

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

RECEIVED

MAY 19 1994

In the Matter of)
)
Implementation of Sections 3(n))
and 332 of the Communications Act) GN Docket No. 93-252
)
Regulatory Treatment of Mobile Services)

To: The Commission

DOCKET FILE COPY ORIGINAL

PETITION FOR CLARIFICATION

MCCAW CELLULAR COMMUNICATIONS, INC.

Scott K. Morris
Vice President of External Affairs
McCaw Cellular Communications, Inc.
5400 Carillon Point
Kirkland, Washington 98033
(206) 828-8420

Of Counsel:

Howard J. Symons
Gregory A. Lewis
Kecia Boney
Mintz, Levin, Cohn, Ferris
Glovsky and Popeo, P.C.
Suite 900
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Cathleen A. Massey
Senior Regulatory Counsel
McCaw Cellular Communications, Inc.
4th Floor
1150 Connecticut Avenue, N.W.
Washington D.C. 20036
(202) 223-9222

May 19, 1994

No. of Copies rec'd 0211
List A B C D E

Table of Contents

Introduction and Summary 1

I. The Commission Should Clarify That the Principle of Mutual Compensation and the "Good Faith" Negotiation Standard Apply to Intrastate Interconnection Arrangements 5

II. The Commission Should Clarify that States Lack the Authority to Mandate Interconnection or Require the Unbundling of CMRS Facilities Associated with Network Interconnection 7

III. The Commission Should Clarify that State Jurisdiction over the Terms and Conditions of Intrastate Offerings Does Not Confer the Authority to Require the Filing of Informational Tariffs 9

IV. CMRS Providers Should Have Sufficient Latitude in the Offering of CMRS Services to Meet Competition 12

V. The Commission Should Clarify that All CMRS Providers may Utilize their Authorized Frequency to Provide Service on a Private Carriage Basis 15

Conclusion 17

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

In the Matter of)
)
Implementation of Sections 3(n))
and 332 of the Communications Act) GN Docket No. 93-252
)
Regulatory Treatment of Mobile Services)

To: The Commission

PETITION FOR CLARIFICATION

Introduction and Summary

McCaw Cellular Communications, Inc. ("McCaw"), pursuant to Section 1.429 of the Commission's rules, hereby petitions the Commission to reconsider and clarify certain aspects of the Second Report and Order^{1/} in the above-captioned proceeding.

In enacting Sections 3(n) and 332 of the Communications Act ("Act"),^{2/} Congress sought to establish a comprehensive Federal scheme to govern the offering of mobile radio services^{3/} under which like services are subject to consistent regulatory treatment.^{4/} The Second Report and Order substantially

^{1/} FCC 94-31 (released March 7, 1994), 59 Fed. Reg. 18493 (April 19, 1994).

^{2/} 47 U.S.C. §§ 3(n), 332, as amended by Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993).

^{3/} See H.R. Rep. No. 213, 103d Cong., 1st Sess. 490 (1993) ["Conference Report"]; H.R. Rep. No. 111, 103d Cong., 1st Sess. 260 (1993) ["House Report"].

^{4/} See, e.g., House Report at 259-60.

accomplishes these goals, creating a sound regulatory foundation for the continued growth and development of commercial mobile radio services ("CMRS"). By this petition, McCaw seeks clarification on several matters that, if left unaddressed, could inadvertently undermine the policies embodied in the Act and the Commission's rules.

With respect to the obligations of local exchange carriers ("LECs") to provide reasonable interconnection to CMRS providers, the Commission should clarify that the principle of mutual compensation between LECs and CMRS providers -- as an essential component of the "reasonable interconnection" standard -- should apply to intrastate as well as interstate traffic. The Commission should also reaffirm that negotiations over the rates for intrastate interconnection, including mutual compensation, should be subject to the "good faith" standard applicable to negotiations with respect to the terms and conditions of interconnection. Conformance with these principles regardless of jurisdiction will ensure the continued development of a seamless national wireless infrastructure, without unduly interfering with state authority over intrastate interconnection rates.

