Report and Order* to extend the cellular resale rule to other CMRS providers was based on its conclusion that the benefits of the mandatory CMRS resale rule will continue to exceed its costs so long as mobile voice and data markets are not yet fully competitive. We have employed that cost/benefit methodology today to fine tune the scope of the resale rule so as to eliminate from its coverage those providers or services for which the analysis suggests that the rule is unnecessary.

1. Exclusion for Certain C, D, E, and F Block PCS Licensees.

32. Disparities among CMRS providers significantly affect the benefits and costs of applying a resale rule to particular classes of CMRS licensees.[73] Our review of the record

[71] For example, contrary to their assertions in the resale proceeding, several telecommunications providers argued in the *CPNI Rulemaking* that telecommunications services must be marketed together with CPE and enhanced services because to proceed otherwise "would be contrary to customer expectations, as well as detrimental to the goals of customer convenience and one-stop shopping." *See* Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115; Implementation of the Non-Accounting Sections of Sections 271 and 272 of the Communications Act of 1934, CC Docket No. 96-149, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, 8120-21 (para. 76, n. 287) (1998) (footnotes omitted); *vacated* in U.S. West Inc. v. F.C.C., 10th Cir. No. 98-9518 (Aug. 18, 1999) (*CPNI Rulemaking*); *see also* Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115; Implementation of the Non-Accounting Sections of Sections 271 and 272 of the Communications Act of 1934, CC Docket No. 96-149, Order on Reconsideration and Petitions for Forbearance, FCC 99-223 (rel. Sept. 3, 1999).

[72] *See, e.g.*, Nextel Petition at 1-3; PCIA Petition at 2, 5. *Cf.* Connecticut Telephone Petition at 5-6; NWRA Petition at 11-12.

[73] Comments filed in response to PCIA's initial request for forbearance revealed that broadband PCS licensees were split into two camps on whether the Commission should forbear from imposing a resale requirement. In that proceeding, earlier-licensed broadband PCS licensees (A and B block), on the one hand, argued that the CMRS market is sufficiently competitive at this time and that resale requirements are not required to insure that carriers do not act in an anticompetitive manner. *See* PrimeCo Comments regarding PCIA's Forbearance Petition at 3-4, SouthEast Comments regarding PCIA's Forbearance Petition at 2-3. On the other hand, later-licensed broadband PCS licensees (C, D, E, and F block) generally argued that new entrants

convinces us that the benefits that might accrue as a result of imposing resale obligations on C, D, E, and F block PCS licensees are outweighed, at this time, by the burdens such obligations impose on these carriers. No significant benefits accrue from subjecting smaller, new entrant competitors with limited network infrastructure and minimal market share to the requirements of the resale rule. Unlike more established firms, new entrants have little or no incentive to restrict resale unreasonably, and little, if any, excess capacity. Therefore, imposing a resale rule on them produces few, if any, public benefits. More established firms, especially those in a market in which competition is not fully established,[74] may have some ability and incentive to restrict resale unreasonably. Thus, subjecting them to a resale rule does provide public benefits.

33. The A and B blocks are several times more built out than the C, D, E, or F blocks. Service has been rolled out in the A and B blocks in 164 and in 214 of the 493 Basic Trading Areas (BTAs), respectively. The build out for the other blocks is as follows: C (35 BTAs), D (86 BTAs), E (56 BTAs), and F (40 BTAs). This disparity in network buildout is reflected in population data, as well. The A-block and B-block broadband PCS provider networks reach 71.5 percent and 78.9 percent of the U.S. population, respectively. The population coverages of the C, D, E, and F broadband PCS networks are: 6.7, 36.0, 21.0, and 11.3 percent, respectively.[75] As a consequence, the A and B block licensees are the more likely of the broadband PCS block licensees to have capacity to resell, whereas the C, D, E, and F block licensees have the greater need to purchase capacity for resale, due to their relative underdevelopment. Thus, we conclude that there are benefits from subjecting A and B block licensees to the resale rule and to exempting licensees in the C, D, E, and F blocks, whose minimal development and incentive to restrict resale suggest that a resale requirement for them would be of limited, if any, utility.

34. However, we believe that a distinction must be made among C, D, E, and F block licensees to account for the fact that many cellular and A and B block licensees also own licenses in the C, D, E, and F blocks.[76] Thus, we are excluding from the coverage of the resale rule only those C, D, E, and F block PCS licensees that do not own and control and are

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into the broadband PCS market need the resale requirement in order to facilitate market entry and to help them to overcome the market head-start that A and B block licensees enjoy. *See* GWI Comments regarding PCIA's Forbearance Petition at 1-5, Northcoast Reply Comments regarding PCIA's Forbearance Petition at 3.

[74] In terms of subscribers, firms with cellular and/or A or B block PCS licenses account for over 95 percent of the CMRS mobile telephony market. *See Fourth Annual CMRS Competition Report*, Table 6, Appendix B.

[75] *See Fourth Annual CMRS Competition Report*, Table 13C, page B-19.

