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

In the Matter of	)	
	)	
Cellexis International, Inc.,	)	
	)	File Nos. WB/ENF-F-97-001
Complainant,	)	WB/ENF-F-97-002
	)	WB/ENF-F-97-003
v.	)	
	)	
Bell Atlantic NYNEX Mobile Systems, Inc.,	)	
Cellco Partnership, and	)	
Washington D.C. SMSA Limited Partnership,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 2001 **Released:** December 19, 2001

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny a formal complaint filed by Cellexis International, Inc. ("Cellexis") against Bell Atlantic NYNEX Mobile, Inc.,[1] Cellco Partnership ("Cellco"), and Washington D.C. SMSA Limited Partnership ("Washington SMSA") (collectively, "Defendants") pursuant to section 208 of the Communications Act of 1934, as amended ("Act").[2] In short, the complaint alleges that Defendants violated sections 201(b), 202(a), 251(a), and 332(c)(1)(B) of the Act[3] by refusing to continue to interconnect their cellular networks with Cellexis's switch so that Cellexis could provide resale cellular service.

2. At this juncture, Cellexis's only remaining claim is for violation of section 202(a) of the

[1] In the caption of its complaint, Cellexis incorrectly identified "Bell Atlantic NYNEX Mobile, Inc." as "Bell Atlantic NYNEX Mobile Systems, Inc." Because subsequent pleadings and orders in this proceeding continued to use Cellexis's caption, it appears here as well.

Subsequent to the filing of the complaint, there were a number of corporate mergers and name changes affecting Bell Atlantic NYNEX Mobile, Inc. At present, the wireless systems of Bell Atlantic Corporation operate under the name Verizon Wireless. *See* Defendants' Supplemental Brief, File Nos. WB/ENF-F-97-001, -002, -003 (filed May 29, 2001) ("Defendants' Supplemental Brief") at 4-5. In this order, however, we refer to Bell Atlantic NYNEX Mobile, Inc. as "Bell Atlantic Mobile."

[2] 47 U.S.C. § 208.

[3] 47 U.S.C. §§ 201(b), 202(a), 251(a), and 332(c)(1)(B).

Act.[4] As discussed below, we deny the section 202(a) claim, because Cellexis has failed to show that Defendants provided a "like communication service" to other customers that Defendants refused to provide to Cellexis.

II. BACKGROUND

A. The Parties and Their Business Relationship

3. Cellexis is an Arizona corporation that provides commercial mobile radio service ("CMRS") as an agent for facilities-based CMRS providers or as a reseller of their services.[5] Washington SMSA and Cellco provide facilities-based CMRS as communications common carriers in the Washington, D.C. and Baltimore, Maryland service areas, respectively, in accordance with licenses from this Commission.[6] Bell Atlantic Mobile is a Delaware corporation that holds majority ownership interests in Washington SMSA and Cellco.[7] It is the managing general partner of Cellco, which, in turn, is the general partner of Washington SMSA.[8] Bell Atlantic Mobile does not itself provide common carrier services, however.[9]

4. In order to operate its system, Cellexis must enter into agreements with other carriers that provide Cellexis with access to local cellular phone numbers and airtime.[10] Cellexis and Defendants entered into such an agreement in the fall of 1993 with respect to the southwest United States.[11] With Defendants' consent, in early 1994, Cellexis began providing prepaid cellular services in the Phoenix, Arizona market, utilizing proprietary technology involving a computer chip installed in a customer's cellular telephone that shut off the phone when prepaid airtime ran out.[12] Thereafter, Cellexis developed technology to provide prepaid cellular service that did not require any modifications of a customer's phone. Specifically, a switch and billing platform in Cellexis's office was connected to Defendants' mobile telephone switching office ("MTSO"), which permitted calls to and from the mobile phones of prepaid cellular customers to be routed through Cellexis's billing platform. As a result, Cellexis could record usage on a real-time basis and disallow service when a customer used all of his or her prepaid