In view of the Commission's plenary authority over the nature and scope of interconnection requirements, the Commission should also clarify that states lack authority to mandate interconnection or require the unbundling of CMRS facilities associated with network interconnection during the pendency of the Commission's review of this issue. Absent clarification,

states could attempt to exploit the Commission's decision to defer the imposition of interconnection obligations on CMRS providers by developing and implementing their own interconnection requirements. Such a result would interfere with the Commission's desire to formulate a uniform policy on interconnection and impede the growth and development of seamless national mobile service, contrary to the intent of Congress.^{5/}

While the Commission has properly forborne from requiring CMRS providers to file tariffs, the Second Report and Order suggests that states may require CMRS providers to file intrastate CMRS tariffs specifying the terms and conditions of service. Such a result is inconsistent with the Act, which, with respect to the terms and conditions of mobile service offerings, simply preserves state authority over consumer protection, land use, and other matters traditionally within a state's regulatory power. The Commission should clarify that this authority does not include the power to compel the filing of tariffs and, especially, the filing of even non-binding rate information.

The Commission should also articulate the standard applicable to the review of the rates of a CMRS provider. Particularly during the statutorily-mandated transition period, during which private carriers offering commercial services remain exempt from common carrier requirements, CMRS providers will need

^{5/} See, e.g., id. at 261 ("The Committee considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network.").

sufficient latitude in establishing prices to be able to compete against providers of functionally equivalent services who can set their rates without regard to the standards applicable to CMRS. More generally, given the existing and increasing range of CMRS options available to the public, the Commission should not find a CMRS rate "unjust and unreasonable" or "unreasonably discriminatory" if other providers in the marketplace charge similar rates for equivalent services.

Finally, the Commission should clarify that all CMRS providers may utilize their authorized frequency to provide service on a private carriage basis, assuming that the service meets the definition of private mobile radio. This flexibility is implicit in the Commission's decision to subject all CMRS providers, including providers of personal communications services ("PCS"), to equivalent regulation, and to permit PCS providers to offer both private and commercial mobile service utilizing the same frequency. To remove any ambiguity, however, the Commission should explicitly find that all CMRS providers enjoy the same regulatory flexibility.

I. The Commission Should Clarify That the Principle of Mutual Compensation and the "Good Faith" Negotiation Standard Apply to Intrastate Interconnection Arrangements

In the Second Report and Order, the Commission required LECs to provide "reasonable and fair interconnection" for all commercial mobile radio services.^{6/} The Commission should clarify that the principle of mutual compensation, as an essential component of the "reasonable interconnection" standard, is applicable to intrastate as well as interstate traffic. The Commission should also reaffirm that negotiations over the rates for intrastate interconnection, including mutual compensation, should be subject to the "good faith" standard applicable to negotiations over interstate interconnection rates. Ensuring conformance with these principles regardless of jurisdiction will ensure the continued development of a seamless national wireless infrastructure.

Under mutual compensation arrangements, cellular carriers recover the costs of switching and terminating traffic for the other entity's network.^{7/} The principle of mutual compensation is separate from the actual rates that a carrier pays to another carrier for switching and terminating traffic originating on the carrier's network, and the Commission has held that mutual compensation is a primary element of the reasonable

^{6/} Second Report and Order at ¶ 230.

^{7/} The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 2 FCC Rcd. 2910, 2915 (1987) ["1987 Interconnection Order"].

interconnection that LECs must offer all CMRS providers.^{8/} Thus, like the other elements of reasonable interconnection, mutual compensation should not be limited to interstate interconnection arrangements.

Unlike interconnection rates, the obligation to provide reasonable interconnection is not segregable between intrastate and interstate commercial mobile radio services. For this reason, and because state regulation in this instance "would negate the important federal purpose of ensuring CMRS interconnection to the interstate network," the Commission has preempted state and local regulation of interconnection matters other than rates.^{9/} The lack of mutual compensation with respect to intrastate traffic would also impede interconnection by imposing upon CMRS providers the burden of terminating and switching that traffic without the opportunity to recover the costs associated with those activities.

Just as there is a single set of rules to govern the physical requirements of interconnection, there must be a uniform principles to govern the relationships between interconnecting carriers. To this end, the Commission should clarify that, notwithstanding state jurisdiction over intrastate

^{8/} Second Report and Order at ¶ 232.

^{9/} Id. at ¶ 230.

interconnection rates, the principle of mutual compensation applies to intrastate interconnection arrangements.^{10/}

II. The Commission Should Clarify that States Lack the Authority to Mandate Interconnection or Require the Unbundling of CMRS Facilities Associated with Network Interconnection

The Commission has announced its intention to initiate an inquiry into the appropriate nature and scope of interconnection obligations of CMRS providers.^{11/} In view of the complexities surrounding the question and the conflicting information that the Commission has received on this issue,^{12/} the Commission's proposed course of action is appropriate. The results of this inquiry will significantly affect the future development of the mobile services market, and it should be undertaken carefully. Pending the outcome of the inquiry, the Commission should ensure that the states do not subvert its efforts to establish a uniform interconnection policy by imposing their own interconnection requirements or requiring CMRS providers to unbundle network facilities associated with CMRS interconnection.

