

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

DA 95-1401

In the Matter of)
)
BellSouth Corporation)
BellSouth Telecommunications, Inc.)
BellSouth Cellular Corp.)
)
Petition for Declaratory Ruling)

ORDER

Adopted: June 21, 1995; Released: June 22, 1995

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION; BACKGROUND

1. Before the Bureau is a request, submitted by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Cellular Corp., seeking clarification that the Commission's Rules currently allow BellSouth Corporation, the Bell Operating Company local exchange carrier, to resell cellular service without having to first establish a separate subsidiary for such purpose. For the reasons discussed below, we deny BellSouth's request.

2. On July 1, 1994, the Commission released a Notice of Proposed Rule Making and Notice of Inquiry in a proceeding examining equal access and interconnection issues.¹ The Notice of Proposed Rule Making was adopted to consider: (1) the imposition of equal access obligations upon commercial mobile radio service (CMRS) providers; and (2) the need for rules governing the requirements for interconnection service provided by local exchange carriers (LECs) to CMRS providers. A third aspect of CMRS interconnection was the subject of a Notice of Inquiry into whether the Commission should propose rules requiring CMRS providers to interconnect directly with each other, and whether to propose rules prohibiting CMRS providers from restricting resale.² BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Cellular Corp. (collectively, BellSouth) together

¹ Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, Notice of Proposed Rule Making and Notice of Inquiry, 9 FCC Rcd 5408 (1994) (*Equal Access NPRM; Interconnection NOI*).

² *Id.* at 5458-69.

filed comments and reply comments in that proceeding.³

3. In the section of its comments responding to resale issues raised in the *Interconnection NOI*, BellSouth requests that the Commission clarify that its rule requiring a Bell Operating Company (BOC) to provide cellular service only through a cellular subsidiary⁴ does not apply to the resale of cellular service by the telephone company.⁵ BellSouth urges the Commission to permit resale of cellular service by the local exchange carrier of a BOC without any requirement that a separate subsidiary be established for such purpose.⁶

4. Recently, the Commission issued a second notice of proposed rule making in CC Docket No. 94-54, in which it proposed to extend the existing resale obligations of cellular licensees to other CMRS providers.⁷ In the *CMRS Interconnection Second NPRM*, the Commission determined that the Docket 94-54 rule making proceeding was not the appropriate forum in which to address BellSouth's proposal and indicated its intent to address BellSouth's request for clarification in a separate proceeding.⁸ Because BellSouth was requesting an interpretation of an existing rule regarding which the Commission did not seek comment or propose any change in the *Interconnection NOI*, the Bureau in this Order will treat BellSouth's request as a petition for declaratory ruling.⁹ Supportive reply comments filed in response to BellSouth's request will be treated as comments in support of BellSouth's

³ Citations to comments and reply comments in this Order refer to pleadings filed on September 12, 1994 (comments), and October 13, 1994 (reply comments), in the initial phase of the CC Docket No. 94-54 rule making proceeding.

⁴ See 47 C.F.R. § 22.903(b). See also notes 14, 15 and 17, *infra*.

⁵ BellSouth Comments at 25-27.

⁶ *Id.* It should be noted that BellSouth has appealed three Commission decisions in GN Docket 90-314 and has filed a petition seeking elimination of the separate subsidiary requirement with the United States Court of Appeals for the Sixth Circuit. See *BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Enterprises, Inc. v. FCC*, Nos. 94-4113, 95-3315 (consolidated with No. 94-3701), Brief for Petitioners (filed May 1, 1995). Docket 90-314 is the rule making proceeding wherein the Commission has established rules and regulations governing personal communications service (PCS), a wireless telecommunications service.

⁷ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, Second Notice of Proposed Rule Making, FCC 95-149 (released Apr. 20, 1995) (*CMRS Interconnection Second NPRM*).

⁸ *Id.* at para. 98.

⁹ The Commission may, in accordance with Section 5(d) of the Administrative Procedure Act, on a party's motion or on its own motion, issue a declaratory ruling terminating a controversy or removing uncertainty. See 5 U.S.C. § 554. See also 47 C.F.R. § 1.2.

petition for declaratory ruling.¹⁰

5. The issue raised by BellSouth involves an interpretation of the separate subsidiary requirement for BOC cellular operations. This rule, originally codified in Section 22.901 of the Commission's Rules, was implemented when cellular was first authorized and initially applied to all local exchange carriers.¹¹ On reconsideration, however, the Commission revised the separate subsidiary requirement to apply only to pre-divestiture AT&T. The Commission concluded that the benefits from imposing structural separation on the independent telephone companies were unlikely to outweigh the costs associated with the separate subsidiary requirement. However, because of AT&T's historically dominant position, the Commission decided that structural separation should be retained for AT&T as an appropriate safeguard to protect the public.¹² The Commission extended the separate subsidiary requirement to the Bell Operating Companies at divestiture.¹³ This requirement, formerly found in Section 22.901(b),¹⁴ is now found in Section 22.903 of the Commission's Rules, which contains conditions applicable to the Bell Operating Companies.¹⁵