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[4] The parties agree that the Commission's recent decision in *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Service*, Fourth Report and Order, 15 FCC Rcd 13523, 13524, ¶ 1 (2000), Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 10009, 10009, ¶ 1 (2001), resolves in Defendants' favor Cellexis's claims under sections 201, 251, and 332 of the Act. Supplemental Brief, File Nos. WB/ENF-F-97-001, -002, -003 (filed May 30, 2001) ("Cellexis's Supplemental Brief") at 3, 10; Defendants' Supplemental Brief at 2, 8-10; Supplemental Reply Brief, File Nos. WB/ENF-F-97-001, -002, -003 (filed June 8, 2001) ("Cellexis's Supplemental Reply Brief") at 2, 6-7; Defendants' Supplemental Reply Brief, File Nos. WB/ENF-F-97-001, -002, -003 (filed June 8, 2001) ("Defendants' Supplemental Reply Brief") at 2. We hereby deem those claims moot.

[5] Formal Complaint, File Nos. WB/ENF-F-97-001, -002, -003 (filed Dec. 20, 1996) ("Complaint") at ¶ 3; Answer, File Nos. WB/ENF-F-97-001, -002, -003 (filed Jan. 24, 1997) ("Answer") at ¶ 3.

[6] Complaint at ¶ 4; Answer at ¶ 4; Defendants' Supplemental Brief at 2.

[7] Complaint at ¶ 4; Answer at ¶ 4.

[8] Brief of Defendants Bell Atlantic Mobile, Inc., *et al*., File Nos. WB/ENF-F-97-001, -002, -003 (filed Dec. 11, 1997) ("Defendants' Brief") at 1 n.1.

[9] *See* Letter from John T. Scott, III, counsel for Defendants, to Howard C. Davenport, Chief, Enforcement Division, Wireless Telecommunications Bureau, File Nos. WB/ENF-F-97-001, -002, -003 (dated July 14, 1998).

[10] Complaint at ¶ 9.

[11] *Id*; Answer at ¶ 9.

[12] *Id.*

airtime.[13]

5. In approximately June 1995, Defendants and Cellexis entered into discussions concerning Cellexis's offering of a prepaid cellular service in the Washington-Baltimore area, as a reseller of Defendants' services, through interconnection between Defendants' cellular network and Cellexis's switch.[14] When negotiations between the parties ended in late 1995, Cellexis believed that it and Defendants already had entered into a binding contract calling for such interconnection.[15] Defendants, on the other hand, disagreed and sought further negotiations and modifications to Cellexis's proposals.[16] Cellexis subsequently filed a complaint in the United States District Court for the District of Columbia seeking to enforce the alleged interconnection agreement with Defendants.[17] The lawsuit was resolved prior to decision by a "Memorandum of Understanding" executed by the parties on February 20, 1996, in which Cellexis and Defendants agreed to enter into a temporary interconnection agreement.[18]

6. On May 20, 1996, Cellexis and Defendants executed a "Service Trial Agreement" ("Agreement"), which permitted Defendants "to conduct a trial to evaluate a possible Bell Atlantic NYNEX Mobile network offering and to evaluate the marketing of such network offering to Cellexis and to other entities who might wish to offer a similar service and to determine whether Bell Atlantic Mobile NYNEX has any further interest in making such an offering available in the Washington D.C./Baltimore market or elsewhere."[19] The Agreement specifically provided for the interconnection of Cellexis's switch with Defendants' MTSOs.[20] According to the Agreement, the service trial "commenced on or about February 20, 1996 and . . . end[ed] on or about February 19, 1997."[21] Although neither party was obligated to renew the Agreement, Defendants were required to give Cellexis ninety days' notice if they intended not to renew.[22]

7. Cellexis began providing prepaid cellular services in the Washington, D.C. and Baltimore, Maryland areas on or about February 20, 1996.[23] On October 11, 1996, Defendants notified Cellexis that they intended to terminate the Agreement and service thereunder on February 19, 1997.[24]

B. The Instant Proceeding

8. Cellexis filed its Complaint with the Commission on December 20, 1996, alleging that (1) Defendants' refusal to continue interconnection with Cellexis was "unreasonably discriminatory," in violation of section 202(a) of the Act;[25] (2) Defendants' decision to terminate interconnection with

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13 Complaint at ¶ 10; Answer at ¶ 10.