The recognition of mobile telephone units, the assignment of frequencies, the supervision of call "hand-offs," and the routing

^{10/} For the same reasons, the Commission should also clarify that the "good faith" standard governing negotiations between CMRS providers and LECs applies with respect to rates for intrastate interconnection as well as to terms and conditions. Ensuring conformance with this standard will ensure the continued development of a seamless national wireless infrastructure, without unduly interfering with state authority over intrastate interconnection rates.

^{11/} Second Report and Order at ¶ 237.

^{12/} Id.

of calls are integral components of a CMRS network. The imposition of state interconnection policies requiring the unbundling of these and other CMRS network functions would effectively negate nationwide CMRS service by forcing CMRS providers to engineer and construct state-specific CMRS facilities. Indeed, compliance with a multitude of state interconnection and unbundling requirements would likely be cost prohibitive. At a minimum, compliance with state interconnection requirements would undermine technological innovation by diverting CMRS resources to the re-engineering of existing network architectures -- re-engineering that could be mooted by the adoption of Federal interconnection standards following the Commission's inquiry.

Preemption in this instance is fully consistent with the Commission's long-standing assertion of plenary authority over the nature and scope of interconnection obligations in the mobile services.^{13/} In the case of CMRS interconnection, once the Commission adopts an interconnection policy, the statute clearly preempts state authority even as to interconnection rates.^{14/} Mobile services, by their nature, "operate without regard to state lines as an integral part of the national telecommunications infrastructure."^{15/} Because state interconnection requirements would be inconsistent with the

^{13/} 1987 Interconnection Order, 2 FCC Rcd. at 2912-13.

^{14/} Second Report and Order at ¶ 237.

^{15/} House Report at 260.

Federal interest in national mobile service,^{16/} the Commission should clarify that states are barred from adopting such requirements.^{17/}

III. The Commission Should Clarify that State Jurisdiction over the Terms and Conditions of Intrastate Offerings Does Not Confer the Authority to Require the Filing of Informational Tariffs

In the Second Report and Order, the Commission properly recognized that conditions in the CMRS market are sufficiently competitive to warrant forbearance from requiring, or even permitting, CMRS providers to file tariffs.^{18/} The Commission should also clarify that states may not require CMRS providers to file informational tariffs for intrastate CMRS services.

Unless and until a state becomes certified to regulate the rates for intrastate CMRS services, the Commission retains

^{16/} See 47 U.S.C. § 332(c)(1)(B); House Report at 261.

^{17/} At least one state is currently exploring the imposition of unbundling requirements on CMRS providers to facilitate interconnection with those providers. Investigation on the Commission's Own Motion into Mobile Telephone Service and Wireless Communications, Order Instituting Investigation No. I.93-12-007 (filed December 17, 1993). The California Public Utilities Commission has proposed to require cellular carriers to unbundle the "radio portion" of their service, *id.* at 27, and subject such carriers to cost-based rate regulation. *Id.* at 20-23. This proceeding, which was initiated after the enactment of new Section 332, is only the latest manifestation of California's efforts to impose interconnection obligations on cellular carriers. See Re-Regulation of Cellular Radiotelephone Utilities, 36 Cal.P.U.C.2d 464 (1990). These efforts are clearly beyond a state's authority over CMRS providers.

^{18/} Second Report and Order at ¶¶ 173-175, 178.

residual authority to regulate intrastate rates.^{19/} Section 332 expressly deprives the states of authority to regulate intrastate CMRS rates unless and until they successfully petition the Commission for such authority.^{20/} Concurrently, while Section 2(b) of the Act generally deprives the Commission of authority over intrastate communications,^{21/} Congress amended that section to except mobile communications services from the general limitation on Commission authority.^{22/}

A broad limitation on state authority over CMRS service is consistent with the general Congressional intent underlying Section 332. Thus, in generally preempting state regulatory authority, Congress sought "[t]o foster the growth and development of mobile services, that, by their nature, operate without regard to state lines as an integral part of the national

^{19/} Cf. id. at ¶ 179 ("The revised Section 332 does not extend the Commission's jurisdiction to the regulation of local CMRS rates. Thus, our decision to forbear from requiring the filing of federal (i.e., interstate) tariffs, has no impact on those services.").

