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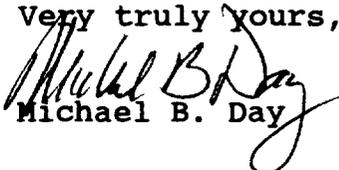
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: PR File No. 94-SP3

Dear Secretary:

Enclosed are an original and ten (10) copies of the two pleadings entitled **THE CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA OPPOSING THE PETITION OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA TO RETAIN STATE REGULATORY AUTHORITY OVER INTERSTATE CELLULAR SERVICE RATES and MOTION OF THE CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA TO REJECT PETITION, OR, ALTERNATIVELY REJECT REDACTED INFORMATION.**

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Very truly yours,  
  
Michael B. Day

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FEDERAL COMMUNICATIONS COMMISSION  
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UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

94-105

In the Matter of )

Petition of the People of the State )  
of California and the Public )  
Utilities Commission of the State of )  
California to Retain State )  
Regulatory Authority over Intrastate )  
Cellular Service Rates )

PR File No. 94-SP3

**RESPONSE OF THE CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA  
OPPOSING THE PETITION OF THE PUBLIC UTILITIES COMMISSION OF  
THE STATE OF CALIFORNIA TO RETAIN STATE REGULATORY AUTHORITY  
OVER INTRASTATE CELLULAR SERVICE RATES**

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Attorneys for the  
Cellular Carriers  
Association of California

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SUMMARY OF THE RESPONSE FILED BY THE  
CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA

The Carriers Association opposes the petition filed by the Public Utilities Commission of the State of California (CPUC) on a wide variety of legal and factual grounds.

The standard for reviewing state petitions to retain rate regulatory authority, as defined by the Federal Communications Commission (FCC) itself, requires that a state demonstrate that market conditions within that state do not protect subscribers from unreasonable rates. This standard places a heavy burden on the CPUC because the facts demonstrate that cellular rates in California are declining, and that there is substantial competition between carriers. In addition, this competition is poised to become substantially more intense with the auction of PCS licenses and the introduction of as many as seven new competitors for each market (assuming the maximum number of PCS and ESMR licensees participate).

The CPUC attempts to construct an argument in favor of continued rate regulation by asserting that cellular rates in California have not declined and that there is excessive market power in the hands of cellular carriers. However, a careful review of the economic arguments advanced by the CPUC in support of these contentions demonstrates that the CPUC has misinterpreted evidence, misconstrued economic theory, or otherwise wrongly concluded that the California cellular market is not competitive. In reality, the available evidence is entirely consistent with the Carriers Association's assertion

that the cellular markets in California are competitive. The CPUC has not properly acknowledged the effect of the scarcity of radio spectrum on both rates and returns in the cellular markets, and yet the value of the currently limited amount of cellular capacity clearly affects both rates and returns dramatically.

The Carriers Association has presented a study by expert economists from Charles River Associates which explains in detail why the CPUC's economic arguments fail to support its conclusions. Two examples of these flawed economic arguments are instructive of the types of errors to be found in the CPUC's analysis. The CPUC cited a study on national cellular rates by a resellers' trade association, arguing that cellular rates have increased in recent years. In point of fact, the study deals with only a very limited type of low usage rate plan, and in all three of the California cellular markets included in the study rates remained flat or declined. Another example can be found in the CPUC's reliance on market concentration calculations which assumed that the two licensed cellular carriers would not compete with each other, and combined their market shares on the basis of that assumption. This unwarranted assumption produced a market concentration index twice as high as if the two carriers had been treated as separate entities, as standard procedures would require. Again and again the CPUC reveals its predisposition to believe that cellular carriers do not compete and structures its evidence to reach that conclusion. On the contrary, an objective reading of the evidence reveals that the CPUC's own data is

equally consistent with the existence of competition.

The Carriers Association has also presented its own information to establish that the market in California is competitive and does produce reasonable rates. In particular, the Carriers Association presented a rate study which proves both a substantial decline in cellular rates across the board, and the migration of a very large majority of all cellular customers from basic rates to discounted rate plans. The inescapable conclusion is that customers are benefiting from the rate decreases which have resulted from rate competition.

Another important argument against extending or increasing the CPUC's authority to regulate cellular rates is that the CPUC has conducted its regulatory policy in a manner which proven inconsistent, inefficient, and extremely costly to the carriers and their customers alike. CPUC policy toward cellular carriers has varied markedly over the years, and all parties have suffered from the uncertainty and regulatory delay this has caused. These policies have repeatedly resulted in higher costs for cellular service, as is the case with the CPUC prohibition against allowing rate plans to include discounts on cellular telephones. The CPUC is the only state in the union which prohibits this practice, yet in spite of repeated demonstrations by the carriers of the benefits to consumers and extensive hearings, the CPUC has still not altered its policy on this issue. The CPUC's history of cellular regulation does not provide confidence that it will allow market forces to shape the development of the commercial

mobile radio services (CMRS) market in California, or that it will be even-handed in its regulation. The CPUC's decision is clearly biased against cellular carriers and favors resellers and ESMR/PCS competitors enormously in comparison. This is both poor economic policy and inconsistent with the Congressional intent to foster regulatory parity amongst CMRS providers, whatever portion of the electromagnetic spectrum they use.