14 Complaint at ¶ 13; Answer at ¶ 13.

15 Complaint at ¶ 14; Answer at ¶ 14.

16 *Id.*; Defendants' Brief at 3-4.

17 *Id.*.; *See Cellexis International, Inc. v. Bell Atlantic Mobile Systems of Washington, Inc.*, Case No. 96-CV-185 (EGS) (D.D.C.).

18 Complaint at ¶ 15; Answer at ¶ 15.

19 Complaint, Exhibit 1 (Agreement at 1).

20 *Id.*, Exhibit 1 (Agreement at ¶ 6(a)).

21 *Id.*, Exhibit 1 (Agreement at ¶ 2).

22 *Id.*, Exhibit 1 (Agreement at ¶ 18(a)).

23 Complaint at ¶ 15; Answer at ¶ 15.

24 Complaint at ¶ 16; Answer at ¶ 16.

25 Complaint at ¶¶ 21-28.

Cellexis violated the "express interconnection requirement" contained in section 251(a) of the Act;[26] (3) Defendants' refusal to continue interconnection was "unjust and unreasonable," in violation of section 201(b) of the Act and the *Hush-A-Phone* line of cases interpreting that section;[27] and (4) Defendants' refusal of Cellexis's "reasonable interconnection request" violated sections 332(c)(1)(B) and 201(a) of the Act.[28] Defendants' Answer sets forth four affirmative defenses, *i.e.*, that (1) the conduct alleged, even if true, is lawful and justified;[29] (2) CMRS providers are not required to provide physical interconnection arrangements with resellers, and requiring such interconnection would violate section 332 of the Act and the Commission's policies;[30] (3) the Agreement specifically permits Defendants to terminate their interconnections with Cellexis, and the Commission is without jurisdiction to modify, extend, or enforce a private contract;[31] and (4) Cellexis's claims are barred by the equitable doctrines of waiver, estoppel and/or unclean hands.[32]

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[26] *Id.* at ¶¶ 29-32.

[27] *Id.* at ¶¶ 33-41 (*citing Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956)).

[28] *Id.* at ¶¶ 42-45. Along with its Complaint, Cellexis filed an "Emergency Motion for Temporary Relief," which sought an order prohibiting Defendants from terminating their interconnection arrangements with Cellexis until the Commission ruled on the Complaint. *See* Emergency Motion for Temporary Relief, File Nos. WB/ENF-F-97-001, -002, -003 (filed Dec. 20, 1996) ("Emergency Motion") at 2. Defendants opposed the Emergency Motion. *See* Opposition to Motion for Temporary Relief, File Nos. WB/ENF-F-97-001, -002, -003 (filed Jan. 7, 1997) ("Opposition to Motion"). In order to remove the need for the Commission to act on the Emergency Motion, Defendants agreed to postpone termination of their interconnections with Cellexis for a thirty-day period. *See* Letter from John T. Scott, III, counsel for Defendants, to Howard C. Davenport, Chief, Enforcement Division, Wireless Telecommunications Bureau, File Nos. WB/ENF-F-97-001, -002, -003 (dated Feb. 13, 1997). Thereafter, Defendants agreed to continue service to Cellexis's existing customers pending resolution of the Complaint. *See* Letter from John T. Scott, III, counsel for Defendants, to Howard C. Davenport, Chief, Enforcement Division, Wireless Telecommunications Bureau, File Nos. WB/ENF-F-97-001, -002, -003 (dated Mar. 13, 1997). Cellexis maintains that its service nevertheless became economically non-viable over time (as a result of customer attrition and an inability to add new customers), and it discontinued providing service in the Baltimore/Washington area in April 1998. *See* Letter from John T. Scott, III, counsel for Defendants, to Howard C. Davenport, Chief, Enforcement Division, Wireless Telecommunications Bureau, File Nos. WB/ENF-F-97-001, -002, -003 (dated May 18, 1997). This renders the Emergency Motion moot.

[29] Answer at 10-11.

[30] *Id.* at 12-13.

[31] *Id.* at 13-14.

