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

In the Matter of )  
)  
Petition of the People of the State )  
of California and the Public )  
Utilities Commission of the State of )  
California to Retail State )  
Regulatory Authority over Intrastate )  
Cellular Service Rates )  
\_\_\_\_\_ )

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**OPPOSITION OF BAY AREA CELLULAR TELEPHONE COMPANY**

**BAY AREA CELLULAR TELEPHONE  
COMPANY**

Adam A. Andersen  
Senior Counsel

Suzanne Toller  
Counsel

651 Gateway Boulevard, Suite 1500  
South San Francisco, CA 94080  
Telephone: (415) 244-5656

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## SUMMARY

In order for its Petition to be granted, the CPUC must demonstrate that market conditions will not protect cellular subscribers from unjust or unreasonable rates. The burden of proof is on the CPUC. However, the economic theories used by the CPUC to support its positions are fraught with error and often a basic lack of understanding. Moreover, many of its allegations and conclusions are mere supposition, unsupported by any evidence. Other allegations purportedly are bolstered by evidentiary data, but that data is similarly replete with mistakes and misconceptions. To make matters worse, the CPUC has improperly redacted the very data that it relies upon data from the publicly available version of the Petition.

The CPUC alleges that the FCC-created duopoly structure coupled with interlocking ownerships has enabled California's cellular carriers to price cellular service at non-competitive levels and to earn returns far above competitive levels. BACTC has interlocking ownership of the type feared by the CPUC, though the CPUC has twice approved the joint ownership of BACTC by AirTouch and McCaw. This ownership structure has not diminished competition in the Bay Area marketplace or in other California markets between BACTC's parent companies. BACTC has implemented procedures to ensure that competitively sensitive information is not shared among competitors, and to ensure that BACTC and its parent companies comply with all applicable state and federal antitrust laws.

The CPUC contends that the relative market share between competing cellular carriers has remained the same, while at the same time the market share of cellular resellers has declined. While the market share of resellers has decreased in the Bay Area, the CPUC can show

no causal relationship to a lack of competition between BACTC and GTE Mobilnet of California, Inc. ("GTE Mobilnet") of any actions of these carriers. The CPUC erroneously links unassociated facts and does not take into account the growth and market power of large retailers, such as Circuit City and The Good Guys, in the Bay Area.

The CPUC contends that the cellular rates charged by BACTC are suspiciously similar to those charged by its competitor in the Bay Area, and that BACTC's rates have not fallen. The CPUC is simply mistaken. BACTC's rates for basic service — the apparent bellwether of the CPUC's analysis — are significantly different than those charged by GTE Mobilnet as are the discount package plan rates offered by each carrier. Furthermore, BACTC has reduced its rates many times, including its basic service rate, and customers can now choose from a variety of discount plans offering substantial reductions from the basic rate plan (which the CPUC has chosen as the baseline measure). The CPUC is aware of those rate reductions — it approved them — yet it refuses to acknowledge their existence or effect.

The CPUC tries to prove that the rates of return earned by cellular carriers are excessive by inappropriately using accounting data and excluding important economic and market factors. Even using that accounting data, the CPUC fails to establish its basic premise that expenses are falling quicker than revenues. The very data relied upon by the CPUC demonstrates that BACTC has had to invest heavily in capital expansion, and that such network investment has, in crucial years, grown at a quicker rate than revenues. BACTC has dramatically expanded its network capacity to meet growing demand for capacity, coverage and service quality, and it has priced its services in order to fill its capacity without degrading service or curtailing service

coverage. The data simply does not support the CPUC's allegation that BACTC has priced its service to fill existing capacity only and to avoid capacity expansion.

In the final analysis, the CPUC has not demonstrated to the FCC that its continued regulation of cellular rates in California is necessary to ensure just and reasonable rates. Despite the CPUC's unhappiness at the cellular rates offered by California cellular carriers, it is uncontroverted that rates are currently just and reasonable since they have been submitted to and approved by the CPUC. In addition to ignoring BACTC's pricing history, the CPUC also ignores the competitive marketplace and its inevitable downward pressure on pricing. The business press recognizes that rates are falling today and that imminent increases in competition for customers will accelerate that trend, but the CPUC seems to oblivious to those realities. The CPUC has not and cannot demonstrate to the FCC that cellular rates will become unjust and unreasonable if it is no longer allowed to regulate cellular rates in California.

