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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Omnibus Budget Reconciliation)
Act of 1993)
Implementation of Sections 3(n))
and 332 of the Communications)
Act)
)
Regulatory Treatment of Mobile)
Services)

94-105

PR File No. 94-SP3

OPPOSITION OF U S WEST CELLULAR OF CALIFORNIA

U S WEST Cellular of California, Inc. ("U S WEST"), which provides commercial mobile service in the San Diego MSA service area, files these comments in opposition to the Petition filed by the Public Utilities Commission of the State of California ("CPUC") to extend state regulatory authority over the rates charged by cellular service providers. By its petition, the CPUC seeks "to retain its regulatory oversight . . . for 18 months, commencing September 1, 1994." Petition at ii.

INTRODUCTION AND SUMMARY

The CPUC has not met the burden established by Congress in the Omnibus Budget Reconciliation Act of 1993 ("Budget Act") to support continued state cellular rate authority. The CPUC has not shown why cellular providers should be subject to disparate and continued state rate regulation. Contrary to the CPUC's claims, cellular market conditions in California are competitive and the public is protected from unjust and unreasonable rates. Congress, with full knowledge of the level and extent of commercial mobile radio services ("CMRS") competition, decided that the states should be preempted from continued rate regulation over CMRS

providers. The CPUC has not demonstrated that special circumstances exist in California which would justify an exception to federal rate preemption. The CPUC's factual claims concerning cellular market conditions are suspect and unreliable.

In addition, the CPUC regulatory regime has hampered competition in the state, has imposed significant and unnecessary burdens on the provision of cellular service, and has harmed consumers. The CPUC improperly seeks to expand its rate authority through its petition, and fails to provide the Commission with adequate details concerning its regulatory proposal. As shown herein, federal preemption of continued CPUC rate authority is entirely consistent with the Budget Act. Accordingly, the CPUC Petition should be denied.

I. THE CPUC PETITION IS LARGELY BASED ON FACTS KNOWN TO CONGRESS WHEN IT DECIDED TO PREEMPT STATE RATE AUTHORITY

Congress, in the Budget Act, created a new federal regulatory framework to govern the offering of all commercial mobile radio services. Under new 47 U.S.C. §332(c)(1)(A), Congress replaced traditional regulation of mobile services with a unified approach that brings commercial mobile services under a comprehensive and consistent federal regulatory framework. Congress determined that detailed regulatory treatment of CMRS providers was inappropriate and could impede the growth and development of CMRS and deny consumer benefits.^{1/}

In establishing this new federal scheme, Congress examined the CMRS industry and determined that continued state rate and entry regulation would conflict

^{1/} H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 260 reprinted in 1993 U.S.C.A.N. 378, 587.

with Congressional objectives. For this reason, Congress expressly preempted such state regulation over commercial mobile services:

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 . . . , except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(C)(D)(3)(A).

In deciding to preempt state jurisdiction, Congress was familiar with facts concerning the CMRS industry and the state of existing and future competition. More particularly, Congress was aware of the cellular duopoly structure and market concentration, as well as the status of alternate wireless services (e.g., enhanced specialized mobile services ("ESMR") and personal communications services ("PCS")) and the likely timetable for the deployment of additional wireless technologies. Against this factual backdrop, the Congress determined that this Commission – and not the states – should govern CMRS rate and entry matters. Congress absolutely preempted states from any continued entry regulation over commercial mobile services; it allowed states to continue to exercise limited rate regulation over CMRS service providers, but only if a petitioning state can demonstrate that:

1. market conditions are such that consumers are not protected from unreasonable and unjust rates; or
2. such market exists and mobile services have become a replacement for landline telephone exchange services for a substantial portion of telephone landline exchange services in such state.

47 U.S.C. §332(c)(3)(A), (B).

The Congress made clear that it intended to require states to meet a substantial burden before it would permit them to exercise continued rate authority.

It also expressed the desire that the Commission ensure that "the policies embodie[d] in § 332(c) be given an adequate opportunity to yield the benefits of increased competition and subscriber choice" ^{2/} The burden imposed on states seeking continued rate authority thus requires more than a "rehash" of familiar arguments regarding competitive issues associated with the cellular duopoly market or claims that, at present, substitutes for cellular service are not finally deployed. Congress knew of these matters when it decided that federal rate preemption was appropriate.