[32] *Id.* at 14. In addition, Defendants argue that the Complaint should be dismissed because Washington SMSA no longer is a defendant in this proceeding. Cellexis previously was a party to litigation against GTE Corporation ("GTE") in the United States District Court for the District of Arizona. That litigation was resolved pursuant to a settlement agreement in which Cellexis agreed "not to institute any proceeding . . . seeking interconnection with wireless facilities owned by GTE or a GTE partnership . . . ." Letter from John T. Scott, counsel for Defendants, to Howard C. Davenport, Chief, Enforcement Division, Wireless Telecommunications Bureau, File Nos. WB/ENF-F-97-001, -002, -003 (dated Feb. 7, 1997) (attached May 14, 1996 Settlement Agreement between Cellexis and GTE at ¶ 7.3). On May 27, 1998, the court held that the settlement agreement prohibited Cellexis from pursuing the instant Complaint against Washington SMSA, because GTE held a minority partnership interest in Washington SMSA. The court also enjoined Cellexis from continuing the prosecution of its Complaint "as it pertains to the Washington Partnership." *See* Letter from John T. Scott, III, counsel for Defendants, to Howard C. Davenport, Chief, Enforcement Division, Wireless Telecommunications Bureau, File Nos. WB/ENF-F-97-001, -002, -003 (dated June 4, 1998) (citing *GTE Mobilnet Service Corp. v. Cellexis International, Inc.*, Civ-97-703-PHX-ROS (D. Ariz. May 21, 1998)). Accordingly, upon Cellexis's motion, the Complaint against Washington SMSA was dismissed with prejudice. *See* Letter from Frank G. Lamancusa, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, to Alfred M. Mamlet, James M. Talens, and Matthew S. Yeo, counsel for Cellexis, and John T. Scott, III, counsel for Defendants, File Nos. WB/ENF-F-97-001, -002, -003 (dated Feb. 29, 2000). Defendants maintain that Washington SMSA is "an indispensable party," and that (continued....)

III. DISCUSSION

A. The Commission Has Authority to Adjudicate Cellexis's Claims.

9. Defendants correctly note that, pursuant to the Agreement's terms, interconnection with Cellexis "automatically terminate[d]" on February 19, 1997, and neither party was "under any obligation to renew" the Agreement.[33] We do not agree with Defendants, however, that the termination provisions of the Agreement preclude Cellexis's Complaint or deprive us of jurisdiction to consider it.[34] Although the Agreement clearly does not obligate Defendants to interconnect with Cellexis after February 19, 1997, Cellexis did not therein waive its rights under the Communications Act. The Agreement, accordingly, also does not alter whatever rights to interconnection Cellexis may have under the Act. We concur with Cellexis that Defendants' statutory interconnection obligations, whatever they may be, exist independent of the Agreement's terms.[35] Therefore, we have authority to consider Cellexis's assertions that Defendants violated the Act by refusing to interconnect.

B. Defendants' Conduct Did Not Violate Section 202(a) of the Act, Because the Services that Defendants Provided to Other Customers Were Not "Like" the Service Defendants Provided to Cellexis.

10. Cellexis's only remaining claim arises under section 202(a) of the Act,[36] which makes it unlawful for any common carrier to discriminate unjustly or unreasonably in its provision of "like communication service."[37] The Commission and the courts have held that a three-step inquiry is required to determine whether a violation of section 202(a) has occurred: (1) whether the services at issue are "like"; (2) if they are, whether there are differences in the terms and conditions pursuant to which the services are provided; and (3) if so, whether the differences are reasonable.[38] When a complainant establishes the first two components, the burden of persuasion shifts to the defendant carrier to justify the discrimination as reasonable.[39]

(...continued from previous page)
the dismissal of the Complaint against it requires dismissal of the entire Complaint. *See* Letter from John T. Scott, III, counsel for Defendants, to Howard C. Davenport, Chief, Enforcement Division, Wireless Telecommunications Bureau, File Nos. WB/ENF-F-97-001, -002, -003 (dated July 14, 1998). In light of our conclusion that Cellexis's complaint should be denied on the merits, we need not rule on this issue.