The CPUC has misrepresented the realities of the current state of the cellular industry and has failed to carry its burden of proof. Consequently, its request for eighteen more months of regulatory authority is factually and legally insupportable. Accordingly, the FCC should reject the CPUC's Petition.

## **I. INTRODUCTION**

Pursuant to Rules 20.13(A)(5) and (B)(1) of the Rules of Practice and Procedure of the Federal Communications Commission ("FCC"), Bay Area Cellular Telephone Company ("BACTC") hereby files its Opposition to 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" submitted in PR File No. 94-SP3 on August 8, 1994 (the "Petition"). BACTC is the nonwireline cellular carrier licensed by the FCC and certificated by the California Public Utilities Commission ("CPUC") to provide facilities-based cellular service in the San Francisco and San Jose Metropolitan Statistical Areas ("MSA"). BACTC is a partnership controlled indirectly by AirTouch Communications, Inc. ("AirTouch") and McCaw Cellular Communications, Inc. ("McCaw").

In order for its Petition to be granted, the CPUC must meet the statutory basis for the continuation of state regulation of rates. Specifically, the CPUC must demonstrate that market conditions will not protect cellular subscribers from unjust or unreasonable rates.<sup>1</sup> The burden of proof is on the CPUC: "If we [the FCC] determine that the state has failed to meet this burden of proof, we will deny the petition."<sup>2</sup> The imposition of such a burden is consistent with the FCC's finding that Congress, by adopting section 332(c)(3)(A) of the Communications Act, intended to preempt state and local rate regulation of all commercial mobile radio services to

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<sup>1</sup> 47 U.S.C. § 332(c)(3)(A).

<sup>2</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") at ¶ 251.

ensure that similar services are accorded similar regulatory treatment and to avoid undue regulatory burdens.<sup>3</sup>

The CPUC attempts to establish that prevailing market conditions in California will not protect its cellular subscribers from unjust or unreasonable rates. In summary, the CPUC supports its basic contention by proffering the following factual and economic arguments:

- (i) The FCC-created duopoly structure coupled with interlocking ownerships has enabled California's cellular carriers to price cellular service at non-competitive levels and to earn returns far above competitive levels.
- (ii) The relative market share between competing cellular carriers has remained the same, while at the same time the market share of cellular resellers has declined.
- (iii) Cellular rates in California are among the highest in the nation and have failed to decline commensurate with declines in capital and operating costs. Further, the rates offered by competing carriers are "strikingly similar" and have not significantly declined.
- (iv) The earnings of cellular carriers are well above the levels normally found in competitive markets and cannot be explained by spectrum scarcity value.<sup>4</sup>

The economic theories used by the CPUC to support its positions are fraught with error and often a basic lack of understanding. Moreover, many of its allegations and conclusions are mere supposition, unsupported by any evidence. Other allegations purportedly are bolstered by

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<sup>3</sup> Second Report and Order at ¶ 250.

<sup>4</sup> Petition at 7.

evidentiary data, but that data is similarly replete with mistakes and misconceptions. To make matters worse, the CPUC has improperly redacted the very data that it relies upon data from the publicly available version of the Petition.

BACTC will not repeat the economic discussions found in the oppositions being filed today with the FCC by its parent companies, AirTouch and McCaw, or by the state industry association, the Cellular Carriers Association of California ("CCAC"). BACTC will focus its opposition on the specific factual allegations and errors in the CPUC's analysis of BACTC's earnings, rates and system capacity. Due to the extent to which the critical data in the Petition is redacted, it is difficult for BACTC to challenge the facts underlying all of the CPUC's allegations; nonetheless, BACTC has first-hand experience as a cellular carrier in California and is able to affirmatively provide accurate data that controverts the CPUC's simplistic arguments.<sup>5</sup>

BACTC has interlocking ownership of the type feared by the CPUC, though the CPUC has twice approved the joint ownership of BACTC by AirTouch and McCaw. This ownership structure has not diminished competition in the Bay Area marketplace or in other California markets between BACTC's parent companies. BACTC has implemented procedures to ensure that competitively sensitive information is not shared among competitors, and to ensure that BACTC and its parent companies comply with all applicable state and federal antitrust laws.

