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

In the Matter of

CELLNET COMMUNICATIONS, INC.,
Complainant,

v. File No. E-91-95

DETROIT SMSA LIMITED PARTNERSHIP,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: July 8, 1994; Released: July 8, 1994

By the Deputy Chief (Policy), Common Carrier Bureau

I. INTRODUCTION

1. Cellnet Communications, Inc. (Cellnet or complainant),[1] has filed the above-captioned formal complaint against Detroit SMSA Limited Partnership (Detroit SMSA or defendant).[2] Cellnet seeks resolution of three issues referred to the Commission under the doctrine of primary jurisdiction, by the United States District Court for the Eastern District of Michigan, Southern Division.[3]

2. The issues referred by the court arise out of a dispute between Cellnet and Detroit SMSA over the terms and conditions for the resale of Detroit SMSA's cellular service by Cellnet.[4] In Count II of its district court complaint, Cellnet generally alleges that Detroit SMSA has been in breach of a 1986 agreement[5] between the parties by providing services to its "retail arm" on more favorable terms and conditions than those provided to Cellnet.[6] In Count III of the complaint Cellnet contends that, irrespective of whether the 1986 agreement is in itself binding, Detroit SMSA has violated the Commission's requirement that cellular service providers offer services to resellers on the same terms and conditions as to its own distribution arm.[7] Following the submission of responsive pleadings by Detroit SMSA, in which it disputed the applicability of any Commission requirements to its cellular service offerings, the court issued its *Referral Order* specifying the following issues for Commission resolution:

> 1. Is the quoted policy in *Cellular Communications Systems,* 86 FCC 2d 469, 511 (1981), a binding rule or requirement, to wit:
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> > [W]e shall require that AT&T and its underlying cellular affiliate provide system capacity to non-affiliated retailers or resellers on a non-discriminatory basis and on the same terms and conditions as its own distribution arm.
>
> 2. If the answer is "yes," does the policy apply to defendant given its current organizational structure?
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> 3. If the answers to questions 1 and 2 are "yes," then how do the "same terms and conditions" apply and how are "terms and conditions" determined?[8]

Before addressing these issues and the specific contentions of the parties, a brief review of the evolution of the Commission's cellular resale requirement is helpful.

II. CELLULAR RESALE REQUIREMENT

3. The Commission's prohibition against cellular resale restrictions has its origins in the 1976 Commission decision regarding the resale and shared use of common carrier services.[9] The Commission reviewed certain provisions in the tariffs of carriers that restricted or prohibited resale of private line services and determined that by restricting subscribers' use of their communications service, such tariff provisions were unjust and unreasonable under Section 201(b) of the Communications Act (Act).[10] The Commission also concluded that such restrictions were unjustly and unreasonably discriminatory, and in violation of

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[1] Cellnet is a Michigan corporation with its principal offices in Madison Heights, Michigan. Cellnet is a non-facilities-based reseller of cellular service in the Detroit market. It purchases cellular telephone services in bulk from, among others, Detroit SMSA.

[2] Detroit SMSA is a Delaware limited partnership with its principal offices in Schaumberg, Illinois. Detroit SMSA, whose general partner is Ameritech Mobile Phone Service of Detroit, is the wireline cellular licensee for the Detroit-Ann Arbor, Michigan metropolitan service area (MSA).

[3] *Cellnet Communications, Inc. v. Detroit SMSA Limited Partnership,* Order Referring Issues to the Federal Communications Commission, Civil No. 88 CV-71292 DT (E.D. Mich. Jan. 30, 1991) (*Referral Order*).

[4] The Commission has defined resale as "activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications services and facilities to the public (with or without adding value') for profit." *Resale and Shared Use of Common Carrier Facilities,* 60 FCC 2d 261, 271 (1976) (*Resale & Shared Use*). The Commission also held that resale of communications service is a common carrier activity subject to Title II of the Communications Act. *Id.* at 316.

[5] Answer, exhibit 1.

[6] *See* Complaint, exhibit B (*TRAC Communications v. Detroit SMSA,* Civil No. 88-CV 71292 CT, Amended Complaint at 7-9 (E.D. Mich. filed May 2, 1989)). Prior to 1990, plaintiff's name was TRAC Communications, Inc. Complaint at 2, n.2.

[7] *Id.,* exhibit B at 9-10.