^{20/} 47 U.S.C. § 332(c)(3)(A). Moreover, Congress provided for state certification to regulate rates only when significant market failure justified the substitution of regulation for the operation of market forces. See id.

^{21/} Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374 (1986).

^{22/} 47 U.S.C. § 152(b) (establishing that the Commission lacks jurisdiction over intrastate communications "[e]xcept as provided in . . . section 332") (emphasis supplied).

telecommunications infrastructure" ^{23/} To permit states to require the filing of tariffs that simply omit the rate information would contravene the Act, especially given the Commission's conclusion that tariff filings are unnecessary and even anticompetitive. ^{24/}

While the Act authorizes states to regulate "other terms and conditions of commercial mobile services," ^{25/} that authority does not permit states to require the filing of informational tariffs for intrastate CMRS service. To the contrary, the statutory reference to "other terms and conditions" was intended to preserve traditional state authority over consumer protection, zoning, corporate activities, and other such matters. ^{26/} This

^{23/} House Report at 260. Cf. Conference Report at 494 ("[T]he Commission, in considering the scope, duration, or limitation of any State regulation shall ensure that such regulation is consistent with the overall intent of this subsection . . . so that . . . similar services are accorded similar regulatory treatment").

^{24/} See Second Report and Order at ¶¶ 174-175. Clearly, a state that has not obtained certification to regulate rates may not tariff intrastate CMRS rates. To avoid any misunderstanding, the Commission should also clarify that states may not require CMRS providers to file even non-binding rate information, even if the state denominates such information as a "term" or "condition" of service. As the Commission itself has noted, tariff filings containing rate information can create significant competitive risks. Id. at ¶¶ 177-178. Permitting states to require the filing of price lists -- in light of the Commission's decision to forbear from requiring tariffs and to refuse even voluntary tariff filings -- would be fundamentally inconsistent with the Congressional goal of creating a uniform regulatory scheme for commercial mobile services. Conference Report at 490. See also 47 U.S.C. § 332(c)(3)(A).

^{25/} 47 U.S.C. § 332(c)(3)(A).

^{26/} See House Report at 261.

statutory authority does not permit states to require CMRS providers to file informational tariffs, and the Commission should clarify the Second Report and Order accordingly.

IV. CMRS Providers Should Have Sufficient Latitude in the Offering of CMRS Services to Meet Competition

Notwithstanding the Commission's decision to forbear from requiring CMRS providers to file tariffs, CMRS providers are subject to complaints under Section 208 of the Communications Act.^{27/} The Commission should take the opportunity in this proceeding to clarify the standard applicable to challenges to CMRS rates.^{28/} Especially during the statutorily-mandated transition period, when private carriers offering commercial services will remain free of common carrier obligations, the Commission should allow the competitive marketplace to discipline rates and accord CMRS providers sufficient latitude in the pricing of CMRS offerings to meet competition. More generally, because consumers will be able to choose from an existing and

^{27/} 47 U.S.C. § 332(c)(1)(A) (barring the Commission from exempting CMRS providers from Section 208). See also Second Report and Order at ¶ 176 ("the Section 208 complaint process [will] permit challenges to a carrier's rates or practices and full compensation for any harm due to violations of the Act").

^{28/} A complainant in a Section 208 proceeding against a CMRS provider would bear the burden of proving the unlawfulness of a carrier's rates, as well as actual injury. See, e.g., MCI Telecommunications Corporation v. Pacific Bell Telephone Co., 8 FCC Rcd. 1517, 1521 (1993) ("[I]ndividual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.").

increasing range of CMRS options, resort to the Section 208 complaint process should become increasingly unnecessary.

Sufficient latitude in the pricing of CMRS offerings is particularly warranted during the statutorily-mandated transition period.^{29/} Private carriers offering commercial services may continue to price and customize their services free of the regulatory burdens imposed on their common carrier competitors. CMRS providers will need to be able to establish prices at levels that permit them to compete with providers of functionally equivalent services who can set their rates without regard to the standards applicable to commercial services. A CMRS rate should be upheld if it can be shown that the complainant can obtain comparable service from a different provider.

Apart from the transition issue described above, the increasing number of competing CMRS providers will diminish the need to police the CMRS market through Section 208 complaint proceedings.^{30/} Consumers already possess a range of CMRS alternatives, and will soon have the option of selecting from among cellular operators, enhanced specialized mobile radio providers, expanded mobile service providers,^{31/} and a minimum of

^{29/} See Second Report and Order at ¶ 280.

^{30/} See id. at ¶ 175 (finding that "the strength of competition [in the cellular market] will increase [in] the near future.").

