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

In the Matter of	)	
	)	
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 and Obsolete	)	
CMRS Regulations	)	
	)	
	)	
Forbearance from Applying Provisions of the	)	
Communications Act to Wireless	)	WT Docket No. 98-100
Telecommunications Carriers	)	
	)	
	)	
Further Forbearance from	)	
Title II Regulation for Certain Types of	)	GN Docket No. 94-33
Commercial Mobile Radio Service Providers	)	
	)	
	)	
GTE Petition for Reconsideration	)	MSD-92-14
or Waiver of a Declaratory Ruling	)	
	)	

MEMORANDUM OPINION AND ORDER AND
NOTICE OF PROPOSED RULEMAKING

Adopted: June 23, 1998 **Released: July 2, 1998**

Comment Date: August 3, 1998
Reply Comment Date: August 18, 1998
Comments and Reply Comments to be filed in WT Docket No. 98-100

By the Commission: Chairman Kennard issuing a separate statement; Chairman Kennard and Commissioners Ness and Tristani issuing a joint statement; Commissioner Furchtgott-Roth dissenting and issuing a separate statement; Commissioner Powell dissenting in part and issuing a separate statement.

TABLE OF CONTENTS

I. INTRODUCTION

1. On May 22, 1997, the Broadband Personal Communications Services Alliance of the Personal Communications Industry Association (PCIA) filed a petition requesting forbearance from the continued application of sections 201, 202, 214, 226,[1] and 310(d) of the Communications Act of 1934, as amended (the Act), to broadband Personal Communications Services (broadband PCS) carriers.[2] PCIA also requests forbearance from continued application of the resale obligations of 47 C.F.R. section 20.12(b) to broadband PCS carriers.[3] In February 1998, the staff designated the PCIA Petition as one of the initiatives

[1] Section 226 is also referred to as Telephone Operator Consumer Services Improvement Act (TOCSIA).

[2] Petition for Forbearance filed by Broadband Personal Communications Services Alliance of the Personal Communications Industry Association (May 22, 1997) (PCIA Petition or Petition).

[3] *Id.* at 27.

to be considered as part of the 1998 biennial review of regulations pursuant to section 11 of the Act.[4] In addition to those proceedings proposed to be initiated as part of the 1998 biennial regulatory review, the Commission has numerous ongoing proceedings that are consistent with the deregulatory and streamlining policy embodied in section 11.

2. The Commission granted in part that portion of the PCIA Petition relating to forbearance from enforcing section 310(d) of the Act in an Order released on February 4, 1998.[5] In the *FCBA Order*, we determined that the record established sufficient justification to forbear from enforcing the requirements of section 310(d) as they apply to *pro forma* assignments of licenses and transfers of control of all wireless telecommunications licensees, and that such forbearance enhances competition and serves the public interest.[6] For the reasons discussed below, we deny in part and grant in part the remaining portions of PCIA's Petition for Forbearance. Although we determine in this Order that the remaining portions of PCIA's Petition for Forbearance shall be denied in part, we emphasize our commitment to forbear from enforcing provisions of our rules that inhibit or distort competition in the marketplace, represent unnecessary regulatory costs, or stand as obstacles to lower prices, greater service options, and higher quality services for American telecommunications consumers. We welcome future opportunities to extend the Commission's exercise of its forbearance authority in furtherance of these goals and, to that end, adopt as Part V of this item a Notice of Proposed Rulemaking seeking comments on possible forbearance from additional provisions of our rules.

3. In addition, as noted above, this proceeding is part of our 1998 biennial review of regulations pursuant to section 11.[7] Section 11 requires us to review all of our regulations applicable to providers of telecommunications services and determine whether any rule is no longer in the public interest as the result of meaningful economic competition between providers of telecommunications service.[8] As part of our biennial review of regulations required under section 11, we believe it is appropriate to review our regulations to determine which regulations can be streamlined or eliminated in light of increased competition in the wireless telecommunications marketplace. In this proceeding, we are guided by the principles of furthering competition in the telecommunications industry and drafting clear and concise rules that provide for fair, efficient, and consistent regulation of wireless telecommunications services.

II. EXECUTIVE SUMMARY

[4] 47 U.S.C. § 161.

[5] *See* Federal Communications Bar Association's Petition for Forbearance from section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers, *Memorandum Opinion and Order*, 13 FCC Rcd. 6293 (1998) (*FCBA Order*).

[6] *Id.* at 6306, ¶ 23.

[7] 47 U.S.C. § 161.

[8] *See* "1998 Biennial Review of FCC Regulations Begun Early; to be Coordinated by David Solomon," *News Release*, 1997 WL 713692 (Nov. 18, 1997).

4. In this Order, we decline to forbear from applying sections 201 and 202 of the Act, the international authorization requirement of section 214 of the Act, and the resale rule of 47 C.F.R. section 20.12(b) to broadband PCS providers because the record does not satisfy the three-prong forbearance test set forth in section 10 of the Act. We do, however, grant partial forbearance from the requirement that CMRS providers file tariffs for their international services. We also grant partial forbearance from section 226 for CMRS providers of operator services and aggregators.

5. We also resolve a related proceeding concerning section 226. We deny GTE's Petition for Reconsideration or Waiver of a Declaratory Ruling[9] and affirm the Common Carrier Bureau's decision that TOCSIA applies to certain activities of GTE's mobile affiliates,[10] but grant limited forbearance from certain provisions of TOCSIA as explained herein.

6. Further, we terminate the Notice of Proposed Rulemaking entitled *Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers*[11] because the enhanced forbearance authority we received in the 1996 Telecommunications Act[12] renders much of the record in that proceeding no longer relevant. We issue a Notice of Proposed Rulemaking seeking new comments regarding forbearance from regulation in wireless telecommunications markets that is responsive to current statutory standards and market conditions.

III. BACKGROUND

7. The Commission derives its authority to forbear from applying regulations or provisions of the Act from sections 332(c)(1)(A)[13] and 10 of the Act.[14] Section 332(c)(1)(A) provides the Commission with the authority to forbear from enforcing most Title II obligations, but only as to providers of commercial mobile radio service (CMRS). Section 10 provides the Commission with authority to forbear from the application of virtually any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or a class of carriers or services.[15]

---

[9] Petition for Reconsideration or Waiver, MSD-92-14 (filed Sep. 27, 1993) (*GTE Reconsideration Petition*).

[10] Petition for a Declaratory Ruling that GTE Airfone, GTE Railfone, and GTE Mobilnet are Not Subject to the Telephone Operator Consumer Services Improvement Act of 1990, *Declaratory Ruling*, 8 FCC Rcd. 6171 (Comm. Carr. Bur. 1993) *(GTE Declaratory Ruling), recon. pending.*

[11] Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, *Notice of Proposed Rule Making*, 9 FCC Rcd. 2164 (1994) (*Further Forbearance NPRM*).

[12] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151 *et seq.*) ("1996 Act"). The 1996 Act amended the Communications Act of 1934.

[13] 47 U.S.C. § 332(c)(1)(A).

[14] 47 U.S.C. § 160(a)(1-3).

[15] *Id.* The Commission may not forbear from applying the requirements of sections 251(c) or 271 until it determines that those requirements have been fully implemented. 47 U.S.C. § 160(d).

8. The CMRS marketplace in which broadband PCS providers compete is substantially less regulated and more competitive than most telecommunications markets. In 1993, Congress forbade state and local governments from regulating the entry of CMRS providers or the rates charged for CMRS, unless a state successfully petitioned for authority to regulate CMRS rates by showing that market conditions fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory, or that such market conditions exist and a CMRS offering is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within that state.[16] The following year, the Commission forbore under section 332(c)(1)(A) from requiring CMRS providers to comply with the tariff filing obligations of section 203, the domestic market entry and market exit requirements of section 214, and several other provisions of Title II.[17] The Commission also denied the petitions of several states for authority to regulate rates under section 332(c)(3).[18] Taken together, these actions have substantially relieved CMRS providers from the most burdensome aspects of common carrier regulation. We believe these deregulatory actions have contributed significantly to the impressive growth of competition in CMRS markets. As we have recently found, substantial progress has been made towards a truly competitive mobile telephone marketplace, resulting in lower prices and more attractive service offerings for consumers.[19]

9. The Commission has also considered forbearance from enforcing other Title II regulations with respect to CMRS carriers on several occasions and in several contexts. In 1993, the Common Carrier Bureau denied a Petition for Declaratory Ruling filed by GTE that sought a ruling that TOCSIA did not apply to certain activities of GTE's mobile affiliates.[20] In the *CMRS Second Report and Order*, the Commission determined that, although it would forbear from enforcing several provisions of Title II against CMRS providers, forbearance with respect to certain other provisions was not then in the public interest.[21] In the *Further Forbearance NPRM* issued later that year, the Commission sought comment on whether it

---

[16] 47 U.S.C. § 332(c)(3).

[17] Implementation of sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd. 1411, 1463-93, ¶¶ 124-219 (1994) (*CMRS Second Report and Order*).

[18] *See, e.g.*, Petition of the Connecticut Department Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, *Report and Order*, 10 FCC Rcd. 7025 (1995) (*Connecticut Rate Regulation Order*), *aff'd sub nom. Connecticut Dept. of Public Utility Control v. FCC*, 78 F.3d 842 (2d Cir. 1996); Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services, *Report and Order*, 10 FCC Rcd. 7842 (1995) (*Ohio Rate Regulation Order*).

[19] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Third Report*, FCC 98-91, at 2, 13-38 (rel. June 11, 1998) (*Third CMRS Competition Report*); *see also* Separate Statement of Chairman William E. Kennard.

[20] *Declaratory Ruling*, 8 FCC Rcd. 6171. GTE subsequently filed a Petition for Reconsideration or Waiver of this Decision, *GTE Reconsideration Petition*, MSD-92-14, which we deny in this order.

[21] *See CMRS Second Report and Order*, 9 FCC Rcd. at 1463-93, ¶¶ 124-219.

should forbear from applying sections 210, 213, 215, 218, 219, 220, 223, 225, 226, 227 and 228 to particular classes of CMRS providers.[22]

10. The Commission has also had several opportunities to apply section 10 during the two years since the 1996 Act became law. For example, in the earliest exercise of its section 10 authority, the Commission determined to forbear from requiring or allowing nondominant interexchange carriers to file tariffs pursuant to section 203 of the Act for their interstate, domestic, interexchange services.[23] The Commission found that tariffing in this market was not necessary to ensure against unjust and unreasonable or unjustly or unreasonably discriminatory charges or to protect consumers,[24] and that complete detariffing would be in the public interest because it would "enhance competition among providers of [interstate] services, promote competitive market conditions, and achieve other objectives that are in the public interest."[25] For similar reasons, the Commission has forborne from requiring providers of interstate exchange access services other than incumbent local exchange carriers (LECs) to file tariffs.[26] The Commission has, however, declined to forbear from requiring nondominant providers of interexchange operator services to file informational tariffs under section 226 because, given that it continued to receive thousands of complaints annually about charges for these services, the Commission concluded that its continued monitoring of these providers' rates pursuant to tariffs would protect consumers.[27] The Commission has also declined to forbear from applying its part 36 jurisdictional separations rules to incumbent LECs subject to its price cap rules, reasoning that forbearance alone would not satisfy the section 10 criteria and that replacing the separations rules with a different apportionment regime, as the petitioner requested, was appropriately addressed in a rulemaking proceeding.[28] As discussed above, in the *FCBA Order* we forbore, with some exceptions, from applying the requirements of section 310(d) to *pro forma* assignments of licenses and transfers of control of wireless telecommunications licensees.[29] Most

---

[22] *Further Forbearance NPRM*, 9 FCC Rcd. 2164.

[23] Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Second Report and Order*, 11 FCC Rcd. 20730 (1996) (*IXC Forbearance Order*), *stayed pending review sub nom, MCI Telecommunications Corp. v. FCC*, Case No. 96-1459 (D.C. Cir., Feb. 19, 1997), *order on recon.*, 12 FCC Rcd. 15014 (1997).

[24] *Id.* at 20739-53, ¶¶ 16-43.

[25] *Id.* at 20760, ¶ 52.

[26] Hyperion Telecommunications, Inc., Petition Requesting Forbearance, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 12 FCC Rcd. 8596 (1997) (*CAP Forbearance Order*). We declined, however, to forbear from imposing tariff requirements on "non-dominant telecommunications carriers in general" on the ground that the record did not address forbearance for this class of carriers with specificity. *Id.* at 8607, ¶ 21. We also did not adopt complete detariffing in this order because no notice had been given of that option. *Id.* at 8607-08, ¶ 22. However, we issued a notice of proposed rulemaking in which we proposed complete detariffing. *Id.* at 8613, ¶¶ 33-34.

[27] Billed Party Preference for InterLATA 0+ Calls, *Second Report and Order on Reconsideration*, 13 FCC Rcd. 6122, 6146-47, ¶ 43 (1998) (*Billed Party Preference Order*), *recon. pending*.

[28] New England Telephone and Telegraph Company and New York Telephone Company Petition for Forbearance From Jurisdictional Separations Rules, *Order*, 12 FCC Rcd. 2308 (1997).

[29] *FCBA Order*, 13 FCC Rcd. 6293.

recently, the Commission has declined to forbear from applying its dominant carrier regulations and rate of return requirements to Comsat Corporation in those markets where it remains a dominant carrier, but proposed to replace rate of return regulation with an alternative method of dominant carrier regulation.[30]

11. PCIA now requests that, pursuant to section 10 of the Act, we forbear, with respect to all broadband PCS licensees, from enforcing the following provisions: sections 201 and 202 of the Act (carriers must furnish services upon reasonable request, carriers must establish physical connections with other carriers in accordance with orders of the Commission, and carriers' rates and practices must be just, reasonable, and non-discriminatory), section 214 of the Act (carriers must obtain Commission authorization to provide international telecommunications services),[31] section 226 of the Act (operator service providers and aggregators,[32] with respect to public phones, must comply with certain requirements), and section 20.12(b) of our rules (certain CMRS carriers must not unreasonably restrict the resale of telecommunications services).[33] PCIA argues that forbearance from enforcement of these provisions is warranted under the three-pronged test of section 10 of the Act.[34]

12. Under section 10, we must forbear from applying any regulation or provision of the Act to a telecommunications carrier or service, or class of telecommunications carriers or services, in any or some of its geographic markets if a three-pronged test is met. Specifically, section 10 requires forbearance, notwithstanding section 332(c)(1)(A), 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;

---

[30] Comsat Corporation Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier, File No. 60-SAT-ISP-97, *Order and Notice of Proposed Rulemaking*, FCC 98-78, ¶¶ 135-163 (rel. Apr. 28, 1998). In addition to the orders discussed in the text, we have incidentally applied section 10 in several other proceedings. Furthermore, Commission staff has applied section 10 pursuant to delegated authority in several instances. *See, e.g.*, Bell Operating Companies Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities, *Memorandum Opinion and Order*, 13 FCC Rcd. 2627 (Comm. Carr. Bur. 1998); Petition for Forbearance From Application of the Communications Act of 1934, as Amended, to Previously Authorized Services, *Memorandum Opinion and Order*, 12 FCC Rcd. 8408 (Comm. Carr. Bur. 1997).

[31] PCIA also requests that we forbear from applying to broadband PCS licensees the section 203 requirement to file tariffs for international services.

[32] These terms are defined in para. 66, *infra*.

[33] PCIA's additional request for forbearance from section 310(d) was consolidated with a similar request for forbearance filed by the Federal Communications Bar Association, and, as previously noted, was granted in the *FCBA Order*, 13 FCC Rcd. 6293.

[34] 47 U.S.C. § 160(a).

(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.[35]

13. On June 2, 1997, the Wireless Telecommunications Bureau issued a public notice seeking comment on the Petition.[36] Twenty-two parties filed comments on the Petition and thirteen parties filed reply comments.[37] On May 21, 1998, we extended until June 8, 1998, the date on which the Petition would be deemed granted in the absence of a decision that it failed to meet the standards for forbearance under section 10(a).[38] On June 5, 1998, we further extended this deadline until June 23, 1998.[39]

IV. DISCUSSION

A. Sections 201 and 202

14. Background. Section 201 of the Act mandates that carriers engaged in the provision of interstate or foreign communication service provide service upon reasonable request, and that all charges, practices, classifications, and regulations for such service be just and reasonable. Section 201 also empowers the Commission to require physical connections with other carriers, to establish through routes, and to determine appropriate charges for such actions.[40] Section 202 states that it is unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services, or to make or give any undue or unreasonable preference or advantage to

[35] *Id.*

[36] Wireless Telecommunications Bureau Seeks Public Comment On Petition For Forbearance Filed by Broadband Personal Communications Services Alliance of the Personal Communications Industry Association, *Public Notice*, 12 FCC Rcd. 7637 (1997).

[37] *See* Appendix B for a complete list of commenters and short-form citations used. Unless otherwise indicated, citations are to comments on the PCIA Petition. *See also* Letter from Pamela J. Riley, AirTouch Communications, to Magalie R. Salas, Secretary, Federal Communications Commission, dated March 24, 1998; Response of PCIA to Staff Questions Regarding TOCSIA from Jeffrey S. Linder, Counsel, PCIA, to Magalie Salas, Secretary, Federal Communications Commission, dated April 10, 1998 (PCIA *Ex Parte*); Letter from Michael F. Altschul, Vice President and General Counsel, CTIA, to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, dated May 1, 1998 (CTIA *Ex Parte*).

[38] Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services, *Order*, FCC 98-99 (rel. May 21, 1998). *See* 47 U.S.C. § 160(c) (petition for forbearance under section 10(a) shall be deemed granted if not denied within one year after the Commission receives it, unless the Commission extends the one-year period by an additional 90 days upon finding that an extension is necessary to meet the requirements of section 10(a)).

[39] Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services, *Order*, FCC 98-113 (rel. June 5, 1998).

[40] 47 U.S.C. § 201.

any person or class of persons.[41] Section 332 of the Act requires that the Commission treat all CMRS providers as common carriers for purposes of the Communications Act, except to the extent the Commission determines to forbear from applying certain provisions of Title II. Although section 10 forbearance contains no such restriction, it is notable that, for purposes of forbearance under section 332, the Commission "may not specify any provision of section 201, 202, or 208." PCIA requests section 10 forbearance from the application of sections 201 and 202 of the Act to broadband PCS providers on the ground that market forces, including the competitive presence of other CMRS providers, are sufficient to ensure that rates are just, reasonable and not unjustly discriminatory.[42] PCIA states that forbearance will promote the public interest by enhancing competition, providing consumers with increased choices, driving prices downward, and eliminating compliance costs.[43]

15. Discussion. Sections 201 and 202, codifying the bedrock consumer protection obligations of a common carrier, have represented the core concepts of federal common carrier regulation dating back over a hundred years. Although these provisions were enacted in a context in which virtually all telecommunications services were provided by monopolists, they have remained in the law over two decades during which numerous common carriers have provided service on a competitive basis. These sections set out broad standards of conduct, requiring the provision of interstate service upon reasonable request, pursuant to charges and practices which are just and reasonable and not unjustly discriminatory. At bottom, these provisions prohibit unreasonable discrimination by common carriers by guaranteeing consumers the basic ability to obtain telecommunications service on no less favorable terms than other similarly situated customers. The Commission gives the standards meaning by defining practices that run afoul of carriers' obligations, either by rulemaking or by case-by-case adjudication. The existence of the broad obligations, however, is what gives the Commission the power to protect consumers by defining forbidden practices and enforcing compliance. Thus, sections 201 and 202 lie at the heart of consumer protection under the Act. Congress recognized the core nature of sections 201 and 202 when it excluded them from the scope of the Commission's forbearance authority under section 332(c)(1)(A).[44] Although section 10 now gives the Commission the authority to forbear from enforcing sections 201 and 202 if certain conditions are satisfied, the history of the forbearance provisions confirms that this would be a particularly momentous step.[45]

16. Sections 201 and 202 are enforced through the formal complaint process established in section 208 of the Act.[46] Under section 208, any aggrieved party may file a petition with the Commission

---

[41] 47 U.S.C. § 202.

[42] PCIA Petition at 23.

[43] *Id*. at 26.

[44] *See* 47 U.S.C. § 332(c)(1)(A).

[45] *See also CMRS Second Report and Order*, 9 FCC Rcd. at 1461, ¶ 120 (stating that classification of PCS as presumptively CMRS, thus making it subject to section 201 and 202 and the complaint procedures in section 208, would contribute to the universal availability of PCS because such regulations place an obligation on PCS licensees to make their services available to the public at non-discriminatory prices).

[46] 47 U.S.C. § 208.

complaining of an alleged violation of these provisions. The carrier that is the subject of the complaint must then either rectify the alleged violation or respond to the complaint. The carrier is relieved of liability for any injury if, within a reasonable period specified by the Commission, the carrier rectifies the injury alleged to have been caused. If the carrier does not satisfy the complaint within the specified time or if there appears to be any reasonable ground for investigating the complaint, the Commission shall investigate the alleged violation.[47] Consumers and carriers are protected by this complaint process. Indeed, when we decided to forbear from applying tariff requirements to CMRS, we relied on sections 201 and 202 and the section 208 complaint process as important safeguards to protect consumers in the event of market failure.[48]

17. Consistent with the centrality of sections 201 and 202 to consumer protection, the Commission has never previously refrained from enforcing sections 201 and 202 against common carriers, even when competition exists in a market.[49] In those instances where the Commission has reclassified carriers as "non-dominant" because they lack market power, and reduced those carriers' regulatory burdens, the Commission has continued to require compliance with sections 201 and 202.[50] For example, we concluded in the *AT&T Reclassification Order* that the prohibitions against unjust and unreasonable rates, practices, and discrimination contained in sections 201 and 202 of the Act apply equally to dominant and non-dominant carriers.[51] We explained that in the absence of section 205 tariff regulation, the substantive obligations imposed under sections 201 and 202, coupled with the complaint and enforcement processes of section 208, would prevent AT&T from engaging in anticompetitive behavior such as prohibition or unreasonable restriction of resale.[52]

18. Based on the record before us, we decline to forbear from enforcing the core common carrier obligations of sections 201 and 202 at this time. The record does not show, as required for forbearance under section 10, that the current market conditions ensure that the charges, practices, classifications and regulations of broadband PCS carriers are just and reasonable and are not unjustly or unreasonably

---

[47] 47 U.S.C. § 208(a). Congress imposed a five month deadline for resolving any section 208 investigation initiated by the Commission, which we believe is indicative of the importance Congress placed on the complaint process even in a largely de-regulated regime. *See* 47 U.S.C. § 208(b)(1).

[48] *See CMRS Second Report and Order*, 9 FCC Rcd. at 1478-79, ¶¶ 175-176; *see also IXC Forbearance Order*, 11 FCC Rcd. at 20743, 20751, ¶¶ 21, 38 (citing continued applicability of sections 201 and 202 and complaint process in support of forbearance from tariffing interstate, domestic, interexchange services); *CAP Forbearance Order*, 12 FCC Rcd. at 8609, ¶ 25 (similar discussion in context of provision of interstate exchange access services by providers other than incumbent LECs).

[49] *See* BANM Comments at 18.

[50] *Id.* (citing Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, *First Report and Order*, 85 FCC 2d 1(1980); Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, *Order*, 11 FCC Rcd. 3271 (1995) (*AT&T Reclassification Order*)).

[51] *AT&T Reclassification Order*, 11 FCC Rcd. at 3282, ¶ 130.

[52] *Id.*

discriminatory, that market forces are sufficient to protect consumers from discriminatory charges and practices of broadband PCS providers, and that forbearance is in the public interest.

19. The first prong of the section 10 forbearance standard is not satisfied unless enforcement of a statutory provision is shown not to be necessary to ensure that charges, practices, classifications, and regulations are just and reasonable, and are not unjustly or unreasonably discriminatory.[53] This standard essentially tracks the central requirements of sections 201 and 202. Thus, in arguing for forbearance from applying sections 201 and 202, PCIA necessarily contends that in order to ensure that broadband PCS providers' charges, practices, classifications, and regulations are just, reasonable, and not unjustly or unreasonably discriminatory, we need not require that those charges, practices, classifications, and regulations be just, reasonable, and not unjustly or unreasonably discriminatory.

20. PCIA argues that the broadband PCS market is competitive within the context of the total CMRS market, that broadband PCS providers lack individual market power, and that, therefore, enforcement of sections 201 and 202 is no longer necessary to ensure that rates and practices associated with broadband PCS, or imposed by broadband PCS providers, are just, reasonable, and not unjustly discriminatory.[54] PCIA relies heavily on the contention that Congress enacted sections 201 and 202 when the communications marketplace was dominated by a few large landline common carriers with substantial market power, and that today's vigorously competitive CMRS market has rendered these regulations superfluous.[55] PCIA argues that competition in the marketplace can appropriately regulate the provision of wireless telecommunications services by broadband PCS providers and that the present level of competition can supplant sections 201 and 202.

21. We agree with PCIA that broadband PCS providers are operating in an increasingly competitive environment. Until a few years ago, licensed cellular providers enjoyed duopoly market power, substantially free of direct competition from any other source. As early as 1994, we cited growing CMRS competition as a consideration supporting forbearance from imposing tariff obligations upon CMRS providers.[56] Growing competition was also the basis for denying state petitions for authority to regulate CMRS rates under section 332(c)(3) of the Act.[57] Just prior to the filing of PCIA's Petition, the

---

[53] 47 U.S.C. § 160(a)(1).

[54] PCIA Petition at 10-26.

[55] *Id.* at 19. In support of its contention that CMRS markets are so competitive that sections 201 and 202 are no longer necessary, PCIA relies on the Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Second Report*, 12 FCC Rcd. 11266 (1997) (*Second CMRS Competition Report*). In particular, PCIA cites findings in the *Second CMRS Competition Report* regarding CMRS market growth, capital investment, the existence of multiple CMRS providers in each market area, and the trend of CMRS providers offering lower prices and new, innovative services. *See* PCIA Petition at 9-16 (citing *Second CMRS Competition Report*, 12 FCC Rcd. 11266).

[56] *CMRS Second Report and Order*, 9 FCC Rcd. at 1478, ¶ 175; *see generally id*. at 1467-72, ¶¶ 135-154 (discussing state of competition).

[57] *See, e.g., Connecticut Rate Regulation Order*, 10 FCC Rcd. at 7055-59, ¶¶ 67-77; *Ohio Rate Regulation Order*, 10 FCC Rcd. at 7851-52, ¶¶ 37-39.

Commission issued its *Second CMRS Competition Report*, in which we acknowledged that the most significant recent entry into CMRS markets has been by PCS providers.[58] We further observed that the prospective entry of PCS carriers appeared to be accelerating the conversion of some cellular systems from analog to digital technology, a change that would facilitate the offering of a broader array of wireless services by cellular licensees.[59] Most recently, we have adopted a *Third CMRS Competition Report* in which we observed that the CMRS marketplace has continued to progress toward competition during the past year, with the result that prices for mobile telephony service have been falling and service offerings have become more diverse.[60]

22. Nonetheless, the competitive development of the industry in which broadband PCS providers operate is not yet complete and continues to require monitoring.[61] The most recent evidence indicates that prices for mobile telephone service have been falling, especially in geographic markets where broadband PCS has been launched.[62] These price declines, however, have been uneven,[63] and do not necessarily indicate that prices have reached the levels they would ultimately attain in a competitive marketplace. In general, licensees do not exert any disciplinary effect in their markets until after they announce their intentions to commence operations, identify the services they intend to offer, and begin soliciting business.[64] While six broadband PCS licenses have now been awarded in most areas, many licensees have yet to begin offering services. Most C, D, E, and F block licensees are not yet in operation, and in some areas, even A or B block licensees have not yet launched services.[65] Furthermore, even if a licensee is providing service in part of its licensed service area, there may be large areas left without competitive service.[66]

23. Assuming all relevant product and geographic markets become substantially competitive, moreover, carriers may still be able to treat some customers in an unjust, unreasonable, or discriminatory

---

[58] *Second CMRS Competition Report*, 12 FCC Rcd. at 11269.

[59] *Id.* at 11269-70.

[60] *See Third CMRS Competition Report* at 2.

[61] *See id.* at 33-35 (discussing factors that have the potential to limit broadband PCS growth and competitive development).

[62] *See id.* at 19-20.

[63] *See id.* at 20.

[64] *See* Satellite Business Systems, *Memorandum Opinion, Order, Authorization and Certification*, 62 FCC 2d 997, 1088-1094 (1977), *aff'd sub nom. United States v. FCC*, 652 F.2d 72, 100-102 (D.C. Cir. 1980); General Telephone and Electronics Corporation, *Memorandum Opinion and Order*, 72 FCC 2d 111, 155-158, *order on recon.*, 72 FCC 2d 516, *further recon. denied*, 84 FCC 2d 18 (1979).

[65] *See Third CMRS Competition Report* at 32-33.

[66] The record does not contain a market analysis of competition within particular geographic markets with respect to any of the requests for forbearance made by PCIA. We also note that the *Third CMRS Competition Report* does not contain any such analysis. *See id.* at 18 n.88.

manner. Competitive markets increase the number of service options available to consumers, but they do not necessarily protect all consumers from all unfair practices. The market may fail to deter providers from unreasonably denying service to, or discriminating against, customers whom they may view as less desirable. In addition, certain conditions even in competitive CMRS markets could facilitate discrimination and unfair practices. For example, CMRS systems use a variety of different technologies and operate over different frequency bands, thus requiring handsets with different capabilities to access different systems. The cost of a new handset--as a component of the cost of switching providers--may thus act to undermine market discipline. This may be exacerbated by the current lack of number portability. Due to these conditions, providers may, in the absence of sections 201 and 202, have the opportunity and incentive to treat some of their existing customers in an unjust, unreasonable, and discriminatory manner, as compared with similarly situated potential new customers.[67]

24. Given the ongoing competitive development of the markets in which broadband PCS providers operate, constraints on market entry imposed by the need for spectrum licenses, and uncertainties regarding the extent to which a competitive market structure can ensure reasonable and nondiscriminatory practices toward all consumers, we are unwilling to assume that current market conditions alone will adequately constrain unjust and unreasonable or unjustly and unreasonably discriminatory rates and practices without specific evidence to that effect. Neither PCIA nor any other source has brought such evidence to our attention. We therefore conclude that the first prong of the section 10 forbearance standard has not been satisfied.

25. Under the second prong of the section 10 forbearance standard, a party seeking forbearance must show that enforcement of a provision is not necessary for the protection of consumers.[68] PCIA asserts that the variety of competitive alternatives available to consumers, along with the broad range of pricing plans from which they may choose, renders the continued application of sections 201 and 202 to broadband PCS providers unnecessary for consumers' protection.[69] We recognize that consumers in today's market may have a broad choice of calling plans, and that many consumers are able to choose to take service from among several providers. Nonetheless, as we found in connection with the first prong of the section 10 forbearance standard, the record does not show that today's market conditions eliminate all remaining concerns about whether broadband PCS providers' rates and practices are just, reasonable, and non-discriminatory. For the same reasons, we cannot conclude that sections 201 and 202 are not necessary to protect consumers.

26. Many of the unjust or unreasonable practices in which carriers could engage could potentially harm consumers. Sections 201 and 202 serve to deter providers that otherwise may arbitrarily refuse service to, or discriminate against, some potential customers. In addition, as noted above, carriers' use of different technologies, the high cost of handsets, and the current lack of number portability combine to create conditions that could facilitate anti-consumer practices. By raising the costs of changing providers for many consumers, these factors might permit carriers to harm customers who are "locked in" to their

---

[67] *See* NWRA Comments at 28.

[68] 47 U.S.C. § 160(a)(2).

[69] PCIA Petition at 22-23.

provider by failing to offer those customers reasonable deals.[70] Furthermore, carriers could harm consumers by unreasonably failing to offer roaming. Carriers might also prohibit or unreasonably restrict resale of their services, thereby harming consumers by restricting potential competition by resellers.[71] In the absence of assurance that current market conditions will prevent such carrier practices, we believe that sections 201 and 202, and the complaint process of section 208, constitute a vital safeguard for consumers.

27. The third prong of the section 10 forbearance standard requires us to forbear only if we find that forbearance is consistent with the public interest.[72] In evaluating whether forbearance is consistent with the public interest, we must consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers.[73] In making this assessment, we may consider the benefits a regulation bestows upon the public, along with any potential detrimental effects or costs of enforcing a provision. PCIA argues that forbearance from applying sections 201 and 202 to broadband PCS providers would further the public interest because these sections limit carriers' ability to develop specialized offerings for particular customers, and impose administrative costs on carriers.[74] Thus, PCIA contends, sections 201 and 202 retard competition and ultimately harm consumers.

28. We reject PCIA's argument for several reasons. First, as already discussed, the first two prongs of the section 10 forbearance standard are not satisfied because the record does not show that present market conditions, in the absence of sections 201 and 202, will protect consumers and ensure that carriers' rates and practices are just, reasonable, and non-discriminatory. Thus, even if we believed forbearance were in the public interest as required under the third prong, we could not forbear from enforcing sections 201 and 202 pursuant to section 10. We also believe that the benefits sections 201 and 202 confer upon the public by protecting consumers and preventing unjust, unreasonable, and discriminatory practices are important parts of our public interest analysis. Indeed, we believe that as customers begin to rely on CMRS as a partial or complete substitute for wireline service,[75] it becomes increasingly important for us to preserve the basic relationship between carriers and customers enshrined in sections 201 and 202.

29. Moreover, we are not convinced that any harm caused by sections 201 and 202, to competition or otherwise, outweighs the public interest benefits of these provisions. As discussed above, we are committed to forbearing from enforcing requirements that impede competition, impose unnecessary costs, or obstruct the provision of diverse, high quality services at low prices. Nonetheless, we are not convinced by PCIA's generalized claims that sections 201 and 202 substantially restrict broadband PCS carriers'

---

[70] NWRA Comments at 28.

[71] *See* NWRA Comments at 28-29; *see also* America One Comments at 2-3.

[72] 47 U.S.C. § 160(a)(3).

[73] *See* 47 U.S.C. § 160(b).

[74] PCIA Petition at 24-26.

[75] *See Third CMRS Competition Report* at 26-28.

ability to develop specialized offerings and competitive prices. To the contrary, the principal regulatory impediments to carrier innovation -- federal and state regulation of rates and state regulation of entry -- have already been removed as applied to CMRS providers by Congressional and Commission action.[76] Rather, sections 201 and 202 give wireless carriers ample discretion to adopt flexible pricing to meet customer needs and marketplace demands. For example, we note that section 202 does not prohibit all different treatment of consumers, only *unreasonable* discrimination among consumers.[77] Furthermore, we disagree that enforcement of sections 201 and 202 puts carriers in the position of speculating about the legal ramifications of offering innovative service packages and prices, and that such speculation chills innovative services and plans.[78] By now, there is a substantial body of precedent that promotional programs, volume discounts and other arrangements may be reasonable and non-discriminatory.[79] We note no party adduces specific evidence that carriers have been deterred from offering particular plans or have been subject to unwarranted complaints. Also, there has been no effort to show the extent of any administrative costs of compliance.[80] We note again that in order to meet the first prong of the section 10 forbearance test, it must be shown that carriers will comply in any event with the central substantive requirements of sections 201 and 202. Under these circumstances, we cannot conclude that the public interest in forbearance outweighs the benefits of continuing to enforce sections 201 and 202.

30. Furthermore, we believe forbearance would harm the public interest, and particularly the growth of competition, in other ways. Forbearance from enforcing sections 201 and 202 with regard to broadband PCS carriers alone would create regulatory asymmetry with respect to cellular and other CMRS providers. This asymmetry would distort competition and contradict the intent of Congress that CMRS providers should be treated similarly.[81] In addition, if we were to forbear from enforcing sections 201 and

---

[76] *See* 47 U.S.C. § 332(c)(3); *CMRS Second Report and Order*, 9 FCC Rcd. at 1463-93, ¶¶ 124-219.

[77] *See, e.g.*, AT&T Communications, Revisions to Tariff F.C.C. No. 12, *Memorandum Opinion and Order*, 4 FCC Rcd. 4932 (1989).

[78] *See* PCIA Petition at 25; *see also* Sprint/APC Comments at 9 (stating that sections 201 and 202 constrain PCS providers from offering imaginative and customized terms and conditions); Nextel Comments at 6-7 (stating that sections 201 and 202 make it difficult for competitive providers to negotiate freely and to tailor terms and conditions of service to the specific needs of particular customers).

[79] *See* BANM comments at 19 (citing Private Line Rate Structure and Volume Discount Practices, *Report and Order*, 97 FCC 2d 923, 947-49, ¶¶ 38-42 (1984)); *see also* Petitions for Waiver of Section 64.702 of the Commission's Rules, *Memorandum Opinion and Order*, 100 FCC 2d 1057, 1106 n.87 (1985) ("Indeed, there is an evolving policy . . . that flexibility in the pricing of private line services such as nondiscriminatory bulk discount offerings is desirable . . .").

[80] *See* PCIA Petition at 24-26.

[81] *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, *Third Report and Order*, 9 FCC Rcd. 7988, 7996, ¶ 13 (1994). We note that PCIA requests in its Petition that the Commission forbear from enforcing sections 201 and 202 solely with regard to broadband PCS providers. PCIA Petition at 18. For the reasons discussed in the text, we conclude that such forbearance is unwarranted without regard to considerations of regulatory symmetry. If we believed the standards for forbearance were otherwise satisfied, we would consider whether the record supported forbearance for a broader category of CMRS providers. *See* para. 73, *infra*.

202, parties would likely turn to the courts for relief from perceived unjust and unreasonable carrier practices.[82] We believe that since the courts lack the Commission's expertise, developed over decades, in evaluating carriers' practices, carriers would face inconsistent court decisions and incur unnecessary costs.[83] This could result in consumers receiving differing levels of service and protection depending upon the jurisdiction in which they live, contrary to the intent of Congress in amending section 332(c).[84]

31. In sum, we find that the record does not permit us, consistent with the three-prong test set out in section 10 of the Act, to forbear from enforcing sections 201 and 202 with respect to broadband PCS providers. First, the record does not show that existing competition in the market in which broadband PCS providers compete has rendered sections 201 and 202 unnecessary to prevent unjust, unreasonable, and unjustly or unreasonably discriminatory practices. Second, the record does not show that sections 201 and 202 are no longer necessary to protect consumers from discriminatory charges and practices by broadband PCS providers. Finally, we do not believe that forbearance from enforcing sections 201 and 202 is consistent with the public interest. The Commission has, pursuant to its authority under section 332(c)(1)(A), forborne from the application of sections 203, 204, 205, 211, 212 and 214 of Title II of the Communications Act to any service classified as CMRS, including broadband PCS.[85] Sections 201 and 202 continue to provide important safeguards to consumers of broadband PCS against carrier abuse in an area that has already been largely deregulated by the Commission. We therefore find that at this time it is necessary to maintain sections 201 and 202, which enable the Commission to ensure that broadband PCS carriers provide service in a just, reasonable, and non-discriminatory manner, and to provide all consumers, including other carriers, with a mechanism through which they can seek redress for unreasonable carrier practices.

B. Resale Rule, 47 C.F.R. § 20.12(b)

32. Background. PCIA has also requested that we forbear from applying the CMRS resale rule to broadband PCS carriers.[86] On June 12, 1996, the Commission adopted a rule prohibiting certain providers

---

[82] Resort to the courts would probably be required because state regulatory commissions would be limited in their ability to fulfill this function. Section 10(e) of the Act prevents state commissions from enforcing any provision of the Act that the Commission has forborne from applying. 47 U.S.C. § 160(e). In addition, under section 332(c)(3), states cannot regulate the entry of CMRS providers under any circumstances and cannot regulate CMRS rates unless the Commission grants a state's petition upon finding that market conditions fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory, or that such market conditions exist and a service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such state. States may, however, regulate the other terms and conditions of CMRS. 47 U.S.C. § 332(c)(3).

[83] *See* BANM Comments at 17-18; GTE Comments at 5.

[84] *See* H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. at 260 (1993) (section 332(c) is intended "[t]o foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure").

[85] *CMRS Second Report and Order*, 9 FCC Rcd. at 1478-81, 1485, 1510-11, ¶¶ 173-182, 196, 272.

[86] PCIA Petition at 27-37.

of CMRS from unreasonably restricting the resale of their services during a transitional period.[87] Prior to 1996, the Commission applied a similar rule only to providers of cellular service.[88] In the *First Report and Order*, the Commission extended the resale rule to providers of broadband PCS and certain "covered" specialized mobile radio (SMR) services in order to promote competition in those services.[89] The Commission found that resale confers important public benefits in less competitive markets, including encouraging competitive pricing; discouraging unjust, unreasonable, and unreasonably discriminatory practices; reducing the need for regulatory intervention and concomitant market distortions; promoting innovation; improving carrier management and marketing; generating increased research and development; and positively affecting the growth of the market.[90] Balancing these benefits against the costs of regulation with respect to each class of providers, the Commission concluded that the rule's potential benefits as applied to cellular, broadband PCS and covered SMR providers exceeded its potential costs.[91] By contrast, because other CMRS providers did not substantially compete in the mass market for two-way switched voice and data services, faced vigorous competition, and operated in markets in which resale was an established practice, the Commission concluded that an express resale requirement was unnecessary for providers of these services.[92] Furthermore, the Commission found that the competitive development of broadband PCS and covered SMR services, as alternatives to cellular, would obviate the need for an express CMRS resale requirement, and it therefore provided that the resale rule would sunset five years following the award of the last group of initial broadband PCS licenses.[93]

---

[87] Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, *First Report and Order*, 11 FCC Rcd. 18455 (1996) (*First Report and Order*), *recon. pending, appeal pending sub nom. Cellnet Communications, Inc. v. FCC*, No. 96-4022 (6th Cir. filed Sept. 19, 1996). The Commission is currently considering petitions for reconsideration or clarification of this order, and these petitions raise many of the same general issues as PCIA does in its petition for forbearance. To the extent that parties raise in their comments in this proceeding issues other than forbearance that are the subject of petitions for reconsideration of the *First Report and Order*, we defer those issues to the reconsideration proceeding, in which a fuller record has been developed. *See, e.g.*, AT&T Comments at 5-6 (urging Commission not to apply the resale rule to bundled packages of services and equipment); GTE Comments at 7 n.10. We also note that while PCIA and others are encouraging us to forbear from enforcing the resale regulation, other parties request that we eliminate the sunset provision and maintain the resale rule in perpetuity. Our decision herein is not meant to prejudge the disposition of issues raised on reconsideration. We are committed to resolving these issues expeditiously.

[88] *See* 47 C.F.R. § 22.901(e) (1995). The prior rule included an exception permitting a cellular carrier to deny resale capacity to a fully operational facilities-based competitor, defined as a carrier whose five-year buildout period had expired. *Id. See generally First Report and Order*, 11 FCC Rcd. at 18457-58, ¶¶ 4-5.

[89] *First Report and Order*, 11 FCC Rcd. at 18459-62, ¶¶ 7, 10-12.

[90] *Id.* at 18461-62, ¶ 10. We note especially that resale in telecommunications markets has helped bring service to smaller and underserved markets, as well as providing opportunities for small businesses. In wireless markets, in particular, resale allows companies that may not have access to spectrum to offer full packages of services and products.

[91] *Id.* at 18464-67, ¶¶ 15-20.

[92] *Id.* at 18467-68, ¶ 21.

[93] *Id.* at 18468-69, ¶ 24. *See* 47 C.F.R. § 20.12(b) ("This paragraph shall cease to be effective five years after the last group of initial licenses for broadband PCS spectrum in the 1850-1910 and 1930-1990 MHz bands is awarded.").

33. Section 20.12(b) of the Commission's rules, which we adopted in the *First Report and Order*, states that "[e]ach carrier subject to this section must permit unrestricted resale of its service" until the transition period expires.[94] We explained in the *First Report and Order* that the rule has two straightforward requirements: (1) no provider may offer like communications services to resellers at less favorable prices, terms, or conditions than are available to other similarly situated customers, absent reasonable justification; and (2) no provider may explicitly ban resale or engage in practices that effectively restrict resale, unless those practices are justified as reasonable.[95] It essentially prohibits covered carriers from unreasonably discriminating against resellers. The resale rule does not require providers to structure their operations or offerings in any particular way, such as to promote resale, adopt wholesale/retail business structures, establish a margin for resellers, or guarantee resellers a profit.[96]

34. Discussion. PCIA argues that we should not wait until the end of the transition period established in the *First Report and Order* to sunset the CMRS resale rule, but rather should forbear from applying that rule to broadband PCS providers immediately.[97] Several commenters support PCIA's position, arguing that the Commission should either forbear from enforcing the resale rule or significantly relax the current requirements due to robust competition in CMRS markets.[98] We find that the record does not show that the three-pronged forbearance test set out in section 10 of the Act has been met.[99] We therefore decline to forbear from enforcing the resale rule with respect to broadband PCS providers at this time.

35. The Commission has a long history of encouraging resale and believes it has played an important role in the development of telecommunications markets in the past and may continue to play such a role in the future.[100] Resellers benefit the marketplace by focusing on residential and smaller business customers, giving them pricing and volume discounts and customer service that facilities-based carriers

---

The commencement of the five-year sunset period will be announced by public notice. *See First Report and Order*, 11 FCC Rcd. at 18469, ¶ 24.

[94] *See* 47 C.F.R. § 20.12(b).

[95] *First Report and Order*, 11 FCC Rcd. at 18462-63, ¶ 12.

[96] *Id.* at 18462, ¶ 12.

[97] PCIA Petition at 27-29.

[98] *See* AT&T Comments at 4-5; BANM Comments at 9-10; BellSouth Comments at 10-11; Nextel Comments at 7; PrimeCo Comments at 3-4; SouthEast Comments at 2-3; Sprint/APC Comments at 1-5; AirTouch Reply Comments at 3-4; BellSouth Reply Comments at 2-3; US WEST Reply Comments at 2-5.

[99] *See* 47 U.S.C. § 160(a).

[100] *See* Resale and Shared use of Common Carrier Services and Facilities, 60 FCC 2d 261, 263 (1976), *recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir.), *cert.denied*, 439 U.S. 875 (1978). *See also* Resale and Shared Use of Common Carrier Domestic Public Switched Network services, 83 FCC 2d 167(1980); *recon. denied*, 86 FCC 2d 820 (1981).

often make available only to larger customers.[101] Resellers also exert downward pressure on the rates charged by facilities based providers of CMRS through their ability to purchase wireless service at high-volume rates and pass those savings on to residential and small business customers. Low-volume consumers benefit from the reseller's lower rates. They also benefit from the reseller's ability to impose market discipline on the facilities-based provider, which can result in lower prices overall. Moreover, resale expands the opportunities for small businesses to participate in the communications marketplace by focusing on unserved or underserved market segments, such as individual consumers and small businesses in particular ethnic communities, that may not receive sufficient marketing attention from underlying CMRS licensees.[102] Resellers are able to offer their customers CMRS service packaged with a wide range of other services, including some obtained from other providers, thus enabling resellers to tailor service packages to meet each customer's particular mix of needs.[103] Furthermore, resale rules that promote the dissemination of benefits to unserved and underserved communities are directly pertinent to the overarching purpose of serving the needs of "all the people of the United States," as mandated in section 1 of the Communications Act.[104]

36. To some extent, PCIA's arguments for forbearance from enforcing the resale rule simply repeat its arguments with respect to sections 201 and 202; namely, that the criteria in section 10 are met because of the level of competition faced by broadband PCS providers and the growth of broadband PCS service.[105] We reject these general arguments for the reasons discussed above.[106] Specifically, we have already found that, notwithstanding many promising developments, the competitive development of the market in which broadband PCS providers operate is not yet complete. Moreover, although increased competition brings many benefits to consumers and eliminates the rationale for many regulations, we cannot assume that increased competition alone will protect consumers from unjust or discriminatory practices. Under these circumstances, the evidence does not establish that current market conditions will ensure that providers' practices are just, reasonable, and not unjustly or unreasonably discriminatory, and that consumers will not be harmed.

37. In addition to these general contentions, PCIA also makes arguments specifically directed to the current necessity for a resale rule and whether application of that rule to broadband PCS providers serves the public interest. With respect to the first prong of the test, PCIA argues that the resale rule is unnecessary because, given the competitive state of the market, broadband PCS providers have no incentive to engage in unjust or unreasonable resale practices, or to unjustly or unreasonably discriminate against resellers. Indeed, PCIA states, in a competitive environment facilities-based operators have a natural

---

[101] *See* NWRA comments at 10-13.

[102] *Id.*

[103] *Id*. at 10-14.

[104] *See* 47 U.S.C.§ 151, *see also* H.R. Rep. No. 104-458, 104th Cong., 2nd Sess. at 104 (1996).

[105] *See* PCIA Petition at 29-34.

[106] *See* Section IV.A, *supra.*

incentive to promote distribution of their services through the use of resellers.[107] PCIA asserts that facilities-based operators are even more likely to rely on resellers where, as is the case with broadband PCS providers, they have extremely high spectrum acquisition and operating costs.[108]

38. As discussed in the *First Report and Order*, we agree that the operation of competitive market forces removes the opportunity and incentive for carriers to restrict resale in an anticompetitive manner. Thus, the benefits to be obtained through a resale rule generally diminish as markets become more competitive.[109] Indeed, this observation underlies the Commission's decision to impose a sunset period on the resale rule.[110] We are not convinced on the present record, however, that existing market conditions impose such discipline on broadband PCS providers, or on other providers subject to the CMRS resale rule. To the contrary, the record contains significant evidence suggesting that despite the current resale rule, abuses in the form of refusals to offer services for resale still exist.[111] For example, WorldCom cites an instance where a carrier's resale program did not include delivery of bills to the reseller, thus allegedly impeding any resale agreement.[112] Touch 1 indicates that it has been presented with reseller rates so complicated that it would be almost impossible to craft a consumer rate plan based on them or to administer such rates in its own billing system, and that such tactics allow facilities-based carriers to be the first to market promotions and rates to attract the existing base of cellular customers.[113] In addition, two surveys submitted by NWRA and TRA suggest that resellers may be encountering significant difficulties in their negotiations with broadband PCS, cellular and SMR carriers.[114] While we cannot conclude from this record that all of these alleged practices are unreasonable, these allegations, which have not been effectively refuted,[115] support our conclusion that the resale rule has not been shown unnecessary to ensure that rates

---

[107] PCIA Petition at 31.

[108] *Id.* at 31-32.

[109] *First Report and Order*, 11 FCC Rcd. at 18463, ¶ 14; *see also id.* at 18462, ¶ 11 ("the benefits to be obtained from a resale rule . . . are most prominent in markets that have not achieved full competition").

[110] *Id.* at 18468-69, ¶ 24.

[111] *See, e.g.*, NWRA Comments at 19-21; One Source Comments at 7-9; WorldCom Comments at 12-13.

[112] WorldCom Comments at 13.

[113] Touch 1 Reply Comments at 1-2.

[114] NWRA attached to its comments a survey dated July 1997 that it sent to 91 resellers. Of the 46 wireless resellers responding to the survey, 61 percent report that they have been unable to obtain resale arrangements with broadband PCS carriers within the past year. NWRA Comments at 4, 19, Attachment at 10. Subsequently, TRA submitted a survey conducted in January and February 1998 indicating that 88.3% of the respondents that were interested in reselling PCS had not successfully made arrangements to do so. Letter from Ernest R. Kelly, III, President, TRA, to William Kennard, Chairman, FCC, dated Feb. 10, 1998, at 1, Attachment at 3; *see also* Letter from Ernest B. Kelly, III, President, TRA, to William Kennard, Chairman, FCC, dated March 24, 1998, Attachment A (March 24, 1998 TRA Letter).

[115] PCIA asserts that the TRA survey results do not preclude the possibility that carriers are not offering resale agreements for legitimate reasons contemplated by the resale rule, or that they are simply not offering specially

and practices are just, reasonable, and non-discriminatory.[116] We note that although the Commission has received few formal complaints about CMRS providers' failure to permit unrestricted resale of their services,[117] we will vigorously investigate any complaints that we receive and take appropriate enforcement action.[118]

39. We also find that PCIA's petition does not satisfy the second prong of the forbearance test. PCIA argues that the resale rule is not necessary to protect consumers because the competitive marketplace will ensure the efficient availability of resale, with its attendant consumer benefits.[119] We reject this contention because, as we have discussed, the record does not show that current market conditions can effectively prevent unreasonable resale practices.[120] In this regard, we emphasize that unrestricted resale promises many benefits to consumers, especially in markets where direct competition among underlying providers remains somewhat limited. With more retail competitors, consumers benefit from alternative choices and higher quality services as carriers vie for customers. As many commenters note, the unrestricted availability of resale helps ensure that consumers will have access to favorable rates and innovative service offerings.[121] For example, Cellnet argues that wireless resellers' ability to buy in bulk from facilities-based carriers allows individual consumers to obtain the same rate as a Fortune 500

---

favorable arrangements for resellers. Letter from Jay Kitchen, President, PCIA, to William E. Kennard, Chairman, FCC, dated March 11, 1998, at 1-2. NWRA argues, however, that not offering a resale agreement is tantamount to refusing a request for resale. March 24, 1998 TRA Letter at 1-2; *see also id.*, Attachment A (addressing PCIA allegations that NWRA survey results are internally inconsistent and statistically do not support TRA's claims).

[116] *See* 47 U.S.C. § 160(a)(1).

[117] *See Discount Business Services, Inc. v. Ameritech Mobile Phone Service of Chicago*, File No. WB/ENF-F-97-010 (filed Mar. 28, 1997) (alleging carrier denied reseller of prepaid service timely access to billing and usage information); *National Wireless Resellers Association v. AirTouch Cellular*, File No. WB/ENF-F-97-012 (filed June 3, 1997) (alleging defendant improperly offers lower rates to resellers that primarily use its services); *Cellexis International, Inc. v. Bell Atlantic NYNEX Mobile, Inc.*, File Nos. WB/ENF-F-97-001, *et al.* (filed Dec. 20, 1996) (alleging defendants improperly attempted to terminate agreement with switch-based reseller); *Cellnet Communications, Inc. v. New Par, Inc.*, File No. WB/ENF-F-ENF-95-010 (filed Feb. 16, 1995) (alleging improper denial of agreement with switch-based reseller); *Nationwide Cellular Service, Inc. v. Comcast Cellular Communications, Inc.*, File No. WB/ENF-F-ENF-95-011 (filed Feb. 16, 1995) (similar).

[118] *See* Letter from Gary P. Schonman, Chief, Compliance and Litigation Branch, Enforcement and Consumer Protection Division, Wireless Telecommunications Bureau, to Robert S. Foosaner, Vice President and Chief Regulatory Officer, Nextel Communications, Inc., File No. WB/ENF-I-98-1132 (May 29, 1998) (commencing inquiry under section 308(b) of the Act into possible violations of the resale rule by Nextel).

[119] PCIA Petition at 34-36.

[120] *See* para. 39, *supra*.

[121] *See* America One Comments at 5-10; Cellnet Comments at 5-7; CompTel Comments at 1-6; MCI Comments at 3-4; NWRA Comments at 11-16; TRA Comments at 2-4; WorldCom Comments at 3-10; NWRA Reply Comments at 1-4; TRA Reply Comments at 6; Touch 1 Reply Comments at 1-2.

company.[122] WorldCom argues that resellers compete in areas such as product design, customer support, billing detail, and pricing, thereby providing to consumers a broader range of service offerings tailored to the needs of different users.[123] In addition, resale allows providers of other telecommunications services that may not have CMRS licenses to offer bundled packages of services, including CMRS, for the benefit of consumers who prefer "one stop shopping."[124]

40. In addition to finding that the first two prongs of the forbearance test are not satisfied, we conclude that the record does not show forbearance from enforcement of the resale rule to be in the public interest. In particular, we find that continued enforcement of the resale rule is important to promote the rapid development of vigorous competition in the market in which broadband PCS providers compete.[125] One of our major reasons for adopting the CMRS resale rule in 1996 was to speed the development of competition in the mass market for two-way switched mobile voice services by permitting new entrants to begin offering service to the public before building out their facilities.[126] This capability, we reasoned, would help new entrants to overcome the advantages enjoyed by two types of earlier entrants. First, all new entrants, including broadband PCS providers, would be competing directly with cellular firms that in many instances had been in the market for a decade or more, and therefore enjoyed substantial advantages of incumbency.[127] Second, we observed that even among broadband PCS providers, the earliest licensed entrant in a geographic market might receive its license and begin operating substantially before its last competitors.[128] In this regard, we note that the A and B block licensees in some areas will have a licensing headstart of three years or more over some of their competitors.[129] We continue to believe that resale opportunities will help later entrants to overcome their competitors' advantages by entering the market through resale before their facilities are built out, and we find nothing in the record to contradict this conclusion.[130]

---

[122] Cellnet Comments at 7; *see also* WorldCom Comments at 8.

[123] WorldCom Comments at 9.

[124] *See* NWRA Comments at 3; WorldCom Comments at 4, 9, and Attachment A (Affidavit of James Wolfinger) at 2.

[125] *See* 47 U.S.C. § 160(b) (directing the Commission to consider whether forbearance will promote competitive market conditions as part of its public interest analysis).

[126] *See First Report and Order*, 11 FCC Rcd. at 18462, ¶ 10; *see also id.* at 18470, ¶ 27.

[127] *Id.* at 18465, ¶ 17.

[128] *Id.* at 18465-66, ¶ 18.

[129] The earliest broadband PCS licenses were awarded to three holders of pioneer's preferences on December 13, 1994, and the remaining A and B block licenses were awarded on June 23, 1995. In some geographic areas, at least one of the remaining licenses still has not been awarded.

[130] *See* WorldCom Comments at 8-9 (noting value of resale to new entrants).

41. The resale rule also promotes competition in ways other than facilitating the early entry of new licensees. In a market that has not achieved sufficient competition, an active resale market can help to replicate many of the features of competition, including spurring innovation and discouraging unreasonably discriminatory practices, by increasing the number of entities offering service at the retail level.[131] In addition, the availability of resale permits more entities to offer packages containing a variety of services including CMRS, thereby increasing competition in the market for multiple-service packages.[132] Resale may also be used as an entry strategy by small entities that may aspire to offer facilities-based services in the future.

42. In opposition to these procompetitive public interest benefits, PCIA argues that the CMRS resale rule harms the public interest by imposing costs of compliance on broadband PCS providers.[133] While PCIA makes no attempt to quantify these costs, we did acknowledge in the *First Report and Order* that, as with all regulation, there are costs associated with resale compliance which should not be imposed unless clearly warranted.[134] We concluded, however, that as applied to cellular, broadband PCS, and covered SMR providers, these costs were outweighed by the benefits of the resale rule.[135] Nothing in the present record persuades us to reevaluate this conclusion. As we have noted, the resale rule only proscribes policies that restrict resale or discriminate against resellers without reasonable justification, and does not require carriers affirmatively to structure their businesses to promote resale.[136] Moreover, we previously determined to sunset the resale rule five years after we award the last group of initial licenses for currently allocated broadband PCS spectrum.[137] In light of these limitations, and in the absence of specific evidence to the contrary, we cannot conclude that the administrative costs imposed by the resale rule outweigh the benefits of the rule. In addition, we are not persuaded that the obligation to permit resale significantly discourages facilities-based carriers from innovating in a market that has not achieved sufficient competition.[138] As we observed in the *First Report and Order*, the resale rule does not prevent a provider from recovering its costs incurred in providing a service, including the costs of developing any underlying technology, or from inserting in its sales agreements appropriate, non-discriminatory terms to protect its interests.[139] Under these circumstances, it is not clear how the rule would operate as a disincentive to innovation.

---

[131] *See First Report and Order*, 11 FCC Rcd. at 18462, ¶ 11.

[132] *See* NWRA Comments at 8; WorldCom Comments at 7-9.

[133] PCIA Petition at 36-37.

[134] *First Report and Order*, 11 FCC Rcd. at 18463, ¶ 14.

[135] *See id.* at 18464-67, ¶¶ 15-20.

[136] *Id.* at 18462, ¶ 12. *Compare* 47 U.S.C. § 251(c)(4)(A) (requiring incumbent local exchange carriers to offer services for resale at wholesale rates).

[137] *See* 47 C.F.R. § 20.12(b).

[138] *See* PCIA Petition at 34.

[139] *First Report and Order*, 11 FCC Rcd. at 18472, ¶ 32.

43. Furthermore, even assuming that forbearance from enforcing the resale rule would confer certain public interest benefits, forbearance would also impose costs. If we were to forbear from enforcing the rule only as applied to broadband PCS providers, we would create a regulatory asymmetry between those providers and their cellular and covered SMR competitors. As discussed above, this result could distort the working of market forces, and contradict clear Congressional intent.[140] If, however, we were to forbear with respect to all CMRS providers, we would further exacerbate the competitive advantage enjoyed by the cellular incumbents.

44. In sum, the record does not show that the three statutory conditions for forbearance from enforcement of the resale rule are satisfied. We therefore conclude at this time that we should continue enforcing the resale rule against all covered providers until the scheduled sunset date five years after we award the last group of initial broadband PCS licenses.[141] We recognize, however, that market conditions or other developments may justify termination of the resale rule, as applied to some or all covered providers, before that time. In particular, conditions in some geographic markets may support forbearance at the same time as the rule is still needed in other locations.[142] In evaluating future petitions, we will consider 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, the value of service to previously unserved or underserved markets, and other factors relevant to determining whether the requirements of section 10 would be satisfied by the granting of such a petition.[143] In order to resolve such petitions in an expeditious fashion, we will place those petitions promptly on public notice and we will establish expedited pleading cycles. We will make every effort to resolve such petitions substantially in advance of the statutory deadline for forbearance petitions.

C. International Section 214 Authorizations

45. PCIA asks us to forbear from the international section 214 facilities authorization requirement as it applies to broadband PCS providers. Pursuant to section 214, we require carriers to obtain separate Commission authorizations to provide international telecommunications service, whether by acquiring facilities or by reselling the international services of another carrier. International section 214 authorizations are filed according to section 63.18 of the Commission's rules and processed pursuant to section 63.12.

---

[140] *See* para. 32, *supra*.

[141] We note that our decision to sunset the resale rule has been challenged both in petitions for reconsideration and in a judicial appeal. *See* n. 87, *supra.* Nothing in this Order is intended to foreclose our reconsideration of the sunset decision.

[142] *See* 47 U.S.C. § 160(a) (Commission may exercise forbearance "in any or some . . . geographic markets").

[143] While not exhaustive, we believe consideration of these factors will provide a more comprehensive view of conditions within a given geographic market than focusing on a single factor, such as the number of competitors. In this sense, we disagree with our dissenting colleagues, Commissioners Powell and Furchtgott-Roth, that other indicia of market conditions are not needed. We believe it would be an abdication of our responsibility under section 10 to ignore information indicative of whether the three prongs of the section 10 forbearance standard, including the prongs mandating consideration of consumer protection issues and the public interest, is met for a particular market.

46. In the *CMRS Second Report and Order*, we exercised the authority granted to the Commission under section 332(c) to forbear from applying section 214 requirements to CMRS providers in the domestic context.[144] We declined at that time to consider forbearing from application of section 214 to CMRS providers' international services.[145] Thus, all CMRS providers are currently required to obtain section 214 authorization before providing international service.

47. PCIA argues that the section 214 authorization requirement is unnecessary because of the highly competitive market conditions in the wireless industry. According to PCIA, broadband PCS providers offering international message telephone service (IMTS) as facilities-based carriers lack any incentive to act in an anticompetitive manner because they are new entrants that lack control of bottleneck facilities.[146] For broadband PCS providers offering IMTS through resale, PCIA argues, the case for forbearance is even stronger because the Commission has determined that U.S. international resellers pose no anticompetitive concerns.[147] Thus, PCIA argues, the section 214 authorization requirement is unnecessary to ensure just, reasonable, and nondiscriminatory rates or to protect consumers. Forbearance would serve the public interest, PCIA claims, by reducing the regulatory delay and costs associated with the application process. The delay while an application is being processed is unnecessary, PCIA argues, because there is little opportunity for broadband PCS providers to engage in anticompetitive conduct.[148]

48. For the reasons discussed below, we find that it is necessary to continue to require that international services be provided only pursuant to an authorization that can be conditioned or revoked. We therefore conclude, based on the record generated in this proceeding, that the section 10 forbearance standard for the international section 214 authorization requirement has not been satisfied. As part of our 1998 biennial review, however, we are considering what steps can be taken to minimize regulatory burdens on international carriers, including PCS providers. We believe that at the conclusion of this review, many of PCIA's concerns with the section 214 authorization process will have been addressed.

49. With the conclusion of the World Trade Organization (WTO) Basic Telecommunications Agreement, we expect to see a shift away from monopoly provision of foreign telecommunications services and toward competition and open entry in WTO member countries. Nonetheless, many foreign markets will continue to be served by monopoly or dominant providers of services or facilities that are necessary for the provision of U.S. international service. Even in countries where liberalization is occurring, carriers may continue for some time to possess market power in foreign termination services. Our regulation of international common carrier services has historically focused on ensuring that all U.S. carriers have fair and nondiscriminatory access to foreign termination services that are necessary for the provision of U.S.

---

[144] *CMRS Second Report and Order*, 9 FCC Rcd. at 1480-81, ¶ 182.

[145] *See id.* at 1481 n.369; 47 C.F.R. § 20.15(d).

[146] PCIA Petition at 52-53.

[147] *Id.* at 53-54 (citing Regulation of International Common Carrier Services, *Report and Order*, 7 FCC Rcd. 7331, 7335, ¶¶ 31-32 (1992) (*International Services*)).

[148] PCIA Petition at 56-58.

international service.[149] Applicants for international section 214 authority that are affiliated with foreign carriers present the greatest regulatory concern because the foreign carrier affiliate may have the ability and incentive to discriminate against unaffiliated U.S. carriers in terminating U.S. traffic. However, we also regulate all U.S. carriers' dealings with foreign carriers to ensure that no carrier is able to acquire an anticompetitive advantage along any particular U.S. international route.[150]

50. The section 214 authorization requirement serves several purposes. It enables the Commission to screen applications for risks to competition and to deny or condition authorizations as appropriate. The review process also includes consultation with Executive Branch agencies on national security, law enforcement, foreign policy, and trade concerns that may be unique to the provision of international services.[151] The section 214 authorization requirement also helps us monitor competitive conditions along U.S. international routes as well as each carrier's compliance with our rules and policies governing the provision of international services. Authorized carriers are required to file annual reports of their traffic and revenue, and facilities-based carriers must file annual circuit status reports. We also condition the authorization of every foreign-affiliated facilities-based carrier on its affiliate's having in effect a settlement rate with U.S. carriers that is at or below the Commission's benchmark rate.[152] Carriers regulated as dominant along a particular route due to an affiliation with a foreign carrier that has market power are additionally required to file quarterly reports of their traffic and revenue,[153] circuit status, and provisioning and maintenance of circuits on the affiliated route. So that we can continue to monitor foreign affiliations, we also require carriers to notify the Commission (and, in some cases, to seek prior approval) of new affiliations with foreign carriers.[154] We developed these requirements very recently as narrowly tailored safeguards against the leveraging of foreign market power to the detriment of U.S. consumers.[155] The section 214 authorization requirement is important to the Commission's efforts to monitor and enforce compliance with its safeguards, and it also serves to inform small carriers of their special obligations as providers of international service.

---

[149] *See generally International Services*, 7 FCC Rcd. 7331.

[150] *See* 47 C.F.R. § 63.14 (prohibition on agreeing to accept special concessions); Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, *Report and Order and Order on Reconsideration*, 12 FCC Rcd. 23891, 23955-65, ¶¶ 150-170 (1997) (*Foreign Participation Order*), *recon. pending*.

[151] *See Foreign Participation Order*, 12 FCC Rcd. at 23918-21, ¶¶ 59-66.

[152] *See* International Settlement Rates, *Report and Order*, 12 FCC Rcd. 19806, 19897-912, ¶¶ 195-231 (1997) (*Benchmarks Order*), *recon. and appeals pending*.

[153] Omnipoint asks, in its comments in this proceeding, that we forbear from enforcing the international traffic and revenue reporting requirements of section 43.61 of our rules with respect to CMRS providers. This request is not properly before us in this proceeding. Nevertheless, we anticipate reviewing this and other requirements in future proceedings.

[154] *See* 47 C.F.R. § 63.11.

[155] *See Foreign Participation Order*, 12 FCC Rcd. at 23950-54, ¶¶ 143-149.

51. We have noted that domestic wireless markets are becoming increasingly competitive, although competition remains limited in some respects.[156] Nonetheless, we are unable to conclude on this record that forbearance from the section 214 authorization requirement would be consistent with the public interest as required under the section 10 standard. PCIA's petition does not address the leveraging of foreign market power by foreign-affiliated carriers except to assert that "as new entrants into the international telecommunication market, broadband PCS providers are without international market power and, therefore, lack the ability to engage in unjust or unreasonable practices."[157] In its reply comments, PCIA argues that "this hypothetical situation is completely speculative, particularly given the small share of international services attributed to CMRS providers," and that there is no evidence that such a situation exists.[158] On the contrary, we are concerned that a broadband PCS provider, like any other carrier of international traffic that competes against other international carriers, could acquire an affiliation with a foreign carrier that has market power and that the foreign affiliate would then have the ability and incentive to discriminate against unaffiliated U.S. international carriers on the affiliated route. Indeed, a number of wireless carriers already have relationships with foreign carriers, and we anticipate that, as a result of the recent World Trade Organization agreement to liberalize telecommunications markets, these relationships will become even more common. This is a time of great change in international telecommunications markets, when many markets are characterized by asymmetrical market power that can have anticompetitive effects and harm U.S. consumers. In the absence of a section 214 authorization requirement, we might be unable to monitor foreign affiliations and compliance with our safeguards or to bring enforcement action against a carrier for failure to adhere to our international rules and policies.

52. We thus continue to have a need to impose certain conditions on all international section 214 authorizations, and in particular cases to impose dominant carrier regulation. We also cannot yet rule out the possibility of a need to impose other conditions on particular authorizations.[159] We therefore must continue to require that international service be provided only pursuant to an authorization that can be conditioned or revoked if necessary to ensure that rates and conditions of service are just, reasonable, and nondiscriminatory and to protect consumers.[160] We may also need to review (in consultation with Executive Branch agencies) any given carrier's international section 214 authorization for national security, law enforcement, foreign policy, and trade concerns.

53. PCIA's argument that forbearance would serve the public interest is unpersuasive in light of the above considerations. The great majority of international section 214 applications are granted through a streamlined process under which the applicant may commence service on the 36th day after public notice of its application. Applications that are opposed or that the Commission deems unsuitable for streamlined

---

[156] *See* paras. 21-23, *supra.*

[157] PCIA Petition at 54.

[158] PCIA Reply Comments at 29.

[159] *See Foreign Participation Order*, 12 FCC Rcd. at 23912-16, ¶¶ 51-58.

[160] See *id.* at 24022-23, ¶¶ 293-296, for a discussion of the need to investigate allegations that a violation of our rules has occurred and of our authority to enforce our safeguards to prevent harm to competition or consumers in the U.S. market.

processing are generally disposed of within 90 days.[161] This delay is not so great a burden as to outweigh the needs described above.

54. For the reasons discussed above, we conclude that the record does not show that it would be consistent with the public interest to forbear from the international section 214 authorization requirement. Therefore, the third prong of the forbearance standard is not met. Because the third prong of the standard is not satisfied, we cannot grant the forbearance PCIA seeks, and we need not address the first two prongs.

D. International Tariffing Requirements

55. PCIA next asks us to forbear from imposing on broadband PCS carriers the requirement of filing tariffs for their international services. In the *CMRS Second Report and Order*, we exercised our forbearance authority under section 332(c) to forbear from requiring or permitting tariffs for interstate service offered directly by CMRS providers to their customers.[162] We did not address the tariffing obligations as they apply to international services.

56. We conclude, based on this record, that the section 10 standard is met for forbearance from the international tariffing requirement for CMRS providers that offer international service directly to their customers for international routes where they are not affiliated with any carrier that terminates U.S. international traffic and collects settlement payments from U.S. carriers. Thus, we will forbear from the mandatory tariffing requirement and adopt permissive detariffing of international services to unaffiliated points[163] for CMRS providers.

57. Under the first criterion for forbearance under section 10, we must determine that mandatory tariff filing requirements are unnecessary to ensure that charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory.[164] In the domestic context, we have determined that tariffing is not necessary to ensure reasonable rates for carriers that lack market power.[165] In the *CMRS Second Report and Order*, we found that competition in the CMRS market for domestic services will lead to reasonable rates and that enforcement of the tariffing requirement is therefore

---

[161] *See* 47 C.F.R. § 63.12.

[162] *See CMRS Second Report and Order*, 9 FCC Rcd. at 1480, ¶ 179.

[163] We use the term *affiliated route* or *affiliated point* in this order to refer to an authorized CMRS carrier's provision of international service to a destination where a carrier that is affiliated with the authorized carrier terminates U.S. international traffic and collects settlement payments from U.S. carriers. *Unaffiliated route* or *unaffiliated point* refers to an authorized carrier's provision of service to an international destination where it has no such affiliated foreign carrier. The existence of an affiliation is determined by the definition of *affiliation* found in Section 63.18(h)(1)(i) of the Commission's rules. *See* n.172, *infra*.

[164] 47 U.S.C. § 160(a)(1).

[165] *See CAP Forbearance Order*, 12 FCC Rcd. at 8608, ¶ 23; *IXC Forbearance Order*, 11 FCC Rcd. at 20742-47, ¶¶ 21-28.

not necessary.[166] In the absence of an affiliation with a foreign carrier, the same considerations apply in the CMRS market for international services. The CMRS market is sufficiently competitive that there is no reason to regulate any CMRS carrier as dominant on an international route for any reason other than an affiliation with a foreign carrier. Therefore, we conclude that tariffs are not necessary to ensure that unaffiliated CMRS providers' charges, practices, classifications, or regulations for international services are just and reasonable and are not unjustly or unreasonably discriminatory.

58. Under the second statutory criterion for forbearance, we must determine that mandatory tariff filing requirements for CMRS providers serving unaffiliated international routes are unnecessary to protect consumers.[167] As explained above, tariffs are not necessary to ensure that rates are just and reasonable. Therefore, tariffs are also not necessary to protect consumers. Accordingly, the second criterion is met.[168]

59. Under the third criterion, we must determine that permissive detariffing of CMRS providers serving unaffiliated international routes is consistent with the public interest.[169] Permissive detariffing reduces transaction costs for service providers and reduces administrative burdens on service providers and the Commission. Thus, carriers that choose not to file tariffs would not need to undertake the time and expense of preparing and filing tariffs, and the Commission would not incur the administrative burden of reviewing them. Section 10(b) requires the Commission, in determining whether forbearance would be consistent with the public interest, to consider whether forbearance would promote competitive market conditions.[170] We believe that permissive detariffing would enable carriers to avoid impediments that mandatory tariffing might impose on a carrier's ability to introduce services because of the time and expense of preparing and filing tariffs. Thus, detariffing should lower the cost of entry into the international services market by CMRS providers. Further, as Omnipoint argues,[171] permissive detariffing would facilitate the provision of international service by CMRS providers by not requiring that they disclose their prices to competitors and would enable carriers that offer international services directly to their customers to enjoy the benefits of our earlier decision to prohibit tariffs for domestic CMRS services. These considerations outweigh any public interest benefit of requiring CMRS providers to file tariffs for the provision of international service on unaffiliated routes. Accordingly, we conclude that permissive detariffing, in contrast to mandatory tariffing, would be consistent with the public interest by reducing administrative burdens on carriers and on the Commission, promoting competitive market conditions, facilitating provision of new service offerings, and promoting market entry. Thus, permissive detariffing will also further the goal of the 1996 Act to "promote competition and reduce regulation . . . to secure

---

[166] *CMRS Second Report and Order*, 9 FCC Rcd. at 1478-79, ¶¶ 174-175.

[167] 47 U.S.C. § 160(a)(2).

[168] *Cf. CAP Forbearance Order*, 12 FCC Rcd. at 8609-10, ¶ 26.

[169] 47 U.S.C. § 160(a)(3).

[170] 47 U.S.C. § 160(b).

[171] *See* Omnipoint Comments at 2-4.

lower prices and higher quality service for American telecommunication consumers and encourage the rapid development of new telecommunications technologies."[172]

60. We are unable to find, however, that it would be consistent with the public interest to adopt permissive detariffing for CMRS providers serving international routes where the carrier is affiliated[173] with a foreign carrier that terminates U.S. international traffic. Currently, our ability to detect and deter certain kinds of anticompetitive pricing practices on affiliated routes depends on the availability of tariffed rates on those routes. When an international carrier serves an affiliated route, the carrier and its affiliate may have the ability and incentive to engage in anticompetitive pricing behavior that can harm competition and consumers in the U.S. market. In our *Benchmarks Order*, we found that there is a danger of anticompetitive price squeeze behavior[174] by U.S. facilities-based carriers on affiliated routes and adopted a trigger to determine when market distortion has occurred as a result of a carrier's provision of international service on an affiliated route. We established a rebuttable presumption that a U.S. facilities-based international carrier has engaged in anticompetitive price squeeze behavior when any of the carrier's tariffed collection rates on an affiliated route is less than the carrier's average variable costs on that route.[175] If tariffs were not available, we would need to rely on another mechanism for detecting, as well as deterring, price squeezes by facilities-based carriers on affiliated routes.[176] When we examined the

---

[172] Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 104-230, at 1 (1996).

[173] For the purposes of our regulation of international telecommunications in Part 63 of our rules, *affiliation* is defined to include (1) a greater than 25 percent ownership of capital stock, or controlling interest at any level, by the carrier, or by any entity that directly or indirectly controls or is controlled by it, or that is under direct or indirect common control with it, in a foreign carrier or in any entity that directly or indirectly controls a foreign carrier; or (2) a greater than 25 percent ownership of capital stock, or controlling interest at any level, in the carrier by a foreign carrier, or by any entity that directly or indirectly controls or is controlled by a foreign carrier, or that is under direct or indirect common control with a foreign carrier; or by two or more foreign carriers investing in the carrier in the same manner in circumstances where the foreign carriers are parties to, or the beneficiaries of, a contractual relation (e.g., a joint venture or market alliance) affecting the provision or marketing of basic international telecommunications services in the United States. A U.S. carrier also is considered to be affiliated with a foreign carrier where the foreign carrier controls, is controlled by, or is under common control with a second foreign carrier that is affiliated with that U.S. carrier under this definition. *See* 47 C.F.R. § 63.18(h)(1)(i); *see also* 47 C.F.R. § 63.18(h)(1)(ii) (defining *foreign carrier*).

[174] A *price squeeze* refers to a particular, well-defined strategy of predation that would involve the foreign carrier setting "high" (above-cost) international settlement rates while its U.S. affiliate offers "low" prices for domestic international message telephone service ("IMTS") in competition with other carriers. Because the foreign carrier's international termination services are a necessary input for providing IMTS, the foreign carrier can create a situation where the relationship between its "high" international settlement rates and its affiliate's "low" prices for IMTS forces competing carriers either to lose money or to lose customers even if they are more efficient than the affiliate. *See Benchmarks Order*, 12 FCC Rcd. at 19901, ¶ 208.

[175] *See id.* at 19908, ¶ 224. For purposes of that bright-line test, we defined a carrier's average variable costs on a route as its net settlement rate plus any originating access charges. *See id.*

[176] *See Foreign Participation Order*, 12 FCC Rcd. at 24000, ¶ 244 ("To the extent that a foreign-affiliated carrier has the ability to engage in a predatory price squeeze, we find that the existence of a tariff filing requirement . . . will serve to deter such behavior.").

potential for price squeeze behavior by affiliated switched resellers in the *Foreign Participation Order*, we did not find the same danger of anticompetitive price squeeze behavior as in the case of affiliated facilities-based carriers. We stated nonetheless that we would monitor the switched resale market carefully for evidence of anticompetitive behavior.[177] The record in this proceeding does not address the extent to which other sources of pricing information are sufficiently available to permit the Commission and interested parties to detect price squeeze behavior by foreign-affiliated carriers in a timely manner. Nevertheless, we anticipate examining this and other issues in a subsequent proceeding. We will also continue to review our rules as market conditions change in the international context to ensure that our regulations are no more burdensome than necessary.

61. Price squeeze behavior on affiliated routes can have anticompetitive effects that are inconsistent with competitive market conditions, and our enforcement of our rules and policies against such behavior currently depends on the availability of tariffed rates on affiliated routes. We therefore conclude that the third prong of the forbearance standard, that forbearance would be consistent with the public interest, is not met for any CMRS provider providing international service to a destination market in which it is affiliated with a foreign carrier that terminates U.S. international traffic and collects settlement payments from U.S. carriers. Because the third prong of the forbearance standard is not satisfied for affiliated routes, we cannot forbear in those circumstances, and we need not address the first two prongs.

62. We next address our decision to forbear from applying the international tariffing requirement on unaffiliated routes to all CMRS providers despite the fact that PCIA's petition seeks forbearance only for broadband PCS providers. No party in this proceeding argues that broadband PCS providers should be treated differently from other CMRS providers as a matter of sound policy. Many commenters argue that forbearance is warranted for all CMRS providers,[178] and several argue that forbearance is appropriate for broadband PCS only if it applies to all CMRS providers.[179] We agree that the same considerations apply to all CMRS providers, regardless of whether they are broadband PCS licensees. We have previously described the need to regulate all CMRS providers similarly.[180] Forbearance from a tariffing requirement for broadband PCS licensees but not for other CMRS licensees would disturb this regulatory neutrality by giving broadband PCS licensees an unfair and unwarranted advantage over their competitors.

63. If we could not extend forbearance to all CMRS providers, we would not be able to grant the forbearance that PCIA seeks, because we would not find that the public interest would be served by granting forbearance that would create a disparity in regulatory treatment among like CMRS services.

---

[177] *See id.* at 23986, ¶ 214.

[178] *See, e.g.*, AMTA Comments at 5; CTIA Comments at 2-3; Nextel Comments at 4; RTG Comments at 5. PCIA acknowledges these comments and supports extending forbearance to all CMRS providers to the extent the Commission finds that the section 10 forbearance standard is satisfied. PCIA Reply Comments at 3-4.

[179] *See* AMTA Reply Comments at 2 (stating that all parties that addressed the appropriate scope of forbearance agreed that any forbearance should apply to the entire CMRS industry); *e.g.*, AT&T Wireless Comments at 1-2; RTG Comments at 5.

[180] *See CMRS Second Report and Order*, 9 FCC Rcd. at 1418, ¶ 13 (finding that Congress intended to ensure that similar mobile services would be subject to consistent regulatory treatment).

Because we find that the same considerations apply to all CMRS providers regardless of whether they are broadband PCS providers, further notice and comment on extending forbearance to all CMRS providers is unnecessary.[181] To the extent that we grant forbearance here, the issues have been fully explored in the record of this proceeding. Were we to seek additional comment on extending permissive forbearance to other CMRS providers, we believe no issues would be raised that could not have been raised in the comments on PCIA's petition. Therefore, we find that the forbearance we adopt here should be applied equally to all CMRS providers.

64. We conclude that we should not adopt complete detariffing, i.e., prohibiting the filing of tariffs, in this proceeding. Although we continue to believe, as we have discussed at length elsewhere,[182] that there are usually added benefits to complete detariffing, PCIA's petition did not request complete detariffing and there is no discussion of that option in this record.[183] Because we conclude that we must continue to require tariffs on affiliated routes, there could be complications to adopting complete detariffing on unaffiliated routes that are not present in the domestic context. For example, a carrier whose affiliation status changes or becomes uncertain might have difficulty timely amending or canceling its tariff. We conclude that it would be imprudent to prohibit the filing of tariffs on unaffiliated routes while continuing to require tariffs on affiliated routes without any discussion in the record of the consequences of such a policy. We therefore have confined our analysis under the forbearance standard to consideration of the options discussed in the record — continuing to require tariffs (mandatory tariffing) or forbearing from requiring tariffs (permissive detariffing) — and have concluded that permissive detariffing would better serve the public interest than mandatory tariffing for CMRS providers serving unaffiliated routes. As discussed above, permissive detariffing would reduce administrative burdens on carriers and on the Commission, promote competitive market conditions, facilitate provision of new service offerings, and promote market entry.[184]

65. We therefore grant PCIA's request for forbearance from the international tariffing requirement to the extent described above. As a result, a CMRS carrier offering international service directly to its customers[185] need not file tariffs for its service to international points where it is not affiliated with a carrier

---

[181] *See* 5 U.S.C. § 553(b)(B) (providing that notice-and-comment procedures are not required "when an agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

[182] *See CAP Forbearance Order*, 12 FCC Rcd. at 8607-08, ¶ 22; *see also IXC Forbearance Order*, 11 FCC Rcd. at 20760-68, ¶¶ 52-66.

[183] *Cf. CAP Forbearance Order*, 12 FCC Rcd. at 8607-08, ¶ 22 (finding that the option of complete detariffing was not available because the petitions had not requested complete detariffing and notice of a proposed change to complete detariffing had not been given). Only when complete detariffing has not been available have we found that permissive detariffing would serve the public interest. *See id*. at 8611-12, ¶¶ 30-33. We anticipate seeking comment on the possibility of complete detariffing of international services in the near future.

[184] *Cf. id.* at 8610-12, ¶¶ 27-32 (finding that permissive detariffing for competitive access providers better serves the public interest than mandatory tariffing).

[185] We are not detariffing the international services of CMRS companies that offer international service on a stand-alone basis, i.e., international service used by customers other than with a mobile radio telephone.

that terminates U.S. international traffic. We amend section 20.15(d) of our rules to provide for this exception to our international tariff filing requirement. If the CMRS carrier acquires an affiliation with a foreign carrier that collects settlement payments from U.S. carriers, it must file a tariff in order to continue to provide service to any market where the foreign carrier terminates U.S. international traffic. We note that, when any authorized international carrier, including a CMRS provider with international section 214 authority, acquires an affiliation with a foreign carrier, it must notify the Commission as required by section 63.11 of the Commission's rules.

E. Section 226: Telephone Operator Consumer Services Improvement Act

66. Background. In 1990, Congress passed and the President signed TOCSIA to "protect consumers who make interstate operator service calls from pay telephones, hotels, and other public locations against unreasonably high rates and anticompetitive practices."[186] TOCSIA regulates two classes of telecommunications service providers: (1) "aggregators," which are defined as persons or entities that make telephones available to the public or to transient users of their facilities for interstate telephone calls using a provider of operator services,[187] and (2) "providers of operator services" (OSPs), which are defined as common carriers that provide operator services, or any other persons determined by the Commission to be providing operator services.[188] "Operator services" have been defined as any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than: (1) automatic completion with billing to the telephone from which the call originated; or (2) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.[189]

67. TOCSIA and our regulations impose several requirements upon aggregators. Aggregators must post the following information on or near the telephone instrument, in plain view of consumers: (a) the name, address, and toll-free telephone number of the OSP presubscribed to the telephone;[190] (b) a written disclosure that rates for service are available on request, and that consumers have a right to obtain access to the OSP of their choice and may contact their preferred OSP for information on accessing its service using that telephone;[191] (c) in the case of a pay telephone, the local coin rate for the pay telephone

---

[186] S. Rep. No. 101-439 at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1577.

[187] 47 U.S.C. § 226(a)(2); 47 C.F.R. § 64.708(b).

[188] 47 U.S.C. § 226(a)(9); 47 C.F.R. § 64.708(i).

[189] 47 U.S.C. § 226(a)(7); 47 C.F.R. § 64.708(g). An access code is a sequence of numbers that, when dialed, connect the caller to the provider of operator services associated with that sequence. 47 U.S.C. § 226(a)(1); 47 C.F.R. § 708(a).

[190] 47 U.S.C. § 226(c)(1)(A)(i); 47 C.F.R. § 64.703(b)(1). A "presubscribed OSP" is the OSP to which the consumer is connected when the consumer places a call using a public telephone without dialing an access code. *See* 47 U.S.C. § 226(a)(8); 47 C.F.R. § 64.708(h). In the landline context, aggregators contract with an OSP and often receive a commission from the OSP for the arrangement.

[191] 47 U.S.C. § 226(c)(1)(A)(ii); 47 C.F.R. § 64.703(b)(2).

location;[192] and (d) the name and address of the Enforcement Division of the Common Carrier Bureau of the Commission.[193] Aggregators must also ensure that each of their telephones presubscribed to an OSP allows consumers to use "800," "900" or "10XXX" access codes to reach the OSP of their choice,[194] and ensure that consumers are not charged higher rates for calls placed using these access codes.[195]

68. TOCSIA and our regulations also impose a number of requirements upon OSPs. OSPs must identify themselves, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call.[196] They must also disclose immediately to the consumer, upon request and at no charge to the consumer, a quotation of their rates or charges for the call, the methods by which such rates or charges will be collected, and the method by which complaints concerning such rates, charges, or collection practices will be resolved.[197] OSPs must also permit the consumer to terminate a telephone call at no charge before the call is connected;[198] not bill for unanswered telephone calls;[199] not engage in "call splashing"[200] unless the consumer requests to be transferred to another OSP after being informed, prior to such a transfer, and prior to incurring any charges, that the rates for the call may not reflect the rates from the actual originating location of the call; and not bill for a call that does not reflect the location of the origination of the call.[201] The Commission recently added an additional requirement: OSPs must now audibly disclose to consumers how to obtain the price of a call before it is connected.[202]

69. The regulatory scheme of TOCSIA also affirmatively charges OSPs with overseeing aggregator compliance with both the statute's posting requirement and its prohibitions on restricting

---

[192] 47 C.F.R. § 64.703(b)(3).

[193] 47 U.S.C. § 226(c)(1)(A)(iii); 47 C.F.R. § 64.703(b)(4).

[194] This is also known as "dial around" access. *See* 47 U.S.C. § 226(c)(1)(B); 47 C.F.R. § 64.703(b).

[195] 47 U.S.C. § 226(c)(1)(C); 47 C.F.R. § 64.705(b).

[196] 47 U.S.C. § 226(b)(1)(A); 47 C.F.R. § 64.703(a)(1).

[197] 47 U.S.C. § 226(b)(1)(C); 47 C.F.R. § 64.703(a)(3).

[198] 47 U.S.C. § 226(b)(1)(B); 47 C.F.R. § 64.703(a)(2).

[199] 47 U.S.C. § 226(b)(1)(F-G); 47 C.F.R. § 64.705(a)(1-2).

[200] "Call splashing" means the transfer of a telephone call from one OSP to another in such a manner that the subsequent OSP is unable or unwilling to determine the location or the origination of the call and because of such inability or unwillingness, is prevented from billing the call on the basis of such location. 47 U.S.C. § 226(a)(3); 47 C.F.R. § 64.708(c).

[201] 47 U.S.C. § 226(b)(1)(H-I); 47 C.F.R. § 64.705(a)(3-4).

[202] 47 C.F.R. § 64.703(a)(4); *see Billed Party Preference Order*, 13 FCC Rcd. 6122.

consumers' access to the OSP of their choice.[203] Finally, TOCSIA requires OSPs to file informational tariffs with the Commission,[204] the Commission requires OSPs to regularly publish and make available at no cost to inquiring customers written materials that describe any recent changes in operator services and in the choices available to consumers in that market,[205] and the Commission requires OSPs and aggregators to ensure immediate connection of emergency telephone calls to the appropriate emergency service of the reported location of the emergency, if known, and, if not known, of the originating location of the call.[206]

70. The Commission has previously considered the issue of TOCSIA's application to wireless service. In 1993, the Common Carrier Bureau denied a Petition for Declaratory Ruling filed by GTE that sought a ruling that TOCSIA did not apply to certain activities of GTE's mobile affiliates. The Common Carrier Bureau held that TOCSIA required the Commission to regulate as an aggregator any entity that makes telephones available to the public or transient users of its premises, and to regulate as an OSP any entity that provides interstate telecommunications service initiated from an aggregator location that includes automatic or live assistance to arrange for billing or call completion. The Common Carrier Bureau found that certain GTE affiliates provided services which made them aggregators and that commercial air-to-ground carriers provided services which made them OSPs.[207] GTE subsequently requested reconsideration or waiver of this decision, arguing that it could not be reconciled with the language, legislative history, and purposes of TOCSIA or sound public policy.[208] We resolve this pending matter below.

71. In the *CMRS Second Report and Order*, adopted in 1994, the Commission concluded, based on the record before it at that time, that forbearance from TOCSIA was not warranted for CMRS providers in general.[209] However, in the *Further Forbearance NPRM* issued later that year, the Commission sought comment on whether there were particular classes of CMRS providers that warranted forbearance from certain regulations. We primarily sought comment on how to define small businesses in CMRS markets and whether certain regulatory provisions were much more of a burden to small carriers than to large carriers.[210] Although we are now terminating the *Further Forbearance NPRM*, we incorporate the comments received in that proceeding that relate to TOCSIA into the record of this proceeding. Since we are resolving GTE's *Reconsideration Petition* with this Order, we also incorporate the record of both the *GTE Declaratory Ruling* and the *GTE Reconsideration Petition* into this proceeding.

---

[203] 47 U.S.C. § 226(b)(1)(D-E); 47 C.F.R. §§ 64.703(e), 64.704(b), 64.705(a)(5).

[204] *See* 47 U.S.C. § 226(h).

[205] 47 C.F.R. § 64.707. *See also* 47 U.S.C. § 226(d)(3)(B).

[206] 47 C.F.R. § 64.706. *See also* 47 U.S.C. § 226(d)(3)(A).

[207] *GTE Declaratory Ruling*, 8 FCC Rcd. at 6176, ¶ 31.

[208] *See generally GTE Reconsideration Petition.*

[209] *CMRS Second Report and Order*, 9 FCC Rcd. at 1490, ¶ 211.

[210] *Further Forbearance NPRM*, 9 FCC Rcd. at 2169, ¶ 23.

72. Discussion. The requirements of TOCSIA and our implementing regulations apply only to entities functioning as aggregators or OSPs.[211] Thus, only a small subset of CMRS activities is affected by TOCSIA. For example, the Common Carrier Bureau has previously held that TOCSIA applies to commercial air-to-ground telephone service and GTE's Railfone service.[212] Other examples of affected services referenced in the record include phones leased with rental cars, mobile phone booths at special events, and mobile phones rented by hotels and shopping malls.[213]

73. Although PCIA requests that we forbear from applying the requirements of TOCSIA to broadband PCS providers only,[214] we believe that we should consider the merits of forbearance from TOCSIA in relation to all CMRS services. One of our primary missions since the passage of the Omnibus Budget Reconciliation Act of 1993 has been to establish regulatory symmetry among similar CMRS services.[215] Broadband PCS providers compete with cellular radiotelephone and SMR providers to provide commercial mobile telephone service, and we see no reason to treat licensees in these services differently with respect to the requirements of TOCSIA. Moreover, it is likely that other categories of CMRS licensees will compete with broadband PCS in the future. In light of our goal of regulatory symmetry, we believe that any decisions we make with respect to forbearance from TOCSIA should apply to all CMRS providers. We note also that commenters in both this and earlier proceedings have argued for forbearance from TOCSIA for CMRS providers generally.[216] More specifically, several commenters argue that failure to extend relief to all CMRS providers would put certain service providers at a competitive disadvantage.[217] Under these circumstances, we find that further notice and comment on extending forbearance to all providers and aggregators of CMRS would be unnecessary.[218] We therefore will apply our decision to forbear from certain requirements of TOCSIA to all providers and aggregators of CMRS.

74. The provisions of TOCSIA ensure that transient users of public telephones enjoy the same benefits they would have if they were using private telephones. Thus, for example, subscribers to wireline

---

[211] *See* 47 U.S.C. § 226(a)(2),(a)(9); 47 C.F.R. § 64.708(b),(i).

[212] *GTE Declaratory Ruling*, 8 FCC Rcd. 6171. We affirm this holding below. *See* para. 89, *infra.*

[213] *See* Colorado Springs Gazette Telegraph, "Colorado Dreamin'" (Nov. 9, 1997); Charleston Gazette and Daily Mail, "Offerings Range From Tires to Tuna" (Oct. 28, 1997); Minneapolis Star Tribune, "Surfing on the Edge; Music Festival Draws People and Dollars by the Thousands" (May 25, 1997).

[214] PCIA Petition at 43.

[215] *See* para. 30, *supra.*

[216] *See, e.g.*, BANM Comments on *Further Forbearance NPRM* at 8; GTE Comments on *Further Forbearance NPRM* at 6; CTIA Comments at 6.

[217] *See, e.g.*, AT&T Comments at 1-2; BANM Comments at 2; BellSouth Comments at 3-9; CONXUS Comments at 3 (arguing that broadband and narrowband PCS should be treated similarly); PrimeCo Comments at 2-3.

[218] *See* 5 U.S.C. § 553(b)(B).

telecommunications services have the ability to presubscribe to the interexchange carrier of their choice,[219] and TOCSIA ensures that they can access this or any other carrier of their choice when using a pay phone. Subscribers to mobile telephone service do not, however, require all of the same legal protections as wireline subscribers. As part of the Telecommunications Act of 1996, Congress amended the Communications Act by adding section 332(c)(8), which exempts CMRS from the obligation of providing equal access to common carriers for the provision of telephone toll services.[220] The Commission then determined that it no longer had the authority to require CMRS providers to offer equal access to common carriers for the provision of telephone toll services. The Commission further found that, although it was authorized in certain circumstances to prescribe regulations to ensure subscribers unblocked access to the telephone toll services of their choice, no demonstrated need for such regulation existed at that time.[221] Thus, both Congress and the Commission have previously decided that certain legal protections needed by users of wireline phones in both private and public contexts are not necessary or appropriate for CMRS subscribers. We believe that these decisions reflect not only an effort on the part of Congress and the Commission to ensure that unwarranted regulatory burdens are not imposed on CMRS, but also a recognition that there may be differences between wireline telephone service and CMRS that justify differences in their regulatory treatment, including differences in treatment when functioning as OSPs.

75. As explained more fully below, we will forbear from applying to CMRS providers those provisions of TOCSIA that impose requirements that are identical or similar to requirements that Congress or the Commission have previously found unnecessary. Thus, we will forbear from enforcing the provisions of TOCSIA related to unblocked access against CMRS aggregators and OSPs, and we will forbear from requiring CMRS OSPs to file informational tariffs. As we discuss below, the three-pronged test under section 10 is satisfied as to these provisions. Although the current factual record is insufficient to support forbearance from other provisions of TOCSIA, we explore in the Notice of Proposed Rulemaking the possibility of further forbearance from TOCSIA and propose to modify our rules in a manner tailored to the mobile phone environment.

76. *Unblocked Access.* TOCSIA and its implementing rules contain several provisions based on the premise that consumers should be allowed access to the OSP of their choice. Aggregators are required to ensure that their telephones presubscribed to a particular OSP allow consumers to use 800 and 950

---

[219] Presubscription is the process by which each customer selects one or more primary interexchange carriers (IXCs) from among several available carriers for the customer's phone line(s). *See* Investigation of Access and Divestiture Related Tariffs, *Memorandum Opinion and Order*, 101 FCC 2d 911, 928, Appendix B, ¶ 4 (1985) (*LEC Equal Access Order*); Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Second Report and Order and Memorandum Opinion and Order*, 11 FCC Rcd. 19392, 19418-20, ¶¶ 46-50 (1996) rev'd in part *sub nom*. People of the State of California v. FCC, 124 F.3d 934 (1997). Thus, when a customer dials "1," the customer accesses only the relevant primary IXC's services. An end user can also access other IXCs by dialing either a five or seven-digit access code. *LEC Equal Access Order*, 101 FCC 2d at 911, ¶ 1; Administration of the North American Numbering Plan Carrier Identification Codes, *Order on Reconsideration, Order on Application for Review, and Second Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 17876 (1997).

[220] 47 U.S.C. § 332(c)(8).

[221] *See* Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, *Order*, 11 FCC Rcd. 12456 (1996) (*CMRS Equal Access Order*).

access codes to reach their preferred OSP.[222] Aggregators also must not charge consumers more for using an access code than the amount the aggregator charges for calls placed using the presubscribed OSP,[223] and they must post a written disclosure that consumers have a right to obtain access to the interstate common carrier of their choice and may contact their preferred interstate common carrier for information on accessing that carrier's service using that telephone.[224] OSPs must ensure, by contract or tariff, that aggregators allow consumers to use 800 and 950 access codes to reach the OSP of their choice and must withhold payment of any compensation due to aggregators if the OSP reasonably believes that the aggregator is blocking such access.[225]

77. We believe that we should forbear from enforcing these provisions with respect to CMRS. In order to do so, the first prong of the section 10 forbearance test requires that we find that enforcement of these provisions is not necessary to ensure that the charges, practices, classifications, or regulations of CMRS providers acting as OSPs are just and reasonable and are not unjustly or unreasonably discriminatory.[226] Discussing the requirements of TOCSIA in general, PCIA asserts that the most persuasive support for such a finding is the "complete lack of complaints" about mobile public phone services, which have been offered since before TOCSIA was enacted.[227] According to PCIA, there is also no evidence that blocking or discriminatory charges have been a problem in the mobile context.[228] We believe that the absence of complaints filed with the Commission about access blocking or discriminatory charges for access by CMRS aggregators, standing alone, may not be enough to support forbearance, particularly since the public mobile phone industry is relatively young. Nonetheless, nothing in the record contradicts PCIA's assertion that blocking of access is not a problem in this context. We note that the principal purpose of TOCSIA, as suggested by its name, is to protect consumers. This function is addressed under the second prong of the forbearance test. In this context, in the absence of some evidence suggesting that without the unblocked access rules CMRS aggregators would engage in unjust, unreasonable, or discriminatory practices, we conclude that the first prong of the forbearance test is satisfied.

78. The second prong of the section 10 forbearance test requires that we find that enforcement of the provisions at issue is not necessary for the protection of consumers.[229] PCIA contends that requiring CMRS providers to comply with the statutory and regulatory requirements of TOCSIA is not necessary to protect consumers because none of the abuses that led to the enactment of TOCSIA, including call

---

[222] 47 U.S.C. § 226(c)(1)(B); 47 C.F.R. § 64.704(a).

[223] 47 U.S.C. § 226(c)(1)(C); 47 C.F.R. § 64.705(b).

[224] 47 U.S.C. § 226(c)(1)(A)(ii); 47 C.F.R. § 64.703(b)(2).

[225] 47 U.S.C. § 226(b)(1)(D-E); 47 C.F.R. § 64.704(b).

[226] 47 U.S.C. § 160(a)(1).

[227] PCIA Petition at 43.

[228] *Id*. at 44-45.

[229] 47 U.S.C. § 160(a)(2).

blocking, have occurred in the mobile context.[230] With respect to the obligation of OSPs to ensure that aggregators comply with the unblocking requirement of TOCSIA and its prohibition against charging higher rates for using access codes to reach a preferred OSP, PCIA states that, because of the resale obligation, CMRS providers may not know that their services are being resold for mobile public phone purposes and therefore have no contract with the aggregator.[231] Finally, PCIA asserts that the TOCSIA unblocking requirements have been superseded by the limitation that section 332(c)(8) places on the Commission's ability to order unblocking.[232]

79. We do not have a factual record that would support a finding that CMRS providers are unable to comply with the requirement that they ensure aggregators' compliance with unblocking because they do not have contracts with aggregators. However, we do believe that it would be inconsistent with section 332(c)(8) to fail to forbear from enforcing the unblocking requirements in question here. As discussed above, under section 332(c)(8), CMRS providers are not required to provide equal access to common carriers for the provision of telephone toll services. Section 332(c)(8) authorizes the Commission to prescribe regulations that afford consumers unblocked access to the provider of telephone toll services of their choice if the Commission determines that consumers are denied access to the provider of their choice and finds that such denial is contrary to the public interest, convenience, and necessity.[233] We believe that this provision reflects a determination on the part of Congress that equal access and unblocking regulations are generally unnecessary to protect consumers of CMRS. Moreover in the absence of any evidence that consumers of CMRS have been denied access to their provider of choice, we have not employed our authority under section 332(c)(8) to prescribe unblocking regulations with respect to ordinary subscribers. In light of these circumstances, we see no need to provide transient users of CMRS with consumer protections that neither Congress nor the Commission has provided for ordinary subscribers. In sum, we conclude that enforcement of the equal access and unblocking provisions of TOCSIA is unnecessary for the protection of consumers.

80. The third prong of the section 10 forbearance test requires that we find that forbearance from applying the provisions in question is consistent with the public interest.[234] In determining whether forbearing from certain regulations meets the public interest prong of the section 10 test, we attempt to balance the costs carriers must incur to comply with regulations and the effects of these costs upon competition with the benefits that these regulations bestow on the public.[235] As we discussed under the second prong, section 332(c)(8) exempts CMRS providers from providing equal access to common carriers for the provision of telephone toll services and unblocked access to the provider of telephone toll services of

---

[230] PCIA Petition at 38, 40, 45. "Call blocking" occurs when an aggregator does not allow consumers to use 800, 900, or 10XXX numbers to access alternative OSPs.

[231] PCIA *Ex Parte*, Attachment at 2.

[232] PCIA Petition at 46.

[233] 47 U.S.C. § 332(c)(8).

[234] 47 U.S.C. § 160(a)(3).

