

Over four years ago, the CPUC concluded that the retail market is competitive¹⁹⁷ and that the retail margin should be eliminated,¹⁹⁸ yet the mandatory margin still stands.¹⁹⁹ The CPUC persists in protecting the resellers without any evidence to demonstrate that the resellers are introducing price competition beneficial to consumers.²⁰⁰

B. Unnecessary tariffing procedures have impeded competition.

The CPUC credits itself with having created a streamlined tariffing procedure allowing minor adjustments to be filed by advice letter and major increases by applications.²⁰¹ To the contrary, the CPUC created a cumbersome procedure that ultimately impeded competition.

Initially, cellular service rates were regulated in much the same way as the rates of monopoly utilities; no rate or condition of service could be modified except on a minimum 40 days' notice.²⁰² The notice requirement--essentially government mandated price signaling--enabled competitors merely to mimic the offering or to file a protest, presumably because the proposed reduction was "too low." These protests result in denying or delaying the benefits to consumers. Since any

197 D.90-06-025 (mimeo) at 73-74, 102 (Finding of Fact 117).

198 Id. at 71-75.

199 See id. at 110 (Ordering ¶15).

200 Hausman Affidavit at ¶¶ 8, 38.

201 Petition at 12.

202 D.94-04-044 (mimeo) at 12-14.

carrier's price changes had to be publicly posted days in advance, pricing could not be used to achieve a competitive edge or differentiation from the other carrier.²⁰³

In 1990, the CPUC reduced the notice period for standard advice letter filings to 30 days and introduced a procedure allowing the introduction of temporary rate decreases on one day's notice.²⁰⁴ Inexplicably, the CPUC limited downward pricing flexibility to 10%, thus requiring carriers to file multiple advice letters in order to effectuate price reductions beyond 10%.²⁰⁵

Moreover, the Commission also imposed a severe penalty on carriers who dropped their rates: rates could be brought back up only after a substantial regulatory proceeding, including a review of issues normally reserved for rate of regulation proceedings.²⁰⁶ This provision sounded the death knell for across the board price cuts in an industry struggling to invest to keep ahead of substantial growth in demand for its services. When this regressive measure was finally removed in April of 1993, the carriers moved immediately to reduce rates.²⁰⁷

Even the limited downward pricing flexibility available under Commission rulings was and is substantially undercut by

203 Hausman Affidavit at ¶ 14.

204 D.90-06-025 (mimeo) at 108 (Ordering ¶8 (a), (b)).

205 Id. at 108 (Ordering ¶ 8(b)); see also D.90-10-047 (mimeo) at 4 (Ordering ¶ 2(c)); D.94-04-043 (mimeo) at 2-5.

206 D.90-06-025 (mimeo) at 109 (Ordering ¶ 9).

207 See Appendix K submitted herewith.

restrictions imposed by the Commission staff, prompted primarily by reseller protests.²⁰⁸ The tariffing procedures have been abused by competitors who filed protests and delayed the introduction of products and services. The resellers have protested AirTouch's advice letter filings 32 times in the last four years.²⁰⁹ In a number of instances those protests delayed the introduction of the new service for as long as six months. California consumers have been denied the benefits of innovative offerings freely available elsewhere, including plans to:

- (a) reduce rates for customers who agree to service over an extended term;
- (b) pass savings on to customers who sign up for service on a reduced commission basis;
- (c) provide promotional gifts and discounted equipment packaging; and
- (d) waive activation fees or provide air time credits by means of temporary tariffs.²¹⁰

These protests were not aimed at ensuring consumer safeguards, but rather were filed by competitors in an effort to maintain their margins.

By imposing disparate regulatory treatment on cellular carriers, the CPUC has laid the groundwork for further abuse of

208 For example, new rate plans could not be introduced by temporary tariffs; reductions on a customer's bill could not exceed ten percent of the average customer's bill; and promotional discounts could not exceed \$25.00 in cash or \$100.00 in credits. This last restriction, the "anti-gift rule" effectively prevented the carriers from implementing any tariffed rate reductions outside of the cumbersome 30-day procedure.