The Carriers Association has also outlined the legal infirmities of the CPUC petition. In direct violation of the FCC's regulations the CPUC has failed to clearly define the regulations it intends to put into effect. One of the most controversial regulations the CPUC proposes to implement is not described at all because the CPUC yet to determine how it will calculate mandatory rate reductions proportional to what the CPUC believes are the carriers' excessive returns. Another clear error is the CPUC's attempt to mix new and existing regulations in a petition filed under the provision of the regulations which grandfathers only existing regulations. Lastly, the CPUC has ordered cellular carriers to unbundle their networks upon the request of resellers and permit interconnection of reseller switches to their systems, for both interstate and intrastate calls. Such an order is plainly preempted by multiple provisions of federal law and FCC decisions.

The greatest single flaw in the CPUC's petition is its failure to consider the overall context of the national market for CMRS. The CPUC does not appreciate the full impact that PCS

and ESMR providers will have on the cellular market. In addition, the CPUC seems oblivious to the often-stated federal policy of imposing similar regulation on providers of similar service. There is no longer any question that the ESMR and PCS providers will target virtually the same market as the existing cellular customers, yet the CPUC is proposing vastly different rate regulation for cellular carriers than for ESMR and PCS providers. This disparate treatment is neither explained nor justified by the CPUC, and poses a serious obstacle to the implementation of Congressional and FCC policy objectives.

In the end, when the FCC has carefully considered all the evidence before it, the Carriers Association believes the FCC will understand that it cannot allow states such as California to pursue their individual rate regulatory schemes, particularly when they are so discriminatory and intrusive. Such a result would clearly hinder the development of national wireless communications networks, or equally unfortunate, cause such networks to avoid California to some degree. The FCC has ample authority and justification to deny the CPUC petition, and it should do so in the interests of California's cellular customers who will be the greatest beneficiaries of the new CMRS industry.

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Regulatory Authority over Intrastate	)	
Cellular Service Rates	)	
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**RESPONSE OF THE CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA  
OPPOSING THE PETITION OF THE PUBLIC UTILITIES COMMISSION OF  
THE STATE OF CALIFORNIA TO RETAIN STATE REGULATORY AUTHORITY  
OVER INTRASTATE CELLULAR SERVICE RATES**

**I. INTRODUCTION AND PROCEDURAL HISTORY**

Pursuant to Rules 20.13(a)(5) and (b)(1) of the Rules of Practice and Procedure of the Federal Communications Commission (hereinafter "FCC" or "Commission") the Cellular Carriers Association of California hereby responds to and opposes the Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain State Regulatory Authority over Intrastate Cellular Service Rates filed on or about August 8, 1994 in the above-captioned docket (hereinafter "Petition").

**A. The Cellular Carriers Association of California**

The Cellular Carriers Association of California ("Carriers Association") is the principal trade association for most of the providers of cellular telephone services in the State of California. The Carriers Association's members are: Airtouch Cellular, American Cellular Communications, Atlantic Cellular Company, Bell South Cellular, Cal-One Cellular, Contel Cellular, GTE-Mobilnet, Lin Broadcasting, McCaw Cellular Communications, Inc., US West/Cellular Co. of California and United States Cellular. The Carriers Association represents its members by advocating industry wide positions in regulatory forums.

**B. The Standard of Review As Set Forth By Congress And The FCC Requires That A State Bear A Heavy Burden In Order To Retain Intrastate Rate Regulation**

The Omnibus Budget Reconciliation Act of 1993 (Budget Act of 1993), in amending Section 332 of the Communications Act of 1934 (47 U.S.C. 332), ("Communications Act") provided a standard by which a State petition to retain rate jurisdiction may be measured. Any State petition for authority to regulate the rates for any commercial mobile radio service (CMRS) must demonstrate that:

- (i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
- (ii) such market conditions exist and such service is a replacement for land line

telephone exchange service for a substantial portion of the telephone land line exchange service within such State.<sup>1</sup>

That same showing is similarly required under Section 332 (3) (B), which provides a state the opportunity to petition the Commission for authority to continue exercising authority of rates already in effect.<sup>2</sup>

The FCC's Second Report and Order<sup>3</sup> interprets the Budget Act of 1993 as necessarily imposing a substantial burden of proof upon a petitioning State and sets forth detailed requirements and guidelines that any State must adhere to in order to establish a continuation of state regulation of rates.