[76] For example, AT&T has a substantial number of D and E block licenses. SBC, Sprint, and BellSouth, and other major carriers are also D and E block licensees.

not owned and controlled by firms also holding cellular, A or B block licenses.[77] Such an approach exempts smaller, new entrant competitors that have little market share and little or no incentive to restrict resale unreasonably, while continuing to cover facilities-based broadband PCS providers that are more extensively built out and that might otherwise have the ability and the incentive to restrict resale.[78]

35. The smaller C, D, E, and F block firms suffer a number of additional factors, beyond lack of buildout, that minimize the benefits of subjecting them to a resale requirement. First, the cellular and, to a lesser extent, the A and B block PCS carriers, enjoy a first mover advantage of having built out capacity earlier, when there were fewer competitors and thus less competition in the mobile telephony market. During the 1970s, the Commission allocated 50 megahertz of spectrum in the 800 MHz frequency band for two competing cellular systems in each market and licensed these systems throughout the 1980s. The first cellular providers launched service in 1983. A and B block broadband PCS licenses were auctioned beginning in December 1994. The first broadband PCS carrier launched service in November 1995. In contrast, the first auctions of C, D, E, and F PCS blocks commenced in the summer of 1996 (the first C-block auction) and were not completed until April 15, 1999. In the battle for subscribers, their late entry pits the C, D, E, and F block firms against far larger, more numerous, and more deeply entrenched rivals than their predecessors confronted.

36. Second, with the exception of the C block firms, these small firms have smaller spectrum blocks--10 megahertz for D, E, and F block firms, as opposed to 30 megahertz for A and B block firms and 25 megahertz for cellular carriers. Less spectrum, all things being equal, means less capacity, which may constrain the ability of the D, E, and F licensees to offer innovative products and to efficiently utilize technologies that require large amounts of bandwidth. Conversely, having two-and-one-half and three times as much spectrum, respectively, confers certain market and operational advantages upon incumbent cellular and A and B block PCS carriers that increase the benefits to be expected from subjecting them to a resale requirement.

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[77] The concept of control is intended to include instances of both *de facto* and *de jure* control. Typically, *de jure* control is evidenced by ownership of 50.1 percent or more of an entity's voting interest, while *de facto* control is determined on a case-by-case basis after considering all of the circumstances.

[78] In fact, the C, D, E, and F block licensees argued in the forbearance proceeding that reselling cellular analog services, rather than digital broadband PCS, would not constitute an effective entry strategy for them in today's marketplace and that requiring A and B block licensees to provide resale opportunities would increase the chances that at least one of the major competitors in each market would have a digital system compatible with that being built by the C, D, E, or F block licensee. *See* GWI Comments regarding PCIA's Forbearance Petition at 1-5; *see also* Northcoast Reply Comments regarding PCIA's Forbearance Petition at 3.

37. Third, the smaller C, D, E, and F block firms are likely to encounter greater difficulty raising capital to finance build out. Many of the cellular and A and B block licensees are owned or controlled by very large telecommunications companies, including all the Bell companies, GTE, AT&T, Sprint, and Vodafone, which have ready access to capital markets. Even when compared to cellular, A, or B block licensees not affiliated with major carriers, C, D, E, and F licensees generally operate at a disadvantage in raising capital, because, when evaluating credit- and investment-worthiness, lenders and investors examine asset holdings, past revenues, and future profitability. As a general matter, compared to cellular and A and B block PCS carriers, the newer C, D, E, and F block firms will have fewer assets and shorter revenue streams. Moreover, because they face entrenched competitors, the expected profits of C, D, E, and F block firms are likely to be lower, from an investor's perspective. This combination of factors may tend to make it more difficult for C, D, E, and F firms to raise debt and equity capital and increases the benefits of promoting a vigorous resale environment to enable them to commence operations and establish a track record prior to building out their own facilities.

38. Although competing CMRS providers will be treated differently under this approach, regulatory asymmetry is less an issue where, as here, there are continuing disparities among members of the regulated class that justify their being treated differently. In crafting this exception to the resale rule, we have used the C, D, E, and F license blocks as a surrogate for factors such as new entrant status, extent of network buildout, access to capital, and firm size. For the reasons discussed above, we believe that they constitute a reasonable surrogate for these factors in the context of today's CMRS marketplace. Accordingly, we believe the exemption from the resale requirement for smaller C, D, E, and F block licensees is a sensible, administratively efficient refinement of the resale rule during this transitional period.

39. Since the resale rule will sunset for all carriers in three years and the difference in treatment is only for a transitional period, eliminating the resale rule immediately for smaller C, D, E, and F block PCS licensees accords with the Commission's two primary objectives in imposing a resale rule, both in the wireline and the wireless telephony market. Resale increases competition by creating a highly competitive secondary market for the service in question and mitigates the headstart advantage of earlier licensing by facilitating market entry for later-licensed competitors. Given the limited build out for many small C, D, E, and F block broadband PCS providers, their exemption from the resale requirement will have minimal negative effect on the secondary market for wireless telephony. Correspondingly, a resale rule for A and B block broadband PCS licensees (and for cellular providers) will help to mitigate the substantial competitive advantages enjoyed by the earlier-licensed cellular and A and B block broadband PCS licensees.

40. Nor will the resultant regulatory asymmetry prove inequitable for wireless telephony providers that continue to be subject to the rule. The limited capacity and/or limited build out of the smaller C, D, E, and F block licensees makes it unlikely that eliminating the resale rule for them will grant them a significant competitive advantage over those wireless telephony providers that remain subject to the rule, until the general sunset in November 2002.[79]

41. Finally, we do not believe that excepting C, D, E, and F block licensees from the resale rule undercuts our general conclusion that a CMRS resale rule is currently warranted. To the contrary, the information specified above regarding the relatively low network buildout of C, D, E, and F block licensees demonstrates how beneficial a resale obligation imposed only on the more established carriers could be to enhancing the state of competition in the CMRS market.