Despite this fact, much of the CPUC Petition is devoted to arguments based on the cellular duopoly structure and the state of competition in the CMRS industry today. Thus, the CPUC states that in concluding that cellular market conditions supported filing of the Petition it:

evaluated the cumulative impact of various criteria including: (1) structural barriers to competitive entry; the market power of the duopoly cellular carriers, . . . ; and (2) the current availability of emerging competitive alternatives to cellular service. ^{3/}

^{2/} H.R. Rep. No. 103-111 at 260. The Congress also wanted the Commission to ensure that any continued state regulatory regime would treat similar services comparably:

[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. H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 473, 494 (1933) (emphasis added).

^{3/} Petition at I (Summary); See also Petition at 7 (the CPUC alleges that it has found that (1) the cellular duopoly structure has created almost absolute barriers to entry; (2) alternate providers of cellular service do not yet exert competitive pressure on duopoly cellular providers; and (3) duopoly service providers earn well above that normally earned in competitive markets). See also Petition at 25, 31, 63-67, 76.

Clearly, information concerning these matters was well known to Congress when it passed the Budget Act. With this knowledge, Congress made the decision that federal, and not state, regulation of CMRS would promote competition and serve the public interest. The Commission should therefore reject the CPUC's efforts to reargue matters resolved by passage of the Act. The CPUC has not met the burden established for extended rate authority and its Petition should be denied.

II. CPUC REGULATION HAS HARMED THE PUBLIC

California has, by all accounts, one of the most pervasive regulatory regimes for the cellular industry in this country. The state has regulated cellular since its infancy and clearly hopes to continue to "tinker" with rate matters, notwithstanding Congress' preference for preemption and notwithstanding the lack of success of California's regulatory efforts to date. Indeed, California's intrusive regulatory scheme has resulted in rates that are among the highest in the country, a fact that the CPUC readily acknowledges. See Petition at 45.

Regulation of the cellular industry in California has impeded rather than promoted competition. Efforts by cellular carriers to reduce rates and make savings available through promotions and discounted offerings have been stymied by the CPUC regulatory process. U S WEST itself has been involved in several situations where regulatory "roadblocks" have prevented it from offering lower rates to its customers, or have substantially delayed the implementation of competitive offerings. The onerous CPUC regulatory burdens have also caused U S WEST to decide not to introduce certain rate plans and service programs in California that have been

successfully offered by U S WEST affiliates in other states. Several examples of the problems created by CPUC regulation follow.

A. Regulatory Rejection: The \$400 Cash Back Offer

One example of the problems created by California's regulatory regime involves a three-year cash-back offer proposed by U S WEST. On June 21, 1991, U S WEST proposed introducing the three-year cash-back offer. Under the program, customers who took cellular service and maintained their service for 36 months would receive a \$400 credit or cash payment. Using the CPUC's rules governing temporary tariffs, U S WEST made the tariff effective immediately, to run for a period of three months, expiring on September 30, 1991. Cellular resellers filed a protest.

Approximately 2000 customers signed up for the program during the first three months. On September 25, 1991, only six days before the expiration date of the promotion, the CPUC announced that it was suspending the tariff. The CPUC did not advise U S WEST what it should do about the many customers who signed up for the promotion. In part, the CPUC suspended the tariff based on a new requirement announced in its ruling – that airtime credit promotions could not exceed \$100.^{4/} U S WEST immediately stopped offering the program (in California only) and sought rehearing, seeking to have the suspension lifted and requesting permission to pay the \$400 owed to customers who signed up for the program in good faith.

Some six months later, the CPUC rejected the rehearing application. It also ordered that the suspension would be retroactive to the June 21 start of the promotion – thereby holding that none of U S WEST's customers who signed up for

^{4/} The CPUC also announced that tangible gift promotion items could not exceed \$25.00 in value. See discussion infra at 10.

the three-year cash-back program would be allowed to receive their \$400 payments. The CPUC made this ruling despite the fact that the U S WEST tariff had been effective upon filing, under the CPUC's own rules. Due to the CPUC's unprecedented retroactive decisionmaking, some 2000 customers who signed up for the cash-back program were denied a promotion they chose, and were not given the cost savings they bargained for.

