DOCKET FILE COPY ORIGINAL

ORIGINAL

RECEIVED

MAR 19 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policies and Rules	)	
Pertaining to the	)	RM-8179

TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY 2

II. THE HIGHLY COMPETITIVE CELLULAR MOBILE MARKETPLACE SHOULD NOT BE UNDERMINED BY UNNECESSARY TARIFFING REQUIREMENTS 3

III. ANY CELLULAR SERVICES WHICH MUST BE TARIFFED UNDER THE ACT QUALIFY FOR STREAMLINED NON-DOMINANT TREATMENT 9

A. The Competition Faced By Cellular Carriers Demonstrates That They Lack Market Power And Are Consequently Non-Dominant 9

B. McCaw Agrees That Part 61 Should Be Amended To Further Streamline The Tariff Filing Procedures For Cellular Carriers 12

IV. MOBILE SERVICES INVOLVE SPECIAL SECTION 221(b) ISSUES 13

V. CONCLUSION 15

Attachment

RECEIVED

MAR 19 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policies and Rules	)	
Pertaining to the	)	RM-8179
Regulation of	)	
Cellular Carriers	)	
	)	
	)	

COMMENTS OF MCCAW CELLULAR COMMUNICATIONS, INC.

McCaw Cellular Communications, Inc. ("McCaw") hereby submits its comments in support of the Cellular Telecommunications Industry Association's ("CTIA") above-captioned Request for Declaratory Ruling and Petition for Rulemaking.[1] McCaw welcomes CTIA's Petition as a timely effort to address a number of important issues affecting the applicability of federal tariffing requirements to cellular carriers. Prompt and favorable Commission action is warranted to minimize adverse and unintended consequences of the AT&T v. FCC decision for cellular services.[2]

---

[1] CTIA Request for Declaratory Ruling and Petition for Rulemaking, (filed Jan. 29, 1993) ("CTIA Petition"); see Public Notice, Report No. 1927 (Feb. 17, 1993).

[2] American Telephone and Telegraph Co. v. FCC, 978 F.2d 727 (D.C. Cir. 1992).

I. INTRODUCTION AND SUMMARY

CTIA requests clarification that cellular carriers are non-dominant under the Commission's rules and proposes use of streamlined tariff procedures where cellular filings are legally required.[3] CTIA also seeks reaffirmation from the Commission that many cellular services are not subject to federal tariffing obligations.

McCaw supports CTIA's Petition because the highly competitive nature of the mobile marketplace renders traditional tariff regulation for cellular services inappropriate and contrary to the public interest. Cellular licensees in each market compete vigorously in terms of price, service quality, and ancillary capabilities. Moreover, they face increased competition from a variety of alternatives to existing cellular services, such as specialized mobile radio ("SMR") and enhanced SMR ("ESMR") systems, personal communications services ("PCS"), and the landline telephone network. The imposition of tariffing requirements on the cellular industry would only stunt its development and impede competition in the mobile communications marketplace.

---

[3] See 47 U.S.C. §203 (1991). The Commission has already issued a Notice of Proposed Rulemaking tentatively concluding that the relief CTIA requests from the existing non-dominant tariffing rules should be granted. Tariff Filing Requirements for Non-Dominant Common Carriers, CC Docket No. 93-36 (released Feb. 19, 1993).

It follows that those few cellular services subject to federal tariff requirements should be given the maximum streamlined treatment lawfully permitted under the Communications Act. This will rightfully minimize the burdens placed on cellular carriers. Just as significantly, a light-handed tariffing scheme will reduce regulatory disparities between cellular carriers and other competing mobile service providers not subject to tariff obligations under the Act and Commission policies.

The characteristics of mobile service also require special consideration under Section 221(b) of the Act.[4] Cellular operators provide telephone service to their subscribers using radio communications, and "radio signals cannot recognize nor stop at a state line ..."[5] Thus, the Commission should clarify that such cellular exchange service remains exempt from federal tariffing requirements.

II. THE HIGHLY COMPETITIVE CELLULAR MOBILE MARKETPLACE SHOULD NOT BE UNDERMINED BY UNNECESSARY TARIFFING REQUIREMENTS

As the largest cellular telephone company in the United States, McCaw has endeavored to realize the Commission's stated objective of "serv[ing] the public interest by

---

[4] 47 U.S.C. §221(b) (1991).