2. Exclusion for Certain SMR Providers

42. The *First Report and Order* limited the scope of the resale rule to providers of Specialized Mobile Radio Services in the 800 MHz and 900 MHz bands that hold geographic area licenses and offer real-time, two-way switched voice service that is interconnected with the PSTN and to Incumbent Wide Area SMR Licensees that provide such services.[80] On reconsideration, Nextel continues to argue that the resale rule should not apply to SMR providers because they have limited capacity and are particularly susceptible to fraud.[81] If SMR providers are to continue to be subject to the resale rule, both AMTA and Nextel urge us to limit the term "covered SMR" to systems that have an in-network switching facility,[82] arguing that these are the only SMR systems that directly compete with cellular and broadband PCS for mass consumer two-way voice customers.[83] SBTI argues that the term "covered SMR" should exclude carriers who operate in a non-cellular configuration and offer only dispatch services to the vast majority of their customers, but who might nevertheless be

[79] To the extent that a C, D, E, or F block licensee contends that it fits within the underlying rationale, but not the literal scope, of the exemption, the Commission will entertain requests for waiver from such carriers on a case-by-case basis. In evaluating the merits of an individual waiver request, the Commission may consider, for example, whether the petitioner's cellular, A and B block holdings are *de minimis*, and whether excluding the petitioner from the requirements of the resale rule would have an adverse impact on competition.

[80] *First Report and Order*, 11 FCC Rcd at 18466 (para. 19).

[81] Nextel Petition at 3-5.

[82] AMTA Petition at 4-8; Nextel Petition at 7.

[83] AMTA Petition at 5-7; Nextel Petition at 6-7.

covered by the resale rule if the interconnected service they provide to such customers is measured by minutes of use.[84]

43. Nextel also asks us to clarify that the definition of covered SMR applies on a system-by-system basis, and not uniformly to all of an operator's systems, some of which may offer covered service and some of which may not.[85] In the alternative, AMTA and PCIA ask us to define the term "covered SMR" in terms of a minimum number of mobile units, for ease of administration.[86]

44. *In-Network Switching Capacity.* The Commission's decision in the *First Report and Order* to exclude some SMR providers from the resale rule was based on its conclusion that these providers would not compete directly with providers of cellular service and broadband PCS. Because the transitional resale rule was intended to promote competition among cellular, broadband PCS, and similar services, the Commission concluded that the costs of extending the rule to SMR providers outside of the covered category exceeded the benefits.[87] Thus, in the *First Report and Order,* the Commission applied the resale rule only to SMR providers that hold geographic area licenses or that are Incumbent Wide Area SMR licensees.[88] On reconsideration, we now conclude that our objective with respect to SMR[89] is best achieved by limiting the resale rule to reach only those SMR providers that offer real-time, two-way switched service that is interconnected with the public switched network (PSTN) utilizing an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-off of subscriber calls. In so doing, we have

[84] SBTI Petition at 3-4. SBTI contends that these providers cannot compete realistically with cellular and broadband PCS in the mass market for real-time, two-way voice services, but appeal, instead, to a niche market of consumers who are interested only in local service. (SBTI's Petition for Reconsideration or Clarification has been rejected as late-filed, except to the extent that it seeks clarification. See para. 77, *infra.*) *See also* BANM Opposition at 9 n.15; RAM Opposition at 2 (opposing any redefinition of covered SMR that would include data-only services in the rule).

[85] Nextel Petition at 7-8.

[86] PCIA submits that coverage should be limited to SMR systems that serve at least 100,000 mobile units and provide real-time, two-way interconnected voice services. PCIA Petition at 20-21. *See also* PCIA Reply at 9. AMTA urges us to limit coverage to SMR systems that serve at least 20,000 or more subscribers nationwide. AMTA Petition at 8-9.

[87] *See First Report and Order*, 11 FCC Rcd at 18466 (para. 19).

[88] The term "Incumbent Wide Area SMR Licensees" is defined in Section 20.3 of the Commission's Rules. 47 C.F.R. § 20.3.

[89] *But see* discussion of SMR and other CMRS data services *infra*, at Section III E 3.

abandoned our previous criterion, which was based on a carrier's license authority, in favor of a technical and operational criterion, *i.e.*, in-network switching capacity, which more closely parallels our intention to cover only those SMR carriers that compete directly with providers of cellular service and broadband PCS.

45. We agree with AMTA, Nextel and SBTI that the "covered SMR" definition adopted in the *First Report and Order* is overinclusive with respect to certain types of SMR systems. The current rule requires all geographic area or wide-area SMR licensees to comply with the resale rule if they provide real-time two-way interconnected voice service. As petitioners point out, however, this brings within the "covered SMR" definition any SMR provider with a geographic or wide-area license that provides any form of interconnected two-way voice service. Thus, SMR providers that primarily offer traditional dispatch services but also offer limited interconnection capability are potentially subject to the resale rule as currently drafted. We believe that this result is inconsistent with our determination that the costs of extending the rule to providers that do not compete with traditional cellular and broadband PCS providers in the mass consumer market would exceed the benefits. We do not believe that it serves the public interest to extend our explicit rule against unreasonable resale restrictions to carriers offering only geographically or functionally limited services, such as dispatch, that are unlikely to be attractive to resellers in any event.