B. Regulatory Delay: Reductions in Roaming Rates

The harm resulting from the California regulatory process has not been limited to the blocking of savings offerings and promotions. Harm has also come from the CPUC's unreasonable delays in processing the approval of new service offerings. As an example, U S WEST's efforts to provide a uniform roaming rate -- again an offering which would benefit cellular subscribers -- were delayed by the CPUC staff for almost a full calendar year; moreover, the approval finally given was provisional -- for one year only. This delay occurred despite the fact that another cellular carrier had already applied for, and received, approval to offer uniform roaming rates.

In April, 1993, U S WEST submitted a proposal to the CPUC staff for a uniform roaming rate for U S WEST customers throughout the state of California. This proposal provided for a flat roaming rate throughout the state, simplifying billing arrangements and, in many cases, reducing rates. Aware of possible delays in the CPUC regulatory process, U S WEST sought advance approval and submitted its tariff proposal to the CPUC for review. Further, to help expedite CPUC review, U S WEST included a complete financial analysis of the impacts of the uniform roaming rate.

The CPUC staff took several months to review the materials provided. In August 1993 (some four months later), U S WEST was advised that its proposal had been conditionally approved; the company then filed its advice letter on August 25, 1993 to implement the new uniform roaming rates. Given the advance review, quick formal approval was expected.

Despite the conditional approval, on September 13, 1993 (some five months after submission of the original proposal), the CPUC staff informed U S WEST that certain tariff definitions were, in their opinion, unclear. In response, U S WEST filed, in mid-September 1993, the requested clarifications. The CPUC staff also advised U S WEST, for the first time, that customer notices had to be sent out because the proposal was for a rate increase.^{2/} U S WEST responded that the proposal was not for a rate increase and that the restrictions applicable to rate increases therefore did not apply. Nonetheless, in an effort to facilitate the approval process, U S WEST sent out notices to its customers concerning the new roaming proposal.

Several months later, the CPUC staff informed U S WEST that the tariff filing had to be modified -- to be in effect for one year only. Once again, U S WEST promptly responded, and amended its proposal as requested. These changes were filed at the beginning of February, 1994.

Finally, almost one full year after U S WEST submitted its uniform roaming tariff proposal to the staff, the CPUC approved it. The CPUC approval was limited to one year, and U S WEST was advised that any extension would require the

^{2/} According to the CPUC, the uniform roaming rate could result in rate increases for a handful of the state's cellular markets.

filing of a formal application. Once again, the CPUC's actions denied California consumers the full benefits of a competitive offering.

C. Additional Examples of Burdens Imposed by CPUC Regulation

In addition to the matters discussed above, the CPUC has imposed numerous other burdens on California cellular carriers. These burdens harm consumers, increase the costs of service provision and add operational complexities found only in California – all without justification. While not meant as an exhaustive list, what follows are other examples of CPUC regulatory burdens.

- Wholesale Clone Requirement -- The CPUC has required that any retail offering or promotion be matched on a rate element by rate element basis with a comparable "clone" on the wholesale side. This requirement has created enormous problems. First, it is not always practicable to offer wholesale clones of retail pricing plans. Second, the clone requirement allows resellers to rely on (and appropriate) the marketing and pricing innovations of their competitors. Third, the difficulties in fashioning wholesale clones means that certain beneficial pricing plans are not offered at all in California. Ironically, it should be noted that despite the CPUC's rigid clone requirement, the evidence shows that resellers rarely subscribe to such plans.

- The Restriction Against Bundling of Equipment -- California, alone among all states, prohibits carriers from bundling equipment with cellular service. Such bundling has been enormously successful throughout the country, and the practice is widely attributed with adding many new cellular subscribers at significant cost savings. By contrast, the CPUC prohibition on bundling has resulted in

California customers facing among the highest equipment prices in the country. The bundling restriction has also had a negative impact on penetration rates in the state.