[8] *See Referral Order* at 2-3. The court did not ask the Commission for its opinion on either the merits of the court's case or the issue of damages, and we do not address those points in this Order.

[9] *Resale & Shared Use,* 60 FCC 2d 261, *modified on other grounds,* 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 & Shared Use of Common Carrier Domestic Public Switched Network Services,* 83 FCC 2d 167, 193 (1980).

[10] *Resale & Shared Use,* 60 FCC 2d at 280-81, 321. Section 201(b) of the Act requires "[a]ll charges, practices, classifications, and regulations for and in connection with each communication service, [to] be just and reasonable." 47 U.S.C. § 201(b).

Section 202(a) of the Act because they would "effectively foreclose a certain class of potential subscribers from obtaining carrier services and facilities."[11]

4. In 1981, when the Commission amended its rules to authorize commercial cellular communications, it extended its *Resale and Shared Use* requirement of unrestricted resale to cellular service, stating that in its view, "the most important issue involving cellular resale is whether cellular system tariffs will restrict resale."[12] Because the Commission continued to believe that any restrictions on the resale of cellular service would violate Sections 201(b) and 202(a) and would be contrary to the public interest, it stated that it would "condition radio licenses awarded to system operators such that no restrictions on resale and shared use of cellular service will be permitted."[13]

5. During the *Cellular Communications Systems* proceeding, AT&T submitted a plan by which it proposed to operate as a wholesale cellular carrier and to provide system capacity to retail distribution entities, including its own proposed separate subsidiary.[14] The Commission stated: "we shall require that AT&T and its underlying cellular affiliate provide system capacity to non-affiliated retailers or resellers on a non-discriminatory basis and on the same terms and conditions as its own distribution arm."[15] The Commission believed at the time that this structural separation of a licensee's retail cellular activity would encourage competitive entry and interconnection for competing resellers on the same basis as for the licensee's subsidiary.[16]

6. When the Commission first enunciated its cellular resale requirement, it did not distinguish between resale of services of wireline and nonwireline carriers.[17] In the years since its adoption, the Commission has expanded, clarified, and applied the rule in a number of cases.[18] Consistently, the Commission has held that restrictions on the resale of cellular service would violate the Act and be contrary to the public interest.[19]

7. In 1991, while initiating a rulemaking proceeding to consider proposed changes to its cellular resale rules, the Commission emphasized the benefits of its long-standing requirement that cellular carriers permit resellers to take service on the same terms and conditions as any other cellular customer would take service.[20] The Commission noted that as common carriers, cellular licensees must under Sections 201(b) and 202(a) of the Act provide reasonable service upon request to similarly-situated persons and on a nondiscriminatory basis.[21] The Commission declared that its current requirement that there be no restrictions of cellular resale would continue to apply with full force to the cellular industry, that cellular licensees must make any volume discounts offered to large retail customers available to resellers on the same terms and conditions, and that resellers must be permitted to resell cellular services on the same terms and conditions as offered to retail customers.[22]

8. In addition, the Commission clarified that it "has never required [facilities-based] cellular companies to establish separate wholesale and retail operations."[23] The existence of a separate retail distribution arm is irrelevant, however, in determining whether a cellular carrier's service offering is discriminatory within the meaning of Section 202(a) of the Act. The Commission made clear in its *Cellular Resale NPRM* that the nondiscrimination standard of its cellular resale requirement compels a facilities-based carrier offering service to certain customers to make that service available to resellers as well "on a non-discriminatory basis and on the same terms and conditions as made available to other *similarly-situated customers*."[24] We turn now to the specific questions referred by the court.

III. DISCUSSION

A. Issue I: Is the quoted policy in *Cellular Communications Systems,* that the Commission "shall require that AT&T and its underlying cellular affiliate provide system capacity to non-affiliated retailers or resellers on a non-discriminatory basis and on the same terms and conditions as its own distribution arm," a binding rule or requirement?

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[11] *Resale & Shared Use,* 60 FCC 2d at 281, 321. Section 202(a) prohibits "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services." 47 U.S.C. § 202(a).

[12] *The Use of Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems,* CC Docket No. 79-318, Notice of Proposed Rulemaking, 78 FCC 2d 984 (1980) (*Cellular Communications Systems NPRM),* Report and Order, 86 FCC 2d 469, 510 (1981) (*Cellular Communications Systems), modified,* 89 FCC 2d 58, *further modified,* 90 FCC 2d 571 (1982), *petition for review dismissed sub nom. United States v. F.C.C.,* No. 82-1526 (D.C. Cir. Mar. 3, 1983).