46. We conclude, as has been suggested by several petitioners and as we have recently found in two other proceedings,[90] that 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, which allows a provider to hand off calls seamlessly without manual subscriber intervention. In-network switching facilities also accommodate the reuse of frequencies in different portions of the same service area. Frequency reuse enables an SMR provider to offer interconnected service to a larger group of customers and to compete directly with cellular and broadband PCS in the mass consumer market. Without in-network switching, a carrier is unlikely to offer the types of high-volume services, including volume discounts, that make resale attractive and procompetitive. We therefore adopt in-network switching capability as a criterion for coverage under the resale rule.

47. Although there may be limited practical significance to extending the exclusion for SMR systems lacking in-network switching capacity to cellular and broadband PCS providers,

[90] *See* Telephone Number Portability, CC Docket No. 95-116, Second Memorandum Opinion and Order on Reconsideration, 13 FCC Rcd 21204, 21228-30 (paras. 52-57) (*Number Portability Second Reconsideration Order*); Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, RM-8143, Memorandum Opinion and Order, 12 FCC Rcd 22665, 22703-04 (para. 78) (*E911 Reconsideration Order*), *further recon. pending.*

we conclude that they should be treated consistently with SMR providers to the extent they do not utilize an in-network switching facility or do not meet other elements of our coverage test. SMR services excluded from coverage under our definition, such as traditional dispatch services, can be provided using cellular or broadband PCS spectrum as well as SMR spectrum.[91] Indeed, the possibility that providers will offer these services over cellular or broadband PCS frequencies has been increased by recent rule changes and proposals allowing licensees to disaggregate their spectrum.[92] We agree with AT&T, BANM, and Cable & Wireless[93] that it would be unfair to continue to exclude SMR providers offering these services, but continue to subject comparably situated cellular and broadband PCS providers to the requirements of the resale rule. As we did in the contexts of number portability and E911, we therefore extend our modified "covered SMR" definition to providers of similar service over cellular and broadband PCS spectrum as well.[94]

48. *Other Proposed Exemptions for SMR.* We reject the alternative proposal that the resale rule exclude providers or systems that serve fewer than a particular number of mobile units. The reasonableness of the numerical thresholds offered by PCIA and AMTA is unsupported by the record. Moreover, we conclude that the number of subscribers to a system is not a reliable indicator of the system's capacity or its ability to compete with cellular and broadband PCS providers. As a result, arbitrarily defining "covered" systems based solely on the number of units served could exclude providers of mobile telephony services that compete in markets where competitive conditions are insufficient to protect against unreasonable restrictions on resale. We seek to develop a definition that covers providers based on the functional nature of the service they provide. A definition based solely on the size of a system without regard for the types of services provided would be arbitrary and incompatible with our policy objectives.

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[91] *See* Amendment of the Commission's Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8965 (1996).

[92] *See* Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21831 (1996).

[93] AT&T Opposition at 5-6; BANM Opposition at 7-9; Cable & Wireless Opposition at 5.

[94] *See Number Portability Second Reconsideration Order,* 13 FCC Rcd at 21229-30 (para. 54); *E911 Reconsideration Order*, 12 FCC Rcd at 22704-05 (para. 81). In the *E911 Reconsideration Order*, the Commission concluded that the E911 requirements should apply only to those cellular, broadband PCS, and SMR providers that provide real-time, two-way interconnected voice service, the networks of which utilize intelligent switching capability and offer seamless hand off to customers. That decision was based, in part, on the competitive consideration that systems without in-network switching typically offer different services from the mass market services traditionally provided by cellular and broadband PCS.

49. We also reject Nextel's contention that all SMR providers should be excluded from the requirements of the resale rule. There are two general types of services presently offered over SMR spectrum: traditional dispatch service (typically used to enable businesses to communicate among employees) and cellular-type service (mobile telephony services traditionally provided to the general public). Some SMR operators, such as Nextel, also offer a type of dispatch service package that Nextel calls "Direct Connect," and that consists of several different functionalities. The Direct Connect feature, itself, offers members of each group subscribing to the service package one-to-one or one-to-many communications among members of the subscriber group.[95] In addition, Direct Connect is packaged with other services, including text and numeric messaging, voice mail, and digital cellular-type service.[96]

50. Without distinguishing in its arguments among these functionalities and their various usage demands, Nextel continues to argue on reconsideration that capacity constraints on SMR spectrum mandate continuing technical control over an SMR system and its end users that cannot accommodate the disjunction between the system operator and the end user that middlemen like resellers create, without significant costs to system integrity. Nextel argues that the geographically-licensed SMR spectrum over which it provides service is highly encumbered and that relocation is just beginning. Nextel argues, further, that an SMR provider must integrate the use of this type of spectrum with that allocated on a site-specific basis, as well as integrating its analog services with its digital offerings.

51. These arguments have already been made and rejected in this proceeding.[97] The problem of transitioning from analog to digital service is not unique to SMR.[98] Moreover, as the Commission indicated in the *First Report and Order*, it is unclear how SMR providers would lose control over their daily operations if their services were purchased by parties intending to resell the services rather than being purchased by end users.[99] In particular, we

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[95] The Direct Connect feature of this package is similar to cellular service in that it could tie up capacity at any base station, anywhere in a metropolitan area, but is similar to traditional dispatch in that it does not use the PSTN.