- Gift and Airtime Credit Promotion Limits -- California has imposed strict limits on gift and airtime promotions, and the CPUC has arbitrarily changed its rules in this area several times. While such promotions provide cost savings and are very popular with consumers in many states, the CPUC has decided that they should be regulated -- and severely restricted. Initially, the CPUC decided to limit promotional gifts to items of "nominal value." Thereafter, the CPUC modified this requirement to limit tangible gifts to a value of \$25, and to impose a separate limit on airtime credit promotions of \$100. Recently, the CPUC further modified the promotional limits -- again permitting the offer of unlimited airtime credits. For now, the CPUC's restriction on tangible gift value amounts remains in effect. This unnecessary restriction severely limits the creative marketing efforts of cellular carriers -- with no corresponding public benefit. ^{6/}

D. Regulatory Impact on Other Competitive Efforts: The Decision Not To Offer Services Offered in Other States

U S WEST has necessarily had to take into account the types of problems described above in planning for the San Diego market. The CPUC's rejection of competitive offerings; the delays in the regulatory process; and unreasonable modifications imposed on competitive offerings have all harmed the state's cellular subscribers. In addition, these factors have increased U S WEST's costs of doing business in the state -- again with no public benefit. These multifarious problems

^{6/} As a concrete example of the impact of the gift limit, a U S WEST concert series promotion involving the award of concert tickets was severely hampered -- because of the very low gift value limit.

have, in turn, caused U S WEST to modify its business plans in the state -- to the detriment of cellular subscribers.

In particular, the CPUC process, and the restrictions imposed, have caused U S WEST to not offer various promotions and plans in San Diego which have been successfully offered and implemented by its affiliates in other states. Thus, popular programs are denied to California's cellular customers. An example is U S WEST's national bulk purchase plan program. In all of the other markets served by U S WEST's affiliates, large customers have the option of buying service out of a bulk tariff, without any access charge and with reduced usage rates. This "best rate" offer is made available to large users because of the substantial economies of scale (based on the sale of large quantity cellular usage).

U S WEST has not offered the national bulk purchase plan in California. The CPUC's regulatory structure requires any entity wishing to purchase cellular services at the equivalent of wholesale rates to obtain a Certificate of Public Convenience and Necessity from the CPUC. As a result, large California users, even those who purchase in amounts equal to or greater than a reseller, are not able to take advantage of the national bulk purchase program. Given the success of this plan in other states, there can be little doubt that it would be popular and successful in California. Unfortunately, the regulatory process has precluded its availability; once again, California's cellular consumers are harmed.

As the above examples illustrate, the CPUC is flat wrong in asserting that the regulatory process in California has benefitted consumers. Instead, the CPUC has blocked or delayed the introduction of competitive services and rates. It has also added unnecessary costs and complexities to the provision of cellular service

in the state. Based on the CPUC's record of regulation, U S WEST submits that continuing the CPUC's rate authority will only further hinder the competitive development of CMRS in California.

III. THE FACTUAL FINDINGS CONTAINED IN THE CPUC PETITION ARE SUSPECT AND UNRELIABLE

The CPUC needed to find non-competitive market conditions to justify its Petition to this Commission; the CPUC therefore was motivated to institute an investigation into the wireless industry which would result in the desired finding.^{2/} In so doing, however, the CPUC followed suspect decision-making procedures. Thus, the findings contained in the CPUC Petition cannot be relied upon.

The CPUC Petition purports to be based on "findings" that the California cellular industry is not competitive at this time. According to the CPUC, this

^{2/} The predisposition of the CPUC on this issue is evident from the commencement of its wireless investigation. In its Order Instituting Investigation ("OII"), the CPUC stated:

It appears that competitive alternatives to current cellular service may develop in the next few years. The development of this competition should diminish the need for vigorous regulation of this market. While it may take some time to develop a fully competitive wireless telecommunications market, we are hopeful that such a market will develop.

* * *

[T]he [regulatory] framework classifies cellular duopolists as dominant carriers and establishes a clear vehicle for an orderly phasing down of regulation when effective competition infiltrates the mobile market.

(OII at 3, 6 (emphasis added)). Thus, the CPUC had already decided in the OII that competition does not exist; it then asked the parties to comment on this subject and to answer data requests – presumably to provide the "imprimatur" of legitimacy for its subsequent actions in filing the petition.

conclusion was based on evidence and data responses received during a 1994 investigation into the California wireless industry (I. 93-12-007) resulting in an August 1994 interim decision finding non-competitive conditions in the state's cellular market.^{8/} (One of the express purposes of this investigation was to determine whether the CPUC should petition this Commission for continued rate authority.) The CPUC states that its findings on competitiveness are based on its "analysis of evidence presented in the record of its investigation into the wireless industry in California, evidence gathered in response to data requests, and evidence cited in publications." Petition at I. Further, according to the CPUC, in reaching its conclusions regarding cellular competitiveness it allowed "all interested parties an opportunity to participate." *Id.* at 6.