While the market share of resellers has decreased in the Bay Area, the CPUC can show no causal relationship to a lack of competition between BACTC and GTE Mobilnet of California, Inc. ("GTE Mobilnet") or any actions of these carriers. The CPUC erroneously links

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<sup>5</sup> For the FCC's reference, BACTC has also provided herewith copies of its opening reply comments in the CPUC's Investigation No. 93-12-007 into the wireless industry. Copies of the comments are in Appendices J and K.

unassociated facts and does not take into account the growth and market power of large retailers, such as Circuit City and The Good Guys, in the Bay Area.

The CPUC blithely contends that the cellular rates charged by BACTC are suspiciously similar to those charged by its competitor in the Bay Area, and that BACTC's rates have not fallen. The CPUC is simply mistaken. BACTC's rates for basic service — the apparent bellwether of the CPUC's analysis — are significantly different than those charged by GTE Mobilnet as are the discount package plan rates offered by each carrier. Furthermore, BACTC has reduced its rates many times, including its basic service rate, and customers can now choose from a variety of discount plans offering substantial reductions from the basic rate plan (which the CPUC has chosen as the baseline measure). The CPUC is aware of those rate reductions — it approved them — yet it blindly refuses to acknowledge their existence or effect.

The CPUC tries to prove that the rates of return earned by cellular carriers are excessive by inappropriately using accounting data and excluding important economic and market factors. Even using that accounting data, the CPUC fails to establish its basic premise that expenses are falling quicker than revenues. The very data (albeit redacted in the Petition) relied upon by the CPUC demonstrates that BACTC has had to invest heavily in capital expansion, and that such network investment has, in crucial years, grown at a quicker rate than revenues. BACTC has dramatically expanded its network capacity to meet growing demand for capacity, coverage and service quality, and it has priced its services in order to fill its capacity without degrading service or curtailing service coverage. The data simply does not support the CPUC's allegation that BACTC has priced its service to fill existing capacity only and to avoid capacity expansion.

In the final analysis, the CPUC has not demonstrated to the FCC that its continued regulation of cellular rates in California is necessary to ensure just and reasonable rates. Despite the CPUC's unhappiness at the cellular rates offered by California cellular carriers, it is uncontroverted that rates are currently just and reasonable since they have been submitted to and approved by the CPUC. More importantly, the advisor to the President of the CPUC has publicly acknowledged that the CPUC "is not really doing anything to bring rates down at this time."<sup>6</sup> The President's advisor further admits that all continued regulation of cellular by the CPUC can offer is protection against increases in cellular rates.<sup>7</sup> This posturing ignores both history and market realities. Cellular carriers in California have always had the ability to raise rates, whether pursuant to application or the CPUC's more recent rate cap procedures. Nonetheless, BACTC has never sought permission nor unilaterally increased any rates. Conversely, when BACTC introduced its newest rate reduction on September 15, 1994, which resulted in up to a 25% decrease from the current basic rate and up to a 15% decrease from each customers' optimal rate plan, the President's advisor deemed that reduction a "non-event."<sup>8</sup>

In addition to ignoring BACTC's pricing history, the CPUC also ignores the competitive marketplace and its inevitable downward pressure on pricing. The business press recognizes that rates are falling today and that imminent increases in competition for customers

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<sup>6</sup> September 15, 1994 *San Jose Mercury News* article, Appendix I.

<sup>7</sup> *Id.*

<sup>8</sup> September 14, 1994 *San Francisco Examiner* article, Appendix H.

will accelerate that trend, but the CPUC seems to oblivious to those realities.<sup>9</sup> Despite its plaintive assertions, the CPUC has not and cannot demonstrate to the FCC that cellular rates will become unjust and unreasonable if it is no longer allowed to regulate cellular rates in California.