[96] The latter functionality enables a group member to place an ordinary, cellular-type call to recipients outside the group. In other words, it is basically a switched mobile telephony service, like traditional cellular service.

[97] *See First Report and Order*, 11 FCC Rcd at 18467 (para. 20).

[98] All cellular carriers seeking to convert from analog to digital must make certain hardware and software changes in their systems to effect this conversion. Therefore, Nextel's argument that it should not have to be subjected to resale because it is converting from analog to digital is no more valid than a similar argument that would be raised by any cellular carrier. *Id.*

[99] *Id.*

note that Nextel is rapidly moving away from traditional dispatch service with the introduction of its four-function Direct Connect service package.[100] While the coverage and usage demands placed on the system by this four-function package are potentially greater than traditional dispatch, it is not clear, and Nextel does not adequately explain, why a reseller of such a package would place any greater or more unpredictable demands upon Nextel's system than Nextel itself does, in offering this service to its own retail customers. Nextel's readiness and ability to market its Direct Connect service package, as well as the rate at which it is adding retail customers,[101] suggest that the capacity is available to do so. Under these circumstances, we find unconvincing Nextel's arguments against permitting a reseller to purchase Nextel's Direct Connect service package for resale, or permitting a reseller to acquire the billing data and other information necessary for traditional resale.

52. *System-By-System Application.* Finally, we agree with Nextel's assertion that the definition of "covered" services for resale purposes should be applied on a system-by-system basis. Therefore, we clarify that if a licensee provides "covered" services on systems in certain areas of the country, and provides only traditional dispatch service on systems in other areas of the country, only the "covered" systems would be subject to the resale rule.[102] Thus, the rule against unreasonable restrictions on resale will not apply to a reseller seeking to offer service in a geographic area where a carrier provides only traditional dispatch service, provided that the geographic area in question is clearly identified by the carrier.

E. Proposed Amendments to Resale Rule

1. Reasonableness of Restrictions

53. PCIA argues that the resale rule should be amended to clarify that only "unreasonable" restrictions on resale are prohibited.[103] PCIA asserts that, although the text of the resale rule states that each carrier "must permit unrestricted resale of its service,"[104] the

[100] This four-function package consists of digital cellular-type service, text and numeric messaging, voice mail, and the Direct Connect function. In fact, we note that the term "dispatch" is noticeably absent from most, if not all, of Nextel's promotional materials.

[101] Nextel reports that its number of customers increased in the first half of 1999 from 2.8 million to 3.6 million. *See* 7/16/99 Comm. Daily (Pg. Unavail. Online).

[102] *See Number Portability Second Reconsideration Order,* 13 FCC Rcd at 21217 (para. 56); *E911 Reconsideration Order*, 12 FCC Rcd at 22705 (para. 82).

[103] PCIA Petition at 11; *see also* AT&T Opposition at 7 n.18.

[104] *See* 47 C.F.R. § 20.12.

Commission's existing resale policies and the text of the *First Report and Order* indicate that only *unreasonable* restrictions are prohibited.[105] PCIA's request is unopposed in the record. On the other hand, TRA asks us to clarify that a carrier's refusal to provide a reseller with electronic billing tapes constitutes an unreasonable restriction on resale and that an absolute refusal to discuss resale with a potential reseller constitutes a *per se* violation of the rule.

54. We agree that we should clarify the Commission's resale rule in order to make the text of the rule consistent with existing Commission policy. This change in the rule would clarify that the reasonableness standard continues to apply in the resale context. Accordingly, we amend the rule, as set forth in Appendix B, to prohibit restrictions on resale, unless the carrier demonstrates that the restriction is reasonable. However, we do not deem it advisable to delineate in the rule itself what bases we might consider reasonable for denying resale. Reasonability determinations are fact-specific, by their very nature, and are better made in the context of a complaint proceeding. However, absent some extraordinary circumstances, we conclude that an absolute refusal either to respond to or address what options, if any, are available to a reseller would constitute an unreasonable restriction on resale. We also wish to clarify, but cannot here resolve definitively for each carrier, the issue of billing tapes. To the extent that electronic billing tapes are available, or could be made available without significant alterations to a carrier's billing systems, we would expect that a carrier would provide access to them for a reseller as part of its responsibilities under the resale rule, and we would likely find it a violation of the resale rule should the carrier fail to do so. On the other hand, carriers are not required to undertake major alterations to their billing systems to accommodate reseller requests.

2. Limited Capacity

55. Nextel contends that, if the resale rule continues to apply to SMR providers, it should be amended to clarify that resale restrictions based on limited capacity are reasonable and are therefore permitted under the rule.[106] Nextel claims that it may need to deny resale in some circumstances due to capacity limitations in order to maintain service during its transition from analog to digital.[107]

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[105] PCIA Petition at 11.

[106] Nextel Petition at 8.

[107] *Id.* at 8-9.