33 Defendants' Brief at 46. *See* Complaint, Exhibit 1 (Agreement at ¶ 18(a)).

34 *See* Answer at 13.

35 *See* Final Reply, Cellexis International, Inc., File Nos. WB/ENF-F-97-001, -002, -003 (filed Jan. 2, 1998) ("Cellexis's Reply Brief") at 6.

36 *See* note 4, *supra*.

37 47 U.S.C. § 202(a) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service . . . .").

38 *See, e.g., Competitive Telecommunications Ass'n v. FCC*, 998 F.2d 1058, 1061 (D.C. Cir. 1993); *MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296, 1303 (D.C. Cir 1988); *Beehive Telephone, Inc. v. Bell Operating Companies*, 10 FCC Rcd 10562, 10567, ¶ 27 (1995); *Metrocall, Inc. v. Worldcom, Inc.*, 15 FCC Rcd 10826, 10830 (Enf. Bur. 2000).

39 *See National Communications Ass'n, Inc. v. AT&T Corp.*, 238 F.3d 124, 129-30 (2nd Cir. 2001); *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22615, ¶ 291 & n.782 (1997), *recon. denied*, 16 FCC Rcd 5681 (2001); *PanAmSat Corp. v. Comsat Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 6952, 6965, ¶ 34 n.90 (1997).

11. Cellexis maintains that Defendants have unlawfully refused to provide it with a communication service that they provide to other customers. Thus, under the forgoing analysis Cellexis bears the initial burden of demonstrating the "likeness" of the service it seeks to the services that Defendants provided to others. A "functional equivalency" test guides our assessment of whether Cellexis has satisfied that burden. We have described the "functional equivalency" test as follows:

> This test looks to whether there are any material functional differences between the services. An important aspect of the test, as it has evolved, involves reliance upon customer perception to help determine whether the services being compared provide the same or equivalent functions. The test asks whether the services at issue are "different in any material respect" and requires the Commission to examine both the nature of the services and the customer perception of the functional equivalency of the services. The test presumes that not all differences between the services make them *a priori* unlike. Rather, the differences must be functionally material or, put another way, of practical significance to customers.[40]

12. As a preliminary matter, we reject Defendants' assertion that an introductory clause of the Agreement, which characterizes Cellexis's service as "requir[ing] a *unique network offering* of [Defendants'] cellular network,"[41] constitutes a "complete bar to Cellexis' claim."[42] Although the quoted language may demonstrate that the parties, at the time they executed the Agreement, perceived the interconnection afforded to Cellexis to be "unique" in some unidentified respects, the recital alone does not govern whether the service Cellexis seeks differs in functionally material respects from services offered to other customers. Accordingly, we turn to the allegedly comparable services – "Mobile Minutes"[43] and "Mobile Direct."[44]

1. Mobile Minutes

13. Mobile Minutes is a prepaid cellular service that Defendants sell to the public.[45] Although Mobile Minutes is similar to the prepaid service Cellexis offers to the public, Cellexis does not seek to purchase Mobile Minutes from Defendants. Indeed, it is undisputed that Defendants offered Cellexis the opportunity to purchase Mobile Minutes service for resale, and that Cellexis declined the offer.[46] Rather, the service Cellexis seeks is interconnection of its switch with the mobile switches of Washington SMSA and Cellco (*i.e.*, interconnection like Cellexis received under the Agreement).[47] Cellexis argues that this interconnection service is comparable to (1) the manner in which Bell Atlantic

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[40] *Beehive Telephone, Inc. v. Bell Operating Companies*, 10 FCC Rcd at 10567, ¶ 28 (1995). *See also Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790, 795-96 (D.C. Cir. 1982); *American Broadcasting Corp. v. FCC*, 663 F.2d 133, 138-39 (D.C. Cir. 1980).

[41] Complaint, Exhibit 1 (Agreement at 1) (emphasis added).

[42] Defendants' Brief at 26.

[43] Complaint at ¶¶ 24-25.

[44] *Id.* at ¶¶ 26-28.

[45] Complaint at ¶ 24; Defendants' Brief at 25.