The CPUC has misrepresented the realities of the current state of the cellular industry and has failed to carry its burden of proof. Consequently, its request for eighteen more months of regulatory authority is factually and legally insupportable. Accordingly, the FCC should reject the CPUC's Petition.

**II. THE FCC SHOULD DISREGARD ALL REDACTED DATA IN THE PETITION, AS WELL AS ANY ARGUMENTS OR CONCLUSIONS THAT RELY ON THAT DATA.**

In its attempt to meet the burden of proof, the Petition includes factual data that allegedly supports the CPUC's analysis of three complex factual matters: the concentration of market shares, the degree of price competition in each market, and the earnings of cellular carriers.<sup>10</sup> However, the vast majority of the factual data on which the CPUC relies and which was submitted in the Petition has been redacted from all copies of the Petition made available to interested parties. This manner of proceeding severely impedes the ability of interested parties, including BACTC, to respond effectively and fully to the CPUC Petition. As will be explained below, this frustrates the intent of the procedure the FCC established in the Second Report and Order and threatens to deny BACTC and other interested parties due process of law.

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<sup>9</sup> Id.

<sup>10</sup> See Petition at 6-7.

**A. The CPUC Justified Its Redactions Based on Its Confidentiality Obligations, But the CPUC Breached Those Obligations by Providing the Data to the FCC Without CPUC Adoption of an Order for That Purpose.**

The CPUC justifies its redaction of vast amounts of factual data and several entire paragraphs of discussion or argument on the basis that it is obliged to protect the proprietary nature of information provided to it by the cellular carriers under claims of confidentiality. Indeed, section 583 of the Public Utilities Code of the State of California ("Public Utilities Code") makes it a misdemeanor criminal offense for any officer or employee of the CPUC to divulge any information furnished to the CPUC by a public utility or affiliated business, except matters specifically made open to public inspection by statute, unless "on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding."

The CPUC's General Order No. 66-C makes clear that "information of a confidential nature furnished to, or obtained by the Commission" is not open to public inspection, and so comes within the scope of Public Utilities Code section 583. Thus, the CPUC officers and employees who furnished redacted copies of the Petition to interested parties were acting consistently with their obligations under California law. However, in furnishing an unredacted original of the Petition to the FCC they violated section 583 of the Public Utilities Code.

The CPUC could have divulged the confidential information included in the unredacted version of the Petition by adopting an order to that effect. However no such order was ever issued.<sup>11</sup> Had the CPUC adopted such an order, cellular carriers, including BACTC,

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<sup>11</sup> Except in clearly defined emergency circumstances, the CPUC may not adopt an order except in public session and pursuant to statutory notice.

could have protected their rights by seeking rehearing and/or judicial review of such order.<sup>12</sup> The CPUC's release of confidential information to the FCC through its Petition denied BACTC and other cellular carriers their rights of confidentiality and appeal under the Public Utilities Code.

**B. Ironically, A Large Portion of the Redacted Data Was Not Confidential at All.**

The concerns of BACTC and other cellular carriers to protect the confidentiality of information previously submitted to the CPUC apply only to a portion of the factual data redacted from the Petition. In fact, most of the redacted data clearly is not confidential at all! Appendix A provides a listing of the topics covered by the many redactions from the Petition. As is evident from this list, of the sixteen (16) topics BACTC could discern among the redacted materials, ten (10) do not involve confidential information. In most of these cases, the redacted data is derived from one or more cellular carriers' tariffed rates, which are published and available in public files at the CPUC and at the carriers' offices. In a couple of instances, the redacted data is derived from other publications.<sup>13</sup>

One might think of excusing the CPUC's overzealous redactions as a conservative effort to ensure that no truly confidential data was released beyond the FCC. However, as will be discussed below, the broad net of redaction the CPUC has cast simply exacerbates the effect, whether intended or not, of making it impossible for interested parties to analyze or correct errors in most of the factual information on which the Petition relies.

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<sup>12</sup> See generally Public Utilities Code §§1731-67.

<sup>13</sup> See Petition at 53, 59, 60.

