

EX PARTE OR LATE FILED

RECEIVED



**McCaw Cellular  
Communications, Inc.**

DOCKET FILE COPY ORIGINAL

JAN 27 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Cathleen A. Massey  
Senior Regulatory Counsel

January 27, 1994

William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Mail Stop Code 1170  
Washington, D.C. 20544

RE: Ex Parte Presentation  
GN Docket 93-252 (Regulatory Treatment of Mobile Services)

Dear Mr. Caton:

Pursuant to the requirements of Sections 1.1200 et seq. of the Commission's Rules, you are hereby notified that on behalf of McCaw Cellular Communications, Inc. ("McCaw"), Gerard Salemme, Senior Vice President - External Affairs and Howard J. Symons of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. met today with Byron Marchant, Senior Advisor to Commissioner Andrew C. Barrett and Brian F. Fontes, Senior Advisor to Commissioner James H. Quello. The issues discussed at the meeting concerned the rulemaking referenced above and are outlined in the attached document.

Should there be any questions regarding this matter, please contact the undersigned.

Sincerely,

*Cathy Massey*  
Cathleen A. Massey

cc: Byron Marchant  
Brian F. Fontes  
Howard J. Symons

No. of Copies rec'd 041  
List ABCDE

JAN 27 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY  
GN DOCKET 93-252 (REGULATORY PARITY)  
EX PARTE PRESENTATION  
PAGE 1 OF 2

**FORBEARANCE ANALYSIS UNDER SECTION 332(c)**

Section 332(c) established the test for the Commission to use in determining whether to forbear from imposing provisions of Title II on commercial mobile service providers. Under this three-part test, the Commission may forbear if it determines that (1) enforcement of a provision is unnecessary to ensure that rates are just, reasonable, and nondiscriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest. As part of evaluating the third factor, the Commission must consider whether forbearance "will promote competitive market conditions, including the extent to which such [forbearance] will enhance competition among providers of commercial mobile services."<sup>2</sup>

*Section 332(c) does not require the Commission to classify a commercial mobile service provider as non-dominant in order to justify forbearance.* Congress was well aware of the Competitive Carrier framework when it enacted Section 332(c).<sup>3</sup> Nonetheless, even when the conferees added the requirement that the Commission evaluate market conditions before it decides to forbear, they did not establish as a precondition for forbearance the dominant non-dominant dichotomy that was the underpinning of the Competitive Carrier policy. Rather, Section 332 requires only that the Commission determine that forbearance will "promote competition among providers of commercial mobile services."<sup>4</sup> The Commission is empowered to forbear from imposing tariffing requirements on providers of commercial mobile services.

The Commission clearly has before it a record sufficient to support forbearance. The record in the Regulatory Parity proceeding convincingly demonstrates that the three statutory standards are met. The record contains an overwhelming consensus that tariffing of cellular

---

<sup>1</sup> 47 U.S.C. § 332(c)(1)(A)(i)-(iii).

<sup>2</sup> 47 U.S.C. § 332(c)(1)(C); see also H.R. Rep. No. 213, 103d Cong., 1st Sess. 491 (1993) ("Conference Report").

<sup>3</sup> See, e.g., H.R. Rep. No. 11, 103d Cong., 1st Sess. 260-261 (1993) ("House Report") (stating that the Committee was "aware" of the court decision voiding "the Commission's long-standing policy of permissive detariffing, applied to non-dominant carriers").

<sup>4</sup> 47 U.S.C. § 332(c)(1)(C); see also Conference Report at 491.

<sup>5</sup> Only Sections 201, 202, and 208 may not be specified as inapplicable. 47 U.S.C. § 332(c)(1)(A). See also House Report at 260-61 ("[t]he Commission may specify . . . the [sic] commercial mobile services need not be tariffed at all").

services is unnecessary to protect consumers, unduly burdensome, and potentially anticompetitive, and that treating cellular carriers differently from other commercial mobile service providers for tariffing purposes would impede competition and harm competitors.<sup>6</sup> As the attached bibliography of materials submitted in the Regulatory Parity proceeding demonstrates, there is more than an adequate basis to conclude that forbearance would promote competition among providers of commercial mobile services and is otherwise justified under the statutory prerequisites.

That is all that is required; the Commission need not decide the issue of whether cellular licensees or any other commercial mobile service providers are non-dominant. Even assuming arguendo the Commission initiates an examination of cellular carriers' market power, the cellular industry itself is competitive.<sup>7</sup> The documents listed on the attached bibliography support such a finding.

---

<sup>6</sup> Thirty-nine parties filed comments for the record in the Regulatory Parity proceeding in support of exempting commercial mobile service providers from tariffing requirements, while only five -- three state PUCs, NABER and the National Cellular Resellers Association -- supported maintaining tariff requirements.