56. As an initial matter, we note that the *First Report and Order* indicated clearly that no provider is required to add capacity in order to accommodate a reseller.[108] We do wish to add, however, that virtually all CMRS carriers are adding capacity to their systems in one form or another, as this is a rapidly growing market, and, in that sense, all could claim to be facing capacity constraints to a certain degree. Obviously, a generalized assertion of capacity limitations, where capacity is actively being brought on line and service is being aggressively marketed to retail customers (including high volume customers), would not provide an adequate basis to deny service to resellers. Beyond this, we decline to make a blanket determination as to what capacity limitation or evidence thereof might constitute reasonable grounds to restrict resale based on the speculative factual scenario presented by Nextel. Such a specific factual determination would more appropriately be made in the context of a complaint filed pursuant to Section 208 of the Act.[109] There, we would be better able to develop a complete factual record, examine the specific concerns of all parties, and render a fully informed decision based on the facts. Accordingly, we reject Nextel's proposed clarification to the rule.

3. Data Offerings

57. AT&T seeks an exemption from the resale rule for data services provided using cellular or broadband PCS spectrum. It points out that such services are presently subject to the resale rule, whereas data services offered by SMR providers are exempt, and contends that such disparate treatment is inequitable and that a comparable exemption should be created for data services provided by cellular and PCS carriers.[110] In addition, several parties argue that

[108] *See First Report and Order*, 11 FCC Rcd at 18462-63 (paras. 12-13).

[109] 47 U.S.C. § 208. We also note that resellers would have the option of requesting the Commission to issue a declaratory ruling concerning the facts surrounding such a denial and the obligations that would apply pursuant to the Communications Act and the resale rule.

[110] AT&T Petition at 4-5. ARDIS takes no position on whether cellular and broadband PCS data-only services should be excluded from the resale rule, but opposes any extension of the rule to additional SMR providers. ARDIS Opposition at 1. ARDIS contends that cellular and broadband PCS data services are not functionally similar to SMR data services because of the disparity in the amount of spectrum allocated to each, and that most non-covered SMR providers cannot realistically offer voice service and can offer only limited capacity for data service to a limited number of customers. *Id.* at 4-7. AT&T rejoins that, although cellular operators have more spectrum allotted to them than SMR licensees, they need to use most of that spectrum for voice, and thus typically use only about the same amount of spectrum for data services as SMR licensees. AT&T Reply Comments at 7-8, n.22.

the resale rule should not be applied to data services because the data services market is nascent and no carrier has a competitive advantage.[111]

58. The Commission determined in the *First Report and Order* that it would be imprudent to distinguish between voice and data services offered by broadband PCS and cellular providers and that both should be subject to the resale rule. It exempted data services offered by SMR providers based on its finding that they do not compete with data services provided by cellular and PCS providers.[112]

59. We continue to believe it imprudent to distinguish between data services and other services offered using CMRS spectrum. Such a rule would be difficult to enforce because there are no usage restrictions applicable to CMRS licensees, and it would be difficult to determine, as an enforcement matter, whether a particular licensee was using its spectrum to transmit voice or data. Given this fact, and the parties' failure to explain sufficiently the relevance of their argument, we also decline to create an exception for data services based on the nascency of the wireless data market.

60. With respect to SMR services, we now conclude that excluding data services from the resale rule would likely create enforcement problems because it can be difficult to determine whether a carrier is offering voice or data services over digital transmission facilities. Thus, we have decided to extend the resale rule to data services offered using SMR spectrum to the same extent that it applies to voice services.[113] In so doing, we reject RAM's argument that data-only SMR services should be excluded from the resale rule either because they do not compete directly with cellular and broadband PCS or because their inclusion might discourage interconnection.[114] Nor do we find any evidence in the record that permitting unrestricted resale is infeasible for CMRS data services or more costly than for voice

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[111] *See* GTE Reply Comments at 8-9. *See also* AT&T Reply Comments at 8-9 (favoring a data services exemption because the service is only beginning to develop and a resale rule is especially likely to discourage beneficial innovation); RAM Comments at 6 (arguing that an exception for data services would promote regulatory parity but should not include bundled voice and data packages).

[112] *See First Report and Order*, 11 FCC Rcd at 18466 (para. 19).

[113] *See* the discussion of in-network switching capacity at Section III D 2, *supra*.

[114] *See* RAM Opposition at 3-6. RAM argues that data-only SMR system operators might have a "perverse incentive" to eliminate interconnection in order to avoid their resale obligations. *Id.* at 6.

services.[115] Thus, we have determined to apply the resale rule to providers of real-time, two-way switched data service that is interconnected with the PSTN and that is offered over cellular, broadband PCS, or SMR spectrum utilizing an in-network switching facility.[116]

4. Access to Proprietary Matter

61. PCIA requests that we clarify that the resale rule does not require unrestricted resale of services that include proprietary technologies and products.[117] PCIA contends that a resale requirement would reduce the incentive for carriers to innovate by diminishing the competitive advantages yielded by their investment.[118]

62. We decline to adopt the clarification proposed by PCIA. No party has submitted evidence to support an exception to the resale rule for services that are offered through proprietary equipment or technology. Absent a more focused showing on this issue, we decline to adopt a general "proprietary technology" exception to the resale rule, which would likely prove difficult, and unnecessarily burdensome, to administer during the remaining three-year life of the rule.

63. We emphasize that under the CMRS resale rule, a carrier is not required to offer a reseller wholesale prices (prices lower than those offered to the carrier's retail customers) or special packages or configurations of services tailored to the reseller's demands. Rather, a carrier is required only to allow a reseller to purchase, at nondiscriminatory prices, those services that the carrier is offering to its own retail customers. Under these conditions, it is unclear how prohibiting restrictions on the resale of proprietary information or technology would eliminate a licensed provider's financial incentive to develop innovative new products.