[13] *Cellular Communications Systems,* 86 FCC 2d at 511.

[14] Specifically, AT&T proposed that "[c]arriers authorized to provide cellular service would be authorized to provide cellular system call carrying capacity to other common carriers at the same price they provide such capacity to their own distribution entities." *Cellular Communications Systems NPRM,* Appendix, 78 FCC 2d at 1011-12.

[15] *Cellular Communications Systems,* 86 FCC 2d at 511.

[16] *Id.*

[17] *See TRAC Communications, Inc. v. Detroit Cellular Tel. Co.,* 5 FCC Rcd 4647 (1990) (*TRAC Communications).*

[18] *See, e.g., James F. Rill,* 60 R.R. 2d 583, 598 (1986) (extending Commission cellular resale requirement to affiliates of BOCs); *TRAC Communications,* 5 FCC Rcd at 4648 ("the Commission's unrestricted resale policy and requirements for cellular licensees have been applicable to all such licensees, both wireline and nonwireline carriers, since the Commission adopted its cellular rules in 1981.").

[19] *See, e.g., Continental Mobile Tel. Co., et al. v. Chicago MSA Ltd Partnership,* 7 FCC Rcd 2675 (Com. Car. Bur. 1992), *application for review denied,* FCC 94-50 (adopted Mar. 7, 1994).

[20] *Petition for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies,* CC Docket No. 91-33, 6 FCC Rcd 1719 (1991) (*Cellular Resale NPRM),* 7 FCC Rcd 4006 (D.C. Cir. 1992) (*Cellular Resale Order), aff'd sub nom. Cellnet Communications v. F.C.C.,* 965 F.2d 1106 (D.C. Cir. 1992).

[21] *Cellular Resale NPRM,* 6 FCC Rcd at 1725, 1730 n.70. Congress recently amended Section 332 of the Act, replacing private and public mobile service categories with two new categories of mobile services, commercial mobile radio service (CMRS) and private mobile radio service (PMRS), and treats CMRS providers, which includes cellular service providers, as common carriers. The common carrier obligations of Section 201(b) and 202(a) continue for all CMRS providers. *Implementation of Sections 3(n) and 332 of the Communications Act,* 9 FCC Rcd 1411, 1417 (1994).

[22] *Cellular Resale NPRM,* 6 FCC Rcd at 1720, 1724.

[23] *Id.* at 1726.

[24] *Id.* at 1725-26 (emphasis added).

1. Contentions of the Parties

9. In referring the issue to the Commission, the court expressed concern that because the above quote from the Commission concerning its cellular resale restriction was expressed in the text of a Report and Order, but not in the Code of Federal Regulations (CFR), the statement "same terms and conditions" might not qualify as a "binding rule or requirement." The court cited *Pacific Gas and Electric v. F.P.C.*,[25] in which the Court of Appeals for the District of Columbia Circuit noted a distinction between a "rule" and a "general statement of policy." *Pacific Gas* concluded that a "general statement of policy is the outcome of neither a rulemaking nor an adjudication . . ., [that a] general statement of policy . . . does not establish a 'binding norm,' [and that an] agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy."[26]

10. Complainant Cellnet argues that *Pacific Gas* is not dispositive because the Commission adopted the "same terms and conditions" requirement after a notice and comment rulemaking. Therefore, Cellnet contends, the quoted statement constitutes a binding rule or requirement,[27] and cellular licensees, such as Detroit SMSA, are required to offer service on the same terms and conditions as those provided to the carrier's own distribution arm.