¹⁰ Reply comments in support of BellSouth's proposal were filed in CC Docket No. 94-54 by Ameritech, the Bell Atlantic Companies (Bell Atlantic), the NYNEX Companies, which include New York Telephone Company, New England Telephone and Telegraph Company, and NYNEX Mobile Communications Company (NYNEX), and Southwestern Bell Mobile Systems and Southwestern Bell Corporation (Southwestern) on October 13, 1994.

¹¹ Cellular Communications Systems, 86 FCC 2d 469, 493-95 (1981) (*Cellular Order*), modified, 89 FCC 2d 58 (1982) (*Cellular Reconsideration Order*), further modified, 90 FCC 2d 571 (1982), appeal dismissed sub nom. United States v. FCC, No. 82-1526 (D.C. Cir. Mar. 3, 1983).

¹² *Cellular Reconsideration Order*, 89 FCC 2d at 78-79.

¹³ Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, Report and Order, CC Docket No. 83-115, 95 FCC 2d 1117 (1984), *aff'd sub nom.* Illinois Bell Telephone Co. v. FCC, 740 F.2d 465 (7th Cir. 1984), *aff'd on reconsideration*, FCC 84-452, 49 Fed. Reg. 26056 (1984), *aff'd sub nom.* North American Telecommunications Association v. FCC, 772 F.2d 1282 (7th Cir. 1985).

¹⁴ Former Section 22.901(b) provided as follows (emphasis added):

Neither Ameritech Information Technologies Corp., Bell Atlantic Corp., BellSouth Corp., NYNEX Corp., Pacific Telesis Group, Southwestern Bell Corp., or US West, Inc., their successors in interest, nor any affiliated entity, may engage in the provision of cellular service, except as provided in paragraphs (c) and (d), or as otherwise authorized by the Commission.

¹⁵ 47 C.F.R. § 22.903(b). Section 22.903(b) reads as follows (emphasis added):

Independence. Separate corporations must operate independently *in the provision of cellular*

II. PLEADINGS; DISCUSSION

6. In its comments and reply comments filed in response to the *Interconnection NOI*, BellSouth contends that there is ambiguity in the Commission's rules regarding cellular resale. Specifically, BellSouth asks the Commission to clarify that Bell Company LECs may resell cellular service without having to use a separate subsidiary.¹⁶ BellSouth argues that this rule is ambiguous because it does not make clear whether resale by a Bell Company's LEC constitutes the "provision" of cellular service. As a result, argues BellSouth, it is unclear whether a Bell cellular affiliate either must refuse to allow resale by its affiliate telephone company, as a consequence of the separation rule, or may not restrict resale by its LEC affiliate.¹⁷ BellSouth observes that the Commission's Rules require structural separation between the Bell Companies' LEC and cellular units -- a Bell Company may "provide" cellular service only through its cellular subsidiary.¹⁸ BellSouth contends that, while cellular carriers are not permitted to restrict resale of their services (except in the case of operational facilities-based competitors), the structural separation rules for Bell Companies may force the

service. Each separate corporation must --

- (1) Maintain its own books of account;
- (2) Have separate officers;
- (3) Employ separate operating, marketing, installation and maintenance personnel; and,
- (4) Utilize separate computer and transmission facilities in the provision of cellular services.

¹⁶ See BellSouth Comments at 25; BellSouth Reply Comments at 5-6. See also *Ex Parte* Letter in CC Docket No. 94-54, from B.G. Almond, Executive Director -- Federal Regulatory, BellSouth Corporation, (Mar. 24, 1995).

¹⁷ BellSouth Comments at 25.

¹⁸ Since the filing of BellSouth's Comments in CC Docket No. 94-54, Part 22 was amended by the Commission. See Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115, Amendment of Part 22 of the Commission's Rules To Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-Common Carrier Service, CC Docket No. 94-46, RM 8367, Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Land Mobile Service, 9 FCC Rcd 6513, 6571, 6660-61 (1994) (*Part 22 Rewrite*). Consequently, the rule section to which BellSouth refers in its pleadings, Section 22.901, 47 C.F.R. § 22.901, is now found in Section 22.903 of the Commission's Rules, 47 C.F.R. § 22.903. Therefore, the discussion here will address new Section 22.903.