First, the FCC notes that it is the State's burden of proof to demonstrate that it has met the statutory basis for the establishment or continuation of state regulation of rates. To that end, States must submit evidence to demonstrate that "prevailing market conditions will not protect CMRS subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably

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<sup>1</sup> Communications Act, § 332(c)(3)(A).

<sup>2</sup> Communications Act § 332(d)(2)(B), 47 U.S.C. § 332(c)(3)(B).

<sup>3</sup> Second Report and Order in the Matter of Implementation of Sections 3n and 332 of the Communications Act, 74 RR 2d (P&F) 835 adopted February 3, 1994 ("Second Report and Order").

discriminatory."<sup>4</sup> The FCC states that its intention is to deny any petition that fails to meet that burden.<sup>5</sup>

Although the FCC notes that the state has the discretion to submit whatever evidence it believes is "persuasive regarding market conditions in the state and the lack of protection for CMRS subscribers in the state,"<sup>6</sup> the Commission nevertheless enumerates in detail the types of evidence, information, and analysis it considers pertinent for its examination of market conditions and consumer protection. The FCC requires information regarding: (1) the number of CMRS providers, their types of services offered, and related information, (2) the number of provider customers and their usage trends, and annual revenues and rates of return for each such provider, (3) rate information for each CMRS provider, (4) an assessment regarding the substitutability of CMRS services with services provided by other carriers, (5) opportunities and barriers to market new entrants, (6) specific allegations of fact regarding anti-competitive or discriminatory actions by CMRS providers, (7) demonstration of instances of systematic unjust and unreasonable rates, or discriminatory rates, and (8) information regarding CMRS customer satisfaction.<sup>7</sup>

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<sup>4</sup> Second Report and Order, supra at 251.

<sup>5</sup> Id. at 252.

<sup>6</sup> Id.

<sup>7</sup> Id.

Second, the state must identify and provide a detailed description of the specific existing or proposed rules that it would establish were the FCC to grant the state's petition.<sup>8</sup>

The imposition of such a formidable burden upon State petitioners is consistent with the FCC's belief that Congress considered preemption of CMRS to be in the public interest and intended generally that such preemption should be the law of the land.<sup>9</sup>

**C. Overview Of CPUC Actions To Regulate Cellular Carriers**

For the past ten years the CPUC has repeatedly altered its view of the appropriate regulatory scheme for California's cellular telephone industry. The California cellular industry has been subjected to substantial regulatory uncertainty as a result of policy shifts at the CPUC. Most recently, CPUC policy has dramatically shifted so as to favor resellers and non-cellular CMRS providers and disadvantage cellular carriers.

The CPUC initially established its policies regarding the development of a state regulatory structure for cellular service in Decision (D.) 84-04-014, which granted the first California cellular Certificate of Public Convenience and Necessity (CPC&N). At its inception, CPUC regulation of cellular carriers was predicated, in great measure, on the

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<sup>8</sup> Id. at 252.

<sup>9</sup> Id. at 250.

view that cellular rates should be set by the carriers based upon market expectations rather than a strict cost-of-service basis. At the same time, however, the CPUC believed that cellular reseller viability must be maintained. To that end, the CPUC assumed jurisdiction over both resellers and cellular wholesalers<sup>10</sup> and established wholesale and retail tariffs which it claimed would ensure proper allocation of costs between wholesale and retail operations, prevent anticompetitive practices, and would encourage competition in the duopoly market by providing resellers with a "viable business opportunity."<sup>11</sup>

Four years later, the CPUC revisited its cellular regulatory framework in Order Instituting Investigation (OII) I.88-11-040, which indicated the CPUC's intention to lessen regulatory control over cellular carriers and cellular rates.<sup>12</sup> Phase I and Phase II of that investigation culminated in D.90-06-025, where the Commission concluded that "the duopoly market structure [did] not necessarily foreclose sufficient competitiveness to maintain fair and efficient pricing of cellular services."<sup>13</sup> The CPUC also determined it could not substantiate that cellular carriers were earning any excessive

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<sup>10</sup> D.84-04-014, 1984 Cal. PUC LEXIS 1359 at \*77.

<sup>11</sup> D.84-04-014 at Conclusion of Law 4.

<sup>12</sup> D.90-06-025 (June 6, 1990) at p.2.

<sup>13</sup> D.90-06-025 36 CPUC 2d 464 at 490.

return on their investment,<sup>14</sup> reasoning that substantial earnings could possibly indicate the market value of the scarce FCC licenses.<sup>15</sup>

The CPUC also found that there was no evidence to convince the Commission that cellular wholesalers were not pricing their services competitively.<sup>16</sup> The CPUC concluded that a combination of regulatory protections and the monitoring of pricing and investment behavior for the purpose of detecting any failure to compete at the wholesale level, would assure that cellular wholesale and retail rates were just and reasonable.<sup>17</sup>

In the same decision, the CPUC allowed carriers to file temporary tariffs instead of availing themselves of the traditional 30-day effective date advice letter process for rate decreases. Any tariff filing decreasing a cellular carrier's average customer bill by not more than 10% would be effective on the date filed.

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<sup>14</sup> D.90-06-025, Conclusion of Law No. 20.

<sup>15</sup> The Commission also noted that factors such as higher cellular start up costs, the potential for technological obsolescence because of enhanced digital technology, and the Commission's inability to evaluate the competitiveness of the individual cellular markets by directly observing patterns of pricing or profits lead to the conclusion that current earned rates of return did not in and of themselves directly indicate the reasonableness of cellular rates. D.90-06-025 at 49.

<sup>16</sup> D.90-06-025 at 60.

<sup>17</sup> Id. at Conclusion of Law 21.

The trend toward regulatory liberalization evidenced in the first two phases of its cellular investigation was abruptly reversed in the CPUC's Phase III decision, D.92-10-026, in which the CPUC significantly modified its previous policy of rate monitoring as set forth in Phase I and II. The Phase III decision would have reverted to cost-based rates for wholesale service predicated upon an industry-wide rate of return ceiling of 14.75%; allowed resellers to seek authorization to perform switching functions without demonstrating the technical feasibility of the switch; and required the facilities-based carriers to unbundle their wholesale tariffs.

The CPUC significantly retracted its new Phase III policy in Decision D.93-05-069, which returned California to the regulatory course set in Phase I and II by rescinding the rate of return requirements of D.92-10-026. D.93-05-069 also granted rehearing on the issues of unbundling the wholesale tariff, the capacity monitoring program, and regarding portions of the reseller switch issue.<sup>18</sup>

Thus, for the most part, the California cellular industry has operated under a framework of price caps as opposed to rate of return regulation. In a move which appeared to represent a loosening of regulation, the CPUC adopted liberalized rate band pricing guidelines which would allow cellular carriers to raise or lower rates within specified

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<sup>18</sup> D.93-05-069, Ordering Paragraph 1.

bands upon one day's notice of a tariff filing.<sup>19</sup> Those guidelines are restricted, in part, to unconditional rate reductions for all subscribers and are explicitly not available for short-term, conditional discounts.<sup>20</sup>

Various tariff filing requirements and related regulations were further relaxed by the CPUC in D.94-04-043.<sup>21</sup> In that decision, the CPUC further modified its Phase II decision to require that a cellular carrier's or reseller's rate reduction tariff filing, including reductions in new service plans, shall be classified as a temporary tariff and made effective on the date filed.

The CPUC's "relaxation" of regulatory requirements did not change the CPUC's apparent desire to ensure reseller viability in hopes of increasing competition. D.94-04-043 required that cellular carriers maintain the mandatory wholesale-retail margin and provide subscribers and resellers 30 to 60 days written notice of the effective dates of provisional tariff schedules.

The CPUC's regulatory relaxation did not, however, foreshadow a move towards a less regulated cellular industry in California. For even as the CPUC modified its tariff filing requirements, it also began an investigation on its own

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<sup>19</sup> Assigned Commissioner's Ruling dated March 25, 1993, as adopted in D.93-04-058, I.87-02-017 (April 21, 1993) Mimeo at 1.

<sup>20</sup> D.93-04-058, finding of fact 3.

<sup>21</sup> D.94-04-043, 1994 Cal. PUC LEXIS 284 (April 6, 1994).

motion into mobile telephone service and wireless communications in its Order Instituting Investigation I.93-12-007.<sup>22</sup> That Investigation proposed a dominant/nondominant regulatory framework and cost of service regulation for cellular carriers but not other CMRS providers.<sup>23</sup> The CPUC would maintain cost of service regulation until it was "absolutely convinced that market forces are in place to ensure just and reasonable rates."<sup>24</sup> The Investigation also proposed a mandatory unbundling of the cellular networks.<sup>25</sup>

On August 3, 1994, five days prior to the CPUC's filing of the instant Petition before the FCC, California cellular policy swerved sharply once again when the CPUC issued D.94-08-022, which established a dominant/nondominant regulatory framework and required cellular carriers to immediately unbundle facilities to accommodate the "reseller switch" upon request from a reseller. In that decision, the CPUC boldly revised California's cellular history by asserting, "...we conclude that the wholesale cellular telephone market currently remains uncompetitive"<sup>26</sup> and that

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<sup>22</sup> I.93-12-007 dated December 21 1993.

<sup>23</sup> Id. at Appendix B, "Proposed Policies Governing Mobile Telephone Services."

<sup>24</sup> Id. at 22.

<sup>25</sup> Id. at Appendix B, page 3.

<sup>26</sup> D.94-08-022 ("Decision") at 2, (emphasis added)