11. Detroit SMSA does not dispute whether the same terms and conditions requirement is binding, but rather it contends that when the Commission adopted its cellular resale requirement in *Cellular Communications Systems*, it intended the requirement to apply only to a cellular licensee that maintains a separate distribution arm that resells the licensee's service to the public, not to cellular licensees that sell all of their service directly to end users and unaffiliated resellers. Defendant claims that the resale requirement was adopted specifically in response to AT&T's proposal to market cellular service directly to end users, so that AT&T could avoid being dependent on nonaffiliated resellers to foster demand for its cellular service. According to Detroit SMSA, AT&T proposed to distribute its service to several resellers, including its own, under the same terms and conditions.[28]

12. Detroit SMSA further contends that in the 10 years since the adoption of the resale requirement, the Commission has never indicated that this obligation should apply to cellular licensees that provide service directly to end users rather than through a separate distribution arm, as proposed by AT&T. In the absence of a licensee's own distribution arm, defendant argues, the requirement has no meaning because there are no "same terms and conditions" available. Further, according to Detroit SMSA, the Commission has never required cellular companies to establish separate wholesale and retail operations.[29]

2. Discussion

13. The Commission's cellular resale requirement is a binding, uncodified substantive rule adopted through notice and comment rulemaking. The Commission adopted this requirement using clearly mandatory terms: "*no* restrictions . . . *will* be permitted;"[30] "we *shall require* AT&T . . .."[31] Subsequently, when the Commission reexamined its requirement, the Commission stated that "[w]e also clarify our requirement that resale capacity be provided on a non-discriminatory basis."[32] Once again, the Commission used mandatory terms, such as "prohibit," "must," and "requirement." Finally, in a decision by the Court of Appeals for the D.C. Circuit, the Commission's clarification of its cellular resale rules was affirmed in terms that support the proposition that the requirement is a binding (albeit uncodified) rule.[33]

14. As established in the Commission's decisions pertaining to cellular resale, cellular licensees are required to provide service to similarly situated customers on a nondiscriminatory basis and on the same terms and conditions. When it first considered the resale of common carrier services, the Commission viewed the issue of resale restrictions as sufficiently complex to require a broad notice-and-comment rulemaking.[34] When the Commission proposed to extend its resale policies to cellular services in 1981, it again initiated a rulemaking proceeding, and specifically requested comments on whether any restrictions or requirements should be imposed regarding resale. The Commission's view was that "the most important issue involving cellular resale [was] whether cellular system tariffs will restrict resale."[35]

15. In *Pacific Gas*, the D.C. Circuit case that apparently gave rise to the court's concerns, the order at issue was "entitled and consistently referred to by the [FPC] as a general statement of policy."[36] That order proposed to implement an FPC plan which would serve only as a guide in other proceedings. It was issued without prior notice or opportunity for public comment or participation. "[T]he stated purpose of Order No. 467 was not to provide an inflexible, binding rule but to give advance notice of the general policy . . .."[37]

16. It is clear that the Commission's same terms and conditions requirement is not a general statement of policy. The requirement, adopted by the Commission as part of its cellular resale rules, was the outcome of a notice and comment rulemaking, in accordance with Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, in which the views of all participating parties were considered.[38] Although "a general statement of policy [may be] adopted without public participation,"[39] that is not what occurred in this instance.

17. Accordingly, in answer to the court's first question, the Commission's statement in its *Cellular Communications Systems*, as subsequently modified and clarified by the

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[25] 506 F.2d 33 (D.C. Cir. 1974).
[26] *Pacific Gas*, 506 F.2d at 38.
[27] Complaint at 5-6.
[28] Answer at 3, 16, 23, and Exhibit 1 at 9, 12, 16.
[29] Answer at 6-7, 15-16, 26, 29.
[30] *Cellular Communications Systems*, 86 FCC 2d at 511 (emphasis added).
[31] *Id.* (emphasis added).
[32] *Cellular Resale NPRM*, 6 FCC Rcd at 1719.
[33] *Cellnet Communications v. FCC*, 965 F.2d 1106, 1108.
[34] *Resale & Shared Use*, 60 FCC 2d at 262.
[35] *Cellular Communications Systems*, 86 FCC 2d at 510.
[36] *Pacific Gas*, 566 F.2d at 40 (footnote omitted).
[37] *Id.*
[38] *Cellular Communications Systems NPRM*, 78 FCC 2d at 996-97.
[39] *Pacific Gas*, 556 F.2d at 39.

Commission and affirmed by the appellate court, is binding, and requires facilities-based cellular licensees to provide service to similarly-situated customers under the same terms and conditions and on a nondiscriminatory basis.

B. Issue II: If the "same terms and conditions" policy is a binding requirement of the agency, does that cellular policy apply to Detroit SMSA given its current organizational structure?