<sup>7</sup> The average subscriber penetration by both cellular carriers in a market area is approximately five percent, and cellular operators face actual or imminent competition from resellers, ESMRs, and up to seven PCS carriers in each service area. Cellular also faces prospective competition from mobile satellite services. Given cellular carriers' lack of market power, it would be unnecessary and counterproductive to regulate them more stringently than other providers of commercial mobile service. Such disparate treatment of cellular also would be contrary to statutory intent. See House Report at 259-60 (intent of parity provision is to ensure that "equivalent mobile services are regulated in the same manner"). Because all commercial mobile services satisfy the statutory criteria for preemption, there is no justification for the Commission to differentiate among them. Cf. Conference Report at 491 ("[d]ifferential regulation . . . is permissible *but is not required*") (emphasis supplied).

## Competition Materials on the Record

Stanley M. Besen, Robert J. Larner, and Jane Murdoch, *The Cellular Service Industry: Performance and Competition*, November 1992 (filed by CTIA)

CTIA, *Cellular: Building for the Wireless Future*, March 26, 1993 (filed by CTIA)

CTIA, *The ABCs of Cellular Competition*, 1993 (filed by CTIA)

EMCI, *The Changing Wireless Marketplace*, December 17, 1992 (filed by CTIA)

Testimony of Jerry A. Hausman before North Carolina Utilities Commission in Docket No. P-100, SBU 114, on Exempting Domestic Public Cellular Radio Telecommunications Service Providers from Regulation, 1991 (filed by Bell Atlantic)

Affidavit of Jerry A. Hausman, United States v. W. Elec. Co., Inc., Civil Action No. 82-0192 (D.D.C. July 29, 1992) (filed by CTIA)

Peter W. Huber, Michael K. Kellogg and John Thorne, *The Geodesic Network II: 1993 Report on Competition in the Telephone Industry*, 1993 (filed by CTIA)

Peter W. Huber, *Report of the Bell Companies On Competition in Wireless Telecommunications Services*, 1991 (filed by CTIA)

Drs. Charles Jackson and John Haring, *Errors in Hazlett's Analysis of Cellular Rents*, September 1993 (filed by CTIA)

PSC of Maryland, Division of Rate Research and Economics, *A Report on Cellular Telephone Service in Maryland*, September 1990 (filed by Bell Atlantic)

North Carolina Utilities Commission, *Order Exempting Domestic Public Cellular Radio Telecommunications Service Providers from Regulation*, Docket No. P-100, SBU 114, February 14, 1992 (filed by Bell Atlantic)

---

# **Personal Communications**

---

*Perspectives,*

*Forecasts,*

*and*

*Impacts*

**Expanded Table of Contents  
and Summary**

**Ralph C. Lenz  
Lawrence K. Vanston**

## Chapter One

### Cellular/PCN Prices and Subscribers

From 1984 through 1992, cellular prices in constant dollars have declined an average of 22% per year for the handset and 10.5% per year for service. In the future, we see handset prices, which on a monthly basis are already low, approaching a lower limit. In the absence of a major change in the driving forces for carrier service pricing, we expect that the established rates of decline will continue. (The most credible potential driving force change is the introduction of additional competition through PCN licenses.) This implies that carrier charges that now average \$80 to \$90 for a customer using 250 minutes of prime-time service per month will average under \$31 (in 1992 dollars) in the year 2001. This trend in carrier charges implies that average airtime charges would fall to under \$0.10 per minute by the year 2003.

Our "low-demand" forecast for cellular/PCN subscriber demand assumes that the price trends outlined above continue and that the historical price-demand relationship holds. We expect the 10 million U.S. cellular subscribers in 1992 to grow to 38 million by the year 2001. We call this our "low demand" scenario for cellular/PCN subscribers because it is more likely to understate demand than overstate it. The reason is prior forecasts using the same basic methodologies (but with less data) have underestimated the demand that actually developed.

*Carrier charges that now average \$80 to \$90 for a customer using 250 minutes of prime-time service per month will average under \$31 (in 1992 dollars) in the year 2001.*

If carrier charges are reduced faster than normal or if customers assign much greater value to mobility than is currently evident, subscribership of over 100 million by the year 2001 could be obtained. This high-demand scenario, although unlikely based on current evidence, needs to be seriously considered, and a lookout for factors supporting it should be maintained.

In our discussion of prices and subscriber demand, we have not drawn a distinction between PCN and cellular service. This is consistent with our assumption that, from the customer's perspective, personal communications is independent of the underlying technology. Since any significant penetration of PCN is unlikely before 1995, there is perilously little data on which to base a separate PCN forecast. We have examined possible scenarios for anywhere from 8 million to 67 million PCN users by 2001. The lower value, which we find the most credible, assumes that PCN penetrates the market at the same rate cellular did. The higher value assumes a