[46] Defendants' Brief at 25, Attachment 2 (Letter from Gary Stannek, Bell Atlantic Mobile, to Larry L. Day, Cellexis, dated September 11, 1997); Opposition to Motion, Attachment 1 (Letter from Katherine S. Abrams to Alfred M. Mamlet, dated December 16, 1996).

[47] Cellexis's Reply Brief at 17-18 ("The *interconnection* that [Bell Atlantic Mobile] provides to support its affiliates' provision of Mobile Minutes is the functional equivalent of the *interconnection* Cellexis seeks. . . . [Bell Atlantic Mobile] offers its distribution arms an *interconnection service* that is precisely the service Cellexis seeks.") (emphasis added).

Mobile purportedly "allow[s] its own distribution arms to interconnect a switch to its network";[48] and (2) the manner in which Defendants interconnect their mobile network with a third-party billing platform furnished by Boston Communications Group ("BCG").[49] We reject both claims.

14. First, Cellexis mischaracterizes Bell Atlantic Mobile as a carrier furnishing interconnection service to its affiliates. Although the pleadings generally describe the conduct at issue in this case as being undertaken by all three Defendants collectively,[50] it appears that Bell Atlantic Mobile is situated differently from its co-defendants. Specifically, Bell Atlantic Mobile does not itself provide common carrier services.[51] It is, instead, the principal owner and effective managing partner of Washington SMSA and Cellco, which themselves provide common carrier service.[52] Thus, Bell Atlantic Mobile does not use Washington SMSA and Cellco as "distribution arms" and, in particular, does not provide Mobile Minutes through interconnection with Washington SMSA and Cellco. Consequently, Bell Atlantic Mobile does not interconnect with Washington SMSA or Cellco in any way that is "like" the interconnection sought by Cellexis.

15. Second, Cellexis's focus on the relationship between Defendants and BCG is misdirected and irrelevant to a discrimination analysis. Section 202(a)'s prohibition against unreasonable discrimination pertains to the provision of "like communication *service*."[53] BCG, however, is not a customer purchasing a service from Defendants. Rather, it is a vendor selling facilities and technology to Defendants.[54] Defendants, in turn, utilize the facilities and technology to furnish Mobile Minutes service to their customers, but, again, Cellexis does not wish to purchase Mobile Minutes service.

16. In sum, Cellexis has not shown that Mobile Minutes is "like" the service sought by it from Defendants. Hence, Cellexis's claim under section 202(a), based on Defendants' provision of Mobile Minutes service to other users, must fail.[55]

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[48] Final Brief of Cellexis International, Inc., File Nos. WB/ENF-F-97-001, -002, -003 (filed Dec. 17, 1997) ("Cellexis's Brief") at 15 (citing *Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, Report and Order, 86 F.C.C. 2d 469, 511 (1981) and *Cellnet Communications v. Detroit SMSA*, Memorandum Opinion and Order, 9 FCC Rcd 3341, 3344 (Com. Car. Bur. 1994)). *See also* Complaint at ¶ 25 (same).

[49] Cellexis's Brief at 16-17. *See also* Cellexis's Reply Brief at 18-19.

[50] This order, accordingly, does the same.

[51] *See* note 9, *supra*.

[52] Reply Brief of Defendants, File Nos. WB/ENF-F-97-001, -002, -003 (filed Jan. 2, 1998) ("Defendants' Reply Brief") at 11; Cellexis's Supplemental Reply Brief at 6. *See* paragraph 3, *supra*.

[53] 47 U.S.C. § 202(a) (emphasis added).

[54] *See* Defendants' Brief at 27-28.