Contrary to these apparently reasonable assertions as to the CPUC's actions in this area, it is clear that the CPUC wireless industry investigation was conducted improperly – and that all "interested parties" were not given an opportunity to participate. Specifically, the CPUC failed to hold evidentiary hearings on disputed issues of fact raised, as required by California law.^{2/}

^{8/} D. 94-08-022 (August 3, 1994) ("August 1994 Decision").

^{2/} The California Public Utilities Code states:

The Commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Cal. Pub. Util. Code § 1708 (West 1965).

The California Supreme Court has repeatedly interpreted Section 1708 to require the CPUC to hold evidentiary hearings on disputed factual issues and to base its findings of fact and conclusions of law solely on the evidentiary record developed at such hearings. See California Mfrs. Ass'n v. Public Util.

(continued...)

When the CPUC opened its wireless investigation, it recognized the need to resolve all necessary issues "involving disputed factual matters" by means of evidentiary hearings. (OII at 35.) However, in the August 1994 Decision, the CPUC concluded that evidentiary hearings were unnecessary -- despite the fact that the decision involved resolution of numerous disputed factual questions.^{10/} Thus, the failure to hold evidentiary hearings renders its decision, and the resulting CPUC Petition, defective.

The CPUC has departed from prior precedent in several respects. For example, in 1990, in an earlier state proceeding involving cellular service (D.90-06-025), the CPUC found that the cellular "duopoly market structure does not necessarily foreclose sufficient competition to maintain fair and efficient pricing of cellular services." (36 CPUC 2d 464, 490). However, in the August 1994 Decision and in the Petition, the CPUC now finds competitive problems with the state's cellular industry. Similarly, while in 1990 the CPUC found that cellular returns on investment was not

^{2/}(...continued)

Comm'n, 24 Cal. 3rd 251, 101 Cal. Rept. 75 (1979); California Trucking Ass'n v. Public Util. Comm'n, 19 Cal. 3rd 240, 96 Cal. Rept. 682 (1977). On September 2, 1994, U S WEST filed an application seeking rehearing of D. 94-08-022 (based, inter alia, on the CPUC's failure to hold hearings as required by law).

^{10/} August 1994 Decision at 6-7. Among the disputed factual matters raised in the state proceeding were: 1) the breadth of relevant product markets in which cellular competes; 2) the effectiveness of using various proposed measures of market power and competition in assessing the competitiveness of cellular service; 3) the elasticity of cellular service; 4) whether California's past and present regulation of cellular market has hindered competition; and 5) the extent to which the present and pending entry of new participants in the mobile telephone services market will enhance competition. See, e.g. U S WEST Comments, Page E2 (February 25, 1994).

a proper basis for determining price competition among cellular carriers or the reasonableness of cellular rates, in the August 1994 Decision, and in the Petition, the CPUC reached the opposite conclusion. (36 CPUC 2d. at 490.) As yet another example, in the August 1994 Decision the CPUC for the first time imposed a new regulation requiring unbundling of the radio transmission link. This clear departure from prior CPUC decisions was again made without hearing.

A brief review of several disputed factual questions resolved by the CPUC without hearing demonstrates the problem with the state investigatory process, and with the factual findings submitted in the Petition:

- In analyzing market conditions, the August 1994 Decision examined the issue of the potential for market substitutes for cellular service. The CPUC recognized that the parties were "in substantial dispute over the timetable for commercial deployment of PCS." (August 1994 Decision at 28.) Yet in its decision, and without hearing, the CPUC reached conclusions concerning PCS and the prospects for alternate service providers competitive to cellular. These "findings" are now relied upon by the CPUC in its Petition. See Petition at 24, 65-67.

- Similarly, in the state investigatory proceeding, a factual dispute arose regarding the proper measurements or indicators that should be used to evaluate competition in the wireless industry. Among the various measures addressed by different parties were rate trends, market entry barriers, customer satisfaction, technological advancement, distribution of facilities ownership, market share, earnings, spectrum availability and rate of system expansion. The CPUC made findings regarding the value of certain of these indicators without hearing, and without allowing parties to question the findings or offer conflicting evidence. Again, the

CPUC's "findings" on this issue are presented to support the CPUC Petition. See Petition at 6-7.

- Likewise, in the state investigatory proceeding, the CPUC reached conclusions concerning the Department of Justice Merger Guidelines and the Herfindahl-Hirschmann Index, despite recognizing that evidence offered by parties to the proceeding was in substantial dispute. (August 1994 Decision at 31-35.) U S WEST submits that there are substantial flaws in the CPUC's market concentration analysis and figures. Once again, while disputed facts were presented, no evidentiary hearings took place. In turn, the CPUC "findings" on this matter are presented to support the CPUC Petition. See Petition at 76-77.

- In addition, the impact of California's cellular regulation on cellular rates was addressed by the CPUC in the state proceeding. The CPUC specifically noted that the parties "expressed divergent views" on this question. (August 1994 Decision at 40.) Yet the CPUC then concluded, again without evidentiary hearings, that cellular regulation was not responsible for the level of rates in the state. (Id. at 45.) Once again, this "finding" is relied upon in the CPUC Petition. Petition at 17, 39.

In sum, the CPUC wireless investigatory proceeding did not allow parties the opportunity to be heard on disputed factual issues, to present evidence, or to cross-examine evidence offered by others. These deficiencies render the factual

assertions presented in the CPUC Petition unreliable. The CPUC's claims regarding cellular industry market conditions should be rejected. ^{11/}

IV. THE CPUC HAS IMPROPERLY EXPANDED ITS RATE REGULATION IN VIOLATION OF SECTION 332

The CPUC has imposed additional rate regulation over cellular carriers during the period after passage of the Budget Act. This action violates the Budget Act, and the Commission should reject the CPUC's efforts to modify its state regulatory framework pending action on the CPUC Petition. Under Section 332, forms of regulation other than those in effect as of June 1, 1993 are not "grandfathered" by the filing of the CPUC Petition:

If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such a State on such date, such State may, no later than one year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition.

47 U.S.C. § 332(c)(3)(B). While the CPUC's rate regulation as of June 1, 1993 properly remains in effect pending consideration of the CPUC petition, any new

^{11/} Apart from the problems discussed above, the CPUC Petition suffers from a more fundamental defect: the assertions in the Petition regarding market conditions in the cellular industry are factually erroneous. U S WEST, the other cellular carriers in California and the Cellular Carriers Association of California, provided substantial information to the CPUC demonstrating the existence of competition in the state's cellular industry. This data was rejected out of hand by the CPUC in the August 1994 Decision, and in the CPUC Petition. U S WEST understands that comments to be filed by other California cellular carriers will present the Commission with a detailed rebuttal of the competitive analysis contained in the CPUC Petition. Accordingly, there is no need to repeat that showing here.

regulation initiated after June 1, 1993 which the CPUC seeks to apply to CMRS providers is preempted by the statute. To impose any new or different regulation, the CPUC must obtain the FCC's prior authorization, upon proper petition.

Thus, while the state's rate-band authority (introduced in April 1993) may properly remain in effect pending consideration and action on the CPUC Petition, the CPUC's August 1994 interim decision to impose the unbundling of access charges from cellular service wholesale rates is unlawful new regulation.^{12/} This new regulation directly affects the rates cellular carriers in California charge their customers. Since this new regulation was initiated after June 1, 1993, it is not "grandfathered" under Section 332. The CPUC has also recently opened two formal proceedings to consider additional regulatory changes affecting wireless carriers.^{13/} To implement this or any other new rate regulation, the CPUC must petition the FCC for prior authorization (and make the requisite showing).

To the extent that the CPUC seeks FCC authorization to impose new rate regulations in the context of its Petition, the Petition fails to meet the statutory burden and should be denied. For the reasons discussed above, there is no showing

^{12/} This regulation is sweeping and will permit switched-based resellers to obtain interconnection directly from the local exchange carrier, and a block of telephone numbers directly from the number administrator. Petition at 21.

^{13/} The first proceeding is an investigation into "Mobile Telephony Service and Wireless Communications that will modify existing regulatory frameworks based on whether the carrier is determined to be dominant or non-dominant." Petition at 10. The second proceeding is a rulemaking to establish modified registration procedures for telecommunications firms deemed "non-dominant." *Id.* As applied to CMRS providers, the proposed CPUC state certification/registration process is unlawful for other reasons. Under Section 332(c)(3)(A) of the Budget Act, Congress absolutely preempted state jurisdiction over CMRS entry matters.

that market conditions are such as to require state rate regulation of any kind. As such, the CPUC's regulatory initiative must be rejected.

Finally, a more fundamental concern is presented by the CPUC's actions in initiating new rate regulation during this interim period. At a time when the Congress and the FCC have determined that a decrease in CMRS regulation – and in state involvement – is in the public interest, the CPUC clearly has a different agenda and is taking steps to increase and intensify its regulatory efforts. The Commission should reject the CPUC's misguided and unlawful attempt.

V. THE CPUC'S VAGUE REQUEST FOR CONTINUED RATE AUTHORITY ALSO FAILS TO PROVIDE THE COMMISSION WITH ADEQUATE INFORMATION FOR DECISIONMAKING

As discussed above, the CPUC has improperly attempted to expand its rate authority during the interim period prior to filing and action on its Petition. Moreover, the CPUC Petition does not clearly spell out – to the Commission or the public – what particular rate regulations the CPUC seeks to implement. Instead, the CPUC seeks authority to continue cellular rate regulation "over all aspects of cellular service . . ." for an eighteen month period commencing September 1, 1994. Petition at 79.

Commission Rule Section 20.13(a)(4) requires that a petitioning state "identify and describe in detail the rules the state proposes to establish if the petition is granted." The CPUC does not comply with this directive. Instead, its Petition refers to current and proposed regulatory initiatives without providing the Commission with the specific information it requires to extend rate authority. Specificity is neces-

sary because state regulation of CMRS rates is the exception to the general rule barring such regulation.

Section 332 was amended in large part to ensure that an appropriate level of regulation was established and administered for CMRS providers;^{14/} further, Congress specified that state rate regulation should be permitted, if at all, only to the extent and for the duration absolutely necessary.^{15/} There can be no confidence that these Congressional directives are met if a state does not describe its proposed regulatory regime with appropriate specificity.

Finally, the CPUC's failure to provide specificity concerning its regulatory proposal deprives CMRS providers of reasonable notice of the rules that the state may apply to them should the petition be granted. In such circumstance, the CPUC might later impose additional rate regulation beyond what this Commission and CMRS providers had assumed – again in contravention of Congressional intent. In sum, the CPUC seeks a broad grant of rate authority without specification. The FCC should not countenance the CPUC's vague and expansive attempt to extend state jurisdiction.

CONCLUSION

In the Budget Act, the Congress determined that the Commission should govern the offering of commercial mobile services and that the states should be

^{14/} See Implementation of Section 3(n) and 332 of the Communications Act. Regulatory Treatment of Mobile Services, Gen. Docket No. 93-252, Second CMRS Report & Order, 9 FCC Rcd. 1411, 1418 ("CMRS Second R&O").

^{15/} See Section 332(b)(3)(B), H.R. Conf. Rep. No. 103-213; Conference Report at 494 and CMRS Second R&O, 9 FCC Rcd. at 1508.

allowed only very limited authority to impose separate rate regulatory requirements over CMRS providers. Congress found that disparate regulatory treatment could impede the development of CMRS and hinder competition. For the reasons stated herein, the CPUC Petition does not satisfy the high standard imposed by Congress to overcome federal preemption. Accordingly, the CPUC Petition should be denied.

Respectfully submitted,

U S WEST CELLULAR OF CALIFORNIA,
INC.



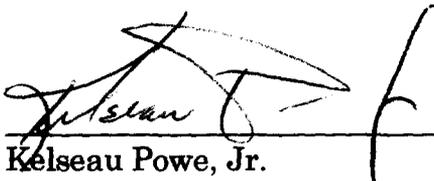
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September 19, 1994

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 OF CALIFORNIA** 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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