64. We have given due consideration to assertions that the resale rule could afford opportunities for resellers to reap benefits from carriers' development and marketing of innovative products to the detriment of carriers' incentives to develop and market services in

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[115] *Cf. Number Portability Second Reconsideration Order,* 13 FCC Rcd at 21227-28 (para. 50) (citing RAM contention that number portability is infeasible for data-only systems because customers of these systems have no telephone number to port).

[116] As a result of our decisions on reconsideration regarding the scope of the CMRS resale rule, it has been necessary to bifurcate paragraph (a) of Section 20.12, "Resale and roaming," to account for distinctions between resale and roaming regarding scope, and to effect a corresponding technical amendment to the cross-reference in the opening clause of the roaming rule in Section 20.12(c), with respect to scope. *See* Appendix B, *infra.*

[117] PCIA Petition at 16-18.

[118] *Id.* at 17. *See also* AT&T Opposition at 6-7; GTE Reply Comments at 3-4; PCIA Reply Comments at 7.

an innovative manner. This concern is grounded in the economic literature, which illustrates that the transitory excess return that a firm may reap by developing an innovative or unique service or process is the primary motivation for firms to compete by innovation.[119] However, we cannot ignore MCI's observation that proprietary components of services are ubiquitous in the CMRS marketplace, despite a resale policy of long standing. The question, then, is the degree to which innovation may be or has been discouraged, and we must balance that cost against the benefit to the public of maintaining a resale rule until carriers can be expected to adopt resale as a necessary means to increase distribution of their services in a competitive CMRS market.

65. We conclude, based on our analysis of the record before us, that, were we to allow carriers to restrict resale of services that include proprietary technologies before sufficient competition develops, the exception could severely restrict the opportunities for resale. Such an exemption could prevent resellers from doing anything more than reselling minutes using the underlying carrier's equipment.[120] Moreover, we note that, in the *Forbearance Memorandum Opinion and Order*, we concluded that "the obligation to permit resale [does not] significantly discourage ... facilities-based carriers from innovating in a market that has not achieved sufficient competition."[121] We affirm that conclusion today and conclude that, on balance, it is not appropriate to create the type of exception from the resale rule that PCIA seeks.

F. Forbearance

66. PCIA argues in its Petition for Reconsideration of the *Forbearance Memorandum Opinion and Order* that the resale rule should be sunset immediately for all CMRS providers. It contends that forbearance from the CMRS resale rule is consistent with the three prongs of

[119] *See generally* M. Kamien & N. Schwartz, *Market Structure and Innovation* 105-215 (1982); J. Reinganum, "The Timing of Innovation: Research, Development, and Diffusion," *The Handbook of Industrial Organization* 849-908 (1990) (eds. R. Schmalensee & R. Willig).

[120] MCI Opposition at 3-4. In response, PCIA argues that the Commission has applied network disclosure requirements only in the presence of market power, and that such requirements would be inappropriate in a competitive environment, where they would impede full competition. PCIA Reply Comments at 8. We note that, even if PCIA's contentions are correct, its remarks about network disclosure requirements are irrelevant here, because the resale rule does not involve or impose network disclosure requirements.

[121] *See Forbearance Memorandum Opinion and Order,* 13 FCC Rcd at 16879 (para. 42).

the forbearance test,[122] and that the record does not contain the evidentiary support required by the Administrative Procedure Act (APA) to sustain the Commission's conclusions concerning the costs and benefits of imposing a resale rule or its determination to deny PCIA's request for forbearance from the rule.[123]

67. Noting the Commission's finding in the *CMRS Second Report and Order* that, "in a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service,"[124] PCIA argues that the variety of innovative service and marketing packages available to different customer segments establishes that the CMRS market is competitive and is already producing all of the benefits that would arguably be promoted through continued enforcement of the resale rule. PCIA contends that those allegations of abuses referred to in the *Forbearance Memorandum Opinion and Order*[125] were based on complainants' misunderstanding of the resale requirement, and cites two reports in support of its position and referred to by the Commission in the Third Annual CMRS Competition Report, finding that PCS prices are between 10 and 15 percent and 17 to 20 percent below cellular prices.[126]

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[122] Section 10 requires forbearance if the Commission determines that: (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.

[123] 5 U.S.C. §§ 551-559. PCIA's forbearance request regarding resale initially applied only to broadband PCS providers. During the course of that proceeding, PCIA broadened its request to all CMRS providers, and has maintained that position on reconsideration. On July 2, 1998, the Commission denied the PCIA Forbearance Petition as it relates to resale, noting that PCIA had made no attempt to quantify those costs which it alleged are associated with imposition of the resale rule, and concluding that, in the absence of specific evidence that would contradict this conclusion, the administrative costs imposed by the resale rule do not outweigh its benefits. *See Forbearance Memorandum Opinion and Order* at para. 42. The Commission's consideration of administrative costs in conducting the cost benefit analysis in the *First Report and Order* has been upheld in *Cellnet*. *See* Discussion, at Part B, "Administrative Costs," *Cellnet*, 149 F.3d 429, 438 (1998).

[124] Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1478 (1994) (*CMRS Second Report and Order*).

[125] *See Forbearance Memorandum Opinion and Order* at para. 38.

[126] See 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 and Order, 13 FCC Rcd 19746 (1998) (*Third Annual CMRS Competition Report*).