Bell cellular subsidiaries to restrict resale to their affiliated telephone companies.¹⁹ BellSouth asserts that, to the extent that PCS licensees are permitted to resell cellular service, regulatory parity requires that this opportunity should be available to Bell Company LECs providing service as PCS licensees, on the same basis as others.²⁰

7. BellSouth argues that although such action is proposed in other proceedings, the Commission does not have to modify its existing cellular separation rule to make clear that LECs may resell cellular service, because the rule can be clarified by interpreting it consistent with its purpose.²¹ BellSouth asserts that the rule itself and the decision adopting it make clear that the Commission's purpose was to ensure that the LEC did not have an opportunity to cross-subsidize cellular services.²² BellSouth further asserts that it is clear from the rule's reference to "separate computer and transmission facilities" that the Commission's intent was to bar the LEC from participating in the provision of facilities-based cellular service, not resale.²³ BellSouth contends that a local exchange carrier reselling either its own affiliate's cellular service, or another company's cellular service, is not utilizing LEC computer and switching facilities in the provision of cellular service.²⁴ Ameritech, Bell Atlantic, NYNEX, and Southwestern concur with BellSouth's interpretation of Section 22.903.²⁵

8. Resolving the issue raised by BellSouth turns on an interpretation of the language in Section 22.903 of the Commission's Rules which requires a separate subsidiary "for the

¹⁹ BellSouth also contends that if the company is forced to create a separate subsidiary, it would be unfairly disadvantaged in its objective to become a viable competitor in the wireless marketplace. *See Ex Parte* Letter in CC Docket No. 94-54, from W.B. Barfield, Associate General Counsel, BellSouth Corporation (Mar. 27, 1995).

²⁰ *Id.* at 26.

²¹ BellSouth observes that if the Commission eliminates the cellular subsidiary requirement in other pending proceedings, this issue will become moot. *Id.*, citing Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, 9 FCC Rcd 1411, 1493 (1994) (*CMRS Second Report and Order*); Comments of Bell Atlantic in GN Docket No. 93-252 at 7 & n.5 (June 20, 1994); Reply Comments of BellSouth in GN Docket No. 93-252 at 4-6 (July 11, 1994); BellSouth Comments on Further Reconsideration in GN Docket No. 90-314 at 39-40 (Aug. 30, 1994).

²² *Id.*

²³ This provision is now found in Section 22.903(b)(4), 47 C.F.R. § 22.903(b)(4).

²⁴ BellSouth Comments at 26-27.

²⁵ Ameritech Reply Comments at 6-7; Bell Atlantic Reply Comments at 15-16; NYNEX Reply Comments at 8-9; Southwestern Reply Comments at 13 n.34.

provision of cellular service.” We conclude that BellSouth’s contention that our current rules can be construed to permit BellSouth, or any other BOC, to purchase and resell cellular service (without establishing a separate subsidiary for such purpose) is incorrect.²⁶ The Commission has previously addressed the analogous question of whether cellular resellers are mobile service providers. In the *CMRS Second Report and Order*, the Commission determined that “mobile resale service is included within the general category of mobile services as defined by Section 3(n) [of the Communications Act of 1934, (Act)] and for purposes of regulation under Section 332 [of the Act], since resale of mobile service can only exist if there is an underlying licensed service.”²⁷ The Commission further determined that “[t]here is no indication in the statute or the legislative history that resellers are not ‘mobile service’ providers or exempt from the Section 332 classification, and we see no reason to establish such an exemption.”²⁸ Cellular service is one type of commercial mobile radio service.²⁹ Thus, it is clear that a reseller of cellular service, in addition to being a “mobile service provider,” is engaged in the “provision of cellular service” for purposes of Section 22.903 of the Commission’s rules. BellSouth’s request is therefore denied.³⁰

²⁶ Although the rule has been modified since BellSouth filed its request, the intent of the provision to which BellSouth refers in its comments has not changed – Part 22 still requires the former BOCs, *inter alia*, to create a separate subsidiary for the “provision of cellular service.” See notes 14, 15 and 17, *supra*.

²⁷ *CMRS Second Report and Order*, 9 FCC Rcd at 1425.

²⁸ *Id.* Section 332 divides all mobile services into two basic categories: commercial mobile radio services and private mobile radio services (PMRS). See 47 U.S.C. §§ 332(d)(1), 332(d)(3). CMRS is any mobile service that is provided for profit and makes interconnected service available to the public or a substantial portion of the public. 9 FCC Rcd at 1425-42. PMRS is a mobile service that is not CMRS or the functional equivalent of CMRS. 9 FCC Rcd at 1445-48.

²⁹ *Id.* at 1454.

³⁰ We do not decide here whether, as BellSouth and some parties contend, the separate subsidiary requirement should be amended or eliminated.

III. ORDERING CLAUSE

9. IT IS ORDERED that the petition for declaratory ruling filed by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Cellular Corp. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Regina M. Keeney
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