1. Contentions of the Parties

18. Cellnet urges the Commission to answer the court's question in the affirmative, because, according to Cellnet, Detroit SMSA continues to operate its retail cellular distribution arm. Cellnet claims that the only changes that Detroit SMSA made were accounting ones, not a physical restructuring of its operation to eliminate the retail subsidiary, as Detroit SMSA asserts. Cellnet notes that although the Commission did not command a particular structure to accomplish the desired result of its cellular resale restriction enunciated in its *Cellular Communications Systems*, Detroit SMSA is attempting to evade its same terms and conditions obligations by recharacterizing its affiliate's functions.[40] Cellnet argues that Detroit SMSA's "organizational structure" has remained materially the same since 1984.

19. Detroit SMSA counters by arguing that it offers service directly to end users and unaffiliated resellers and has no distribution arm for the purposes of resale. Therefore, Detroit SMSA contends, the Commission's cellular resale restriction is not applicable. Detroit SMSA admits that one of its subsidiaries acted as its retail distribution arm prior to September 30, 1986, but states that it implemented changes that eliminated its subsidiary's role as a reseller of Detroit SMSA's service.[41]

2. Discussion

20. The answer to the court's second question is yes. In *Cellnet Communications*, the court agreed that the Commission's cellular resale rules "barred facilities-based carriers from restricting resale to non-facilities-based resellers and from discriminating against purchasers for resale.[42] In its *Cellular Resale NPRM*, in a passage clarifying the rule against resale restrictions, the Commission stated that it "had never required cellular companies to establish separate wholesale and retail operations."[43] The court explicitly affirmed this clarification.[44]

21. The Commission's cellular resale requirement, as clarified above,[45] applies to the defendant regardless of its current organizational structure. As discussed above, cellular licensees are required to provide service to similarly-situated customers under the same terms and conditions on a nondiscriminatory basis. The fact that Detroit SMSA claims not to have a retail distribution arm for its cellular offerings is irrelevant to its obligation as a facilities-based cellular licensee.

C. Issue III: if the answers to questions 1 and 2 are "yes," how do those "same terms and conditions" apply and how are "terms and conditions" determined?

1. Contentions of the Parties

22. Cellnet contends that in defining "terms and conditions," the Commission must consider whether the objective of its cellular resale requirement, free and fair competition at the retail level, has been achieved. Cellnet asserts that the structural separation originally proposed by AT&T that gave rise to the Commission's cellular resale requirement was such that the cellular licensee, AT&T, would operate as a wholesaler, with distribution to end users by AT&T's separate distribution arm, as well as by unaffiliated resellers.[46] According to Cellnet, this separation was intended, *inter alia*, to prevent discrimination by the cellular licensee against retail competitors and subsidization of the cellular licensee's competitive services.[47]

23. Cellnet argues that one of the terms and conditions that must be considered is the existence of any subsidy of the licensee's retail division by its wholesale division, and charges that the terms and conditions under which Detroit SMSA provides cellular service to its retail division includes a subsidy to offset the retail division's losses.[48]

24. Without responding to the court's third question, Detroit SMSA generally denies Cellnet's allegations that it subsidizes any retail division, and again denies that it has any obligation to maintain its operations in the manner proposed by AT&T in *Cellular Communications Systems NPRM*, or to maintain wholesale and retail operations as separate profit centers. Detroit SMSA argues that the Commission never intended that its same terms and conditions requirement be applied to a hypothesized distribution arm created through arbitrary cost and revenue allocations, such as it claims Cellnet is proposing.[49]

2. Discussion

25. Cellnet does not specifically address the court's third question regarding the manner in which "the same terms and conditions" are determined and applied. Instead, Cellnet argues that the Commission should weigh the procompetitive objectives of its cellular resale requirement and consider the existence of any subsidy of Detroit SMSA's retail division by its wholesale division as a term and condition. It appears that Cellnet is attempting to bolster the argument it made in response to the Court's second question that Detroit SMSA is evading the same terms and conditions requirement by providing cellular service through a retail cellular distribution arm. Cellnet's arguments miss the point. As we stated in addressing the Court's second question above, the fact that a cellular licensee has a retail distribution arm for its cellular offerings is irrelevant to its obligation to provide service to similarly-situated customers, including resellers, under the same terms and conditions.