68. PCIA also contends that the analytic criteria established in the *Forbearance Memorandum Opinion and Order*[127] for evaluating future forbearance requests on a market-by-market basis are unnecessarily complex, impermissibly vague under APA standards, and ignore Section 10's underlying legislative purpose to provide a pro-competitive, deregulatory national policy framework. PCIA alleges that requiring elaborate cost benefit analyses is administratively inefficient and may discourage carriers from filing forbearance petitions specific to their markets. Should the Commission continue to refuse to forbear from the CMRS resale rule, PCIA recommends that it grant automatic forbearance from the resale rule in markets where a minimum of four competitors exists.[128]

69. We agree with those opposing PCIA's petition for reconsideration that competition in the wireless telephony market is not yet at a state where the resale obligation should be eliminated, and conclude that it should be retained for the remainder of the transitional period, until it sunsets on November 24, 2002.[129] We addressed the forbearance issues raised by PCIA just last year. Since that time, competition in CMRS industries has continued to grow.[130] However, we do not view competitive conditions in the CMRS marketplace as qualitatively different from those that obtained one year ago; *i.e.*, competition continues to be a "work in progress," as the marketplace evolves from the tight duopoly that prevailed only a few years ago to a state of full competition, which we anticipate will prevail in a few years. The situation has 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. Rather, we see the gradual, but steady, growth of competition in these markets as confirming our decision to maintain the rule at present, but sunset it at a specific time in the future, based on our expectations that competition will develop in these markets over time sufficient to support the elimination of the rule. Hence, we deny PCIA's petition for reconsideration.

70. We also disagree that the market-by-market forbearance criteria set forth in the *Forbearance Memorandum Opinion and Order* are unnecessarily complex, impermissibly vague or overly burdensome.[131] In that Order, we recognized that conditions in some

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[127] *See Forbearance Memorandum Opinion and Order,* 13 FCC Rcd at 16880 (para. 44).

[128] PCIA Forbearance Petition at 23-25.

[129] TRA Opposition to Forbearance Petition at 3-12; America One Opposition to Forbearance Petition at 4-7.

[130] *See Fourth Annual CMRS Competition Report* at 19-22.

[131] *Forbearance Memorandum Opinion and Order* at para. 44. Resale advocates allege that a bright line test keyed solely to a specified minimum number of competitors in a market would violate Section 10 because the level of competition is only one factor in a forbearance analysis, and the existence of a prescribed number of competitors is thus not dispositive of the question whether forbearance from a particular regulation is mandated

geographic markets may support forbearance, although the rule might still be needed in other markets. In consequence, we stated that we would consider several factors in weighing a market-specific forbearance request, including "the state of facilities-based competition, the extent of resale activity within the relevant market, the immediate prospects for future development of additional facilities-based competition, [and] the value of service to previously unserved or underserved markets."[132]

71. We continue to believe that the present approach provides a necessary degree of flexibility for disposing of market-specific forbearance requests, both with respect to the parameters of the market and the criteria indicative of adequate competition. It would be difficult to establish a meaningful bright-line test to be applied across the board in all forbearance proceedings. Furthermore, the near-term sunset of the rule provides an additional reason to retain the present market-by-market approach to forbearance requests respecting resale.

IV. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

72. As required by the Regulatory Flexibility Act, 5 U.S.C. § 604, the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) of the possible impact on small entities by the policies and rules adopted in this Order on Reconsideration. The Supplemental FRFA is contained in Appendix C.

B. Authority

73. This action is taken pursuant to Sections 1, 4(i), 4(j), 10, 201, 202, 303(r), 309, 332, and 403 of the Communications Act, 47 U.S.C. §§ 1, 4(i), 4(j), 160, 201, 202, 303(r), 309, 332, 403.

C. Further Information

74. For further information regarding this Order, contact Jane Phillips or Stacy Jordan, Wireless Telecommunications Bureau, Policy Division, at (202) 418-1310.

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under Section 10(a). *See* TRA Opposition to Forbearance Petition at 13-14.

[132] *Forbearance Memorandum Opinion and Order* at para. 44.

V. ORDERING CLAUSES

75. Accordingly, IT IS ORDERED that the rule amendments and clarifications appearing in Appendix B and discussed herein ARE ADOPTED and SHALL BE EFFECTIVE 60 days after publication of a summary of this Order in the Federal Register.

76. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by AT&T Corp., the Personal Communications Industry Association, the American Mobile Telecommunications Association, and Nextel Communications, Inc. in CC Docket No. 94-54 ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

77. IT IS FURTHER ORDERED that the Petition for Reconsideration or Clarification filed by Small Business in Telecommunications, Inc. in CC Docket No. 94-54 IS ACCEPTED to the extent such Petition seeks clarification, and otherwise IS REJECTED as a late-filed Petition for Reconsideration.

78. IT IS FURTHER ORDERED that the Petitions for Reconsideration or Clarification filed by the Cellular Resellers Association, Connecticut Telephone and Communications Systems, Inc., the National Wireless Resellers Association, and Small Business in Telecommunications, Inc., ARE DENIED.

79. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by the Personal Communications Industry Association pertaining to WT Docket No. 98-100 and GN Docket No. 94-33 IS GRANTED to the extent indicated herein and otherwise IS DENIED.

80. IT IS FURTHER ORDERED that the Office of Public Affairs, Reference Operations Division, shall send a copy of this Order on Reconsideration, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary