

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

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
)  
) 94-110  
) PR File No. 94-SP8  
Omnibus Budget Reconciliation Act of 1993 )  
Implementation of Section 3(n) and Section 332(c) )  
of the Communications Act )  
)  
)  
Regulatory Treatment of Mobile Services )

U S WEST NEWVECTOR OPPOSITION

U S WEST NewVector Group, which provides cellular services in the Casper MSA and Wyoming RSAs 4 and 5, opposes the petition filed by the Wyoming Public Service Commission for "Authority to Maintain Current Regulation of Rates and Market Entry" ("PSC Pet."), even assuming this Commission has jurisdiction to entertain this petition.<sup>1</sup>

I. Introduction and Summary

The Wyoming PSC petition, which seeks to maintain "some rate and market entry regulation" over some providers of commercial mobile radio services (Pet. at 2), must be denied. Congress has preempted all state involvement over the entry of those providing CMRS service. It has not author-

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<sup>1</sup>Congress has required that state petitions to continue CMRS rate regulation be filed "no later than 1 year after August 10, 1993." 47 U.S.C. § 332(c)(3)(B)(emphasis added). See also Second CMRS Order, 9 FCC Rcd 1411, 1501 n.492 (March 7, 1993)("States must file such petitions prior to August 10, 1994.")(emphasis added); FCC Rule 24.13(b)(extension petitions must be filed "before August 10, 1994"). The Wyoming PSC did not file its petition prior to August 10, 1994. Consequently, this Commission has no choice but to deny the petition, for Congress did not empower it to waive this statutory filing deadline. See Conference Report at 493-94 ("[I]f the State fails to file a petition within this time, the State authority is preempted as all other States are preempted under subsection (c)(3)(A).").

ized this Commission to entertain any state petition, including Wyoming's, which seeks to continue to regulate entry into the CMRS market.

While Congress has empowered this Commission to authorize states to continue rate regulation when the state demonstrates the presence of certain statutory criteria, the Wyoming PSC has failed to establish a prima facie case for continued rate regulation of "some" CMRS providers. Not only does the petition fail to discuss the governing statutory criteria, but the evidence the PSC does provide demonstrates that its proposed regulatory regime, which it styles as "regulated competition" (Pet at 4 ¶ 4), would frustrate the very objectives which Congress sought to achieve in amending Section 332 of the Communications Act.

## **II. The Request to Maintain Market Entry Regulation Over Unspecified CMRS Providers Must Be Denied As a Matter of Law**

The Wyoming PSC seeks permission to continue "some . . . market entry regulation" over some CMRS providers.<sup>2</sup> This Commission cannot lawfully grant this request.

In Section 332(c)(3)(A) of the Communications Act, Congress preempted the states from all entry regulation over CMRS providers:

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<sup>2</sup>Pet. at 2. The PSC's entry regulation request appears to be limited to one class of CMRS provider: "wholesale cellular providers as licensed and authorized by the FCC." *Ibid.* This is an unusual request given that all cellular providers in Wyoming have already obtained an entry certificate from the Wyoming PSC. In any event, this request clearly contravenes the regulatory parity directive underlying amended Section 332(c). See 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 as implemented by the Commission, so that, consistent with the public interest, similar services are accorded similar regulatory treatment.")(emphasis added).

Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. (Emphasis added.)

Congress took this action “to ensure that similar services are accorded similar regulatory treatment and to avoid undue regulatory burdens, consistent with the public interest.” Second CMRS Order, 9 FCC Rcd at 1504 ¶ 250.

While Congress did authorize states to seek to continue their existing rate regulation under limited circumstances, it did not provide similar authorization regarding entry regulation. See U.S.C. § 332(c)(3)(B). Consequently, the request of the Wyoming PSC to continue to “exercise some . . . market entry regulation” over certain CMRS providers must be denied as a matter of law.

### **III. The Request to Maintain “Some” Rate Regulation Over “Some” CMRS Providers Must be Denied**

#### **A. The PSC Has Failed to Describe Its Proposed Regulatory Regime of “Regulated Competition”**

This Commission has directed states filing petitions to maintain rate regulation to “identify and describe in detail the rules the state proposes to establish if [its] petition is granted”<sup>3</sup>:

[W]e conclude that a state must identify and provide a detailed description of the specific existing or proposed rules that it would establish if we were to grant its petition. Second CMRS Order, 9 FCC Rcd at 1505 ¶ 252.

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<sup>3</sup>FCC Announces Procedures Governing State Petitions for Authority to Regulate Commercial Mobile Radio Service Rates, Public Notice, DA 94-764, at 3 (July 8, 1994)(emphasis added).

*See also* FCC Rule 20.13(a)(4), requiring a petitioning state “to identify and describe in detail the rules the state proposes to establish if the petition is granted.”

Specificity is necessary because state regulation of CMRS rates is the exception to the general rule barring such regulation, because Section 332 was amended in large part “to ensure that an appropriate level of regulation be established and administered for CMRS providers,”<sup>4</sup> and because Congress specified that state rate regulation should be permitted, if at all, only to the extent and for the duration absolutely necessary.<sup>5</sup> There can be no confidence that these Congressional directives are met if a state fails to describe its proposed regulatory regime with some specificity. Moreover, without specificity, CMRS providers are deprived of reasonable notice of the specific rules that a state may apply to them should the petition be granted, and states would have the flexibility to later impose an additional level of regulation beyond what this Commission and CMRS providers had assumed -- all in contravention of Congressional policies.

The Wyoming PSC has not attempted to respond to this Commission’s request for specificity. To the contrary, the PSC only alludes to what CMRS providers are not required to do.<sup>6</sup> This Commission and CMRS providers in Wyoming are thus left to speculate over the precise boundaries of the

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<sup>4</sup>*See* Second CMRS Report, 9 FCC Rcd at 1418 ¶ 14.

<sup>5</sup>*See* Section 332(b)(3)(B), Conference Report at 494, and Second CMRS Report, 9 FCC Rcd at 1506 ¶ 257.

<sup>6</sup>According to the PSC, it “does not require cost justification for [these wholesale] rates” and “existing rates . . . can be easily changed to meet market demand or competitive forces.” Pet. at 2.

“regulated competition” regime the PSC proposes to impose over some Wyoming-based CMRS providers.

The Wyoming PSC appears to seek rate regulation authority in two contexts as part of its concept of “regulated competition.” Pet. at 4 ¶ 4. First, it apparently wants to maintain “some” regulation over the “wholesale” rates charged by “cellular providers or other CMRS providers.” Pet. at 2. Closer examination, however, reveals that the PSC does not seek to regulate wholesale cellular rates *per se*, but that it only wants wholesale cellular carriers to file price lists.<sup>7</sup>

This Commission has determined that the filing of price lists even submitted voluntarily, “is not in the public interest” and constitutes “an unreasonable practice” because such “filings can inhibit competition” and thus undermine the strong Congressional policy favoring competition:

Indeed, even permitting voluntary filings would create a risk that competitors would file their rates merely to send price signals and thereby manipulate rates. By refusing to accept these tariff filings we prevent carriers from hiding behind their tariffs to avoid reducing their rates. To avoid the introduction of these anti-competitive practices, to protect consumers and the public interest, and because continued voluntary filing of tariffs is an unreasonable practice for commercial mobile radio services under 201(b) of the Act, we will not accept the tariff filings of CMRS providers. Second CMRS Order, 9 FCC Rcd at 1479-80 ¶ 178.

While the Commission’s decisions were made in connection with interstate services, its rationale applies with equal force to intrastate services. In either case, price lists would impede incentives for competitive price discount-

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<sup>7</sup>See note 6 *supra*.

ing (because all planned price changes would be public) and would remove the ability of CMRS providers to make rapid, efficient responses to changes in demand and cost. This Commission should, therefore, deny the PSC request to require at least some CMRS providers to file price lists with the PSC.

The PSC also wants to continue to regulate the retail rates of one of the 22 CMRS providers in Wyoming: Union Telephone Company. Even here, however, the PSC proposes to regulate Union's retail cellular rates only when Union's cellular service is used in one, narrow context: in the provision of "fixed cellular telephone service." Pet. at 3 ¶ 1. As shown below, even if the PSC could justify such disparate regulation in the CMRS market (given Congress' clear directive for regulatory parity, *see n.2 supra*), its request does not meet the statutory criteria justifying rate regulation.

**B. The PSC Does Not Even Allege, Much Less Demonstrate, That It Satisfies the Statutory Test**

Congress has declared that states may regulate CMRS rates in one of two specified circumstances. It has further made clear that the states have the burden of establishing that one of these conditions exists,<sup>8</sup> and that, in close cases, this Commission should deny state petitions to extend current rate regulation.<sup>9</sup>

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<sup>8</sup>Section 332(c)(3)(B) authorizes this Commission to grant state petitions to continue CMRS rate regulation "if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii)." (Emphasis added.) See also Second CMRS Order, 9 FCC Rcd at 1504 ¶ 251 ("Any state filing a petition pursuant to Section 332(c)(3) shall have the burden of proof that the state has met the statutory basis for the establishment or continuation of state regulation of rates," and "[i]f we determine that the state has failed to meet this burden of proof, then we will deny the petition.").

<sup>9</sup>See House Report at 261-62 ("In reviewing [state] petitions under clause (ii), the Commission also should be mindful of the Committee's desire to give the policies embodied in Section

Section 332(c)(3)(A)(ii) specifies that rate regulation may be appropriate when CMRS service “is a replacement for landline telephone exchange service for a substantial portion of the telephone landline exchange service within such State.” While the Wyoming PSC asserts that Union’s fixed cellular service can be used as a replacement for landline telephone service (as can many CMRS services), it does not allege that this fixed cellular service is a substitute “for a substantial portion of the telephone landline exchange service within” Wyoming, as the statute expressly requires.

The reason for this material omission is understandable. NewVector is advised that Union has less than 40 customers for its fixed cellular service -- many of whom are oil and electric companies and many of whom use fixed cellular service for a temporary period of time only. In contrast, according to the PSC’s own data, the State of Wyoming includes over 30,000 CMRS customers (*see* Pet., Ex. 7) and over 245,000 landline access lines.<sup>10</sup> Under no circumstances can it be said that Union’s fixed cellular service is a replacement for wireline service in a substantial portion of Wyoming.

Moreover, Union faces a competing cellular carrier in every area it offers its cellular service, including its “fixed” service. Congress has made clear that continued rate regulation over CMRS services is inappropriate where, as here, consumers have a choice among several CMRS providers:

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332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee.”)

<sup>10</sup>Docket 87-339 Monitoring Report, Table 3.3 p.76 (May 1994). Wyoming is, as the PSC correctly points out, a very rural state. Nevertheless, its penetration of households with telephone service available is growing and close to the national average: 94.8% vs. 95.6%. *See Telephone Subscribership in the United States*, Table 2 (Industry Analysis Division, Aug. 30, 1994).

If . . . several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of this service, it is not the intention of the conferees that States should be permitted to regulate these competitive services simply because they employ radio as a transmission means. Conference Report at 493.

Finally, the Wyoming PSC does not allege the existence of the remaining statutory criterion necessary to support rate regulation: CMRS market conditions in its state “fail to protect subscribers adequately from unjust or unreasonable rates or rates that are unjustly or unreasonably discriminatory.”<sup>11</sup> Specifically, the PSC does not claim that its regulation of Union’s fixed cellular service is necessary to protect subscribers from unreasonable or discriminatory rates charged by Union. Rather, it states that regulation of Union’s fixed cellular rates is “imperative” because those rates:

- Could “forestall land line expansion if not properly reviewed and established by the [PSC] of Wyoming;”
- “[C]an infringe in other companies land line certificated areas;”  
and
- “[C]ould affect extension of facilities, service quality and rates [because] other land line companies have expressed concern over the provision of [fixed cellular] service.” Pet. at 3 ¶ 1.

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<sup>11</sup>With respect to the Wyoming CMRS market generally, the PSC does not dispute that rates for cellular services have been falling, and it notes that rates for other (non-cellular) CMRS services have been “essentially flat; that is, no increases or decreases.” Pet. at 4 ¶ 2. Moreover, it is not apparent what circumstances would warrant state regulation of CMRS services to prevent unreasonably discriminatory rates given that all CMRS providers are subject to Section 202(a) of the Communications Act (which prohibits imposition of unreasonably discriminatory rates) and to this Commission’s complaint jurisdiction.