[235] *See* 47 U.S.C. § 160(b).

the subscriber's choice through the use of a carrier identification code.[236] Congress enacted section 332(c)(8) in part because it felt that the imposition of equal access requirements on wireless services would inflate the cost of service.[237] As discussed above, the Commission has endeavored, consistent with its statutory mandate, to avoid imposing unnecessary regulations on CMRS and to allow competition to produce benefits for the consumer. We believe that this approach to forbearance promotes competitive market conditions and enhances competition among CMRS providers. In light of Congressional concerns that equal and unblocked access requirements would increase the cost of service, and the fact that we have no evidence that such requirements would produce any identifiable benefits, we conclude that forbearance from the unblocking provisions of TOCSIA with respect to CMRS is consistent with the public interest.

81. *Informational Tariffs.* Under TOCSIA, OSPs are required to file tariffs specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.[238] We have considered forbearing from this requirement in the past and have declined to do so. In the *CMRS Second Report and Order*, we decided not to forbear from enforcing the section 226 tariff requirement for CMRS, even though we forbore from requiring other tariff filings under section 203, because the required filings are less detailed than those required pursuant to section 203.[239] More recently, in the *Billed Party Preference Order*, we again indicated that we were not prepared to conclude that Section 226 informational tariffs are no longer necessary as applied to all OSPs to protect consumers.[240]

82. Having further considered this issue, we now believe that we should forbear from applying the informational tariff requirement to CMRS OSPs. The first prong of section 10 requires us to find that enforcement of the tariff filing requirement is not necessary to ensure that the charges and practices of OSPs are just and reasonable and are not unjustly or unreasonably discriminatory. The rates and related surcharges or fees in OSPs' informational tariffs may be changed without prior notice to consumers or to this Commission.[241] Moreover, we are encouraged by the fact that the CMRS marketplace is becoming increasingly competitive and will continue to promote rates and practices that are just and reasonable. When we decided to forbear from enforcing section 203 with respect to CMRS, we found that even though the cellular services marketplace was not fully competitive, there was sufficient competition to justify forbearance from tariffing requirements, and we noted in particular that the strength of competition would increase in the near future.[242] We believe that the same can be said today of the public CMRS marketplace. In addition to cellular providers, broadband PCS and SMR providers are entering the market and promise

---

[236] 47 U.S.C. § 332(c)(8). *See also CMRS Equal Access Order*, 11 FCC Rcd. 12456.

[237] H.R. Rep. No. 204(I), 104th Cong., 1st Sess. (1995).

[238] 47 U.S.C. § 226(h)(1)(A).

[239] *CMRS Second Report and Order*, 9 FCC Rcd. at 1490, ¶ 211.

[240] *Billed Party Preference Order*, 13 FCC Rcd. at 6146-47, ¶ 43.

[241] *See id.*

[242] *CMRS Second Report and Order*, 9 FCC Rcd. at 1479, ¶ 177.

to increase competition in the near future. In light of this growing competition and our earlier findings regarding the usefulness of detariffing as a spur to competition, as well as the continued applicability of sections 201 and 202, we do not believe that it is necessary for CMRS providers to file informational tariffs. In the event isolated abuses do occur, they can be dealt with under sections 201 and 202 through our complaint procedures. We therefore conclude that the tariff filings required under section 226 are not necessary to ensure just and reasonable rates and practices.

83. The second prong of section 10 requires us to find that enforcement of the section 226 tariff filing requirement is not necessary for the protection of consumers. For the same reasons stated under the first prong, we believe that the tariff requirement is not necessary to protect consumers. We note also that there is no record evidence that indicates a need for these informational tariffs to protect consumers.

84. Under the third prong of section 10, we must find that forbearance from applying the section 226 tariffing requirement is consistent with the public interest. With respect to this prong of the section 10 test, PCIA claims that forbearance from TOCSIA is in the public interest because the statute undermines the benefits derived from detariffing CMRS providers. PCIA states that the Commission forbore from requiring tariffs from broadband PCS providers because tariffs could impede providers' flexibility, remove incentives for price discounting and the introduction of new offerings, and generally limit competition.[243] According to PCIA, forbearance from the requirement to file informational tariffs is necessary to realize the pro-competitive benefits the Commission intended to achieve in the *CMRS Second Report and Order*.[244]

85. We agree with PCIA with respect to these arguments. When we decided to forbear from applying section 203 to CMRS, we reasoned that tariffing imposes administrative costs and can be a barrier to competition.[245] We indicated our belief that tariff filings can remove carriers' ability to make rapid, efficient responses to changes in demand and cost, as well as remove incentives for the introduction of new offerings, impede and remove incentives for competitive price discounting, and impose costs on carriers that attempt to make new offerings. Finally, we said that forbearance would foster competition, which would expand the consumer benefits of a competitive marketplace.[246] Indeed, we found that even permissive tariff filings for CMRS providers entailed too great a risk of fostering anticompetitive practices, and might allow service providers to use their tariffs to avoid reducing their rates.[247] We therefore instituted mandatory detariffing for CMRS.[248] Even though the tariff filing requirements of section 226 are less burdensome and therefore less costly than the requirements of section 203, we nonetheless agree with PCIA that enforcement of the section 226 requirements is inconsistent with our decision to require detariffing for CMRS. We also believe that the cost of filing informational tariffs is not outweighed by any

---

[243] PCIA Petition at 47 (citing *CMRS Second Report and Order*).

[244] *Id.* at 47-48.

[245] *CMRS Second Report and Order*, 9 FCC Rcd. at 1478-79, ¶ 175.

[246] *Id.* at 1479, ¶ 177.

[247] *Id.* at 1479-80, ¶ 178.

[248] *Id*.

benefits these tariffs might produce, and we conclude that forbearance from enforcing this filing requirement is consistent with the public interest. Consistent with our previous mandatory detariffing decision for CMRS, we therefore forbid CMRS OSPs from filing informational tariffs under section 226, and we require CMRS OSPs with tariffs currently on file to cancel those tariffs within 90 days of publication of this Memorandum Opinion and Order in the Federal Register.[249]

86. *Other Requirements.* PCIA claims in its Petition that other OSP requirements of TOCSIA are irrelevant to CMRS, unduly burdensome, or impossible for broadband PCS providers to meet. Thus, for example, PCIA states that the requirement that OSPs disclose their rates immediately to the consumer is irrelevant in the CMRS context because charges are determined by the aggregator.[250] PCIA also asserts that other requirements would be very costly, and produce little benefit, because CMRS providers cannot generally distinguish calls from public mobile phones from calls placed by subscribers using their own phones.[251] However, neither PCIA nor any of the commenters has supplied sufficient specific factual material in support of these claims. Thus, we believe that we do not have an adequate record at this time to forbear from any of the OSP provisions of TOCSIA other than those already discussed. We similarly lack a record to forbear from enforcing any additional aggregator disclosure provisions, which may provide important information to consumers. As we have stated previously, one of our major goals with respect to CMRS is to refrain from imposing any unnecessary regulations, in the belief that robust competition will produce benefits for the consumer, and we will therefore consider forbearing from other provisions of TOCSIA. We therefore solicit factual information through the Notice of Proposed Rule Making that will provide us with a basis for deciding whether we may forbear under section 10 from enforcement of the remaining provisions of TOCSIA.

87. *GTE Petition for Reconsideration.* With respect to its petition for reconsideration, GTE contends that Congress did not intend TOCSIA to apply to mobile telecommunications service providers.[252] We disagree. As the Common Carrier Bureau stated in the *GTE Declaratory Ruling*, we believe that the statutory language and legislative history indicate that Congress intended TOCSIA to apply to all phones made available to the public in situations where the consumer, not the telephone provider, pays for the cost of the call, regardless of whether the phone is a mobile phone or not.[253] Furthermore, although numerous commenters on the *Further Forbearance NPRM* contend that the "captive customer" problem Congress

---

[249] Our decision to institute mandatory detariffing for CMRS OSPs is not inconsistent with our adoption of permissive detariffing for CMRS international services on unaffiliated routes. Unlike in the international context, there is no reason to believe that requiring the withdrawal of OSP tariffs could lead to complications. *See* para. 64, *supra.*

[250] PCIA Petition at 48.

[251] PCIA *Ex Parte* at 4-6; see also CTIA *Ex Parte* at 2.

[252] *GTE Reconsideration Petition* at 9-11. This argument is also raised by PCIA and Nextel. *See* PCIA Petition at 40; Nextel Comments at 8.

[253] *GTE Declaratory Ruling*, 8 FCC Rcd. at 6174 ("The telephones provided by the GTE subsidiaries are not courtesy telephones because the consumer, not the telephone provider, pays for the cost of the call."). *See* 47 C.F.R. § 64.708(b); 47 U.S.C. § 226(2); S. Rep. No. 439, 101st Cong., 2d Sess. at 2, 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1577, 1579, 1582.

passed TOCSIA to remedy is uniquely a landline telephone service problem,[254] we believe that, as AT&T correctly noted, customers who need to place a call from a public telephone located on an airplane or a train are as "captive," if not more "captive," than customers making a landline OSP call from a hotel or hospital.[255] We believe that Congress imposed TOCSIA's aggregator regulations to protect "captive" customers, and therefore these provisions should apply to commercial air-ground telephone service and Railfone service.

88. Upon review of the record, we find GTE offers no new facts or legal arguments in support of its position that TOCSIA does not apply to the actions of certain of its mobile affiliates, other than to allege that the decision failed to consider the policy and practical implications of classifying cellular carriers as OSPs in the Railfone and rental cellular phone contexts. Upon consideration of the entire record, we find no reason to overturn the Common Carrier Bureau's decision. We therefore affirm the decision in the *GTE Declaratory Ruling* that TOCSIA applies to the actions of certain GTE affiliates, and deny the *GTE Reconsideration Petition.* However, our order today provides relief from certain of the provisions of TOCSIA for CMRS providers and will grant GTE some of the relief it sought in its petition. We also note that we are exploring other issues concerning TOCSIA's application to mobile service in the Notice of Proposed Rulemaking.

V. NOTICE OF PROPOSED RULEMAKING

A. Application of TOCSIA to CMRS Aggregators and OSPs

89. In the Memorandum Opinion and Order, we determined that, except for the provisions relating to unblocked access and the filing of informational tariffs, the present record is inadequate to support forbearance from applying the provisions of TOCSIA and our implementing regulations to CMRS OSPs and aggregators. PCIA has, however, made several arguments that could, if adequately supported, may establish grounds for forbearing from enforcing some or all of those provisions.[256] Consistent with the deregulatory intent of the 1996 Act, and with the more specific forbearance directive of section 10 and biennial review requirement of section 11, we believe that PCIA's arguments merit further inquiry. Accordingly, in this Notice of Proposed Rulemaking we ask questions designed to elicit specific information relevant to determining whether, and in what respects, we should forbear from applying additional provisions of TOCSIA to CMRS providers and aggregators, continue applying these provisions to those parties, or modify or eliminate our rules implementing TOCSIA to address the different circumstances faced by CMRS providers.

---

[254] Dial Page Comments on *Further Forbearance NPRM* at 7-8; BellSouth Reply Comments on *Further Forbearance NPRM* at 4; Nextel Reply Comments on *Further Forbearance NPRM* at 7-8.

[255] AT&T Reply Comments on *Further Forbearance NPRM* at 12-13. In addition to being unable to walk to competitor's telephone while on an airplane or a train, airline passengers are also forbidden to even turn on their personal cellular phones while airborne. *See* 47 C.F.R. §22.925 (cellular telephones on board an aircraft must be turned off when the aircraft leaves the ground).

[256] *See generally* PCIA *Ex Parte*.

90. As discussed above, a principal function of TOCSIA is to ensure that transient users of publicly available telephones and telecommunications services enjoy the same consumer protection as subscribers to the equivalent services.[257] We will consider this attribute of the statute prominently in deciding whether to forbear from applying any portion of TOCSIA, or eliminate or modify any of our implementing regulations, with respect to CMRS providers and aggregators. Thus, for purposes of the section 10(a) forbearance analysis, the maintenance of equivalent protection for all CMRS users will be relevant to determining whether continued enforcement of a provision is unnecessary to ensure that carriers' practices are just, reasonable, and not unjustly or unreasonably discriminatory; whether the provision is unnecessary for the protection of consumers; and whether forbearance is consistent with the public interest.[258] We will also consider the protection of consumers who obtain CMRS through aggregators, as compared with other CMRS consumers, as a principal factor in determining whether to make any changes to our forbearance regulations outside of section 10, including in determining whether a regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of service under section 11.[259] We encourage commenters to focus their remarks on the context of equivalent protection for all consumers of CMRS.

91. CMRS networks and service offerings differ from those of wireline service providers in several respects. These differences may include, among other things, differences in equipment inherent in the nature of mobile service; differences in prevailing rate structures such as larger local calling areas for CMRS, roaming charges, and charges for incoming calls; differences in the governing regulatory regimes; and differences in the relationships between OSPs and aggregators and between OSPs and end users. In addition to possibly supporting forbearance from applying some provisions of TOCSIA to CMRS providers and aggregators, these differences may mean that different regulations implementing TOCSIA are appropriate in the CMRS context. Accordingly, in this Notice we propose to consider applying modified TOCSIA regulations to CMRS providers and aggregators as well as eliminating the application of certain regulations and statutory provisions. Our adoption of any appropriate modifications to the regulations implementing the statute should promote the public interest both by relieving CMRS providers and aggregators of regulatory burdens that are ill-suited to the CMRS context and by providing consumers with targeted measures for their protection.

92. In the Memorandum Opinion and Order above, we forbear from enforcing certain provisions of TOCSIA against all providers and aggregators of CMRS.[260] We determined to extend forbearance to all CMRS, even though PCIA requested forbearance only as to providers of broadband PCS, because providers holding different categories of licenses within CMRS compete with each other and there did not

---

[257] *See* para. *73, supra.*

[258] *See* 47 U.S.C. § 160(a).

[259] We note that to the extent our regulations implementing TOCSIA are not required by the statutory text, we need not satisfy the section 10 forbearance standard in order to exempt a class of providers from those regulations or modify the regulations applicable to certain providers, if such a change is warranted by the language and purposes of TOCSIA. Commenters may, however, frame their comments regarding any of our TOCSIA regulations in terms of the section 10, section 11, or section 332(c) criteria.

[260] *See* para. 74, *supra.*

appear to be any compelling reasons for distinguishing among them. Under these circumstances, we concluded that maintaining regulatory symmetry would promote the public interest by avoiding distortion of competition in the markets for CMRS.[261] For the same reasons, we tentatively conclude that any decision to forbear arising out of this Notice of Proposed Rulemaking will apply to providers and aggregators of all services classified as CMRS. We seek comment on this tentative conclusion.

93. Before addressing the provisions of TOCSIA and our implementing rules individually, we also seek comment on a few matters that underlie our consideration of many of these provisions. PCIA argues that many of the provisions of TOCSIA are unduly burdensome as applied to broadband PCS providers because these providers may not be able to distinguish users that obtain service through an aggregator from other users of their services.[262] We seek comment as to whether all broadband PCS providers, and other CMRS providers, are in fact currently unable to identify calls that are placed or received through aggregators. If some aggregator calls can in fact be identified, we request specific information as to what factors, including the type of CMRS involved, technical attributes of the underlying provider's network, or the type of aggregator arrangement, permit such identification. We also seek clarification as to whether calls made through aggregators cannot be distinguished from all other CMRS calls, or only from certain types of calls (*e.g.*, roaming calls).[263] To the extent that some aggregator calls cannot be identified, we further seek comment regarding whether it would be feasible for providers to introduce the capability to identify these calls and, if so, at what cost.

94. We also seek comment on the different contexts in which CMRS is now or could in the future be offered through aggregators. The record includes evidence of a variety of different transient uses of mobile telephone service, including air-to-ground telephone service on commercial airlines, the leasing of phones along with rental cars, mobile phone booths at special events, and the rental of phones by hotels and shopping malls.[264] We seek further information on the distinguishing characteristics of each of these arrangements, and on any other contexts in which CMRS is aggregated. In particular, when addressing particular provisions of TOCSIA, commenters should consider whether the statutory provisions and our regulations have different impacts depending on the type of aggregator arrangement in question. Commenters should also consider the potential future evolution of CMRS aggregation. In particular, we seek comment regarding how proposed billing schemes under which the calling party pays for airtime might affect the arrangements between CMRS providers and aggregators and the impact of TOCSIA and our implementing rules.[265]

---

[261] *Id.*

[262] *See* PCIA Petition at 44; PCIA *Ex Parte* at 4-5; CTIA *Ex Parte* at 2.

[263] *See* PCIA Petition at 46; PCIA *Ex Parte* at 4-6 (stating that application of section 64.703(a) to broadband PCS effectively requires providers to brand all roamer calls).

[264] *See* n.211, *supra.*

[265] *See* Calling Party Pays Service Option in the Commercial Mobile Radio Services, *Notice of Inquiry*, 12 FCC Rcd. 17693 (1997).

95. Aggregator Disclosure and OSP Oversight of Aggregators. Even before the enactment of TOCSIA, we proposed rules "that pertain to a subject that is vital to the operation of an open and competitive operator services marketplace: customer information and notification."[266] After TOCSIA was enacted, we adopted rules requiring aggregators to post "on or near the telephone instrument, in plain view of consumers" information designed to aid consumers. This information includes (1) the name, address, and toll-free telephone number of the provider of operator services; (2) a written disclosure that the rates for all operator-assisted calls are available on request, and that consumers have a right to obtain access to the interstate common carrier of their choice and may contact their preferred interstate common carrier for information on accessing that carrier's service using that telephone; (3) for pay telephones, the local coin rate for the pay telephone location; and (4) the name and address of the Commission's Common Carrier Bureau enforcement division.[267] We require all aggregators to comply with this posting requirement, including aggregators in non-equal access areas.[268] Responsibility for enforcement of the aggregator posting requirement is, in part, placed upon the OSP used by the aggregator. The OSP is obligated to ensure, by contract or tariff, that each aggregator for which such provider is the presubscribed provider of operator services is in compliance with the posting requirements.[269]

96. We have declined in most respects to forbear from enforcing these provisions with respect to CMRS at this time because of the vital information that disclosure provides to consumers of public telecommunications services, and because there is no record evidence that these requirements impose an undue burden on aggregators.[270] For the same reasons, we tentatively conclude that we should continue in the future to require some form of disclosure by CMRS aggregators similar to that mandated by section 226(b)(1)(D) of the Act. In particular, we believe customers of CMRS aggregators will benefit from access to the same information that is available to direct customers of CMRS providers, including the identity of and how to contact the underlying service provider, how to obtain information about rates, and how to lodge complaints about service. We seek comment on this tentative conclusion. In particular, we are interested in any unusual burdens that the disclosure requirement generally might impose on aggregators. For example, if certain aggregators are prone to frequently changing their underlying service

---

[266] Policies and Rules Concerning Operator Service Providers, *Notice of Proposed Rule Making*, 5 FCC Rcd. 4630, 4631-32, ¶ 14 (1990) (*TOCSIA NPRM)*.

[267] 47 C.F.R. § 64.703(b). *See also* 47 U.S.C. § 226(c)(1) (requiring posting of items 1, 2, and 4 above). We note that section 226(c)(1)(A)(iii) requires aggregators to post the name and address of the Common Carrier Bureau's enforcement division. We tentatively conclude that, for purposes of public wireless phones, the Wireless Telecommunications Bureau's enforcement division should be substituted. We believe we have authority to make this substitution pursuant to our forbearance power and our authority under section 4(i) of the Act to perform any and all acts as may be necessary in the execution of our functions. *See* 47 U.S.C. § 154(i). We seek comment on this tentative conclusion.

[268] *See* Policies and Rules Concerning Operator Service Providers, *Report and Order*, 6 FCC Rcd. 2744, 2759, ¶ 36 (1991) (*TOCSIA Implementing Order*).

[269] 47 U.S.C. § 226(b)(1)(D); 47 C.F.R. § 64.703(e).

[270] *See* para. 86, *supra*. We are, however, forbearing from enforcing the disclosure requirements relating to the right to access the interstate common carrier of the consumer's choice, consistent with our decision that CMRS aggregators need not offer consumers that choice. *See* paras. 76-80, *supra*.

provider, might it be costly for them to continuously update the disclosure information? Are there circumstances where an aggregator might not know the identity of its underlying service provider? If so, how do these conditions differ from those encountered by wireline aggregators? We also welcome comment on the benefits of disclosure to consumers.

97. Although we tentatively conclude that we should retain some form of disclosure requirement for CMRS aggregators, we recognize that the appropriate form of disclosure may be different in the CMRS and wireline contexts. In particular, we note that wireless public phones are not always attached to a particular stationary geographic location, and, indeed, may not be attached to anything at all. This fact could impede compliance with the statutory and regulatory requirement that aggregators post information "on or near the telephone instrument."[271] Due to the increasing diminution in size of CMRS telephone devices, it may be impossible to post all of the required information, in a legible fashion, on the telephone instrument itself. We also recognize that because certain mobile public phones are not fixed to a particular location, it may not be possible to post notices in every place where a consumer can initiate a call. We therefore tentatively conclude that we should forbear from requiring CMRS aggregators to post disclosure information "on or near the telephone instrument," and instead should permit some or all CMRS aggregators to use some other reasonable means of disclosure. For example, we might permit CMRS aggregators to provide the required information to the consumer at the point of establishing a contractual relationship, *e.g.*, at the car rental counter or concierge desk.[272] We seek comment regarding this tentative conclusion and how it should be implemented. For example, we seek comment on whether the point of establishing a contractual relationship is an appropriate alternative time for disclosure, or whether this point may be nonexistent or difficult to identify under some circumstances. We also seek comment as to the means by which disclosure should be effected at the time the relationship is established; *e.g.*, by posting information in the aggregator's office or by handing a leaflet to the customer. Commenters should also consider alternatives to disclosure at the time of contracting, such as placing information in the glove compartment of a rental car. In addition, we are interested in whether alternative means of disclosure should be available to all CMRS aggregators, or only to aggregators that will have difficulty complying with the literal statutory requirement.

98. We also seek comment on whether certain disclosures should be required of CMRS aggregators in addition to those mandated under section 226(c) of the Act and section 64.703(b) of our rules. Specifically, CMRS providers typically impose a number of charges on end users that are not commonly encountered in the wireline context, including roaming charges, charges for airtime, and charges for incoming calls. We believe that CMRS subscribers are typically aware of these charges, but that transient users of CMRS may not be. We therefore seek comment on whether CMRS aggregators should be required to disclose the existence of these or other charges. If so, we further seek comment regarding the precise nature of the required disclosure. For example, should the aggregator provide information regarding the boundaries of the home calling area? Alternatively, where the CMRS device provides notice that a customer will incur roaming charges (*e.g.*, a light on the device is illuminated), should this fact be

---

[271] 47 U.S.C. § 226(c)(1)(A); 47 C.F.R. § 64.703(b).

[272] We note that before TOCSIA was enacted, we proposed to afford aggregators the option of meeting their disclosure obligations by giving printed documentation to the customer in person. We provided as examples that a customer at a hotel or a patient at a hospital could be given the required information while checking in. *TOCSIA NPRM*, 5 FCC Rcd. at 4632, ¶ 17.

disclosed? Should the aggregator be required to disclose the phenomenon of "call capture?"[273] We welcome comment on these and other relevant questions.

99. Section 64.703(b)(3) of our rules requires that in the case of a pay telephone, an aggregator must disclose the local coin rate for the location.[274] We seek comment on whether this requirement is appropriately applied to CMRS aggregators. In particular, we request information regarding whether coin-operated CMRS phones exist. If not, should we forbear from applying this disclosure requirement, or should we retain it to apply to coin-operated applications that may be developed in the future? If coin-operated phones do currently exist, is there any reason aggregators should not be required to disclose the coin rate? For example, are rate structures too complicated to be conveniently posted? If so, is there any compromise proposal that could effectively protect consumers without unduly burdening aggregators? Commenters should specifically address any relevant differences between CMRS and wireline coin-operated phones.

100. We also tentatively conclude that we should retain the requirement that CMRS OSPs ensure by contract or tariff that aggregators will comply with the disclosure requirements.[275] Congress believed that OSP oversight is important to ensuring aggregator compliance with TOCSIA, and we agree with Congress' judgment.[276] We also are not convinced on the present record that OSP oversight is unduly burdensome. PCIA argues, however, that compliance with the oversight requirement is problematic for CMRS OSPs because, unlike wireline OSPs, they typically do not have contracts with aggregators, and indeed may not know who aggregators of their services are.[277] We seek comment regarding the prevalence of contractual arrangements between CMRS aggregators and OSPs, and how this compares with the wireline context. To the extent such contracts do not exist, we seek comment on the costs and benefits of requiring CMRS aggregators and OSPs to enter into contracts. We also seek comment on practical alternatives to contractual provisions as a means of effecting OSP oversight, and on whether OSPs that do not have contracts with their aggregators, or do not know who their aggregators are, should be exempt from the oversight requirement. In addition, we welcome comments on the benefits of oversight by CMRS OSPs.

---

[273] "Call capture" or "capture of subscriber traffic" occurs when a mobile radio user is unable to initiate a call through a carrier's system from a location within that system's service area, because the control channel signal from an adjacent system is stronger at that location. Capture occurs because CMRS devices are designed to seek service, when initiating a call, from the system with the strongest control channel signal on the preferred channel block. In such a situation, the user's radio automatically registers in and initiates calls through the adjacent system, potentially triggering roaming charges. *See* Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, *Further Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd. 2109, 2124 n.81 (1997).

[274] *See* 47 C.F.R. § 64.703(b)(3). We note that this requirement is not imposed by statute.

[275] *See* 47 U.S.C. § 226(b)(1)(D); 47 C.F.R. § 64.703(e).

[276] *See* S. Rep. No. 439, 101st Cong., 2d Sess. at 13 (1990). *See also TOCSIA Implementing Order*, 6 FCC Rcd. at 2747-48, ¶ 4.

[277] See PCIA Petition at 46-49; Sprint/APC Comments at 15; PCIA *Ex Parte*, Attachment at 2.