**C. Whether or Not the Redacted Data Is Confidential, the CPUC's Inclusion of That Data in Its Petition Impairs the Review Process Established by the FCC and Threatens to Deny Interested Parties Due Process of Law.**

In the Second Report and Order, the FCC established procedures to implement the intent of section 332(c)(3) of the Communications Act and to allow states to petition for the extension of their regulatory authority over cellular providers. Those procedures describe what the states must include in such petitions, and also allow interested parties to file comments in response to those petitions.<sup>14</sup> The FCC requires that such responsive comments "be based on evidence that can rebut the showing made in the petition."<sup>15</sup>

Interested parties, including BACTC, are severely handicapped in their ability to rebut the "showing made" in the Petition to the extent that they do not know what that "showing" was. In its present opposition to the Petition, BACTC does the best it can to rebut the CPUC's arguments for retaining regulatory authority and to rebut whatever factual assertions the CPUC has chosen to reveal in the redacted version of its Petition. But BACTC and other interested parties are unable to rebut the factual assertions included in the unredacted CPUC Petition provided only to the FCC. This set of circumstances impairs the review process established by the FCC's Second Report and Order and challenges the statutory scheme established by the Communications Act. It also threatens to deprive BACTC and other interested parties of their Constitutional right to due process of law.

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<sup>14</sup> Second Report and Order at ¶ 255.

<sup>15</sup> *Id.*

### **III. THE CPUC HAS FAILED TO ESTABLISH THAT THE INTERLOCKING OWNERSHIP OF CELLULAR SYSTEMS IN THE STATE HAS ANY ANTI-COMPETITIVE EFFECTS**

The CPUC alleges that the interlocking ownership interests among cellular carriers weaken competition by diminishing the incentive to compete, maximizing the incentive to increase profits,<sup>16</sup> and facilitating the sharing of pricing information between competitors.<sup>17</sup> This is mere speculation. The Petition is devoid of any evidence that the partner-competitor relationships in any of the California cellular markets have inhibited price competition or resulted in the sharing of pricing or any other competitively sensitive information. Moreover, it is disingenuous for the CPUC to make this allegation since it approved the very interlocking ownership arrangements that it now asserts provide a reason for continuing regulation.<sup>18</sup>

BACTC is controlled by one of the very interlocking ownership structures about which the CPUC is allegedly concerned. This ownership structure has in no way diminished BACTC's incentive to compete with its competitor in the Bay Area, GTE Mobilnet, nor, to the best of its knowledge, has it diminished BACTC's partners' incentive to compete in the other

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<sup>16</sup> Petition at 27-8.

<sup>17</sup> See Second Report and Order at ¶ 138; CPUC Decision No. 94-08-022 at 26.

<sup>18</sup> See e.g., Decision No. 93-08-024 at 16 (in which the CPUC approved BACTC's current partner/competitor ownership structure finding that such a structure was not adverse to the public interest.)

markets in which they compete.<sup>19</sup> The ownership structure similarly has not facilitated the sharing of pricing or other competitively-sensitive information. BACTC has established elaborate procedures to ensure that sensitive information does not flow from one partner to the other partner.

BACTC has prepared written procedures for handling partner-competitor information and has even created separate subdivisions within departments when necessary to segregate such information. For instance, BACTC's national account sales group is divided into two independent teams, one to assist McCaw's national sales efforts and the other to assist AirTouch's national accounts program. Those two groups are physically separated, trained and monitored to ensure that they do not allow the strategies, plans, rates, etc. of one partner to get to the other partner. BACTC has retained outside antitrust counsel to train its personnel in partner-competitor issues and has an internal compliance officer (an attorney) to oversee and advise on partner-competitor issues.

Significantly, when presented with these same allegations by the CPUC in its comments on the FCC's Notice of Proposed Rulemaking in this docket,<sup>20</sup> the FCC declined to use the interlocking ownership of the California's systems as a reason to regulate the rates of cellular carriers. Instead the FCC stated that "[t]hese arrangements will be monitored by the Commission

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<sup>19</sup> The CPUC exaggerates the number of markets in which BACTC's partner, AirTouch (previously PacTel) and McCaw are competitors. In Appendix C to the Petition the CPUC lists the Fresno, Visalia and Santa Barbara MSAs as markets in which McCaw and AirTouch reportedly compete; however, AirTouch has no operations in those MSAs. McCaw's competitors in those markets are either Contel or GTE Mobilnet.