[5] ATS Mobile Tel. v. Curtin Call Comm., Inc., 232 N.W.2d 248 (Neb. 1975) (citations omitted).

implementing a nationwide high-capacity mobile communications service."[6] Facilitated by the Commission's pro-competitive regulatory policies and driven by consumer demand, the cellular industry has experienced explosive growth and has presented the public with an exciting array of new services. This expansion has created new jobs, new opportunities and increased competition in the mobile marketplace.

Unfortunately, the cellular industry now faces substantial uncertainty regarding the applicability of federal tariffing requirements. McCaw believes that the unprecedented wholesale extension of tariffing regulation to cellular carriers is completely unwarranted. Tariffing of some variety is the traditional means of protecting the interest of consumers from abusive conduct by an established monopoly providing an essential service. But tariffing is unnecessary in a marketplace that is fast-growing and competitive even if not "perfectly" competitive as defined in economic theory. In a competitive marketplace, tariffing establishes a clear price floor and removes incentives to reduce rates.[7] The tariffing process itself provides

---

[6] Cellular Communications Systems, 86 F.C.C. 2d 469, 502 (1981).

[7] It has been suggested that California's principal cellular markets continue to experience higher cellular rates than the rest of the nation largely because the detailed tariff regulation imposed in that state discourages vigorous price competition.

competitors with a strategic resource to impose additional costs and delays on other carriers.

Moreover, as the Commission is aware, an overly burdensome tariffing regime acts like a wet blanket thrown across an entire industry. Young companies, like McCaw, that are required to operate leanly to compete, lack the internal bureaucracy dictated by full-blown tariffing. Without relief from the Commission, McCaw and other cellular carriers would be required to divert revenues from the development and deployment of services to add a new layer of administration to handle tariffing. In addition, carriers will become less responsive to customer needs and less agile in meeting competition. The Commission too, would be faced with the prospect of heaping additional work upon its overburdened staff or spending scarce dollars to add more people to process more paper. Both the industry and the public would be ill-served by such a result.

Cellular is a competitive, dynamic industry today, and will only become more and more competitive in the foreseeable future. Two independent cellular licensees in each service area compete vigorously in terms of price, service quality,

if they are dissatisfied with the price or quality of their service.

Cellular carriers are also subject to effective competition from numerous cellular resellers. As the FCC has recognized, cellular subscribers have multiple choices regarding "technology, service offerings, and service price" from which to meet their mobile communications needs.[8] Indeed, in recent written testimony before the California [illegible]

and two-way, have also recently entered the marketplace; these services compete with cellular for a large segment of customers whose mobile communications needs focus on the ability to send and receive text and data rather than communicate only by voice. In addition, the FCC has proposed to grant national 900 MHz SMRs licenses to be used for both voice and data mobile services.[12]

The Commission has also proposed to authorize at least three new PCS providers in each market "as a way of introducing additional competition to current mobile radio services."[13] PCS and cellular licensees are expected to "compete on price and quality."[14] Other direct competitors to various cellular services include the mobile satellite services and certain landline alternatives for interstate long distance calling.

---

[11](...continued)
DC-2197, released August 5, 1992; Fleet Call, Inc., Petition for Rulemaking, RM-7985, filed April 22, 1992.

[12] Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, Docket No. 89-553 (released Dec. 18, 1989) (Notice of Proposed Rulemaking); First Report and Order and Further Notice for Proposed Rulemaking, Docket No. 89-553 (released Feb. 12, 1993).

[13] Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 FCC Rcd 5676, 5688 (1992).

[14] Id. at 5701.

Significantly, many of these service providers are or may be considered private carriers, free from federal and state regulations. The application of traditional tariff requirements to cellular carriers would undermine competition and create significant market distortions by imposing heavy administrative costs exclusively on the cellular industry and its subscribers. Dominant carrier filing requirements would pose a particularly ominous threat to the free market by forcing cellular carriers to share confidential cost and pricing data with their competitors. Consequently, the private carrier mobile service providers would enjoy a distinct competitive edge in pricing their offerings, designing service plans, and marketing them to the public.

It follows that, to the extent the FCC is forced to impose some form of tariffing on cellular carriers as a result of the court's decision -- at least until that ruling is reversed or legislative relief is obtained -- it should be the least onerous regulation necessary to satisfy statutory requirements. Cellular carriers should be afforded at least as much streamlining as will be provided to non-dominant carriers. The full, fair and effective competition that would arise from keeping all competitors on an equal regulatory footing would benefit the public through the availability of a greater range of diverse services at lower prices.