209 See Appendix N submitted herewith discussing the resellers' protests.

210 See, e.g., Resolutions T-14607, T-13292, T-14608, T-14621, T-14990, T-15037; see also D.92-02-076.

the regulatory process by unregulated competitors. Indeed, the CPUC has cited a Nextel protest to a carrier's advice letter as evidence in support of its Petition, but fails to acknowledge that the cellular carrier was responding to increased competition in the wireless marketplace.²¹¹ Nextel has manipulated the regulatory process by attempting to bar carriers from offering programs that would lower the price for cellular service and equipment to consumers while Nextel is free to make such offerings.²¹² The CPUC does not appear to be troubled by such abuses.

C. The CPUC continues to deny consumers the benefits of competition commonly available in other states.

The CPUC's belated relaxation of particular rules is an admission that its restrictive regulation was anti-competitive. Unfortunately for consumers, it has taken the CPUC years to come to this conclusion. The CPUC's piecemeal approach to relaxing regulation clearly is not the most efficient and does not meet Congress' standard.

211 Petition at 74-75.

212 Nextel has made several filings with the CPUC in an attempt to preclude the cellular carriers from offering plans allowing term and volume discounts for customers and discounts on CPE. See e.g. Comments of Nextel Communications Inc. in Response to Assigned Commissioner's Ruling in I.88-11-040, dated December 29, 1993; Protest of Nextel Communications Inc. to LACTC's Application for Customer Specific Contracting Authority in A.94-02-018, dated September 8, 1994; Opening and Reply Briefs of Nextel Communications, Inc. on Bakersfield Cellular Telephone Company's Petition for Modification of D.89-07-017 and D.90-06-025, dated June 17 and 24, 1994.

The CPUC applauds itself for recent pricing flexibility, but fails to acknowledge its continued micromanagement of the cellular industry still denies consumers substantial benefits:

- California is the only state prohibiting pro-consumer packaging of equipment and service.²¹³ Since 1989, the CPUC has repeatedly rejected carriers' requests to offer packaged CPE and service.²¹⁴ The CPUC complains of carriers using different technologies,²¹⁵ but refuses to permit packaging which would reduce the consumers' costs²¹⁶ and substantially increase cellular penetration;²¹⁷
- The retail margin continues in force, requiring rate element by rate element adjustments²¹⁸ despite the absence of any evidence that this requirement enhances competition;

213 See, e.g., Bundling of Cellular CPE and Cellular Service, 7 FCC Rcd 4028, 4030 (1992) ("[T]here appear to be significant public interest benefits associated with the bundling of cellular CPE and service" and such "packaging [of] cellular CPE and service is a common and generally accepted practice in the cellular industry."); Hausman Affidavit at ¶¶ 7, 16.

214 See, e.g., Phase I Comments of PacTel Cellular and Its Affiliates in I.88-11-040, dated March 1, 1989, Tab C (Hausman Affidavit), at 34; Conditional Protest of PacTel Cellular and Its Affiliates to Application No. 92-06-013, dated July 22, 1992, at 2-9; Comments of PacTel Cellular and Its Affiliates to the Assigned Commissioner's Ruling Proposing Pricing Guidelines to Modify Decision 90-06-025, dated April 9, 1993, passim; Comments of PacTel Cellular and Its Affiliates in Support of Petition by Bakersfield CTC to Modify D.89-07-019 and Ordering Paragraph 16 of D.90-06-025 in I.88-11-040, dated August 16, 1993, passim.

215 Petition at 71.

216 D.89-07-019; see also D.90-06-025 (mimeo) at 110-111 (Ordering ¶ 16).

217 Hausman Affidavit at ¶ 16.

218 D.90-06-025 (mimeo) at 55.

- The CPUC lifted the \$100 ceiling on service credits, but inexplicably has maintained a \$25 limit on "gifts" (including cash rebates);²¹⁹
- One year after approving contract plans, the CPUC effectively imposed retroactive ratemaking by placing restrictive conditions and micromanaging implementation of the plans.²²⁰

There is no justification for these regulatory hurdles. The anti-competitive impact of these regulations will only be exacerbated under the CPUC's new dominant/non-dominant framework.