^{31/} See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, FCC 93-257, RM-8117, RM-8030, RM-8029 (rel. June 9, 1993) (Notice of Proposed Rule Making).

three and as many as seven PCS providers.^{32/} Given the existing and increasing range of CMRS options available to the public, market forces will serve to ensure carrier compliance with the obligations imposed by Section 201 and Section 202.^{33/} Under those circumstances, "valid complaints [under Section 208] should be infrequent."^{34/}

Because the discipline of the marketplace will prevent CMRS providers from engaging in unreasonable or discriminatory pricing, complainants alleging unlawful rates should face a high standard of proof. A CMRS rate should not be found "unjust and unreasonable" or "unreasonably discriminatory" if other providers in the marketplace charge similar rates for equivalent services. At minimum, a CMRS rate that is comparable to the rates charged by other CMRS providers for equivalent services should be deemed presumptively lawful.

^{32/} Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, FCC 93-451 (rel. October 22, 1993) (Second Report and Order).

^{33/} See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 91 F.C.C. 2d 59, 69 (1982) (Second Report and Order).

^{34/} Id. at 70.

V. The Commission Should Clarify that All CMRS Providers may Utilize their Authorized Frequency to Provide Service on a Private Carriage Basis

The Commission has properly determined that all CMRS providers should be subject to equivalent regulatory requirements.^{35/} The Commission further concluded that PCS providers may offer service on a private carriage basis.^{36/} Consistent with these findings, the Commission appears to have concluded that all CMRS providers may utilize their authorized frequency to provide service on a private carriage basis.^{37/} Because authorization of all CMRS providers to offer both private and commercial services is consistent with the Act, the Commission should explicitly confirm that this uniform regulatory treatment will apply.

Congress's central goal in revising Section 332(c) of the Act was to replace disparate regulation of mobile services with a comprehensive Federal framework that governs all commercial mobile services.^{38/} As the Commission recognizes, regulatory

^{35/} See, e.g., Second Report and Order at ¶ 162 ("[D]ifferential tariff and exit and entry regulation of CMRS as a general matter does not appear to be warranted.")

^{36/} See id. at ¶¶ 116-123 (permitting PCS licensees licensed as a CMRS provider to dedicate a portion of their assigned spectrum to PMRS service). According this flexibility to CMRS providers will encourage them to deploy a wide range of innovative services to the public. See Comments of McCaw Cellular Communications, Inc., GN Docket 93-352, at 12-14 (Nov. 8, 1993).

^{37/} See Second Report and Order at ¶ 115.

^{38/} Conference Report at 490. See Second Report and Order at ¶ 12.

disparity would thwart the intent of Congress since it has "taken a comprehensive and definitive action to achieve regulatory symmetry in the classification of mobile services."^{39/} The Second Report and Order therefore provides that all mobile radio service providers, including PCS providers, will be subject to common carrier regulation if they meet the statutory CMRS definition.^{40/}

While the Commission expressly permits PCS providers to offer private and commercial services utilizing the same authorized frequency, the Second Report and Order does not expressly extend that same flexibility to other CMRS providers. That flexibility is only implicit in the statement that the Commission "favor[s] issuing a single license to CMRS providers offering both commercial and private services on the same frequency."^{41/} To remove any doubt about this matter, and consistent with the Congress's and the Commission's efforts to ensure consistent regulatory treatment of similarly situated mobile service licensees, the Commission should explicitly authorize all CMRS providers to offer private and commercial mobile services utilizing the same authorized frequency.

^{39/} Second Report and Order at ¶ 13.

^{40/} See id. at ¶¶ 114, 162.

^{41/} Id. at ¶ 115.

Conclusion

For the foregoing reasons, the Commission should effectuate the Congressional intent to encourage the growth and development of mobile services by clarifying the Second Report and Order as proposed herein.

Respectfully submitted,

MCCAWE CELLULAR COMMUNICATIONS, INC.



Scott K. Morris
Vice President of External Affairs
McCaw Cellular Communications, Inc.
5400 Carillon Point
Kirkland, Washington 98033
(206) 828-8420

Of Counsel:

Howard J. Symons
Gregory A. Lewis
Kecia Boney
Mintz, Levin, Cohn, Ferris
Glovsky and Popeo, P.C.
Suite 900
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Cathleen A. Massey
Senior Regulatory Counsel
McCaw Cellular Communications, Inc.
4th Floor
1150 Connecticut Avenue, N.W.
Washington D.C. 20036
(202) 223-9222

May 19, 1994

D28067.1