[55] In advance of discovery by the parties, Commission staff directed Defendants to provide certain information concerning the marketing, provision, and network configuration of "Mobile Minutes." *See* Letter from Howard C. Davenport, Chief, Enforcement Division, Wireless Telecommunications Bureau, to Alfred M. Mamlet and James M. Talens, counsel for Cellexis, and John T. Scott, III, counsel for Defendants (dated Feb. 26, 1997). Defendants and BCG each moved for a protective order (*see* Defendants' Motion for Protective Order, File No. WB/ENF-F-97-001, -002, -003 (filed Mar. 21, 1997); BCG's Motion for Protective Order, File No. WB/ENF-F-97-001, -002, -003 (filed Mar. 21, 1997)), which Commission staff denied in part. *See* Letter from Howard C. Davenport, Chief, Enforcement Division, Wireless Telecommunications Bureau, to Alfred M. Mamlet and James M. Talens, counsel for Cellexis; John T. Scott, III, counsel for Defendants; and Barry A. Friedman and Scott A. Fenske, counsel for BCG (dated May 12, 1997). BCG subsequently filed an Application for Review of the staff's letter-order. *See* Application for Review by BCG, File Nos. WB/ENF-F-97-001, -002, -003 (filed May 19, 1997) ("Application for

(continued....)

2. Mobile Direct

17. Mobile Direct is a service offering of the Defendants suitable for large corporate users. It provides an alternative routing for mobile phones through the customers' PBXs or Centrex office phone systems.[56] Defendants advertise that, with the service, "local cellular phones operate like PBX/Centrex extensions and allow direct access to any least-cost routing capability [a] company has negotiated with [its] long distance carrier."[57] For most Mobile Direct customers, special programming in the Defendants' switches routes the customer's mobile phone calls from the Defendants' network to the customer's PBX using individual analog circuits.[58] Three customers nationwide, however, are provided a T-1 connection between Defendants' network and their PBX.[59]

18. Cellexis argues that the service it sought from Defendants was "like" Mobile Direct Service offered to others, because "[Defendants] provide similarly-situated [Mobile Direct] customers with the same type of switch interconnection over a T-1 line that Cellexis seeks."[60] For the reasons described below, we disagree.

19. T-1 lines are used to provide most telecommunications service, and this sole similarity between Mobile Direct service and Cellexis's service alone does not make the services "functionally equivalent." Indeed, it is the purpose of a technical configuration, not the configuration itself, that is relevant in determining functional equivalence.[61] In this case, we find that the interconnection of

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Review"). After we denied the Application for Review (*see Cellexis v. Bell Atlantic NYNEX Mobile, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 22467 (1998)), BCG appealed to the United States Court of Appeals for the District of Columbia Circuit. *See Boston Communications Group v. Federal Communication Commission*, Case No. 98-151, Petition for Review (filed Nov. 12, 1998). The Court enjoined the Commission from disclosing the information pending disposition of BCG's appeal. *See id.*, Order (issued Nov. 18, 1998). Briefing in the appellate proceeding has been stayed, and the appeal is still pending. *See id.*, Order (issued Apr. 13, 1999).

Cellexis objects to the Commission's issuance of a decision on its section 202(a) claim "until all of the Mobile Minutes information it has requested from BCG is provided and further briefs are filed and made part of the record in this proceeding." Cellexis's Supplemental Brief at 2 n.1. But Cellexis fails to explain how it is prejudiced by a lack of access to this information, and we perceive no such prejudice. The information in question might have been probative only with respect to Cellexis's claims under sections 201, 251, and 332, which we deny in light of the *Fourth Report and Order*. *See* note 4, *supra*. The information is not relevant to Cellexis's section 202(a) claim, because, whatever Defendants' internal facility arrangements for Mobile Minutes service may be, the arrangements are not being offered or provided to a customer. *See* discussion, *supra*, section III.B.1. Accordingly, we hereby vacate the staff's May 12, 1997 letter-order and our October 28, 1998 Order on Review, and instruct the staff to return the confidential BCG information to Defendants.

56 Complaint at ¶ 26; Answer at ¶ 26.

57 Complaint, Exhibit 5.

58 *See* Letter from John T. Scott, III, counsel for Defendants, to Howard C. Davenport, Chief, Enforcement Division, Wireless Telecommunications Bureau (dated Mar. 6, 1997) (attached Response to the FCC's 2/27/97 Questions at C.1).