101. OSP Identification, Disclosure, and Termination at No Charge. TOCSIA requires that every OSP audibly and distinctly identify itself to every person who uses its operator services before any charge is incurred by the consumer, permit the consumer to terminate the telephone call at no charge before the call is connected, and disclose to the consumer upon request, at no charge, a quotation of its rates or charges for the call, the methods by which such rates or charges will be collected, and the methods by which complaints concerning such rates, charges, or collection practices will be resolved.[278] Our regulations reiterate these requirements, and in addition we require that the OSP disclose audibly to the customer how to obtain the price of a call before the call is connected.[279]

102. In the Memorandum Opinion and Order, we have concluded that on the present record, the criteria for forbearance from applying these requirements to CMRS OSPs are not satisfied.[280] We seek additional comment on this issue. In particular, we seek comment on PCIA's arguments in favor of forbearance. First, PCIA and commenters supporting its position argue that the OSP disclosure and call termination requirements are unnecessary to protect consumers because CMRS providers' rates and practices are reasonable, competitive market forces motivate CMRS providers to offer services at reasonable rates, and CMRS providers generally disclose rate information as a matter of sound business practice.[281] We have already found, based on the existing record, that current market conditions may not ensure that CMRS providers will refrain from unjust, unreasonable, or unreasonably discriminatory practices.[282] We seek comment as to whether this analysis is any different when CMRS providers are acting as OSPs. We also seek comment on the disclosure practices of CMRS OSPs, and in particular whether they make relevant information available to consumers on each call and inform consumers before each call how to obtain such information. In addition, assuming providers typically do act reasonably and disclose their rates and practices, we seek comment on whether these circumstances are sufficient grounds for forbearing from regulation. For example, even if CMRS providers' rates and practices are reasonable, consumers may have an independent interest in knowing what those rates and practices are before they incur charges. Similarly, even if most CMRS providers disclose their rates and practices as a matter of business practice, regulation may be important to ensure disclosure by all providers. We seek comment on these theories. We also seek comment on whether continuing to apply disclosure requirements to CMRS

---

[278] 47 U.S.C. § 226(b)(1)(A-C).

[279] 47 C.F.R. § 64.703(a).

[280] *See* para. 86, *supra*.

[281] *See* PCIA Petition at 43-45; AT&T Comments at 7-8; GTE Comments at 10; Sprint/APC Comments at 13-15; ALLTEL Comments on the *Further Forbearance NPRM* at 3; Bell Atlantic Comments on the *Further Forbearance NPRM* at 9; CTIA Comments on the *Further Forbearance NPRM* at 7; GTE Comments on the *Further Forbearance NPRM* at 6-8; In-Flight Comments on the *Further Forbearance NPRM* at 5; McCaw Comments on the *Further Forbearance NPRM* at 5-6; Nextel Comments on the *Further Forbearance NPRM* at 15; SBMS Comments on the *Further Forbearance NPRM* at 11-16; AMTA Reply Comments on the *Further Forbearance NPRM* at 4-5; BellSouth Reply Comments on the *Further Forbearance NPRM* at 3-4; McCaw Reply Comments on the *Further Forbearance NPRM* at 5; PCIA *Ex Parte* at 1-2, Attachment at 1.

[282] *See* paras. 19-24, *supra* (discussing decision not to forbear from enforcing sections 201 and 202).

OSPs on each call is consistent with our decision to forbear from requiring these providers to file informational tariffs.[283]

103. Second, PCIA argues that enforcement of these requirements is not in the public interest because compliance with these requirements is unduly costly and burdensome for CMRS OSPs. In particular, PCIA contends that broadband PCS providers have no way of distinguishing a rental phone from a private phone, and therefore must make the required announcements, at a minimum, at the beginning of all roamer calls that are not billed to the originating number.[284] PCIA also states that the financial costs of complying with the OSP identification and disclosure requirements are substantial, arguing in particular that compliance with the new requirement to audibly disclose how to obtain the price of a call would entail replacement or modification of network equipment, design and installation of new switch software, the development and maintenance of databases, and the hiring and training of new personnel.[285] We seek comment on these arguments, including specific information regarding the costs of compliance for CMRS OSPs.[286] To the extent that CMRS providers cannot distinguish calls made through aggregators from other calls, we further seek information regarding the costs of making the required identification and disclosures on a larger universe of calls.

104. Finally, PCIA argues that the OSP disclosure requirements are ill suited to CMRS operator services because, unlike in the wireline context, CMRS OSPs typically have no direct relationship with the end user and do not set the end user's rates. Rather, according to PCIA, the aggregator sets the customer's rates and bills the customer directly. Therefore, PCIA argues, information regarding the OSP's rates is of little value to the consumer, and OSPs do not have sufficient information to accurately disclose the rate that may be charged to any end user.[287] We seek comment on the billing practices that prevail in CMRS aggregator contexts, and on the variations that may exist in these practices. In particular, we seek information on whether, and under what circumstances, end users are billed by aggregators, OSPs, or both. To the extent that end users pay charges only to aggregators, we seek comment on whether aggregators set those fees independently or simply pass on the fees charged to them by OSPs. We also seek information on any fees or charges assessed by aggregators on top of the OSP's charges. In light of existing practices, we seek comment on whether, and under what circumstances, aggregators or OSPs are better situated to provide meaningful rate and billing information to end users. In addition, we seek comment on how CMRS

---

[283] *See* para. 85, *supra.*

[284] PCIA Petition at 46; PCIA *Ex Parte* at 4-6 and Attachment at 1.

[285] *See* PCIA Petition at 47; PCIA *Ex Parte* at 3 and Attachment at 1.

[286] GTE and McCaw both provided estimates of how potentially expensive the original imposition of TOCSIA would be for CMRS providers. PCIA cited both GTE's 1993 $20 million estimate of the cost of compliance for the cellular industry and McCaw's 1994 extrapolation of this estimate to $100 million cost of compliance for the entire CMRS industry, without providing new figures. PCIA Petition at 47 (citing *GTE Reconsideration Petition* at 17 and McCaw Comments on the *Further Forbearance NPRM* at 5). These figures, however, are several years old, and presumably many of the costs at issue have already been incurred. We seek current information regarding the compliance costs presently faced by the CMRS industry.

[287] *See* PCIA *Ex Parte* at 2-3, 4, and Attachment at 1.

aggregator arrangements compare with those in the wireline context, and how any differences affect the rules that may be appropriate to protect consumers.

105. Billing for Unanswered Calls. TOCSIA and our regulations forbid OSPs from billing for unanswered telephone calls in areas where equal access is available, and from knowingly billing for unanswered telephone calls in areas where equal access is not available.[288] PCIA asserts that this provision is unnecessary as applied to CMRS providers because standard industry practice is to begin accruing air time charges only when the call is connected, and there is no evidence that billing for unanswered calls has been a problem in the mobile telecommunications industry.[289] We seek comment about CMRS industry practices with respect to billing for unanswered calls and any variations in those practices. In particular, we seek information regarding what constitutes billable airtime and whether CMRS providers calculate airtime differently for customers who obtain service through aggregators than for other users of their networks.[290] Commenters should further address the cost of implementing and complying with this provision for CMRS calls made through aggregators. To the extent that CMRS providers cannot distinguish between public and other users of the network, commenters should address the costs of forgoing billing for unanswered calls for a larger set of users.

106. Call Splashing. Both TOCSIA and the implementing regulations forbid OSPs from engaging in "call splashing" or billing for a call that does not reflect the originating location of the call without the consumer's informed consent.[291] PCIA argues that this prohibition is unnecessary as applied to CMRS OSPs because these providers have not engaged in call splashing to the detriment of consumers, as evidenced by the lack of consumer complaints about the practice.[292] In particular, PCIA argues that because most mobile service providers charge distance-insensitive toll rates, call splashing by CMRS providers would not harm consumers or unfairly benefit carriers.[293] PCIA observes that the point of call origination has little meaning in the mobile context since callers frequently change location during the

[288] 47 U.S.C. § 226(b)(1)(F-G); 47 C.F.R. § 64.705(a)(1-2).

[289] PCIA *Ex Parte*, Attachment at 1-2.

[290] We note that in another proceeding, a cellular service provider has asked us to declare that "call initiation" in the CMRS context occurs when the customer activates the phone to place or receive a call. *See* Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments at 3, 11-12 (filed Nov. 12, 1997).

[291] 47 U.S.C. § 226(b)(1)(H-I); 47 C.F.R. § 64.705(a)(3-4). "Call splashing" means the transfer of a telephone call from one provider of operator services to another such provider in such a manner that the subsequent provider is unable or unwilling to determine the location of the origination of the call and, because of such inability or unwillingness, is prevented from billing the call on the basis of such location. 47 U.S.C. § 226(a)(3); 47 C.F.R. § 64.708(c).

[292] PCIA Petition at 43; *see also, e.g.*, CTIA Comments on *Further Forbearance NPRM* at 7; GTE Comments on *Further Forbearance NPRM* at 6; In-Flight Comments on *Further Forbearance NPRM* at 5.

[293] *See* PCIA Petition at 45; PCIA *Ex Parte* at 2 and Attachment at 3.

course of a communication.[294] PCIA further argues that broadband PCS providers cannot feasibly target users of aggregated services for call splashing because they have no way of distinguishing a rental phone from a private phone.[295]

107. As discussed above, the present record is insufficient to support forbearance based on PCIA's arguments.[296] We therefore seek further comment on PCIA's arguments and on the costs and benefits of applying the call splashing prohibition to CMRS. In particular, we seek comment on whether CMRS OSPs have any history of call splashing to the detriment of consumers, and on whether situations exist or could arise where CMRS OSPs could have an incentive to engage in call splashing that would harm consumers. In this regard, we request comment on the prevalence of distance-insensitive billing in CMRS markets, how this billing practice affects CMRS OSPs' incentives to engage in call splashing and the potential for call splashing to harm consumers, and how these conditions compare with the situation in wireline services. In addition, we seek information on the costs to CMRS OSPs of complying with the call splashing prohibition for calls made through aggregators and, to the extent that CMRS providers cannot distinguish between customers of aggregators and other users, the costs of complying with this prohibition on other calls as well.

108. OSP Publication of Changes in Services. Under TOCSIA, the Commission is required to establish a policy for requiring providers of operator services to make public information about recent changes in operator services available to consumers.[297] Pursuant to that directive, we have required OSPs to regularly publish and make available at no cost to inquiring consumers written materials that describe any recent changes in operator services and in the choices available to consumers in that market.[298] PCIA argues that CMRS providers have no basis for issuing such reports because they are only incidentally and involuntarily OSPs.[299] We seek comment on the costs and benefits of requiring CMRS OSPs to publish regular reports of their changes in service in light of the nature of the services provided, the level of abuses, and carriers' customary disclosure practices. We are also interested in how this cost-benefit analysis compares with the analysis for wireline OSPs. Commenters should particularly consider whether the benefit of these reports to consumers may vary for different CMRS aggregator arrangements, and therefore whether it may make sense to modify or forbear from enforcing the rule only for certain types of arrangements.

109. Routing of Emergency Calls. TOCSIA requires the Commission to establish minimum standards for OSPs and aggregators to use in the routing of emergency telephone calls.[300] Under our rules

---

[294] PCIA *Ex Parte*, Attachment at 3.

[295] PCIA Petition at 46.

[296] *See* para. 86, *supra.*

[297] 47 U.S.C. § 226(d)(3)(B).

[298] 47 C.F.R. § 64.707.

[299] PCIA *Ex Parte*, Attachment at 3.

[300] 47 U.S.C. § 226(d)(3)(A).

implementing this provision, OSPs and aggregators are required to ensure immediate connection of emergency telephone calls to the appropriate emergency service of the reported location of the emergency, if known, and if not known, of the originating location of the call.[301] More recently, the Commission has promulgated requirements specifically governing the routing and handling of emergency 911 calls by cellular, broadband PCS, and SMR licensees that offer real-time, two-way switched voice service that is interconnected with the public switched network and utilize an in-network switching facility which enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls.[302] These requirements include:

- covered carriers must process and transmit to the designated Public Safety Answering Point (PSAP) all 911 calls made from wireless mobile handsets, including calls initiated by roamers;

- during Phase I of implementation and deployment, covered carriers must provide the telephone number of the originator of a 911 call and the location of the cell site or base station receiving a 911 call from any mobile handset accessing their system to the designated PSAP through the use of Automatic Number Identification (ANI) and Pseudo-ANI.[303] These capabilities will allow the PSAP attendant to contact the caller if the 911 call is disconnected;

- during Phase II of implementation and deployment, covered carriers must achieve the capability to identify the latitude and longitude of a mobile unit making a 911 call within a radius of no more than 125 meters, using Root Mean Square methodology (which equates to a success rate of approximately 67 percent to 75 percent).

110. PCIA asserts that CMRS aggregators' and OSPs' obligations with respect to emergency services are spelled out in the Commission's E911 rules, which supersede section 64.706.[304] The record, however, is almost totally devoid of comments addressing the emergency call routing obligation. We seek comment as to whether section 64.706 is appropriately applied to CMRS aggregators and OSPs, in light of our E911 rules. Commenters should specifically address the costs and benefits of applying section 64.706 in the CMRS context. In addition to addressing the impact of section 20.18, commenters should consider whether section 64.706 remains necessary and appropriate as applied to any CMRS aggregators and OSPs

---

[301] 47 C.F.R. § 64.706.

[302] 47 C.F.R. § 20.18; *see* Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 18676 (1996) (*E911 Order*); *Memorandum Opinion and Order*, 12 FCC Rcd. 22665 (1997) (*E911 Reconsideration*), *further recon. pending*.

[303] "Pseudo-ANI" means a number, consisting of the same number of digits as ANI, that is not a North American Numbering Plan telephone directory number and may be used in place of an ANI to convey a special meaning. The specific meaning assigned to the pseudo-ANI is determined by agreements, as necessary, between the telephone system originating the call, intermediate telephone systems handling and routing the call, and the destination telephone system. *E911 Reconsideration*, 12 FCC Rcd. at 22715, ¶ 103.

[304] PCIA *Ex Parte*, Attachment at 3.

that are not covered by the E911 rule, or whether those providers that are not covered by the E911 rule should be excluded from any emergency call routing obligation because they are incapable of handling emergency calls.[305]

B. Forbearance From Other Statutory and Regulatory Provisions.

111. In the *CMRS Second Report and Order*, the Commission classified all mobile radio services as either commercial mobile radio service (CMRS) or private mobile radio service (PMRS). The statutory definition of CMRS is "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public."[306] In the *CMRS Second Report and Order*, we concluded that CMRS includes the following former private radio services: SMR licensees that provide interconnected service, private carrier paging, and all for-profit interconnected services offered by business radio service and 220-222 MHz band licensees (we excepted, however, private paging systems that service the licensee's internal communications needs but do not offer for-profit service to third-party customers).[307] We concluded that CMRS also includes the following common carrier services: cellular service, all air-ground services, common carrier paging, all mobile telephone services and resellers of such services, offshore radio service, public coast stations and providers of mobile satellite service directly to end users.[308] We also decided to treat both broadband and narrowband PCS as CMRS on a presumptive basis, but to allow PCS systems to be treated as PMRS if a carrier makes a showing sufficient to overcome this presumption.[309] In the *CMRS Second Report and Order*, we determined to forbear from applying sections 203, 204, 205, 211, 212 and 214 of Title II of the Communications Act to any service classified as CMRS.[310] While we determined to continue enforcing the remaining sections of Title II with respect to CMRS providers, we announced that we would undertake a rulemaking proceeding to evaluate the possibility of additional regulatory relief from Title II for smaller entities that had complained of the disproportionate burden the current regulations imposed upon them.[311] We subsequently issued the *Further Forbearance NPRM* to initiate that rulemaking.

---

[305] *See E911 Order*, 11 FCC Rcd. at 18716-18, ¶¶ 80-83; *E911 Reconsideration*, 12 FCC Rcd. at 22700-05, ¶¶ 70-83.

[306] *See* 47 U.S.C. § 332(d)(1).

[307] *See CMRS Second Report and Order*, 9 FCC Rcd. at 1448-54, ¶¶ 82-99.

[308] *Id.* at 1454-58, ¶¶ 100-109; *see* 47 C.F.R. § 20.9. At the time of adoption of this regulation, we determined that we would treat as CMRS for-profit subsidiary communications services transmitted on subcarriers within the FM baseband signal that provide interconnected service, but we would use our discretion to determine whether we would treat the provision of space segment capacity to other than end users by satellite licensees and other entities as common carriage. *CMRS Second Report and Order*, 9 FCC Rcd. at 1457-58, ¶¶ 108-109.

[309] *See* 47 C.F.R. § 20.9(b).

[310] *CMRS Second Report and Orde*r, 9 FCC Rcd. at 1475-90, ¶¶ 164-213.

[311] *Id.* at 1419, 1511, 1515, ¶¶ 17, 272, 285. *See also* Separate Statement of Commissioner Andrew C. Barrett.

112. The Commission received numerous comments and reply comments on the *Further Forbearance NPRM*, but the passage of the Telecommunications Act of 1996 made sweeping changes which not only affected all consumers and telecommunications service providers, but also greatly expanded the Commission's forbearance authority. Section 332(c) authorizes the Commission to forbear from applying most provisions of Title II to any CMRS "service or person."[312] Under our section 10 authority, by contrast, we may forbear from applying almost any regulation or provision of the Act to any "telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of their geographic markets."[313] The 1996 Act also added section 11, which directs us biennially to review all of our telecommunications regulations and repeal or modify any regulations that we determine are no longer necessary in the public interest as the result of meaningful economic competition between providers of service.[314] Because these legal changes and changes in the telecommunications marketplace have made portions of the record in the *Further Forbearance NPRM* stale, we terminate that proceeding and seek new comments regarding forbearance from applying any regulation or provision of the Act to wireless telecommunications carriers licensed by the Commission. Such carriers include telecommunications carriers licensed under Part 21 (domestic public fixed radio services), Part 22 (public mobile radio services), Part 24 (personal communications services), Part 90 (private land mobile radio services),[315] and Part 101 (fixed microwave services)[316] of our rules.[317]

113. We believe the goals we identified in the *CMRS Second Report and Order* mirror those set for us by Congress in the 1996 Act: reduce the regulatory burden upon, and foster vigorous and fair competition among, telecommunications providers.[318] We are continually striving to meet those goals. For example, our decision to forbear from applying tariffing requirements in sections 203, 204, and 205 to CMRS providers significantly reduced the filing burdens placed upon such providers.[319] Continuing this trend, we recently granted the FCBA's forbearance petition and that portion of PCIA's petition relating to *pro forma* transfers and assignments, subject to several exceptions, eliminating the requirement that

---

[312] 47 U.S.C. § 332(c)(1).

[313] 47 U.S.C. § 160(a).

[314] 47 U.S.C. § 161.

[315] Although Part 90 governs "private land mobile radio services," certain SMR, paging, and other service providers regulated under Part 90 have been classified as CMRS providers, and therefore fall within the definition of "telecommunications carrier" under the Act.

[316] Part 101 governs both common carrier and private fixed point-to-point microwave services. However, only common carrier microwave licensees are telecommunications carriers eligible for forbearance under this Notice.

[317] However, licensees governed by these rule parts who do not meet the definition of "telecommunications carrier" (*e.g.*, public safety and private microwave licensees) are beyond the scope of our section 10 forbearance authority, and therefore are not subject to this Notice.

[318] *CMRS Second Report and Order*, 9 FCC Rcd. at 1418-19, ¶ 16.

[319] *See id.* at 1475-81, ¶¶ 165-82; H.R.Rep. No. 111, 103d Cong. 1st Sess. at 259-60 (1993).

telecommunications carriers licensed by the Wireless Telecommunications Bureau obtain prior Commission approval before consummating *pro forma* transactions, *i.e.*, transactions that do not constitute a substantial change of control.[320] As we have stated in other proceedings, however, the decision to forbear from enforcing statutes or regulations is not a simple decision, and must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria are met.[321]

114. Section 332(c) and section 10 differ in scope, yet set forth similar three-pronged tests that must be met in order for us to exercise our forbearance authority. Since we issued the *Further Forbearance NPRM* prior to the passage of section 10, we seek comment as to whether the differences in language between section 332(c) and section 10 necessitate a departure from the criteria we enunciated in the *Further Forbearance NPRM* as a test for whether we would use our authority to forbear. These criteria are: (1) how the relevant statutory forbearance test and in particular the cost/benefit analysis we associate with the last prong of the test apply to the provision sought to be forborne from, (2) how forbearance from applying the provision would enhance future CMRS competition, (3) how Congressional intent underlying the provision would be affected, (4) how forbearance for particular types of CMRS providers would comport with regulatory symmetry and (5) whether there are other factors or alternatives we should consider in classifying CMRS for further forbearance purposes.[322] We further ask, since our authority under section 332(c) was limited to deregulation of commercial mobile services, whether we should extend any forbearance pursuant to section 10 to wireless carriers other than those classified as CMRS, *e.g.*, wireless competitive local exchange carriers (CLECs), in order to promote their role in providing competition in the local exchange market.

115. If commenters seek forbearance from particular statutory provisions or regulations, we ask them to primarily focus their analysis on whether forbearance is warranted under the three-pronged test of either section 332 or section 10. In connection with the third prong of the test, the public interest standard, commenters should show whether the costs incurred by carriers to comply with particular provisions outweigh the benefits to the public to be gained in applying them, as well as whether forbearance from particular statutory provisions would enhance future competition from a diversity of entities and thus tend to justify a finding that forbearance served the public interest. It would also be useful for commenting parties to consider and comment upon: (i) the original purpose of the particular rule in question; (ii) the means by which the rule was meant to further that purpose; (iii) the state of competition in the relevant market at the time the rule was promulgated; (iv) the current state of competition as compared to that which existed at the time of the rule's adoption; (v) how any changes in competitive market conditions between the time the rule was promulgated and the present might obviate, remedy, or otherwise eliminate the concerns

---

[320] *FCBA Order*, 13 FCC Rcd. at 6299, ¶ 9.

[321] *See* Bell Operating Companies Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities, *Memorandum Opinion and Order*, 13 FCC Rcd. 2627 (Comm. Carr. Bur. 1998). *See also CAP Forbearance Order*, 12 FCC Rcd. 8596.

[322] *Further Forbearance NPRM*, 9 FCC Rcd. at 2165, ¶ 8.

that originally motivated the adoption of the rule; and (vi) the ultimate effect forbearance may have on consumers.[323]

116. We also seek comment on whether there exist, within CMRS and other wireless telecommunications markets, types of providers for which application of a particular statutory or regulatory provision will either pose undue costs or yield no benefits to the public. For example, if the costs of regulation are fixed, smaller providers could be more likely than other types of providers to be burdened by the costs of regulation. We believe two factors of the public interest test that we have proposed to apply under section 332(c) can serve to guide our determinations in this area.[324] The first is whether differential costs of compliance with particular laws or regulations make forbearance appropriate for particular types of providers. The second is whether the public interest benefits from application of particular provisions vary among the different types of providers.

117. In addition, we ask interested parties to comment on how forbearance for particular types of providers would comport with the goal of regulatory symmetry,[325] bearing in mind that our forbearance authority permits different regulation of different providers.[326] Specifically, we seek comment on whether limiting forbearance to only some CMRS or other wireless telecommunications carriers would undermine regulatory symmetry and the regulatory scheme established in the *CMRS Second Report and Order*.

118. Finally, we ask interested parties to suggest any other factors or alternatives that we should consider when evaluating forbearance petitions affecting telecommunications services or providers licensed or regulated by the Wireless Telecommunications Bureau.

VI. CONCLUSION

119. We find, based on the record before us, that the section 10 forbearance standard is not satisfied for sections 201 and 202 of the Act and 47 C.F.R. § 20.12(b) (the resale rule) with respect to broadband PCS and other CMRS providers, and deny PCIA's request to forbear from requiring broadband PCS providers to comply with these provisions. We also find that the section 10 forbearance standard is not satisfied with respect to the requirement that broadband PCS and other CMRS providers obtain section 214 authorization for providing international services. Forbearance is, however, warranted from the requirement that these carriers file tariffs for their international services, except on affiliated routes, and we find that this forbearance should be extended to all CMRS providers. Forbearance is also warranted from the provisions of TOCSIA that require CMRS aggregators to provide unblocked access and related provisions, as well as the requirement that CMRS OSPs file informational tariffs. We find, however, that

---

[323] *See* 1998 Biennial Review -- Broadcast Ownership Rules, MM Docket No. 98-35, *Notice of Inquiry*, FCC 98-37 (rel. March 13, 1998) (Statement of Comm'r Harold W. Furchtgott-Roth).

[324] *See Further Forbearance NPRM*, 9 FCC Rcd. at 2165, ¶ 8.

[325] *See* H.R.Rep. No. 111, 103rd Cong., 1st Sess. at 259-60 (1993); *CMRS Second Report and Order*, 9 FCC Rcd. at 1417-22, ¶¶ 13-29.

[326] Section 10 explicitly grants us this authority; the Congressional intent underlying section 332(c) would also permit such application of its provisions.

the factual record is insufficient to support forbearance from enforcement of the other provisions of TOCSIA at this time, and we solicit further information in the Notice of Proposed Rulemaking that we hope will provide a basis for determining whether to forbear from applying other provisions of TOCSIA in the future.

120. We also find that GTE has failed to raise any new facts or legal arguments in support of its contention that TOCSIA does not apply to certain activities of its mobile affiliates, and therefore we deny its Petition for Reconsideration.

121. We also dismiss the Notice of Proposed Rulemaking entitled *Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers* because the record no longer reflects our expanded forbearance authority. The Notice of Proposed Rulemaking we issue today seeks comment regarding additional forbearance from regulation in wireless telecommunications markets.

VII. ORDERING CLAUSES

122. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i), 10, 11 and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 160, 161 and 332, the outstanding portions of the Petition for Forbearance filed by the Broadband Personal Communications Services Alliance of the Personal Communications Industry Association on May 22, 1997, ARE GRANTED IN PART AND DENIED IN PART to the extent discussed above.

123. IT IS FURTHER ORDERED that, pursuant to sections 1, 4(i), 226 and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 226 and 332, the Petition for Reconsideration or Waiver filed by GTE on September 27, 1993, IS DENIED.

124. IT IS FURTHER ORDERED that, pursuant to sections 1, 4(i) and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and 332, the rulemaking proceeding captioned Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, GN Docket No. 94-33, IS TERMINATED.

125. IT IS FURTHER ORDERED that, pursuant to sections 1, 4(i), 10, 11, 303(g), 303(r) and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 160, 161, 303(g), 303(r) and 332, a NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

126. IT IS FURTHER ORDERED that, pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on the Notice of Proposed Rulemaking on or before **August 3, 1998**, and reply comments on or before **August 18, 1998**. Comments and reply comments should be filed in WT Docket No. 98-100. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. For each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. Send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. For further information contact Jeffrey Steinberg at 202-418-0620 or Kim Parker at 202-418-7240.

127. IT IS FURTHER ORDERED that, Parts 20 and 64 of the Commission's Rules ARE AMENDED as specified in Appendix C, effective 30 days after publication in the Federal Register.

128. This is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.203, and 1.206(a).

129. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA),[327] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible impact on small entities of the rules proposed in the Notice of Proposed Rulemaking (Notice) in WT Docket No. 98-XX. Written public comments are requested on the IRFA. Comments on the IRFA must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines for comments on the Notice. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.

A. Need for, and objectives of, the proposed rules:

In this Notice, the Commission proposes to consider forbearing from applying provisions of section 226 of the Communications Act (Telephone Operator Consumer Services Improvement Act or TOCSIA)[328] to Commercial Mobile Radio Service (CMRS) providers and aggregators of CMRS, as well as modifying its rules applying TOCSIA to those entities. Specifically, the Commission proposes to: (1) continue to require some form of disclosure to consumers by CMRS aggregators similar to that mandated by section 226(b)(1)(D) of the Act, although the precise nature of the disclosure may be modified; (2) forbear from requiring CMRS aggregators to post disclosure information "on or near the telephone instrument," and instead permit all or some CMRS aggregators to use some other reasonable means of disclosure; and (3) continue to require CMRS providers of operator service (OSPs) to ensure by contract or tariff that aggregators will comply with the disclosure requirements.[329]

In addition, the Commission requests comment on whether it should forbear from applying other provisions of TOCSIA in the CMRS context or whether these requirements should be modified as applied to CMRS aggregators and OSPs. These provisions include requirements that OSPs identify themselves to consumers, disclose certain information, and permit termination of calls before connection at no charge upon request; that OSPs refrain from billing for unanswered calls in areas where equal access is available and refrain from knowingly billing for unanswered calls in areas where equal access is unavailable; that OSPs avoid certain call transfer and billing practices known as "call splashing"; that OSPs make publicly available information about recent changes in their operator services; and that OSPs and aggregators ensure immediate connection of emergency telephone calls. The Commission's objective is to formulate rules that are responsive to the differences between CMRS and fixed services provided through aggregators, that avoid imposing unnecessary burdens on CMRS OSPs and aggregators, and that provide

---

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

[328] 47 U.S.C. § 226.

[329] Definitions of aggregator and OSP can be found at 47 U.S.C. § 226(a)(2) and (9), 47 C.F.R. § 64.708(b) and (i), and para. 66 of the Memorandum Opinion and Order and Notice of Proposed Rulemaking, *supra*.

consumers who obtain CMRS through aggregators with protections comparable to those enjoyed by other consumers of CMRS.

The Notice also seeks comment on forbearance from applying other provisions of the Act to all wireless telecommunications carriers licensed by the Commission, including telecommunications carriers licensed under Part 21 (domestic public fixed radio services), Part 22 (public mobile radio services), Part 24 (personal communications services), Part 90 (private land mobile radio services), and Part 101 (fixed microwave services) of our rules. The Commission's objective is to reduce regulatory burdens upon providers of wireless telecommunications services where consistent with the public interest, and thus to foster vigorous and fair competition among these providers.

B. Legal basis:

The proposed action is authorized under sections 1, 4(i), 10, 11 and 332(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 160, 161 and 332(c).

C. Description and estimate of the number of small entities to which rules will apply:

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by our rules.[330] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[331] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[332] Nationwide, there are 275,801 small organizations.[333] "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."[334] As of 1992, there were 85,006 such jurisdictions in the United States.[335]

In addition, the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act.[336] Under the Small Business Act, a "small business concern" is

---

330 5 U.S.C. §§ 603(b)(3), 604(a)(3).

331 5 U.S.C. § 601(6).

332 5 U.S.C. § 601(4).

333 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

334 5 U.S.C. § 601(5).

335 U.S. Department of Commerce, Bureau of the Census, "1992 Census of Governments."

336 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632).

one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).[337]

The Notice could result in rule changes that, if adopted, would affect all small businesses that are aggregators or providers of CMRS operator services as well as all small business that are wireless telecommunications carriers. To assist the Commission in analyzing the total number of affected small entities, commenters are requested to provide estimates of the number of small entities that may be affected by any rule changes resulting from the Notice. The Commission estimates the following number of small entities may be affected by the proposed rule changes:

Cellular Radiotelephone Service. The Commission has not developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.[338] The size data provided by the SBA does not enable us to make a meaningful estimate of the number of cellular providers which are small entities because it combines all radiotelephone companies with 1,000 or more employees.[339] The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, is the most recent information available. This document shows that only twelve radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.[340] Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. The Commission assumes, for purposes of this IRFA, that all of the current cellular licensees are small entities, as that term is defined by the SBA. In addition, the Commission notes that there are 1,758 cellular licenses; however, a cellular licensee may own several licenses. The most reliable source of information regarding the number of cellular service providers nationwide appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (TRS). The report places cellular licensees and Personal Communications Service (PCS) licensees in one group. According to the data released in November 1997, there are 804 companies reporting that they engage in cellular or PCS service.[341] It seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees; however, the Commission is unable at this time to estimate with greater precision the number of cellular service carriers qualifying as small business concerns under the SBA's

---

337 15 U.S.C. § 632.

338 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

339 U.S. Small Business Administration 1992 Economic Census Employment Report, Bureau of the Census, U.S. Department of Commerce (radiotelephone communications industry data adopted by the SBA Office of Advocacy) (SIC Code 4812).

340 U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

341 FCC, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997).

definition. For purposes of this IRFA, the Commission estimates that there are fewer than 804 small cellular service carriers.

Broadband PCS. The broadband PCS spectrum is divided into six frequency blocks designated A through F. The Commission has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of less than $40 million in the three previous calendar years.[342] This definition of "small entity" in the context of broadband PCS auctions has been approved by the SBA.[343] The Commission has auctioned broadband PCS licenses in blocks A through F. Of the qualified bidders in the C and F block auctions, all were entrepreneurs. Entrepreneurs was defined for these auctions as entities, together with affiliates, having gross revenues of less than $125 million and total assets of less than $500 million at the time the FCC Form 175 application was filed. Ninety bidders, including C block reauction winners, won 493 C block licenses and 88 bidders won 491 F block licenses. For purposes of this IRFA, the Commission assumes that all of the 90 C block broadband PCS licensees and 88 F block broadband PCS licensees, a total of 178 licensees, are small entities.

Narrowband PCS. The Commission has auctioned nationwide and regional licenses for narrowband PCS. There are 11 nationwide and 30 regional licensees for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition for radiotelephone companies. At present, there have been no auctions held for the major trading area (MTA) and basic trading area (BTA) narrowband PCS licenses. The Commission anticipates a total of 561 MTA licenses and 2,958 BTA licenses will be awarded in the auctions. Given that nearly all radiotelephone companies have no more than 1,500 employees, and that no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, the Commission assumes, for purposes of this IRFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

220 MHz Radio Services. Commercial licenses in the 220-222 MHz band are divided into two categories.[344] Phase I licensees are licensees granted initial authorizations from among applications filed on or before May 24, 1991.[345] The Commission has not adopted a definition of small business specific to Phase I 220 MHz licensees. Accordingly, the Commission will use the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons. Approximately 1,515 non-nationwide Phase I licenses and four nationwide Phase I licenses have been awarded. The Commission estimates that almost all of the holders of these licenses are small entities under the SBA definition.

---

[342] *See* 47 C.F.R. § 24.720(b)(1).

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

[344] Some channels in the 220-222 MHz band are reserved for Public Safety and Emergency Medical Radio Services. Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, *Third Report and Order; Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd. 10943, 10972-79, ¶¶ 59-72 (1997). In addition, qualified entities may obtain secondary licenses to use these frequencies for fixed geophysical telemetry operations. *Id.* at 11009-12, ¶¶ 140-146. These licensees would not be affected by any rules adopted pursuant to this Notice.

[345] 47 C.F.R. § 90.701(b).

Phase II licensees are licensees granted initial authorizations from among applications filed after May 24, 1991.[346] The Commission has adopted a two-tiered definition of small businesses in the context of auctioning Phase II licenses in the 220-222 MHz band. A small business is defined as either (1) an entity that, together with its affiliates and controlling principals, has average gross revenue for the three preceding years of not more than $3 million; or (2) an entity that, together with affiliates and controlling principals, has average gross revenue for the three preceding years of not more than $15 million.[347] This definition of small business has been approved by the SBA.[348] There have not been any auctions to date of 220 MHz licenses, and it is therefore impossible accurately to predict how many eventual licensees out of the auctions process will be small entities. Based on its experience with auctions of SMR licenses in the 900 MHz band, however, the Commission estimates that for the 908 auctionable licenses in the 220 MHz band, there will be approximately 120 applicants, of which approximately 92 will be small entities within either prong of the definition approved by the SBA.[349]

Paging. The Commission has proposed a two-tier definition of small businesses in the context of auctioning geographic area paging licenses in the Common Carrier Paging and exclusive Private Carrier Paging services. Under the proposal, a small business will be defined as either (1) an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than $3 million; or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than $15 million. Since the SBA has not yet approved this definition for paging services, the Commission will utilize the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons. At present, there are approximately 24,000 Private Paging licenses and 74,000 Common Carrier Paging licenses. According to *Telecommunications Industry Revenue* data, there were 172 "paging and other mobile" carriers reporting that they engage in these services.[350] Consequently, the Commission estimates that there are fewer than 172 small paging carriers. The Commission estimates that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

Air-Ground Radiotelephone Service. The Commission has not adopted a definition of small business specific to the Air-Ground Radiotelephone Service.[351] Accordingly, the Commission will use the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and the Commission estimates that almost all of them qualify as small entities under the SBA definition.

---

[346] 47 C.F.R. § 90.701(c).

[347] 47 C.F.R. § 90.1021(b).

[348] Letter from A. Alvarez, SBA, to D. Phythyon, FCC (Jan. 6, 1998).

[349] *See 220 MHz Third Report and Order*, 12 FCC Rcd. at 11096, Appendix A.

[350] FCC, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997).

[351] Air-Ground radiotelephone service is defined in section 22.99 of the Commission's rules, 47 C.F.R. § 22.99.

Specialized Mobile Radio (SMR). The Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz SMR licenses to firms that had revenues of no more than $15 million in each of the three previous calendar years. This regulation defining "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. The Commission assumes for purposes of this IRFA that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 900 MHz SMR band, and recently completed an auction for geographic area 800 MHz SMR licenses. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. There were 10 winning bidders who qualified as small entities in the 800 MHz auction.

Offshore Radiotelephone Service. This service operates on several ultra high frequency (UHF) TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico. At present, there are approximately 55 licensees in this service. The Commission is unable at this time to estimate the number of licensees that would qualify as small entities under the SBA definition for radiotelephone communications. The Commission assumes, for purposes of this IRFA, that all of the 55 licensees are small entities, as that term is defined by the SBA.

General Wireless Communications Service. This service was created by the Commission on July 31, 1995[352] by transferring 25 MHz of spectrum in the 4660-4685 MHz band from the federal government to private sector use. The Commission is unable at this time to estimate the number of licensees that would qualify as small entities under the SBA definition for radiotelephone communications.

Common Carrier Fixed Microwave Services. Microwave services include common carrier fixed,[353] private operational-fixed,[354] and broadcast auxiliary radio services.[355] Of these, only operators in the common carrier fixed microwave service are telecommunications carriers that could be affected by the adoption of rules pursuant to this Notice. At present, there are 22,015 common carrier fixed microwave licensees. The Commission has not yet defined a small business with respect to microwave services. For

---

[352] *See* Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, *Second Report and Order*, 11 FCC Rcd. 624 (1995).

[353] 47 C.F.R. §§ 101 *et seq*. (formerly Part 21 of the Commission's rules).

[354] Persons eligible under Parts 80 and 90 of the Commission's rules can use private operational fixed microwave services. *See* 47 C.F.R. §§ 80.1 *et seq.*; 47 C.F.R. §§ 90.1 *et seq*. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use an operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[355] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's rules. *See* 47 C.F.R. §§ 74.1 *et seq*. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points, such as a main studio and an auxiliary studio. The broadcast auxiliary microwave services also include mobile TV pickups which relay signals from a remote location back to the studio. This service is not included within the scope of this Notice.

purposes of this IRFA, the Commission will utilize the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons. The Commission estimates that for purposes of this IRFA all of the common carrier fixed microwave licensees would qualify as small entities under the SBA definition for radiotelephone communications.

Rural Radiotelephone Service. The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service.[356] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS).[357] The Commission will use the SBA definition applicable to radiotelephone companies; *i.e.*, an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that almost all of them qualify as small entities under the SBA definition.

Marine Coast Service. The Commission has not adopted a definition of small business specific to the marine coast service. The Commission will use the SBA definition applicable to radiotelephone companies; *i.e.*, an entity employing no more than 1,500 persons. There are approximately 10,500 licensees in the marine coast service, and the Commission estimates that almost all of them qualify as small under the SBA definition.

Wireless Communications Services (WCS). WCS is a wireless service which can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission will use the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons, while it seeks SBA approval of a more refined definition.[358] The Commission auctioned geographic area licenses in the WCS service. Based upon the information obtained in the auctions process, the Commission concludes that eight WCS licensees are small entities.

In addition to the above estimates, new licensees in the wireless radio services will be affected by these rules, if adopted. CMRS aggregators will also be affected by these rules, if adopted. The Commission does not have any basis for estimating the number of CMRS aggregators that may be small entities. To assist the Commission in analyzing the numbers of potentially affected small entities, commenters are requested to provide information regarding how many small business entities may be affected by the proposed rules.

D. Description of reporting, record keeping and other compliance requirements:

The Notice proposes no additional reporting, recordkeeping or other compliance measures and seeks to minimize such burdens for CMRS aggregators and OSPs. As noted, we propose to forbear from

---

[356] Rural Radiotelephone Service is defined in section 22.99 of the Commission's rules, 47 C.F.R. § 22.99.

[357] BETRS is defined in sections 22.757 and 22.729 of the Commission's rules, 47 C.F.R. §§ 22.757, 22.729.

[358] The Commission defined "small business" for the WCS auction as an entity with average gross revenues of $40 million or less in the three preceding years and "very small business" as an entity with average gross revenues of $15 million or less in the three preceding years. *See* Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), *Report and Order*, 12 FCC Rcd. 10785 (1997).

requiring CMRS aggregators to post disclosure information "on or near the telephone instrument," and instead permit all or some CMRS aggregators to use some other reasonable means of disclosure.

E. Steps taken to minimize the significant economic impact on small entities, and significant alternatives considered:

The Notice proposes to reduce the administrative burdens and cost of compliance with TOCSIA and the Commission's implementing regulations for CMRS aggregators and OSPs generally. This reduction of burden will economically benefit small entities within these categories. In addition, the Commission seeks comment on ways of reducing regulatory burdens by forbearing from applying any provisions of the Communications Act to wireless telecommunications carriers, including those carriers that are small business entities. We specifically request comment on whether forbearance from applying any statutory provision is appropriate with respect to smaller CMRS providers.

F. Federal rules which overlap, duplicate, or conflict with these proposed rules:

None.

APPENDIX B

LIST OF COMMENTERS AND SHORT-FORM NAMES USED

Comments on the PCIA Petition

America One Communications, Inc. (America One)
American Mobile Telecommunications Association, Inc. (AMTA)
AT&T Wireless Services, Inc. (AT&T)
Bell Atlantic NYNEX Mobile, Inc. (Bell Atlantic NYNEX)
BellSouth Corporation (BellSouth)
Cellnet of Ohio, Inc. (Cellnet)
Cellular Telecommunications Industry Association (CTIA)
Competitive Telecommunications Association (CompTel)
CONXUS Communications, Inc. (CONXUS)
General Wireless, Inc. (GWI)
GTE Service Corporation (GTE)
KCI Communications Corp. d/b/a/ One Source (One Source)
MCI Communications Corporation (MCI)
National Wireless Resellers Association (NWRA)
Nextel Communications, Inc. (Nextel)
Omnipoint Communications, Inc. (Omnipoint)
PrimeCo Personal Communications, L.P. (PrimeCo)
Rural Telecommunications Group (RTG)
SouthEast Telephone, Ltd. (SouthEast)
Sprint PCS and American Personal Communications (Sprint/APC)
Telecommunications Resellers Association (TRA)
WorldCom, Inc. (WorldCom)

Reply Comments on the PCIA Petition

AirTouch Communications, Inc. (AirTouch)
American Mobile Telecommunications Association, Inc. (AMTA)
AT&T Wireless Services, Inc. (AT&T)
BellSouth Corporation (BellSouth)
Cellular Telecommunications Industry Association (CTIA)
National Wireless Resellers Association (NWRA)
Nextel Communications, Inc. (Nextel)
Northcoast Communications, LLC (Northcoast)
Personal Communications Industry Association (PCIA)
PrimeCo Personal Communications, L.P. (PrimeCo)
Telecommunications Resellers Association (TRA)
Touch 1 Wireless (Touch 1)
US WEST, Inc. (US WEST)

Comments on the Further Forbearance NPRM

Alltel Service Corporation (Alltel)
American Mobile Telecommunications Association, Inc. (AMTA)
Applied Technology Group, Inc. (Applied)
AT&T Corporation (AT&T)
Bell Atlantic Mobile Systems, Inc. (BANM)
BellSouth Corporation (BellSouth)
Cellular Telecommunications Industry Association (CTIA)
Dial Page, Inc. (Dial Page)
E.F. Johnson Company (E.F. Johnson)
Geotek Communications, Inc. (Geotek)
Grand Broadcasting Corporation (Grand Broadcasting)
GTE Service Corporation (GTE)
In-Flight Phone Corp. (In-Flight)
McCaw Cellular Communications, Inc. (McCaw)
National Association of Business and Educational Radio, Inc. (NABER)
Nextel Communications, Inc. (Nextel)
NYNEX Corporation (NYNEX)
OneComm Corporation (OneComm)
Pacific Bell and Nevada Bell (PacBell)
SEA, Inc. (SEA)
Southwestern Bell Mobile Systems, Inc. (SBC)
The Southern Company (Southern)
United States Sugar Corporation (US Sugar)
Utilities Telecommunications Council (UTC)
Waterway Communications System, Inc. (Watercom)
WJC Maritel Corporation (WJC)

Reply Comments on the Further Forbearance NPRM

American Mobile Telecommunications Association, Inc. (AMTA)
AMSC Subsidiary Corporation (AMSC)
AT&T Corporation (AT&T)
BellSouth Corporation (BellSouth)
Cellular Telecommunications Industry Association (CTIA)
GTE Service Corporation (GTE)
In-Flight Phone Corp. (In-Flight)
McCaw Cellular Communications, Inc. (McCaw)
Nextel Communications, Inc. (Nextel)
NYNEX Corporation (NYNEX)
Pacific Bell and Nevada Bell (PacBell)
Radiofone, Inc. (Radiofone)
Southwestern Bell Mobile Systems, Inc. (SBC)

Sprint Corporation (Sprint)
US WEST, Inc. (US WEST)
United States Telephone Association (USTA)
Waterway Communications System, Inc. (Watercom)

APPENDIX C

FINAL RULES

Title 47 of the Code of Federal Regulations, Parts 20 and 64, is amended as follows:

Part 20 - COMMERCIAL MOBILE RADIO SERVICES

1. The authority citation for Part 20 is amended to read as follows:

AUTHORITY: Secs. 4, 10, 251-254, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 160, 251-254, 303, and 332 unless otherwise noted.

2. Section 20.15 is amended by revising paragraphs (c) and (d) to read as follows:

§ 20.15 Requirements under Title II of the Communications Act

*****

(c) Commercial mobile radio service providers shall not file tariffs for interstate service to their customers, interstate access service, or interstate operator service. Sections 1.771-1.773 and part 61 of this chapter are not applicable to interstate services provided by commercial mobile radio service providers. Commercial mobile radio service providers shall cancel tariffs for interstate service to their customers, interstate access service, and interstate operator service.

(d) Nothing in this section shall be construed to modify the Commission's rules and policies on the provision of international service under Part 63 of this chapter, except that a commercial mobile radio service provider is not required to file tariffs for its provision of international service to markets where it does not have an affiliation with a foreign carrier that collects settlement payments from U.S. carriers. For purposes of this paragraph, *affiliation* is defined in § 63.18(h)(1)(i) of this chapter.

*****

Part 64 - MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for Part 64 is amended to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 10, 201, 218, 226, 228, 332, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 10, 201, 218, 226, 228, 332, unless otherwise noted.

2. Section 64.703 is amended by deleting the word "A" at the beginning of paragraph (b)(2) and inserting in its place the phrase "Except for CMRS aggregators, a".

3. Section 64.704 is amended by adding a new paragraph (e) to read as follows:

§ 64.704 Call blocking prohibited.

*****

(e) The requirements of this section shall not apply to CMRS aggregators and providers of CMRS operator services.

4. Section 64.705 is amended by adding a new paragraph (c) to read as follows:

§ 64.705 Restrictions on charges related to the provision of operator services.

*****

(c) The requirements of paragraphs (a)(5) and (b) of this section shall not apply to CMRS aggregators and providers of CMRS operator services.

5. Section 64.708 is amended by redesignating paragraphs (d) through (h) as (f) through (j), redesignating paragraph (i) as paragraph (l) and adding paragraphs (d), (e) and (k) to read as follows:

§ 64.708 Definitions.

*****

(d) *CMRS aggregator* means an aggregator that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises for interstate telephone calls using a provider of CMRS operator services;

(e) *CMRS operator services* means operator services provided by means of a commercial mobile radio service as defined in section 20.3 of this chapter;

*****

(k) *Provider of CMRS operator services* means a provider of operator services that provides CMRS operator services;

*****

Separate Statement of Chairman William E. Kennard
PCIA's Broadband Personal Communications Services Alliance's
Petition for Forbearance for Broadband Personal Communications Services

Today, the Commission takes an important step toward ensuring that the competition we are beginning to see emerge in the mobile telephony market will continue in a manner that benefits America's consumers. Based on the record presented in this proceeding, and information the Commission compiled in its Third Annual CMRS Competition Report, we wisely reject the request by the Personal Communications Industry Association ("PCIA") to forbear from core protections against discrimination and unfair dealing contained in sections 201 and 202 of the Communications Act. By rejecting this request, our decision today ensures that all American mobile telephony consumers will have the basic ability to obtain telecommunications service on no less favorable terms than other similarly situated customers, and not just those who live in markets characterized by widespread competition. Based on the centrality of these protections, which have served us well in both competitive and non-competitive contexts, it would be an abdication of our responsibility to consumers to rely simply on the workings of the market to ensure that Americans receive quality service at fair and reasonable prices.

At the same time, we take steps to ensure that prices charged by providers of mobile telephony services will continue their current downward trend by preserving the Commission's CMRS resale rule. This transitional rule, which will sunset five years after a date noted in a Public Notice issued concurrently with this Order, ensures that incumbent mobile telephony providers will be subject to price and service competition by resellers while their facilities-based competitors are building out their systems. The presence of resellers will serve to ensure that facilities-based carriers treat consumers fairly.

Our actions today also ensure that resale will continue as a viable strategy for entry into telecommunications by small and minority-owned businesses. These businesses, which often do not have the large amounts of capital needed to build out facilities, frequently are able to effectively serve niche or otherwise underserved markets. Many segments of our society would go unserved or underserved without them. Our Order ensures that resellers will continue to operate in this market in a manner that benefits consumers.

Although I reject PCIA's petition to forbear from enforcement of Sections 201, 202 and the Commission's CMRS resale rule, I would like to reiterate my commitment to Commission forbearance from unnecessary regulation. I want to emphasize my interest in forbearance from enforcing provisions of our rules that inhibit or distort competition in the marketplace, represent unnecessary regulatory costs, or stand as obstacles to lower prices, greater service options, and higher quality services for American telecommunications consumers. I welcome future opportunities to extend the Commission's exercise of its forbearance authority in furtherance of these goals and, to that end, I note the Commission's decision to adopt, as part V of this Order, a Notice of Proposed Rulemaking seeking comments on possible forbearance from additional

provisions of our rules.

Section 10 of the Communications Act gives the Commission a powerful tool by allowing the Commission to forbear from the application of virtually any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or a class of carriers or services. Congress was clear in enunciating the specific test that must be applied by the Commission in its consideration of whether to forbear from the provisions of the Telecommunications Act or our regulations.[1] In this case, the record demonstrated that forbearance should be granted with regard to several of the provisions cited by the petitioners (certain tariffing requirements for international service offered directly to customers and certain requirements of Section 226 of the Telecommunications Act, TOSCIA (Telephone Operators Consumer Services Improvement Act)). However, the record clearly demonstrated that the Commission should not forbear on a national basis from enforcing sections 201 and 202, or the resale rule at this time. One-size-fits-all forbearance in this instance would not adequately protect consumers or the public's interest in robust competition. Although the record does not support forbearance on a national basis at this time, I would welcome future petitions to forbear from the CMRS resale rule for specific geographic markets based on the factors delineated in the Commission's Order. I encourage parties seeking future forbearance to submit specific showings and particularized evidence so that the Commission can analyze fully whether their requests satisfy each part of the test prescribed by Congress.

---

[1] Under section 10, we must forbear from applying any regulation or provision of the Act to a telecommunications carrier or service, or class of telecommunications carriers or services, in any or some of its geographic markets, if a three-pronged test is met. Specifically, 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.

47 U.S.C. § 160(a)(1-3).

Despite the rhetoric in the dissenting statements, the disagreements between the majority and the minority pertain to two simple issues. First, should CMRS carriers be freed of their statutory obligation to provide service on just, reasonable, and not unreasonably discriminatory terms and conditions? Second, and more particularly, should they be free to refuse to provide service to resellers on the same terms and conditions as they offer it to other customers? The majority says "no" to both questions.

But this is a far cry from heavy-handed regulation or "central economic planning." Free market auctions, not government planners, determine which entities are awarded PCS spectrum. Licensees, not bureaucrats, formulate business strategies and marketing plans. Carriers, not state or federal regulators, establish the prices charged for CMRS services, prices that can be changed at will. And the free market, not the government, will ultimately decide whether the additional businesses that are able to enter the market as resellers -- and thereby provide increased competition in the CMRS marketplace -- will succeed or fail in providing the services protected against discrimination in this order.

The issue today isn't whether a market with multiple providers should be regulated the same as a market with a single provider. Of course not. But the fact is that the provisions of the Communications Act, and of the Commission's rules, need not be applied, and should not be applied, on an "all or nothing" basis.

A market with two suppliers is better than a market with only one. If a consumer has four, five, or six choices of suppliers of similar services, instead of two, the prospects for substantial competition are much improved. But the presence of a particular number of competitors does not mean that each and every statutory provision and rule have become irrelevant. Certain elemental "rules of the road" may still be appropriate to ensure fair competition and consumer protection. Congress recognized this in formulating the three-part test for application of the Commission's forbearance authority.

Today's decision reflects the majority's application of the statutory forbearance standards to the particular provisions at issue, in light of the record currently before the Commission. The majority stands ready to evaluate additional forbearance petitions, and to grant relief wherever the statutory standards are fulfilled. But mere assertions that a particular number of competitors have entered a market -- or overheated rhetoric about excessive regulation -- will not substitute for the analysis required by Section 10 of the Communications Act.

Dissenting Statement of Commissioner Harold W. Furchtgott-Roth

In re: Memorandum Opinion and Order
and Notice of Proposed Rulemaking
Personal Communications Industry Association's Broadband
Personal Communications Services Alliance's Petition for Forbearance
for Broadband Personal Communications Services

I respectfully dissent from this very limited forbearance action. I agree with Commissioner Powell's well-reasoned view, as articulated in his dissenting statement, that the majority's forbearance analysis under Section 10 of the Telecommunications Act[2] is flawed, especially as applied to the Commission's mandatory resale rule.[3] I write a separate dissent, however, to challenge the majority's implicit view that manifest competition -- indicated by the existence of as many as six facilities-based competitors in some markets -- provides insufficient justification to deregulate.

Fundamentally, I believe the question regulators should ask about existing rules is not whether there is sufficient justification to *de*-regulate but, rather, whether there is continuing justification to regulate. And, of course, regulation is justified only if the benefits of the regulation significantly exceed the costs. In this particular case, I believe the answer is that there no longer is justification to impose the mandatory resale rule, particularly in markets with four or more facilities-based broadband wireless carriers. The costs of the rule simply outweigh the benefits.

Wireless Competition

It has been said recently that "the market for wireless services is a dynamic, expanding market that is providing new services to consumers at lower prices,"[4] that "[t]he wireless telephone industry . . . is already the exemplar of fierce competition,"[5] and that "[c]onsumers in

---

[2] 47 U.S.C. § 160.

[3] 47 C.F.R. § 20.12(b) (1997).

[4] *Separate Statement of Chairman William E. Kennard in re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 and Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services,* FCC 98-91, (May 14, 1998).

[5] *Press Statement of Chairman William E. Kennard in re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services* (March 24, 1998).

many markets already enjoy a substantial reduction in rates as a result of PCS competition."[6] I fully agree.

Just look at the attached map, which is reprinted from the *Third Annual CMRS Competition Report* the Commission adopted a few weeks ago.[7] In at least eight areas of the country, there are *six* mobile telephone operators. In another forty or so areas, there are five mobile telephone operators; over fifty other areas have four operators. In at least these hundred areas, which generally are the most populous areas in America, fierce competition in mobile telephone service indeed has arrived.

Mandatory Resale

And, yet, says the majority, we must retain our mandatory resale requirement, which has its roots and justification in the duopoly wireless environment.[8] Although I have serious doubts about the public benefits of the mandatory resale rule even in non-competitive markets, it defies common sense to continue to impose such a rule in competitive markets.

Resale itself is not burdensome, of course, and, in fact, can be a great boon to consumers and facilities-based wireless service providers alike. Indeed, *voluntary* resale facilitates service to unserved or underserved communities. For example, if a facilities-based wireless provider were not yet effectively marketing service to an insular community in the provider's service area, the provider would have strong incentives to give a wholesale price break to a reseller with ties to the insular community. The facilities-based provider then would be able to effectively serve a community that it was not serving before, the reseller with ties to the community would have a good business opportunity and, most importantly, the previously unserved or underserved community would receive service. Under a *mandatory* resale rule, however, facilities-based service providers would not want to offer a price break to resellers with ties to insular communities because all other resellers, including those serving mainstream business and residential markets, would be entitled by regulation to take advantage of the price break.

The majority was not willing, at least in this order, to forbear from the mandatory resale rule on either a nationwide basis, as was requested in the PCIA petition, or on a market-by-

---

[6] *Separate Statement of Commissioner Susan Ness in re Amendment of the Commission's Rules Regarding Installment Payment Financing for C-Block Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82 (October 16, 1997).

[7] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 and Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC 98-91 (adopted May 14, 1998).

[8] Under this FCC requirement, an interpretation of Section 20.12(b) of our Rules, 47 C.F.R. § 20.12(b) (1997), service providers may not prohibit resale of their service and must offer resellers the best deals that are offered to other customers.

market basis. To its credit, however, the majority says that the FCC will be open to future petitions for forbearance on a market-by-market basis. This makes common sense. Why make the citizens of Miami suffer under the mandatory resale rule while waiting for Cheyenne to "become competitive?"

Unfortunately, the majority believes that competition measured by sheer numbers of competitors is not good enough. Indeed, the majority says the mere existence of many -- say, four, five, or six -- facilities-based service providers in a market is insufficient reason to forbear from the mandatory resale rule. They say the Commission should consider other factors, such as "the extent of resale activity" (how can that be meaningful information given the existing mandatory resale requirement?), "the value of service to previously unserved or underserved markets" (again, how can this be quantified given the existing resale rule?), and "other factors" (anything goes!). In spite of these vague and quite unhelpful FCC suggestions, I hope future petitions for forbearance will be submitted on a market-by-market basis and simply will indicate the number of carriers serving that specific market. I should think that four facilities-based competitors would be an adequate showing of competition for this purpose.[9]

Section 11

Not only would the majority's test for future forbearance petitions be very difficult for the Commission to administer, it would ignore Section 11 of the Telecommunications Act,[10] which directs the Commission to repeal or modify regulations that are "no longer in the public interest as the result of meaningful economic competition between providers of such service."[11] Surely, under such a straightforward test, markets with four, five, or six facilities-based competitors would be deemed competitive and no longer in need of a mandatory resale rule.

In addition, as to Section 11, I must state yet again that this item should not be mistaken for complete compliance with that section's requirements. As I have explained previously, the FCC is not planning to "review ***all*** regulations issued under this Act . . . that apply to the operations or activities of any provider of telecommunications service," as required under Subsection 11(a) in 1998 (emphasis added).[12] Nor has the Commission issued general principles to guide our “public interest” analysis and decision-making process across the wide range of FCC regulations.

---

[9] Because some areas may never be able to support more than two or three facilities-based service providers, the showing of at least four facilities-based service providers should be necessary for forbearance from the mandatory resale rule only until the rule sunsets.

[10] 47 U.S.C. § 161.

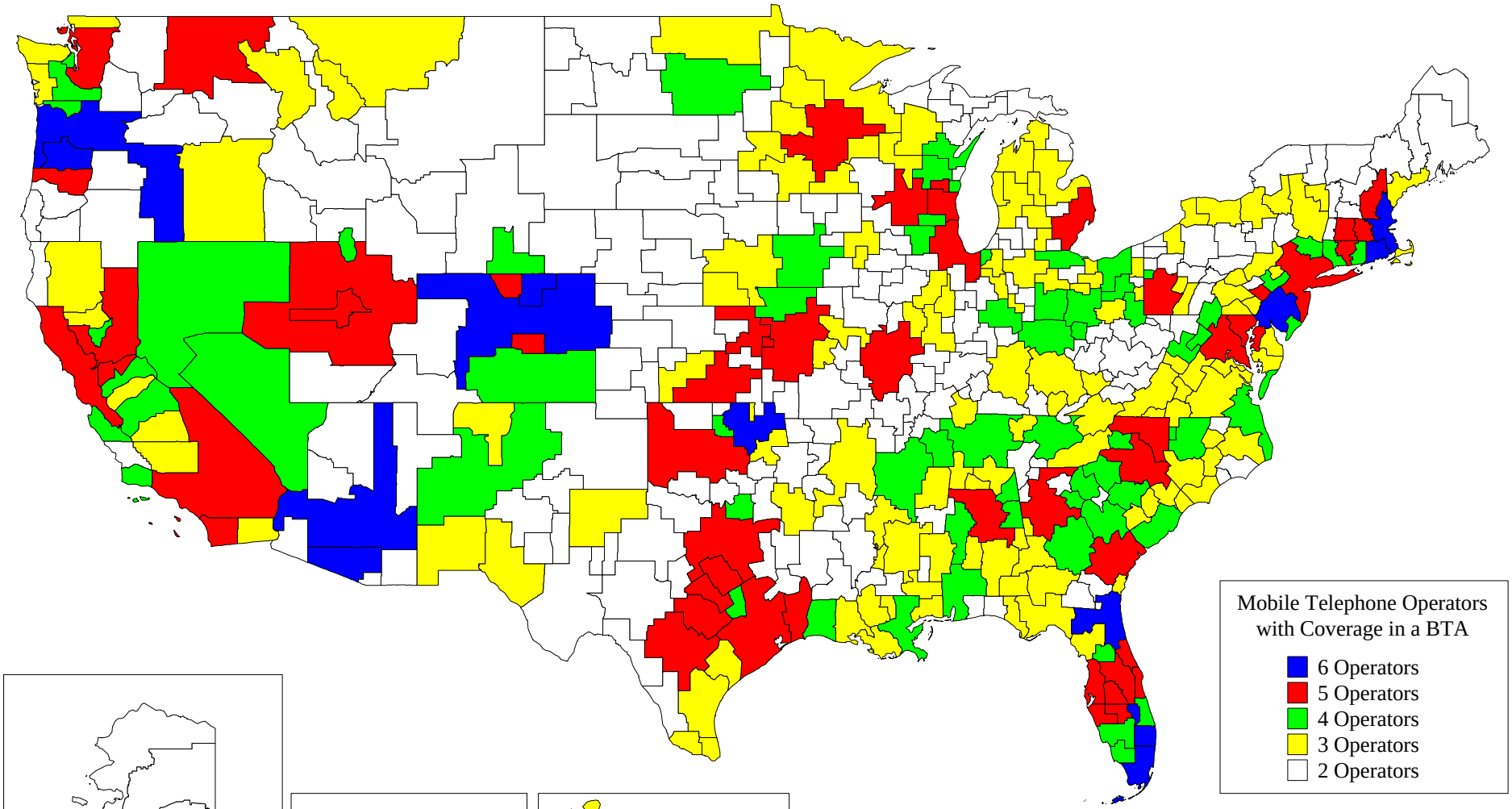
[11] *Id.*

[12] *See generally 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements*, 13 FCC Rcd 6040 (released Jan. 30, 1998).

In one important respect, however, the FCC's current efforts are more ambitious and difficult than I believe are required by the Communications Act. Subsection 11(a) -- "Biennial Review" -- requires only that the Commission "*determine* whether any such regulation is no longer necessary in the public interest" (emphasis added). It is pursuant to Subsection 11(b) -- "Effect of Determination" -- that regulations determined to be no longer in the public interest must be repealed or modified. Thus, the repeal or modification of our rules, which requires notice and comment rule making proceedings, need not be accomplished during the year of the biennial review. Yet the Commission plans to complete roughly thirty such proceedings this year.

I encourage parties to participate in these thirty rule making proceedings. I also suggest that parties submit to the Commission -- either informally or as a formal filing -- specific suggestions of rules we might determine this year to be no longer necessary in the public interest as well as ideas for a thorough review of all our rules pursuant to Subsection 11(a).

Estimated Mobile Telephony Service Deployment: Number of Operators* in Each BTA with Some Level of Coverage



* Mobile telephone operators included in analysis are cellular, broadband PCS, and Nextel Communications.

Source: Federal Communications Commission estimates.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL POWELL, DISSENTING IN PART

Re: *Personal Communications Industry Association's ("PCIA") Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services*

I concur in this decision to the extent it grants forbearance for carriers in the Commercial Mobile Radio Services ("CMRS") with regard to international tariffs and certain provisions of TOCSIA. I am also unwilling to grant PCIA's request for forbearance from sections 201 and 202, but solely out of concern with the regulatory asymmetry that would result from limiting forbearance to broadband PCS providers. (I discuss this more fully below.) To be clear, I do not necessarily share the majority's reasoning for reaching the same result.

While I would be remiss not to be somewhat encouraged by the Order's "commitment to forbear" and the proposals in the Notice to forbear from additional provisions, I fear that these words cannot live up to the heavy burden imposed on this and future petitioners. The majority decision denies most of the subject request to forbear based on speculative fears and outdated rationales that raise the bar so high that future and pending forbearance petitions -- even in the most competitive segment of the telecommunications industry and in geographic markets that are fully competitive -- do not seem to stand a chance. The current and foreseeable competitive developments in the CMRS market and the deregulatory, pro-competitive mandates of the 1996 Telecom Act require more faith in markets and in consumers. Accordingly, I respectfully dissent from those parts of the Order establishing the framework and rationale for reviewing this and future forbearance petitions.

Section 10 of the Communications Act, added by Title IV (Regulatory Reform) of the 1996 Telecom Act, provides that the Commission *shall* forbear from applying any regulation or any provision of the Communications Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, *if* the Commission determines that such deregulatory action meets the three-prong forbearance test.[13] Under the first prong, we must determine whether enforcement of a regulation or statutory provision is *not* necessary to ensure that the charges, practices and classifications are just and reasonable and are not unjustly or unreasonably discriminatory. The second prong requires us to determine whether enforcement of a regulation or provision is *not* necessary for the protection of consumers. The last prong asks whether forbearance is *consistent with* the public interest. As part of this "public interest" prong of that test, Congress commands the Commission to consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among

[13] *See* Pub. L. No. 104-104, Title IV, § 401, 110 Stat. 128 (1996); 47 U.S.C. § 160(a).

providers of telecommunications services.[14] Section 10 is a very important provision of the pro-competitive, deregulatory 1996 Act.[15] Petitions for forbearance should be taken very seriously and the standards for granting forbearance must be applied clearly and consistently in furtherance of the objectives of the 1996 Act.

PCIA has asked for forbearance from certain provisions of Title II of the Communications Act and the Commission's rules for a particular class of telecommunications services and carriers: broadband PCS, the "new kid on the block" in the mobile communications market.[16] Broadband PCS providers are a class of CMRS providers subject to section 332(c) of the Communications Act, which was added by the 1993 Omnibus Budget Reconciliation Act.[17] Other CMRS providers include cellular carriers, Specialized Mobile Radio ("SMR") service providers, paging companies and narrowband PCS providers. We recently reported to Congress that, due largely to the implementation of new broadband PCS systems across the country, competition in the CMRS industry "has grown more than it has ever before," that, in the mobile telephone market (broadband PCS, cellular and SMR), "the signs of competition are clear" and that "the paging/messaging market has been highly competitive for a number of years" and is beginning to face even more competition from other wireless sectors.[18] Most significantly, we concluded that mobile telephone operators are beginning to position their services as "true

---

[14] 47 U.S.C. § 160(b). If the Commission determines that forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

[15] We must always be reminded that in the 1996 Act, Congress' principal objective (and the Commission's mandate) was to "*promote competition and reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." *See* Pub. L. No. 104-104, 110 Stat. 56 (1996) (preamble to the Act) (emphasis added).

[16] *See* PCIA Petition at 2.

[17] Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A)(iii), 107 Stat. 393 (1993); 47 U.S.C. § 332(c) (providing that persons engaged in the provision of CMRS shall, insofar as such person is so engaged, be treated as a "common carrier" for purposes of this Act, except that the Commission was authorized to forbear from enforcing any provision of Title II of the Act, except sections 201, 202, and 208.) The three-prong forbearance test in section 332(c) is nearly identical to the newer forbearance provision. Section 10 of the Act, however, provides that "Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act." 47 U.S.C. § 160(a) (emphasis added).

[18] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Third Report*, FCC 98-91, at 2 (released. June 11, 1998) ("CMRS Competition Report").

replacements for the wire-based services of LECs."[19]

In light of the developments since PCIA filed its forbearance petition over a year ago, the first question that comes to my mind is whether a particular class of CMRS -- a particular technology, a particular frequency band -- should be singled out for regulatory forbearance. I think the answer is clearly "no." Promoting competition is not necessarily about promoting certain competitors or technologies -- even the new kids on the block -- over others. Therefore, I concur with the Order's extension of forbearance for international tariffs and TOCSIA to all CMRS carriers. I also agree that, under the public interest prong of the forbearance test, it would be unwise to create "regulatory asymmetry" among competing CMRS carriers.

The next question, then, is whether we should forbear from the provisions raised by PCIA for the broader class of CMRS. In analyzing this question, which is especially timely in view of the tremendous growth and promise of competition in the CMRS market which we recently reported to Congress, I respectfully disagree with the regulatory approach taken in this Order. I would have preferred to focus on the positive developments that competition is bringing to consumers in the form of lower prices and innovative services, instead of signaling the continued, indefinite need for regulatory intervention even when all relevant product and geographic markets become substantially competitive.[20] I am increasingly concerned that we are setting up a misguided framework for addressing competition and deregulation questions that will perpetuate regulation, institutionalize government intrusion in markets, and inhibit the full blossoming of competition all in direct contravention to Congress' wishes. Such a framework will go a long way in securing regulators a leading role in telecommunications markets, but will do little to promote the robust, high quality competition that Congress envisioned and from which consumers will really benefit. I outline my concerns more fully below.

First, I question the suggestions in this Order (and others) that we regulators are the "master chefs" of competition, carefully mixing the ingredients, setting the oven temperature and monitoring the cooking. And, that only we decide if competition "is soup yet" while consumers eagerly wait to be fed. From this perspective, deregulation apparently is viewed as dessert, something you cannot have until competition is cooked and consumed, rather than a necessary ingredient to competition. This Order is sprinkled with such suggestions.[21]

---

[19] *Id.* at 63.

[20] *See* Order at ¶ 23. I respectfully disagree with the Chairman's statement that "it would be an abdication of our responsibility to consumers to rely simply on the workings of the market to ensure that Americans receive quality service at fair and reasonable prices." I would suggest that it would be irresponsible not to constantly reexamine the continued necessity for regulation of competitive markets.

[21] For example it explains in several places that, despite the tremendous inroads toward substantial competition among CMRS providers, competitive development "is not yet complete and continues to require monitoring." It also says that "prices for mobile telephone service have

I reject the view that competition is a product of the regulator's handiwork. I believe instead our task is more humble -- to shift economic decisions to the market and out of the hands of central planners. The "master chef" approach is fundamentally flawed. For one, it views competition as a product. Competition is not that at all, it is a dynamic process by which producers and consumers interact to establish prices and output that reflect the value of such goods and services to consumers willing to pay. And, it is a process that drives the introduction of new innovative products and services. Those prices may ebb and flow and products may vary from one market to another, depending on the unique attributes of individual markets and consumers. The interaction of the market determines the outcome. Regulation of competitive markets distorts the competitive process, for such regulation attempts to pronounce appropriate conditions rather than letting the process determine those conditions. There is no "right price," no "appropriate level of services," no real ability for regulators to know when its "soup" yet.

As a general matter, deregulation is a critical pre-condition to competitive conditions because it removes government interference between consumers and producers. The Order admits as much when it gives credit to earlier deregulatory efforts involving state preemption and CMRS forbearance (when there was still a cellular duopoly) for "contribut[ing] significantly to the impressive growth of competition in CMRS markets."[22] It is one thing to ensure that monopolies do not reign and that barriers to competition have been removed. It is quite another, however, to use deregulation as a tool, carrot or stick to engineer our own vision or values as to the nature, scope and quality of goods and services that we believe should be produced by competition. This is especially true where, as is the case with CMRS, the market seems to be functioning properly.[23]

---

been falling," but these price declines "have been uneven, and do not necessarily indicate that prices have reached the levels they would ultimately attain in a competitive marketplace." Order at ¶ 22 (footnote omitted). I would note that a competitive market (particularly, when we view the entire nation as the market, as we often do) rarely treats all consumers the same. Variations in price among different consumers can be a reflection of many things. Some consumers are high volume users, some consumers are more willing to switch providers than others, some consumers demand advance features more than others, some want low cost basic services. All this means that prices and services will always vary in fully competitive markets. "Uneven price decreases" cannot, thus, be taken as a sign that a market is un-competitive. Indeed, it may easily be a reflection of competitive conditions.

[22] Order at ¶ 8. As noted above, section 10(b) requires that the Commission consider whether forbearance from enforcing the provision or regulation *will* promote competitive market conditions, including the extent to which such forbearance *will* enhance competition among providers of telecommunications services. The suggestion that abounding competition is a pre-condition for forbearance would turn this provision on its head.

[23] Traditionally, a market is thought to be healthy if prices reflect marginal costs, there is growth and no restriction of output, and we see continuing innovation. All of these indications appear to

Second, the Order seems to set up a false choice between competitive free markets and consumer protection. For example, the Order states that even "[a]ssuming all relevant product and geographic markets become substantially competitive, moreover, carriers may still be able to treat some customers in an unjust, unreasonable, or discriminatory manner. Competitive markets increase the number of service options available to consumers, but they do not necessarily protect all consumers from all unfair practices."[24] The item speculates that under "certain conditions" -- namely, different CMRS technologies, different frequency bands, the cost of a new handset and the current lack of number portability -- may "undermine market discipline."[25] Under such conditions, according to the Order, carriers "have the opportunity and incentive to treat some of their existing customers in an unjust, unreasonable, and discriminatory manner, as compared with similarly situated potential new customers."[26] I worry that if we define consumer protection so broadly as to suggest that we must ensure that every consumer is protected from every speculative or possible harm that we can imagine in our creative minds, we will never feel comfortable deregulating, for no form of competition can guarantee such results (nor do I believe regulators can either).

I believe government has a role to play in protecting consumers from harm. But, such harms should be specific and identifiable, not merely consequences regulators can imagine producers have an incentive to inflict. No one should quibble about government intervention that protects the health and safety of consumers, for example. Nor, as a proponent of strong enforcement mechanisms, would I dispute the need for some government intervention to protect against the anticompetitive harms of market failure and monopoly prices, as well as to prevent fraud, misrepresentation and the like. But, as I read the Order, consumer protection is being

---

be present in the CMRS market generally.

[24] Order at ¶ 23 (emphasis added).

[25] *Id.*

[26] *Id.* I disagree that we can instill or even affect market discipline by regulatory fiat. It is also somewhat dramatic to suggest that, in a competitive market, carriers will "abuse" their current customers. If those existing customers (whether abused, just disenchanted, or stolen away by more attractive offers) switch providers, such switching or churn surely is one measure of a competitive market, but lack of switching alone cannot compel the conclusion that competitive conditions are absent. If other providers fail to offer choices the consumer values enough to leave their current provider, that does not mean that the consumer is vulnerable to abuse because the market is not competitive. Indeed, such a condition may promote innovation, as competing providers hunt for new products and service options that entice that customer away. Furthermore, in a growth industry competition may, for a time, focus on new customers rather than competing for existing customers, but I fail to see how that means a market is not competitive.

raised not merely to guard against harm but as a moniker for a consumer right to a certain number of competitive alternatives, to certain prices, and to certain services all deemed by the regulator. Even were this laudable in some sense, it is slight of hand to call it protecting consumers from harm in a competitive world. It is simply old-style regulation with a pretty bow tied on it.

It is a complete fallacy that the risks of free market competition are greater than the benefits it brings. I believe firmly that competitive markets are the most consumer benefiting economic model every devised by mankind. Indeed, the noted economist Friedrich Hayek contended that markets work far better than "planned economies," because they "utilize the knowledge and skill of all members of society to a much greater extent than would be possible in any order created by central direction."[27] And yet, I sense too often we overlook this fundamental truth. Instead, we take counsel of our fears and overstate our ability to manage competition to avoid those things we fear.

Moreover, I do not believe that consumer protection should be invoked merely to protect certain firms from competition. It should carry no weight that a given business model will suffer or disappear if the government no longer guarantees its viability, provided that the ability and opportunity to provide the same value to consumers is transferred from firms of the defunct model to other firms. For example, with CMRS resale, the Yankee Group recently concluded,

> there may actually be a future for resellers . . provided they can endure the rigors of competition. As carriers focus more on increasing the utilization of their digital network capacity, they will recognize resale as a vital and viable distribution channel. At the same time, economic pressure threatens the reseller's ability to remain a player in the wireless game without the assistance of specialized third-party service providers. The existence of harmonious resale deals, including the likes of MCI, suggests regulation is not necessary to ensure the future of wireless resale, but rather the soundness of the business proposition will make the possibilities plain. Therefore, the onus is on wireless resellers to determine innovative ways of complementing the business of the carriers, while ensuring profitable business models for themselves.[28]

Regulators are in no position, and are incapable, of ensuring a successful business model. Once the resale rule sunsets or upon earlier forbearance in certain geographic markets, competitive market forces, technological developments, marketing innovations and other factors (not

---

[27] Friedrich Hayek, *Studies in Philosophy, Politics, and Economics* (University of Chicago Press, 1967), 162.

[28] The Yankee Group, Wireless Resale: Is There a Future?, Executive Summary (February 1998) (found at http://research.yankeegroup.com on June 22, 1998) (emphasis added).

regulatory mandates) will better serve to pick the winning and losing business models.

Nevertheless, this Order reaches out to micromanage market forces by imposing "factors" that will be considered in evaluating future petitions seeking forbearance from the resale rule. One of these factors is "the value of service to previously unserved or underserved markets."[29] I am at a loss as what constitutes an "unserved" or "underserved" market let alone how we will "value" such service.

Finally, I would say a word about enforcement. I recognize that competition can fail to function properly if there are barriers to entry, monopolists with market power that can ignore normal market forces, and other conditions that can frustrate the proper functioning of the market to the detriment of consumers. In these areas, I believe in strong enforcement to ensure that the foundations of competition are not threatened. But such an exercise is a far cry from managing competition and tinkering with producer and consumer behavior on a nationwide scale. Enforcement is policing misconduct, not actively guiding competitors and directing the evolution of markets.

In sum, the 1996 Act mandates, through forbearance or other means, that the Commission move away from the monopoly-oriented, over-regulatory origins of communications policy and toward a world in which the market, rather than bureaucracy, determines how communications resources should be utilized. Yet, so often, we cannot actually bring ourselves to let go, to jump off our regulatory perch. We need to attack the hard questions like whether all aspects of traditional "common carrier" regulation continues to be relevant in the new competitive world of telecommunications. It is true that risks await in free markets: risk that the consumers will be harmed by anti-competitive conduct on the part of firms with market power; risk that communications companies may be acquired, downsized or driven out of business; and risk that some individuals will not vie successfully for the many choice jobs that competition will create. Though these fears are not inconsequential, they nearly always are overstated and tend to paralyze us from taking action that would allow markets to flourish and competition to grow. Instead, we speculate about possible anticompetitive effects and then adopt policies intended to protect new entrants and consumers from them. Rather than protect these interests, however, we more often, in practical effect, handicap the market and postpone the arrival of competition and consumer choice.

[29] Order at ¶ 44.