Simply stated, the Wyoming PSC wants to regulate Union's fixed cellular service, not to ensure that the rates Union charges are not unreasonably high, but rather to ensure that Union's rates are not so attractively low that consumers served by other landline telephone companies will not forsake their wireline service for Union's wireless service. This state policy of "regulated competition" is contrary to the policies Congress wanted to achieve in amending Section 332: the public interest is served when people have choices and when a competitive market is managed by the forces of competition rather than regulation.

The PSC's remaining two arguments can be also dismissed. The PSC appears to assert that the CMRS market in Wyoming is becoming less competitive because U S WEST Communications has announced plans to terminate its provision of Rural Radio Service and Improved Mobile Telephone Service ("IMTS"). Pet. at 3 ¶ 1. This assertion is simply not credible -- especially when one considers that, according to the PSC, there are at least 30,600 CMRS customers in Wyoming while U S WEST Communications has no customers for its Rural Radio Service and only 125 IMTS customers.<sup>12</sup> See Pet., Exhibit 7. Moreover, the PSC petition does not even acknowledge the dozens of narrowband and broadband PCS licensees which will soon be providing CMRS service throughout Wyoming, entry that will certainly intensify competition within the CMRS market.

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<sup>12</sup>U S WEST's IMTS customer base has decreased by over 80% over the past three years (to 125 customers) as consumers have moved to better and more economical alternatives (*e.g.*, cellular). Unable to find a buyer for this antiquated (pre-cellular) technology, U S WEST's choices were: (1) raise rates by 400% to recover its costs in providing IMTS service -- action that would only accelerate the migration of the few remaining IMTS customers to other CMRS services, or (2) continue to offer the service at non-compensatory (and subsidized) rates -- action that is incompatible with a competitive market.

The PSC also suggests that its involvement in the CMRS market is necessary to entertain complaints. In support, the PSC recites receipt of 20 customer complaints filed against CMRS providers since 1986 (or about two per year among a customer base of over 30,000) -- although it does not specify which, if any, of these complaints it found to have merit. Most of these complaints involved disputes over billing or service quality.<sup>13</sup> See Pet., Exhibits 9 and 10. However, these are the very types of matters that fall within the “other terms and conditions” which states are free to establish even if their rate regulation petitions are denied.<sup>14</sup>

#### **IV. Conclusion**

There is no basis in law to grant the Wyoming PSC’s request to maintain “some . . . market entry regulation” over some CMRS providers, and the PSC has failed to establish (or even allege) that its exercise of “some rate regulation” over some CMRS providers is necessary to protect consumers. Accordingly, under the clear directives which Congress established, this Commission must deny the Wyoming petition.

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<sup>13</sup>This Commission should note that most of the complaints referenced in Exhibit 10 were actually lodged against wireline companies in connection with their wireline service. One informal complaint filed against certain CMRS providers deserves special mention because the PSC has chosen to append the complaint as a separate exhibit (Exhibit 9).

Over three years ago, the Wyoming Radio Common Carrier Association filed a letter with the PSC alleging that cellular carriers in the state were charging rates that were too low! The PSC responded by encouraging the RCC Association to submit some facts in support of its otherwise undocumented allegations, expressing a willingness to conduct a public hearing if some facts were submitted. To NewVector’s knowledge, the RCC Association declined to respond to this PSC invitation and never pursued the matter.

<sup>14</sup> See House Report at 261 (“By ‘terms and conditions,’ the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters . . .”).

Respectfully submitted,

U S WEST NewVector Group, Inc.



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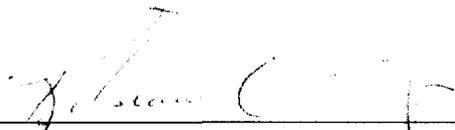
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September 19, 1994

## CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 19th day of September, 1994, I have caused a copy of the foregoing **U S WEST NEWVECTOR OPPOSITION** to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.

  
\_\_\_\_\_  
Kelseau Powe, Jr.

**\*Via Hand-Delivery**

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