59 Defendants' Brief at 39.

60 Complaint at ¶ 26. *See also* Complaint at ¶¶ 26-28; Cellexis's Brief at 9-15; Cellexis's Reply Brief at 6-16.

61 *See Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d at 803-04 (concurring opinion) ("The word 'service' as it is used in section 202(a) refers to the entire package of benefits, rights, restrictions, duties, facilities and services contracted for between the customer and the communications carrier and is not restricted to the physical facilities that are used in long distance calls."); *Beehive Telephone*, 10 FCC Rcd at 10567, ¶ 30 (an assessment of whether services are "like" must focus on the *practical* significance of the service to users).

Cellexis's system was accomplished in a manner to meet Cellexis's unique needs, *i.e.*, (1) to monitor the usage of its customers for *all* their calls on a real-time basis; (2) to deny service immediately when customers exhausted their prepaid usage; and (3) to restrict calls to the Washington-Baltimore service areas.[62]

20. Specifically, although Mobile Direct service in a few instances involves the use of a T-1 circuit interconnection between a switch on Defendants' network and a switching device on a customer's premises, there are a number of significant differences between the facilities arrangements provided to Mobile Direct customers (including those with T-1 connections) and those required for Cellexis's service. First, Cellexis utilized "bottleneck" call routing, in which *all* calls to or from the mobile phones of its customers were routed through Cellexis's switch, so that Cellexis could monitor usage and cut off service to customers when necessary. In contrast, Mobile Direct users do not require "bottleneck" routing through their PBXs, and calls to and from these customers' mobile units also may be completed over Defendants' network, in the same manner as calls of its other subscribers, without transiting customers' PBXs.[63] Second, Cellexis's mobile phones were assigned "pseudo" numbers so that they could not be reached over the public network without going through Cellexis's switch.[64] By contrast, the mobile phones of Mobile Direct customers are assigned regular cellular phone numbers and may be called from the public telephone network without transiting the customer's PBX.[65] Third, Cellexis's customers were able to make calls only within the Washington-Baltimore service areas, not as roamers in other markets. The mobile phones of Mobile Direct customers, on the other hand, may be used to make calls while roaming in other markets.[66] Finally, Cellexis's service used Feature Group D signaling to enable Cellexis rapidly to identify its customers and their account balances prior to routing their calls. Mobile Direct, however, employs traditional PBX-type signaling.[67]

21. Cellexis responds that these service differences were imposed upon it by Defendants or that Defendants would make the same features needed for its service available to other Mobile Direct customers.[68] It appears from the record, however, that Defendants designed the service features and configuration of Cellexis's service to meet Cellexis's unique requirements.[69] Moreover, beyond its assertion regarding T-1 lines (which, as explained above, has little persuasive force), Cellexis has not shown that any Mobile Direct service configuration exists for any other customer with features similar to those used by Cellexis.

22. In short, we conclude that Mobile Direct service differs in functionally material respects from Cellexis's service. Therefore, Mobile Direct service is not "like" the service sought by Cellexis, and Cellexis's claim under section 202(a), consequently, must fail.

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62 Defendants' Reply Brief at 20-22.

63 Defendants' Brief at 42-43.

64 Pseudo numbers are special telephone numbers (*i.e.*, not regular cellular telephone numbers) that permit Cellexis to block calls of its customers originating outside its geographic area. Defendants' Brief at 43.

65 *Id.*

66 *Id.*

67 *Id.* at 43-44.

68 Cellexis's Brief at 10-15; Cellexis's Reply Brief at 8-10.

69 Defendants' Reply Brief at 20-22.

IV. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201(b), 202(a), 208, 251(a), and 332(c)(1)(B) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 202(a), 208, 251(a), and 332(c)(1)(B), that the above-captioned complaint filed by Cellexis International, Inc. IS DENIED IN PART, to the extent specified herein, and otherwise IS DISMISSED AS MOOT.

24. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 208, that the "Emergency Motion for Temporary Relief" filed by Cellexis IS DISMISSED AS MOOT.

25. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), and 208, that the letter-order issued in this proceeding on May 12, 1997 by the Chief, Enforcement Division, Wireless Telecommunications Bureau, as well as our Memorandum Opinion and Order denying BCG's Application for Review and upholding the Bureau letter-order, adopted on October 28 1998, 13 FCC Rcd 22467, ARE VACATED.

26. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary