

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

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In the Matter of)
)
Implementation of Sections 3(n))
and 332 of the Communications Act)
)
Regulatory Treatment of Mobile)
Services)

GN Docket 93-252
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION
TO COMMENTS TO PETITIONS FOR RECONSIDERATION

The Cellular Telecommunications Industry Association ("CTIA")¹ respectfully submits its Reply to Comments to the petitions for reconsideration filed in the above-captioned proceeding.²

Introduction

In its Opposition/Comments to Petitions for Reconsideration, CTIA rebutted the claims of the National Cellular Resellers Association, MCI, the National Association

¹ CTIA is a trade association whose members provide Commercial Mobile Services, including over 95 percent of the licensees providing cellular service to the United States, Canada, and Mexico, and the nation's largest providers of ESMR service. CTIA's membership also includes wireless equipment manufacturers, support service providers, and others with an interest in the wireless industry.

² See In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, GN Docket 93-252, 9 FCC Rcd 1411 (1994) ("CMRS Order").

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of Regulatory Utility Commissioners, and the New York State Department of Public Service that the Commission improperly decided to forbear from regulating CMRS end-user and access charges, and improperly has preempted state regulation of intrastate CMRS interconnection rates.³ CTIA urged the Commission to reject these requests for wholesale revision of the regulatory regime the Commission has established to implement the statutory mandate to institute regulatory parity and to subject all commercial mobile radio services to a minimum of regulatory mechanisms in light of a competitive marketplace.

Section 332(c) (1) (A) Does Not Require that the Commission Classify Cellular as "Non-dominant" to Justify Forbearance

In its Opposition, Nextel Communications urges the Commission to revisit its decision to include cellular carriers in the forbearance rules adopted for other CMRS providers.⁴ Not surprisingly,⁵ Nextel endorses MCI's arguments that the Commission's CMRS regulations should encompass a dominant/non-dominant regulatory scheme. Nextel also concurs with MCI's discussion of the appropriate levels of regulation for dominant and non-dominant CMRS providers, as

³ CTIA Opposition/Comments at 2-7.

⁴ Opposition of Nextel Communications, Inc. at 5-6.

⁵ MCI has announced its intention to spend \$1.3 billion to purchase a 17% interest in Nextel. *Washington Business Wire*, Feb. 28, 1994.

well as MCI's position concerning LEC interconnection obligations.⁶

As CTIA demonstrated in its Opposition/Comments, the MCI analysis now endorsed by Nextel is fatally flawed. Not only do MCI and Nextel merely repeat the same arguments concerning dominance and the asserted lack of competition that the Commission fully considered and rejected in the *CMRS Order*,⁷ MCI (and now Nextel) miss the essential point that the statutory test for forbearance is entirely separate from the concept of "dominance".

The crux of MCI's argument is that:

[t]he Commission's conclusion that forbearance is appropriate because all CMRS is offered by "non-dominant carriers" in "competitive markets" is inconsistent with its own findings elsewhere in the R&O that "the record does not support a finding that the cellular marketplace is fully competitive."⁸

The Commission, however, did not base its decision to forbear on the premise that all CMRS is offered by "non-dominant carriers" in "competitive markets". Rather, the Commission specifically stated that:

[d]espite the fact that the cellular service marketplace has not been found to be fully competitive, there is no record evidence that indicates a

⁶ Nextel Opposition at 4-5, and n.6. See MCI Petition for Clarification and Partial Reconsideration at 4-5.

⁷ See Nextel's Comments filed November 8, 1993 at 18 and Nextel's Reply Comments filed November 23, 1994 at 3-9.

⁸ MCI Petition at 4.

need for full-scale regulation of cellular or any other CMRS offerings.⁹

Congress did not require the Commission to base its decision to forbear on its finding that cellular carriers were non-dominant; rather the Commission properly based its decision on the finding that tariffs were not necessary under the three prong standard for tariff forbearance set forth in Section 332(c)(1)(A).

Section 332(c)(1)(A) does not require that the Commission classify a commercial mobile service provider as "non-dominant" to justify forbearance. Congress was well aware of the dominant/non-dominant distinction when it enacted the Budget Act.¹⁰ As McCaw Cellular Communications points out in its Opposition to Petitions for Reconsideration,

"... when House-Senate conferees added the requirement that the Commission evaluate market conditions before it decided to forbear, they did not limit forbearance to carriers that had been declared "non-dominant." Rather, they required only that the Commission determine that forbearance will "promote competition among providers of commercial mobile services."¹¹

⁹ CMRS Order at 1478.

¹⁰ See, e.g., H.R. Rep. No. 213, 103d Cong., 1st Sess. 260-61 (stating that the Committee was aware of the Court of Appeals decision voiding the "Commission's long-standing policy of permissive detariffing, applied to non-dominant carriers").

¹¹ McCaw Cellular Communications Opposition to Petitions for Consideration at 10-11 (footnotes omitted).

Instead of basing its analysis on "dominance", Section 332(c)(1)(A) of the Budget Act specifies a three prong test that the Commission must apply in considering to forbear CMRS providers from title II provisions. The *CMRS Order* specifically finds that the cellular market is sufficiently competitive to muster forbearance under this statutory test;¹² and the fact that the Commission finds the cellular market "not fully competitive" does not undermine the overall finding of sufficient competition.¹³

The *CMRS Order* precisely tracks the three prong statutory test where it states three reasons for the Commission's decision to forebear from requiring tariffing of cellular services: (1) sufficient competition exists today, with additional competition promised in the future; (2) section 201, 202 and 208 provide important protections if market failure arises; and (3) forbearance is consistent with the public interest because tariffs are not essential to insure that non-dominant carriers do not unjustly discriminate in their rates.¹⁴

¹² *CMRS Order* at 1478-1479.

¹³ *Id.* at 1478.

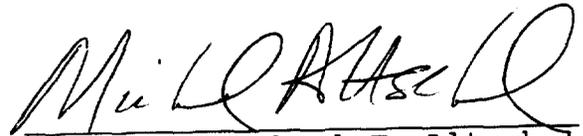
¹⁴ The Commission also recognized that in a competitive environment, imposition of mandatory and/or voluntary tariffing can harm competition. See *CMRS Order* at 1478-1480.

Conclusion

Since the Commission's three findings fully meet the statutory standard for cellular tariff forbearance, the Commission should reject the arguments of those who seek to reimpose such obligations.

Respectfully submitted,

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I, Stacie A. Brooks, hereby certify that on this 27th day of June, 1994, copies of the foregoing Reply Comments of the Cellular Telecommunications Industry Association were served by hand delivery upon the following parties:

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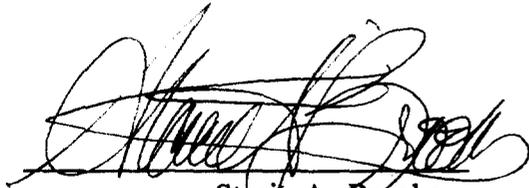
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