FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 20 and 64

[WT Docket No. 98–100, GN Docket No. 94–33; FCC 98–134]

Commercial Mobile Radio Services and Miscellaneous Rules Relating to Common Carriers

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this *Memorandum Opinion and Order,* the Commission grants in part and denies in part the Personal Communications Industry Association's (PCIA) Petition for Forbearance For Broadband Personal Communications Services. Simultaneously with this Order, the Commission is issuing 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. The *Notice of Proposed Rulemaking* is summarized elsewhere in this edition of the **Federal Register**.

EFFECTIVE DATE: September 10, 1998.

FOR FURTHER INFORMATION CONTACT: Jeffrey Steinberg at (202) 418–0620 or Kimberly Parker at (202) 418–7240 (Wireless Telecommunications Bureau/ Commercial Wireless Division).

SUPPLEMENTARY INFORMATION: This is a summary of the *Memorandum Opinion and Order*, FCC 98–134, adopted June 23, 1998 and released July 2, 1998. The complete text of the *Memorandum Opinion and Order* is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. and also may be purchased from the Commission's copy contractor, International Transcription Services, (202) 857–3800, 1231 20th St., N.W., Washington, D.C. 20037.

Synopsis of the Memorandum Opinion and Order

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, and 310(d) of the Communications Act of 1934, as amended (the Act), to broadband Personal Communications Services (broadband PCS) carriers. PCIA also requests forbearance from continued application of the resale obligations of 47 CFR 20.12(b) to broadband PCS carriers. For the reasons discussed below, the Commission grants partial forbearance from the requirement that Commercial Mobile Radio Service (CMRS) providers file tariffs for their international services. The Commission also grants partial forbearance from section 226 of the Act (the Telephone Operator Consumer Services Improvement Act or TOCSIA) for CMRS providers of operator services and aggregators. The Commission 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 CFR 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. In addition, the Commission denies the Petition of GTE Service Corporation (GTE) for Reconsideration or Waiver of a Declaratory Ruling and affirms the Common Carrier Bureau's decision that TOCSIA applies to certain activities of GTE's mobile affiliates, but grants limited forbearance from certain provisions of TOCSIA as explained herein.

II. Background

1. The Commission derives its authority to forbear from applying regulations or provisions of the Communications Act of 1934 (Act) from sections 332(c)(1)(A) and 10 of the Act. Section 332(c)(1)(A) provides the Commission with the authority to forbear from enforcing most Title II obligations, but only as to commercial mobile radio service (CMRS) providers. 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.

2. Under section 10, the Commission 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;

(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.

3. On June 2, 1997, the Wireless Telecommunications Bureau issued a public notice seeking comment on the Petition. Twenty-two parties filed comments on the Petition and thirteen parties filed reply comments. On May 21, 1998, the Commission 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). On June 5, 1998, the Commission further extended this deadline until June 23, 1998.

III. Discussion

A. Sections 201 and 202

4. *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. 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 any person or class of persons. 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. PCIA states that forbearance will promote the public interest by enhancing competition,

providing consumers with increased choices, driving prices downward, and eliminating compliance costs.

5. *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). 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. 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.

6. Based on the record, the Commission declines 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 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.

7. 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. 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, the Commission need not require that those charges, practices, classifications, and regulations be just, reasonable, and not unjustly or unreasonably discriminatory.

8. 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.

9. 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, the Commission is 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 the Commission's attention. The Commission therefore concludes that the first prong of the section 10 forbearance standard has not been satisfied.

10. 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. 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. The Commission recognizes 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, the Commission 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, the Commission cannot conclude that sections 201 and 202 are not necessary to protect consumers.

11. The third prong of the section 10 forbearance standard requires the Commission to forbear only if it finds that forbearance is consistent with the public interest. In evaluating whether forbearance is consistent with the public interest, the Commission 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. In making this assessment, the Commission 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. Thus, PCIA contends, sections 201 and 202 retard competition and ultimately harm consumers. The Commission rejects PCIA's argument for several reasons.

12. The Commission believes 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 its public interest analysis. Indeed, as customers begin to rely on CMRS as a partial or complete substitute for wireline service, it becomes increasingly important for the Commission to preserve the basic relationship between carriers and customers enshrined in sections 201 and 202.