<sup>20</sup> Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Notice of Proposed Rule Making.

[FCC] and are subject to scrutiny under federal antitrust laws." <sup>21</sup> The FCC should similarly reject the CPUC's attempt to use the interlocking ownership of California's cellular systems as a basis for continued regulation.

**IV. THE CPUC ERRONEOUSLY CONCLUDES THAT THE CARRIERS' STABLE MARKET SHARE AND RESELLERS' DIMINISHING MARKET SHARE INDICATE A LACK OF COMPETITION IN THE CELLULAR MARKET.**

The CPUC states that the lack of competition in the cellular market is further indicated by the relatively stable market share of facilities-based carriers, <sup>22</sup> and by the relatively small and diminishing market share of resellers. <sup>23</sup> The CPUC alleges that "duopolists are gradually eliminating any competition that might have existed in the retail market."<sup>24</sup>

The CPUC cites no economic theory to support its claim that relatively stable-market shares of competitors are indeed evidence of lack of competition. The CPUC also presents no evidence of a causal link between resellers' market share and actions of the cellular carriers. The CPUC overlooks many other possible explanations for resellers' diminishing market share, including the growth of large mass merchandisers in recent years. Indeed, large national retailers such as Circuit City and The Good Guys presently account for approximately a third of all cellular activations on BACTC's system. Their visibility and marketing impact has allowed them to have a dramatic impact on the retail market. Moreover, given the CPUC's determination

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<sup>21</sup> Second Report and Order at ¶ 138.

<sup>22</sup> Petition at 29.

<sup>23</sup> Petition at 31-34.

<sup>24</sup> Petition at 34.

that resellers have not significantly enhanced competition at the retail level,<sup>25</sup> the resellers' alleged diminishing market share should have no impact on the competitiveness of the market.

**V. THE PETITION FAILS TO ESTABLISH THAT CELLULAR CARRIERS' HISTORICAL PRICING PRACTICES IN CALIFORNIA DEMONSTRATE THE NEED FOR CONTINUED REGULATION.**

The CPUC alleges that cellular carriers' pricing practices evidence a lack of competition in the cellular market and the need for continued regulation.<sup>26</sup> Specifically the CPUC asserts that (1) the similarity of prices between the cellular carriers "raises questions";<sup>27</sup> (2) despite "maximum regulatory flexibility for cellular duopolists" rates (especially for basic service) have not come down as much as the CPUC expected;<sup>28</sup> (3) any rate relief from discount plans must be offset against the increased costs of those plans;<sup>29</sup> and (4) any rate reductions have been temporary.<sup>30</sup> To support its allegations, the CPUC presents data regarding cellular carriers' rates for basic and discount plans. Because the data is all redacted, it is difficult for BACTC to know whether it is accurate or supports the Commission's allegations.<sup>31</sup> However, BACTC can represent to the FCC that the CPUC's allegations are directly at odds with the historical pricing practices of the cellular carriers in the Bay Area.

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<sup>25</sup> Petition at 25.

<sup>26</sup> See generally Petition 6-7, 34-45.

<sup>27</sup> Petition at 38.

<sup>28</sup> Petition at 39, 41.

<sup>29</sup> Petition at 43.

<sup>30</sup> Petition at 39.

<sup>31</sup> Frustratingly, the CPUC has chosen to redact these numbers even though they are based on publicly available tariff information.

Since its commencement of service in the Bay Area, BACTC has permanently reduced the rates of its basic plan, permanently introduced a number of discount rate plans (which have been further reduced on several occasions) and offered numerous short term promotions -- providing real cost savings to its cellular customers. All of these reductions in rates have been market driven and voluntarily implemented by BACTC; none have been required by any CPUC decision or directive. BACTC has never increased its rates, nor sought CPUC authority to increase its rates -- even to match increases in inflation.