III. ANY CELLULAR SERVICES WHICH MUST BE TARIFFED UNDER THE ACT QUALIFY FOR STREAMLINED NON-DOMINANT TREATMENT

A. The Competition Faced By Cellular Carriers Demonstrates That They Lack Market Power And Are Consequently Non-Dominant

While the Commission has previously opined that cellular carriers are dominant in some respects,[15] it has never undertaken the required market power analysis to determine whether that status is truly warranted. In fact, the Commission has conceded as much in granting an interim waiver of the dominant carrier tariffing rules for cellular companies.[16] McCaw submits that an examination of today's cellular market permits only one conclusion -- that cellular carriers merit non-dominant treatment.

The rapid growth of both cellular services and substitutable offerings from other wireless service providers demonstrate that there are no significant barriers to entry in the mobile marketplace. The fact that in a young industry, like cellular, system capacity has been expanding substantially -- and that cellular service accounts for no more than five percent of the total telecommunications

---

[15] See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (Fifth Report and Order), 98 F.C.C. 2d 1191, 1204 n.41. (finding cellular carriers dominant but possessing a limited ability to engage in anticompetitive conduct or cost-shifting).

[16] Petition for Waiver of Part 61 of the Commission's Rules, DA 93-196 (released Feb. 19, 1993).

market, and less than one percent of the interexchange market[17] -- confirms that opportunities remain for new entrants. As CTIA notes,

> [i]t makes little sense to confer non-dominant status on an interexchange carrier the size of MCI, yet retain the dominant classification for cellular carriers which are engaged in interstate services to an extremely limited extent by comparison.[18]

Clearly, neither the cellular industry nor any of its participants can be considered dominant in the interstate market.

Moreover, as shown above, the imposition of dominant carrier tariffing obligations on cellular service providers would be contrary to the public interest. Not only would such burdens require wrenching reorganization of existing business operations that were established to accommodate a competitive environment, they would be extremely costly to implement. As a result, resources would need to be redirected from more productive activities. It is, therefore, not surprising that nowhere in this nation are cellular carriers required to comply with existing and laborious regulatory burdens equivalent to those tariffing

---

[17] See CTIA Petition at 19 n.47.

[18] Id. at 20.

constraints associated with dominant carrier status under the Commission's rules.

Classification of cellular carriers as non-dominant also is consistent with the FCC's treatment of participants in telecommunications markets with similarly or even less competitive structures. For example, the Commission has tentatively declared local multipoint distribution service ("LMDS") providers to be non-dominant when operating in a duopoly market -- like cellular.[19] The FCC has also classified even the sole MSS licensee as non-dominant because of the availability of substitute services.[20] Accordingly, the Commission should declare that any cellular services subject to federal tariffing will receive streamlined non-dominant treatment under the Act.

---

[19] Local Multipoint Distribution Service, FCC 92-538 (released Jan. 8, 1993) (Notice of Proposed Rulemaking).

[20] Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, 2 FCC Rcd 485, 490 (1987) (Second Report and Order), aff'd, 2 FCC Rcd 6830 (1987), further recon. denied, 4 FCC Rcd 6016 (1989), vacated in part, ARINC v. FCC, 928 F.2d 428 (D.C. Cir. 1991), tentative decision on remand, 69 Rad. Reg. 2d (P&F) 828 (1991), final decision on remand, 70 Rad. Reg. 2d (P&F) 271 (1992).

B. McCaw Agrees That Part 61 Should Be Amended To Further Streamline The Tariff Filing Procedures For Cellular Carriers

McCaw strongly supports CTIA's requested revisions to the tariffing rules, particularly the elimination of cost support data and notice periods. Saddling cellular carriers with these incongruous burdens would seriously diminish the flexibility and competitiveness of the entire mobile communications marketplace. The net result would be detrimental to both consumers and the wireless industry.

Under the existing tariff rules, cellular carriers such as McCaw would be forced to file tariffs for all pricing and service modifications made in response to consumer demand. As the Commission has recognized, a notice period for such filings would adversely impact the marketplace by providing competitors with advance notice of marketing strategies and by restricting some carriers' ability to quickly respond to changing market conditions.[21] Problematically, there would be no corresponding constraints on untariffed competitors.