D. After ten years of regulation, the CPUC has no "standards" for setting rates.

In support of its claim that regulation "probably" has not contributed to higher rates, the CPUC cites the Sacramento market.²²¹ Rate setting in the Sacramento market typifies the CPUC's erratic approach to cellular regulation. Contrary to the CPUC's claim, the application of the Sacramento-Valley Limited Partnership ("SVLP") is not pending;²²² it was arbitrarily denied in a decision that created an entirely separate rate standard applicable only to one unfortunate carrier in the

219 See, e.g., D.90-10-047 (mimeo) at 5 (Ordering ¶ 2(j)); CACD Resolution No. T-14607 at 6-7 (Ordering ¶ 3); D.92-02-076 (mimeo) at 22-23 (Ordering ¶ 3(g), 6); D.94-04-043 (mimeo) at 17.

220 The restrictive conditions imposed by the CPUC undermine the incentives to offer the plans and reduce the convenience to the customer: proration of the termination penalty, elimination of termination penalties after first year, arbitrary selection of a maximum 3 year contract period, requiring customer signatures that deny the customer easy paperless activation, and specific contract renewal notice. D.94-04-043 (mimeo) at 9-15, 18-19 (Ordering ¶ 6).

221 Petition at 46.

222 Petition at 42.

state. The CPUC rejected the application without a hearing,²²³ concluding that the application was "deficient" because the CPUC itself "had not developed standards as to how to evaluate supporting data to conclude that a rate increase is justified."²²⁴ The CPUC once again essentially set up a "catch 22" approach to rate setting that no applicant could meet. This is despite the fact that SVLP has suffered years of losses, and never achieved a return of more than 4%. The particularly capricious nature of the CPUC's treatment of SVLP is underscored by the CPUC's approval in 1989 of a rate increase for SVLP's competitor that was, as the CPUC admitted, "comparable" to the increase requested by SVLP.²²⁵ In light of ten years of regulation of the cellular industry and the approval of a comparable increase for the competitor, the CPUC's claim is, at best, an admission of the arbitrary nature of CPUC regulation.²²⁶

223 The CPUC chose to ignore evidence that, despite the increased value of the service, SVLP's current customer bill is the third lowest of the top 60 MSAs in the United States and that SVLP was operating only slightly above the break even point. Ibid.

224 Id. at 22.

225 Id. at 28.

226 Incredibly, the admitted "absence of standards" for rate setting led the CPUC to default to traditional cost based regulation--which the decision denying SVLP's application admitted was inappropriate for cellular. D.94-04-044 (mimeo) at 19, 21-22, 30. Moreover, the CPUC, without any risk analysis, arbitrarily borrowed a 9.75% rate of return used in proceedings governing water utilities as a benchmark for SVLP. D.94-04-044 (mimeo) at 25.

E. The CPUC has waffled three times in four years on the fundamental issue of cost based pricing.

The CPUC concluded four years ago that rate of return regulation would be neither efficient nor workable for cellular carriers,²²⁷ yet it persists in threatening to impose such regulation.

In 1990, the CPUC commented at length regarding the unsuitability of cost-based/rate of return regulation for cellular service, specifically noting that such regulation:

- is inconsistent with the most important regulatory goals of promoting technological advancement, the expansion of service, and economic efficiency;²²⁸
- will produce different prices for the two carriers' systems causing the higher-priced carrier to lose customers;²²⁹ and
- will cause one system to become overburdened with subscribers, resulting in degradation of service quality.²³⁰

In a startling about face in 1992, the CPUC, without affording the parties notice or an opportunity to be heard, rejected these findings, and adopted rate of return regulation, borrowing an arbitrary 14.75% rate of return from a proceeding governing monopoly local exchange carriers.²³¹ In 1993, in response to protests of the procedural irregularities, the CPUC yet again

227 D.90-06-025 (mimeo) at 15-18, 48-50, 59-60, 93-94, 100, 101 (Findings of Fact 14, 90-91, 98; Conclusions of Law 20-21).