**A. Price Similarity Is Not an Indicator of a Lack of Price Competition; Even If it Were, the Evidence Establishes That Rates in the Bay Area Are Not Similar.**

The Petition states that the similarity of basic service prices "raises questions" as to price competitiveness.<sup>32</sup> The CPUC's current stance on this issue is in marked contrast to the its previous finding that "[i]n a fully competitive market, the prices of individual firms track closely and may even be identical."<sup>33</sup> For the reasons stated in CCAC's Opposition to the Petition and those underlying the CPUC's earlier decision on this point, BACTC asserts that the similarity of prices is not a relevant indicator of price competition. However, assuming for the sake of argument that price similarity is an indicator, the record establishes that identity of pricing does not exist.

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<sup>32</sup> Petition at 38.

<sup>33</sup> CPUC Decision No. 90-06-025 at 49.

The Bay Area cellular carriers' retail rates for basic service are significantly different:<sup>34</sup>

	<u>BACTC</u>	<u>GTE Mobilnet</u>	<u>% Difference</u>
Access			
0-399 min. of use	\$39.99	\$45.00	11.1%
400+ min. of use	\$37.50	\$45.00	16.7%
Usage			
Peak	\$ 0.45	\$ 0.45	
Peak	\$ 0.20	\$ 0.20	

Moreover, as the rate sheets attached hereto as Appendix B demonstrate, the carriers' discount package rate plans are also very different. None of the two carriers' rate plans has the same price and they generally include different numbers of minutes. In addition, while GTE Mobilnet tends to offer a consistent rate for peak and off-peak usage, BACTC offers a significant discount for off-peak usage.

**B. The CPUC's Analysis of Basic Service Rate Trends is Seriously Flawed.**

The CPUC expresses its disappointment that rates for basic service have not decreased "as much as expected."<sup>35</sup> It appears that the CPUC is asserting that the alleged failure of carriers to decrease rates for basic service is grounds for continued regulation. There are a number of problems with the CPUC's analysis.

Cellular carriers should not be faulted for continuing to charge a market-driven rate which was approved by the CPUC. The CPUC approved rates for each cellular service

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<sup>34</sup> The carriers' wholesale rates are similarly divergent.

<sup>35</sup> Petition at 39.

provider in the State at the time that the carrier was certificated to provide cellular service. Those rates were, as is admitted by the CPUC, market-driven.<sup>36</sup> In the Los Angeles and San Francisco markets (among others) the approved rate was \$45.00 per month for access and \$0.45/0.20 per minute for peak/off-peak usage. The CPUC has never articulated what rates other than the ones it approved it believes carriers should charge nor ordered carriers to lower their rates.

The CPUC has also failed to demonstrate how the continuation of its regulation of cellular rates will bring basic rates down "as much as expected." The CPUC has done nothing in the last ten years to require basic rates to be reduced and under section 322 of the Communications Act, there is nothing they can do now to require specific rates reductions.<sup>37</sup> Despite the CPUC's dramatics, the evidence clearly demonstrates that rates for basic service have decreased significantly in at least one California market. In April 1991, BACTC reduced its basic rate by creating a tiered access rate based on the number of minutes used by a customer.<sup>38</sup>

<u>Minutes Used</u>	<u>Retail Access Charge</u>	<u>Percent Decrease</u>
0-99	\$45.00	0%
100-199	\$42.00	6.7%
200-399	\$40.00	11.1%
400+	\$37.50	16.7%

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<sup>36</sup> Petition at 38, citing CPUC Decision No. 84-04-014, Finding of Fact 18 at 82.

<sup>37</sup> If the CPUC believed that rates for basic service were "unjust and unreasonable", it had a legal obligation to revise these rates -- not just express its disappointment. P.U. Code section 451 states "every unjust or unreasonable charge demanded or received for ... [utility] service is unlawful." It has never done so.

<sup>38</sup> BACTC Advice Letter No. 88; Advice Letter No. 88 also created a tiered wholesale access rate.

These rates remained in effect until April 1993, when BACTC further lowered its basic rate as follows:<sup>39</sup>

<u>Minutes Used</u>	<u>Retail Access Charge</u>	<u>Percent Decrease</u>
0-399	\$39.99	Up to 11.1%
400+	\$37.50	0%

Both reductions in rates were undertaken by BACTC voluntarily in response to market conditions.

**C. The CPUC's Focus on Basic Rates is Misplaced. Discount Plans Provide Significant Savings to the Majority of Cellular Customers.**

Despite overwhelming evidence, the CPUC fails to acknowledge that cellular carriers have significantly lowered rates by introducing discount rate plans. Instead the CPUC disparages the amount of savings offered to customers by these plans, characterizing those rate reductions as only "modest rate relief."<sup>40</sup> The CPUC also attempts to undercut the value of those plans by alleging that those plans suffer from "difficult-to-quantify costs to consumers in terms of reduced flexibility, risk of termination fees and foregone access to emerging technologies."<sup>41</sup> Again the CPUC provides no evidence to support its claims other than redacted data, which are derived from publicly available tariff and subscriber numbers. BACTC does not know whether the numbers provided by the CPUC are correct. However, based on its experience in the Bay

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<sup>39</sup> BACTC Advice Letter No. 205; Advice Letter No. 205 also further lowered wholesale access charges.

<sup>40</sup> Petition at 43.

<sup>41</sup> Petition at 43.

Area cellular market, BACTC can represent to the FCC that discount rate plans have indeed provided the majority of customers on its system with significant rate reductions.

Since the CPUC modified its advice letter and tariff filing process to make it more responsive to competitive market conditions,<sup>42</sup> BACTC has offered an increasing number of innovative rate plans, providing much greater choice of service arrangements for BACTC subscribers and, in many cases, opportunities for substantial reductions in average per-minute charges and in total monthly bills. BACTC asserts that these developments demonstrate that the surest means for achieving effective rate competition is to eliminate regulatory constraints.

As the chart attached hereto as Appendix C demonstrates, since 1990, the number of retail service options BACTC has offered has increased from just two to twenty-one as of today.<sup>43</sup> All of the plans are permanent rate plans. Some of these plans require a twelve-month commitment and have a charge for early termination,<sup>44</sup> others do not.<sup>45</sup> All of these plans provide a discount to BACTC's basic rates; in some instances that discount was deepened by a further

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<sup>42</sup> CPUC Decision No. 90-06-025 at 108 (implementing the temporary [same-day effective] tariff procedure); CPUC Decision No. 93-04-058 (implementing the rate band guidelines).

<sup>43</sup> The majority of BACTC's rate plans are available to wholesale subscribers at a deeper discount. The remaining plans were introduced without wholesale equivalents pursuant to CPUC decisions allowing no wholesale equivalents.

<sup>44</sup> Occasional, Security, Standard, Value, Advantage, Premium, Digital Flex.

<sup>45</sup> Personal, Executive, Enable-Link<sup>SM</sup>, Government, Emergency, Large Organization and Corporate Management Plans.

reduction in the plan rates.<sup>46</sup> All of the plans were created in response to market forces, and not because BACTC was required to do so by any regulatory action.

A number of BACTC's discount rate plans are targeted to special classes customers with special requirements. In December 1989, BACTC introduced its Government Plan, which is available only to government agencies and provides a discount of up to 29% off access and 20% off usage rates. In early 1991, BACTC introduced two plans directed at large volume users: (1) the Large Organization Plan, which provides discounts of 10% to 17% off basic rates and has no service establishment charges, and (2) the Executive Plan, which provides discounts of up to 8.5% for large individual users.<sup>47</sup> In June 1992, BACTC introduced its Enable-Link<sup>SM</sup> Plan to make cellular service economically accessible to physically disabled customers; this plan offers a monthly access charge discounted approximately 75% and a 40% discounted activation charge. In 1994, BACTC introduced its Corporate Management Plan to large organizations who purchase a minimum of 50 phones and guarantee payment for all of the end users; this plan provides a discount of up to 34% for monthly access and 16% on usage charges.

Other BACTC plans are targeted at customers with a range of usage needs who want predictability in their monthly cellular bills. In April 1993, BACTC introduced six analog package plans each of which includes a different amount of free minutes (ranging from 5 to 520

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<sup>46</sup> See Appendix C which also indicates where any rates were permanently reduced.

<sup>47</sup> All discounts are calculated using current reduced basic rates; thus, when basic rates were higher the discounts would have been deeper.