In addition, as discussed above, public filing of extensive cost support data would supply competitors with proprietary, competitively sensitive information. Such requirements should be discarded as they would create a

---

[21] See Tariff Filing Requirements for Non-Dominant Common Carriers, CC Docket No. 93-36 (released Feb. 19, 1993).

serious regulatory imbalance and discourage new service offerings, resulting in no tangible benefit to consumers.

Finally, McCaw submits that "banded rates" -- a range of rates or a maximum rate -- and other comparably flexible provisions affecting cellular service offerings should satisfy Section 203 obligations. Such rate structures would permit cellular carriers to continue to respond competitively by lowering prices to meet subscriber demands. The Commission has tentatively recognized the propriety of such a scheme for non-dominant common carriers.[22] Only in this manner can the FCC substantially mitigate the adverse consequences of imposing tariffing obligations on cellular carriers.

IV. MOBILE SERVICES INVOLVE SPECIAL SECTION 221(b) ISSUES

McCaw also agrees with CTIA that the Commission should confirm that cellular exchange services are not subject to the FCC's tariffing jurisdiction where they incidentally traverse state lines.[23] While the AT&T v. FCC decision found permissive detariffing to be contrary to Section 203(a) of the Act and reversed portions of the Competitive Carrier policies, the court did not address the regulatory status of

---

[22] Id.

[23] CTIA Petition at 3.

services falling outside of the scope of the Commission's jurisdiction.

Specifically, Section 221(b) provides that:

> [N]othing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communications, in any case where such matters are subject to regulation by a State commission or by local governmental authority.[24]

Clearly, cellular service constitutes exchange service within the meaning of Section 221(b). Thus, mobile services that are essentially intrastate, with de minimus interstate extensions, are exempt from federal tariffing obligations. Radio waves, unable to conform to predetermined boundaries, will inevitably cross state borders.

Moreover, certain local cellular markets such as Kansas City, KS/Kansas City, MO, involve an interstate component by definition. Section 221(b) was intended to preserve state jurisdiction in such cases. The Commission has recognized

---

[24] 47 U.S.C. §221(b) (1991).

this limitation on many occasions and should now reaffirm this long-standing policy.[25]

V. CONCLUSION

From the initial authorization of cellular service, the Commission has recognized its unique characteristics, allowing cellular carriers to configure systems without regard to unwarranted regulatory strictures or traditional geographic boundaries. The Commission's forward-looking approach has been well-rewarded. Unfettered by inappropriate regulation, the cellular industry today is characterized by robust competition and beneficial service packages that meet

---

[25] See MTS/WATS Market Structure, 97 F.C.C. 2d 834, 882 (1984) (treat[ing] the mobile radio services provided by RCCs and telephone companies as local in nature); Mobile Radio Services, 93 F.C.C. 2d 908, 920 (1983) (because paging services have historically been local in nature, the states have traditionally regulated paging common carriers); The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 59 Rad. Reg. 2d (P & F) 1275, 1284 (1986) ("cellular carriers are generally engaged in the provision of local, intrastate, exchange telephone service").

McCaw also recommends a broad and flexible construction of Section 221(b)'s "subject to state regulation" requirement. Specifically, McCaw believes that active state regulation is not required to remove cellular exchange services from FCC jurisdiction. This is consistent with the Commission's previous interpretation of the analogous phrase "subject to public regulation" as not requiring active regulation in its Computer II decisions. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C. 2d 384, 493 (1980), further proceedings, 84 F.C.C. 2d 50, 107 (1980), aff'd sub nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982).

the unique requirements of mobile users for local, regional and nationwide wireless communications services.

To preserve this healthy competitive environment, the Commission should now clarify the applicability of the federal tariffing requirements to cellular carriers as set out above. Such measures are necessary to ensure full, fair, and effective competition in the mobile marketplace after AT&T v. FCC.

Respectfully submitted,

MCCAW CELLULAR COMMUNICATIONS, INC.

By: Scott K Morris/cac

Scott K. Morris
Vice President, Law
MCCAW CELLULAR COMMUNICATIONS, INC.
5400 Carillon Point
Kirkland, Washington 98033
(206) 828-8420

Cathleen A. Massey
Senior Regulatory Counsel
MCCAW CELLULAR COMMUNICATIONS, INC.
1250 Connecticut Avenue, N.W.
Suite 401
Washington, D.C. 20036
(202) 223-9222

March 19, 1993

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 1993, I caused copies of the foregoing "Comments of McCaw Cellular Communications, Inc." to be mailed via first-class postage prepaid mail to the following:

Michael F. Altschul
Cellular Telecommunications Industry Association
Vice President and General Counsel
Two Lafayette Centre, Suite 300
1133 21st Street, N.W.
Washington, D.C. 20036

Evelyn Ramos

Testimony of Cheryl A. Tritt
Chief, Common Carrier Bureau
Federal Communications Commission

Hearing Before the
Senate Committee on Energy and Public Utilities
California Legislature

January 12, 1993

Chairman Rosenthal and Members of the Senate Energy and Public Utilities Committee:

I appreciate this opportunity to provide testimony regarding the Federal Communications Commission's (FCC) actions to promote competition in the nationwide

Although the current level of cellular competition may not be optimal,[7] I would like to stress two points in assessing the development of competition and the FCC's expectations for the future of competition in the cellular marketplace. First, when the FCC established the licensing system for accepting cellular applications in 1981 -- under which two carriers would compete in each cellular market -- the Commission noted that competition "will foster important public benefits of diversity of technology, service and price. . . ."[8] With this duopoly market firmly established, the cellular industry has seen strong and steady growth, burgeoning demand, competition based on price and service, and continued improvement in service quality and coverage.

Second, there are new services driven by new technologies that will play a major role in bringing a greater level of competition to cellular markets. Emerging new offerings such as Personal Communications Services (PCS) are expected to facilitate a variety of new and innovative services to meet consumers' demands and needs for mobile and portable communication services.

The FCC anticipates that these services will be priced competitively with existing mobile communications services such as cellular, paging and private radio services that will result in lowering the cost of these existing services. PCS also could augment emergency communications when disasters, such as earthquakes or tornadoes, render the public switched telephone network inoperable. Several consumer studies have projected that there could be over 60 million PCS users in the United States within ten years.[9]

Among the existing mobile communications technologies that may compete with cellular is Specialized Mobile Radio (SMR). SMR currently provides businesses with mobile radio services to meet internal communications needs. Advances in digital technology will allow SMR to develop cost-effective services that are likely to compete directly with cellular.

In 1991, the Commission waived the one-year construction requirement to allow [illegible]

San Francisco, Chicago and New York in 1994; and Dallas/Forth Worth and Houston in 1995.[11] With the Fleet Call/DisCom merger and with advances in equipment manufacturing, some expect SMR to offer comparable system cost structures and competitive pricing relative to cellular.[12]

Mobile satellite two-way voice service and mobile data service are additional new technologies that will compete for business and consumer wireless customers in the future. While it is expected that high end international business users will most likely benefit from mobile satellite services, mobile data will compete both in the business and consumer segments, and it may be offered over cellular, SMR, satellite, and other public and private network systems.

I should also point out that the balance between state and federal regulation of the cellular industry has been one of the Commission's primary concerns. For example, at the time the Commission created the regulatory structure for cellular service it preempted state regulation of technical standards. This ensured compatible operation of equipment on both local and national levels. The Commission stated that it is imperative that no additional technical requirements be imposed by the states which could conflict with our standards and frustrate the federal scheme for the provision of nationwide cellular service. This remains one of our primary concerns today. We would closely scrutinize any measures -- such as state-imposed requirements that cellular carriers provide interconnection to reseller switches -- which may interfere with the compatible operation of cellular equipment.[13]

I thank Chairman Rosenthal for this opportunity to submit my written comments regarding competition in the cellular industry. As the FCC embarks on the licensing of unserved areas in the cellular service, we can expect that additional members of the public will receive cellular service. In addition, future competition for cellular is assured by the new technologies I have mentioned, and I expect the competitive alternatives available to consumers will keep prices at market levels. As needed, the Commission remains committed to taking further steps to foster additional competition in the cellular marketplace.

Cheryl A. Tritt
Chief, Common Carrier Bureau
Federal Communications Commission

---

11 "Fleet Call, DisCom Eye $320M Tax-Free Merger," Radio Communications Report, Jan. 4, 1993.

12 See CTIA Paper, "The Changing Role of Cellular in the Wireless Marketplace," Dec. 1992.

13 Cellular Systems, 89 FCC 2d 58, 95 (1982). See Sections 2(b) and 221(b) of the Communications Act. 47 C.F.R. §§2(b) and 221(b).