13. 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. The Commission therefore finds 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 CFR 20.12(b)

14. *Background.* PCIA has also requested that the Commission forbear from applying the CMRS resale rule to broadband PCS carriers. On June 12, 1996, the Commission adopted a rule prohibiting certain providers of CMRS from unreasonably restricting the resale of their services during a transitional period. Prior to 1996, the Commission applied a similar rule only to providers of cellular service. In Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, published at 61 FR 38399 (July 24, 1996) CC Docket No. 94–54, 11 FCC Rcd. 18455 (1996) (*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.

15. Section 20.12(b) of the Commission's rules, which was 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. The Commission 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. 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.

16. *Discussion.* PCIA argues that the Commission 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. 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. The Commission finds that the record does not show that the three-pronged forbearance test set out in section 10 of the Act has been met. It therefore declines to forbear from enforcing the resale rule with respect to broadband PCS providers at this time.

17. 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. The Commission rejects these general arguments for the reasons discussed above. Specifically, the Commission has 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, the Commission 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.

18. 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 incentive to promote distribution of their services through the use of resellers. 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.

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. While the Commission cannot conclude from this record that all of these alleged practices are unreasonable, these allegations, which have not been effectively refuted, support its conclusion that the resale rule has not been shown unnecessary to ensure that rates and practices are just, reasonable, and non-discriminatory. Although the Commission has received few formal complaints about CMRS providers' failure to permit unrestricted resale of their services, it will vigorously investigate any complaints that it receives and take appropriate enforcement action.

19, The Commission also finds 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. The Commission rejects this contention because the record does not show that current market conditions can effectively prevent unreasonable resale practices. In this regard, the Commission emphasizes 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.

20. Finally, the record does not show forbearance from enforcement of the resale rule to be in the public interest. In particular, the Commission finds 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. One of the Commission's major reasons for adopting the CMRS resale rule in 1996 was to speed the development of competition by permitting new entrants to begin offering service to the public before building out their facilities. This capability 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. Second, 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. The Commission continues 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 finds nothing in the record to contradict this conclusion.

21. 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. 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. Resale may also be used as an entry strategy by small entities that may aspire to offer facilities-based services in the future.

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

23. The Commission therefore concludes at this time that it should continue enforcing the resale rule against all covered providers until the scheduled sunset date five years after it awards the last group of initial broadband PCS licenses. The Commission recognizes, 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. In evaluating future petitions, the Commission 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. In order to resolve such petitions in an expeditious fashion, the Commission will place those petitions promptly on public notice and it will establish expedited pleading cycles. The Commission will make every effort to resolve such petitions substantially in advance of the statutory deadline for forbearance petitions.

C. International Section 214 Authorizations

24. PCIA asks the Commission to forbear from the international section 214 facilities authorization requirement as it applies to broadband PCS providers. Pursuant to section 214, the Commission requires 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. All CMRS providers are currently required to obtain section 214 authorization before providing international service.

25. For the reasons discussed below, the Commission finds that it is necessary to continue to require that international services be provided only pursuant to an authorization that can be conditioned or revoked. The Commission therefore concludes, 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 its 1998 biennial review, however, the Commission is considering what steps can be taken to minimize regulatory burdens on international carriers, including PCS providers. The Commission believes that at the conclusion of this review, many of PCIA's concerns with the section 214 authorization process will have been addressed.

26. The Commission is unable to conclude on the present 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.'' The Commission is 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. The Commission 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.

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

28. The Commission concludes 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, the Commission cannot grant the forbearance PCIA seeks, and it need not address the first two prongs.

D. International Tariffing Requirements

29. PCIA next asks the Commission to forbear from imposing on broadband PCS carriers the requirement of filing tariffs for their international services. In the *CMRS Second Report and Order*, 59 FR 18493 (April 19, 1994), the Commission exercised its forbearance authority under section 332(c) to forbear from requiring or permitting tariffs for interstate service offered directly by CMRS providers to their customers. The Commission did not address the tariffing obligations as they apply to international services.

30. The Commission concludes, based on the present 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, the Commission will forbear from the mandatory tariffing requirement and adopt permissive detariffing of international services to unaffiliated points for CMRS providers.