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[40] Complaint at 27-28.
[41] Answer at 7, 25, 29.
[42] 965 F.2d at 1109.
[43] FCC Rcd at 1726.
[44] *Cellnet Communications*, 965 F.2d at 1110-11.
[45] *See supra*, paras. 9-17.
[46] Complaint at 31.
[47] *Id.* at 31-32.
[48] *Id.* at 49-50.
[49] Answer at 15-16, 27.

26. In answer to the court's third question, the terms and conditions of a particular service offering are discerned from the four corners of the agreement or tariff governing that offering. In a complaint proceeding under Section 208 of the Communications Act, the burden would be on the complainant to plead facts that would tend to show that a facilities-based cellular licensee has included provisions in a tariff or agreement that would foreclose similarly-situated customers from ordering the same or substantially similar service under the same terms and conditions or, that the licensee has failed to provide such service under the same terms and conditions.[50] In the latter case, to determine whether the same terms and conditions governed two offerings, the Commission would compare the agreements or tariffs governing those offerings. Such requirements as minimum deposits to start service, minimum usage commitments, and rate levels for different services are typical of the terms and conditions that the Commission would compare.

27. Similarly, how such terms and conditions are applied would be a question of fact. To satisfy the same terms and conditions requirement, licensees must be willing to provide substantially similar service to similarly-situated customers.[51] Once the terms and conditions of an offering are identified, the Commission would expect the licensee to offer those same terms and conditions to any similarly situated customers requesting that service.[52] Based upon evidence developed through the complaint process, the Commission would determine whether this was in fact occurring.

IV. CONCLUSION AND ORDERING CLAUSES

28. We grant Cellnet's complaint to the extent that it seeks rulings on issues referred by the United States District Court, Eastern District of Michigan, regarding the Commission's cellular resale requirement. We conclude that the Commission's cellular resale requirement, as discussed above, is a binding requirement on cellular licensees, and applies to Detroit SMSA regardless of its organizational structure. In addition, we address the court's specific questions regarding the application of the Commission's "same terms and conditions" requirement to cellular licensees.

29. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 208 of the Communications Act, 47 U.S.C. §§ 154(i), 208, and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Cellnet's complaint IS GRANTED, to the extent discussed above.

30. IT IS FURTHER ORDERED that the Chief, Formal Complaints and Investigations Branch, shall send a copy of this Memorandum Opinion and Order via Certified U.S. Mail, Return Receipt Requested, to the Honorable Avery Cohn, United States District Court, Eastern District of Michigan, 219 Federal Building and U.S. Courthouse, Detroit, Michigan 48226.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief (Policy)
Common Carrier Bureau

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[50] 47 U.S.C. § 208. It is well established that in a Section 208 complainant proceeding the complainant has the burden of proof. *See, e.g.,* Amendment of Rules Concerning Procedures to be followed When Formal Complaints are Filed Against Common Carriers, 8 FCC Rcd 2614, 2616-17 (1993); Connecticut Office of Consumer Counsel v. AT&T Communications, 4 FCC Rcd 8130, 8133 (1989), *aff'd sub nom. Connecticut Office of Consumer Counsel v. FCC,* 915 F.2d 75 (2d Cir. 1990), *cert. denied,* 111 S. Ct. 1310 (1991).

[51] *See, e.g.,* AT&T Communications, Revisions to Tariff F.C.C. No. 12, 6 FCC Rcd 7039, 7047, 7052 (1991) (requiring substantially similar options in an interexchange carrier's contract tariff offerings to be available to any similarly-situated party, including resellers, upon request). Id. at 7053. *See also Sea-Land Service, Inc. v. I.C.C.,* 738 F.2d 1311, 1316-17 (D.C. Cir 1984); *MCI Telecommunications Corp. v. FCC,* 917 F.2d 30, 38-39 (D.C. Cir 1990).

[52] In its *Cellular Resale NPRM,* the Commission suggested that requirements that certain customers "make deposits, meet minimum number limitations and the like, which are not also imposed on other customers" would appear unlawfully discriminatory. In addition, the Commission stated that the practice of offering "preferred customers bulk rates that are lower than wholesale rates, while at the same time not making these bulk rates available to resellers would appear discriminatory." The Commission indicated that under its resale rules, "facilities-based carriers offering a bulk rate to certain customers must make that bulk rate available to resellers on the same terms and conditions as made available to similarly situated customers." *Cellular Resale NPRM,* 6 FCC Rcd at 1725.