228 Id. at 100 (Finding of Fact 90).

229 Id. at 16.

230 Ibid.

231 D.92-10-026 (mimeo) at 56 (Findings of Fact 52-53).

reversed itself and rejected its own rate of return proposal.²³²

Seven months later, the CPUC opened an investigation and resurrected a cost-based/rate of return proposal.²³³ The CPUC apparently still cannot make up its mind and is considering this alternative for the fourth time.²³⁴ The fact that the CPUC is virtually adrift on this basic philosophical issue makes it very difficult for carriers to plan for the future. It also demonstrates that the CPUC has no understanding of the severely counter-productive effects of rate of return regulation in a competitive market or the nature of competition in the wireless marketplace. The CPUC simply does not have the skill or perspective to regulate this market consistent with the federal plan.

F. The CPUC has failed to meet any of the regulatory goals it set four years ago.

In 1990, the CPUC adopted a regulatory framework intending "to rely on competitive forces to set prices for cellular service."²³⁵ The CPUC concluded that:

"The combination of increased pricing flexibility for carriers and Commission oversight of cellular system expansion and utilization will produce just and

232 D.93-05-069 (mimeo) at 8.

233 I.93-12-007 (mimeo), Appendix B.

234 See Petition at 19-20. The CPUC cited fundamental concerns regarding rate of return regulation for local exchange companies in light of the dynamics of competition and new technology. See D.89-10-031, 33 CPUC 2d 43 at 92-134 (1989). It is incredible that the CPUC is still considering such regulation for the even more competitive wireless industry.

235 D.90-06-025 (mimeo) at 3, 5.

reasonable wholesale rates through the competitive process."²³⁶

Rather than directly regulating price, the CPUC ordered that certain regulatory tools would be implemented to protect consumers. Four years later the CPUC has not implemented any of those measures:

- The CPUC ordered the elimination of fixed margins for resellers and implementation of modification to the Uniform System of Accounts ("USOA") so that a carrier's historical cellular costs would be allocated to retail and wholesale, thereby creating a benchmark to protect against alleged predation by the carriers.²³⁷ The CPUC has abandoned the USOA in favor of the more anti-competitive retail margin.
- The CPUC ordered that capacity monitoring should be implemented to ensure that the carriers filled capacity as rapidly as possible.²³⁸ The CPUC subsequently rejected capacity monitoring on the basis that the available data was insufficient to evaluate the market.²³⁹ Ironically, the CPUC now uses a skewed form of capacity monitoring to support its biased conclusion in this proceeding.²⁴⁰
- The CPUC determined that a streamlined certification procedure for RSA carriers should be authorized;²⁴¹ however, the CPUC delayed so long that the issue was rendered "moot" by the certification of the carriers.

236 Id. at 101 (Finding of Fact 102).

237 Id. at 74.

238 Id. at 60-61, 105 (Conclusion of Law 20).

239 I.93-12-007 (mimeo) at 11.

240 Petition at 51-54, Appendix M.

241 D.90-06-025 (mimeo) at 105 (Conclusion of Law 22).

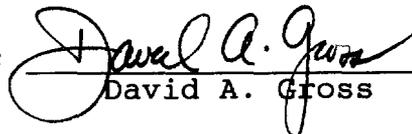
VI. CONCLUSION.

For the foregoing reasons, the CPUC's Petition is procedurally defective on several important grounds and must be dismissed. Moreover, the CPUC has failed to meet its very substantial burden of proof in presenting evidence of a demonstrated failure of market conditions in California to protect subscribers. Thus the CPUC's Petition must be denied.

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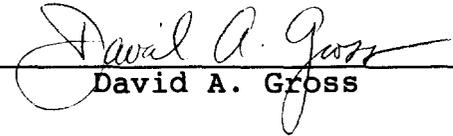
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CERTIFICATE OF SERVICE

I, David A. Gross, do hereby certify that I have on this 19th day of September, 1994, caused to be forwarded a copy of the foregoing OPPOSITION OF AIRTOUCH COMMUNICATIONS TO CPUC PETITION TO RATE REGULATE CALIFORNIA CELLULAR CARRIERS by first class United States mail, postage prepaid, to the following:

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