31. Under the first criterion for forbearance under section 10, the Commission 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. In the domestic context, the Commission has determined that tariffing is not necessary to ensure reasonable rates for carriers that lack market power. In the *CMRS Second Report and Order*, the Commission found that competition in the CMRS market for domestic services will lead to reasonable rates and that enforcement of the tariffing requirement is therefore not necessary. 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.

32. Under the second statutory criterion for forbearance, the Commission must determine that mandatory tariff filing requirements for CMRS providers serving unaffiliated international routes are unnecessary to protect consumers. 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.

33. Under the third criterion, the Commission must determine that permissive detariffing of CMRS providers serving unaffiliated international routes is consistent with the public interest. 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. The Commission believes 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, 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 the Commission's 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.

34. The Commission is 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 with a foreign carrier that terminates U.S. international traffic. Currently, the Commission's 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. If tariffs were not available, the Commission would need to rely on another mechanism for detecting, as well as deterring, price squeezes by facilities-based carriers on affiliated routes. 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.

35. Price squeeze behavior on affiliated routes can have anticompetitive effects that are inconsistent with competitive market conditions, and enforcement of the Commission's rules and policies against such behavior currently depends on the availability of tariffed rates on affiliated routes. The Commission therefore concludes 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, the Commission cannot forbear in those circumstances, and it need not address the first two prongs.

36. The Commission will 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. If the Commission could not extend forbearance to all CMRS providers, it would not be able to grant the forbearance that PCIA seeks, because it would not find that the public interest would be served by granting forbearance that would create a disparity in regulatory treatment among like CMRS providers. Therefore, forbearance should be applied equally to all CMRS providers.

37. The Commission will not adopt complete detariffing, i.e., prohibiting the filing of tariffs, in this proceeding. Although 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. Because the Commission continues 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. Therefore, 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.

38. The Commission grants 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 need not file tariffs for its service to international points where it is not affiliated with a carrier that terminates U.S. international traffic. 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. In addition, 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 § 63.11 of the Commission's rules.

E. Section 226: Telephone Operator Consumer Services Improvement Act

39. *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.'' 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, 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. ''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.

40. TOCSIA and the Commission's 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; (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; (c) in the case of a pay telephone, the local coin rate for the pay telephone location; and (d) the name and address of the Enforcement Division of the Common Carrier Bureau of the Commission. 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, and ensure that consumers are not charged higher rates for calls placed using these access codes.

41. TOCSIA and the Commission's 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. 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. OSPs must also permit the consumer to terminate a telephone call at no charge before the call is connected; not bill for unanswered telephone calls; not engage in ''call splashing'' 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. 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.

42. 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 consumers' access to the OSP of their choice. Finally, TOCSIA requires OSPs to file informational tariffs with the Commission, 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, 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.

43. 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. 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.

44. 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. However, in the *Further Forbearance NPRM,* 59 FR 25432 (May 16, 1994), issued later that year, the Commission sought comment on whether there were particular classes of CMRS providers that warranted forbearance from certain regulations. Although the Commission is now terminating the *Further Forbearance NPRM,* it incorporates the comments received in that proceeding that relate to TOCSIA into the record of this proceeding. Since the Commission is resolving GTE's *Reconsideration Petition* with this Order, it also incorporates the record of both the *GTE Declaratory Ruling* and the *GTE Reconsideration Petition* into this proceeding.

45. *Discussion.* The requirements of TOCSIA and the Commission's implementing regulations apply only to entities functioning as aggregators or OSPs. Thus, only a small subset of CMRS activities is affected by TOCSIA. The Commission 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, the Commission will forbear from enforcing the provisions of TOCSIA related to unblocked access against CMRS aggregators and OSPs, and will forbear from requiring CMRS OSPs to file informational tariffs. As discussed 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, the Commission explores in the *Notice of Proposed Rulemaking* (summarized elsewhere in this edition of the **Federal Register**) the possibility of further forbearance from TOCSIA and proposes to modify its rules in a manner

tailored to the mobile phone environment.

46. *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 access codes to reach their preferred OSP. 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, 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. 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.

47. In order to forbear, the first prong of the section 10 forbearance test requires that the Commission 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. 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. According to PCIA, there is also no evidence that blocking or discriminatory charges have been a problem in the mobile context. The Commission believes 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. 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, the first prong of the forbearance test is satisfied.

48. The second prong of the section 10 forbearance test requires that the Commission find that enforcement of the provisions at issue is not necessary for the protection of consumers. 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 blocking, have occurred in the mobile context. 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. 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.

49. The Commission does 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, the Commission believes that it would be inconsistent with section 332(c)(8) to fail to forbear from enforcing the unblocking requirements in question here. The Commission believes that section 332(c)(8) reflects a determination on the part of Congress that equal access and unblocking regulations are generally unnecessary to protect consumers of CMRS. In light of these circumstances, the Commission sees no need to provide transient users of CMRS with consumer protections that neither Congress nor the Commission has provided for ordinary subscribers. In sum, the Commission concludes that enforcement of the equal access and unblocking provisions of TOCSIA is unnecessary for the protection of consumers.

50. The third prong of the section 10 forbearance test requires that the Commission find that forbearance from applying the provisions in question is consistent with the public interest. In determining whether forbearing from certain regulations meets the public interest prong of the section 10 test, the Commission balances 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. In light of Congressional concerns that equal and unblocked access requirements would increase the cost of service, and the absence of evidence that such requirements would produce any identifiable benefits, the Commission concludes that forbearance from the unblocking provisions of TOCSIA with respect to CMRS is consistent with the public interest.

51. *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.

52. Having further considered this issue, the Commission now believes that it should forbear from applying the informational tariff requirement to CMRS OSPs. The first prong of section 10 requires a finding 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 the Commission. Moreover, the CMRS marketplace is becoming increasingly competitive and will continue to promote rates and practices that are just and reasonable. In the event isolated abuses do occur, they can be dealt with under sections 201 and 202 through the Commission's complaint procedures. Therefore, the tariff filings required under section 226 are not necessary to ensure just and reasonable rates and practices.

53. The second prong of section 10 requires the Commission 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, the Commission believes that the tariff requirement is not necessary to protect consumers. There is no record evidence that indicates a need for these informational tariffs to protect consumers.

54. Under the third prong of section 10, the Commission 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.

Consistent with its previous mandatory detariffing decision for CMRS, the Commission therefore forbids CMRS OSPs from filing informational tariffs under section 226, and it requires 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**.

55. *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. 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. However, neither PCIA nor any of the commenters has supplied sufficient specific factual material in support of these claims. Thus, the Commission believes that it does not have an adequate record at this time to forbear from any of the OSP provisions of TOCSIA other than those already discussed. It similarly lacks a record to forbear from enforcing any additional aggregator disclosure provisions, which may provide important information to consumers.

56. *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. The Commission disagrees. As the Common Carrier Bureau stated in the *GTE Declaratory Ruling,* 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. Furthermore, although numerous commenters on the *Further Forbearance NPRM* contend that the ''captive customer'' problem Congress passed TOCSIA to remedy is uniquely a landline telephone service problem, 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. The Commission believes 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.

57. Upon review of the record, the Commission finds that 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, the Commission finds no reason to overturn the Common Carrier Bureau's decision. It therefore affirms the decision in the *GTE Declaratory Ruling* that TOCSIA applies to the actions of certain GTE affiliates, and deny the *GTE Reconsideration Petition.* However, this Order 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. The Commission is exploring other issues concerning TOCSIA's application to mobile service in the *Notice of Proposed Rulemaking,* summarized elsewhere in this edition of the **Federal Register**.

IV. Procedural Matters

58. *Paperwork Reduction Act Analysis.* This *Memorandum Opinion and Order* does not contain any information collections requiring approval by the Office of Management and Budget because, in it, the Commission forbears from applying already established rules.

V. Ordering Clauses

59. 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.

60. 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.

61. 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.

62. It is further ordered that, Parts 20 and 64 of the Commission's Rules are amended effective September 10, 1998.

List of Subjects

47 CFR Part 20

Communications common carriers, Radio.

47 CFR Part 64

Communications common carriers, Telephone.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rule Changes

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 : 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: 47 U.S.C. 10, 201, 218, 226, 228, 332, unless otherwise noted.

2. Section 64.703 is amended by removing 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;

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