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

In re Petition of	)	94-104
	)	
THE ARIZONA CORPORATION COMMISSION	)	PR File No. 94-SP2
	)	
To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services	)	

To: The Commission

COMMENTS OF CENTURY CELLUNET, INC.

Century Cellunet, Inc. ("Century") hereby submits its comments on the petition of the Arizona Corporation Commission ("Arizona") to retain authority over entry and rate regulation of all Commercial Mobile Radio Service ("CMRS") providers offering these services within the state of Arizona. As detailed below, Arizona's petition cannot be granted. The statute is clear that state and local governments may not regulate the terms and circumstances of CMRS entry. As for the regulation of CMRS rates, Arizona has failed to make the prerequisite showing for the grant of such authority.

I. THE COMMUNICATIONS ACT CLEARLY PREEMPTS STATE AND LOCAL REGULATION OF CMRS ENTRY

Section 332(c)(3)(A) of the Communications Act clearly provides that "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. . . ."[1]

[1] 47 U.S.C. § 332(c)(3)(A).

While that section continues on to permit states to petition the FCC for new or continued authority to regulate CMRS rates in certain situations, it does not provide for states to petition to regulate CMRS entry.

Both the legislative history of the provision[2] and the FCC Order implementing this statutory directive[3] make this distinction clear. Opportunities for states to file petitions to continue regulation are explicitly limited to the regulation of CMRS rates only. In contrast, the preemption of entry regulation was intended to be absolute. Thus, Arizona may not be granted authority to continue to impose CMRS entry regulation.

II. ARIZONA HAS NOT MADE THE REQUISITE SHOWING FOR THE FCC TO GRANT ITS PETITION TO REGULATE CMRS RATES

Although both the statute and the legislative history express a clear intent to allow the CMRS market to function without state or local intervention, Section 332(c)(3)(A) of the Communications Act permits the FCC to grant a state's petition to continue to regulate CMRS rates in certain limited situations. Specifically, the Commission may grant such a petition only "if such State demonstrates that--

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[2] See, e.g., H.R. CONF. REP. NO. 213, 103rd Cong., 1st Sess. 492-93, reprinted in 1993 U.S. CODE CONG. & ADMIN. NEWS 1088, 1181-82 (Conference Report); H.R. REP. NO. 111, 103rd Cong., 1st Sess. 260, reprinted in 1993 U.S. CODE CONG. & ADMIN. NEWS 378, 587 (House Report).

[3] Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1501-02, 1504 (1994) [hereinafter "Order"].

> (i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
>
> (ii) such market conditions exist and such service is a replacement for landline telephone exchange service for a substantial portion of the telephone landline exchange service within such State."[4]

In its Order adopting procedures for these petitions, the FCC emphasized that "[a]ny 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."[5] The Order also sets forth examples of the types of evidence and information that would be pertinent to the FCC's examination of market conditions and consumer protection:

(1) The number of CMRS providers in the state, the types of services offered by these providers, and the period of time during which these providers have offered service in the state.

(2) The number of customers of each such provider, and trends in each provider's customer base during the most recent annual period (or other reasonable period if annual data is not available), and annual revenues and rates of return for each such provider.

(3) Rate information for each CMRS provider, including trends in each provider's rates during the most recent annual period (or other reasonable period if annual data is not available).

(4) An assessment of the extent to which services offered by the CMRS providers that the state proposes to regulate are substitutable for services offered by other carriers in the state.

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[4] 47 U.S.C. § 332(c)(3)(A) (emphasis added).

[5] Order at 1504 (emphasis added).

(5) Opportunities for new entrants that could offer competing services, and an analysis of existing barriers to such entry.

(6) Specific allegations of fact (supported by an affidavit of a person or persons with personal knowledge) regarding anti-competitive or discriminatory practices or behavior on the part of CMRS providers in the state.

(7) Evidence, information, and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, imposed upon CMRS subscribers. Such evidence should include an examination of the relationship between rates and costs. We will consider especially probative the demonstration of a pattern of such rates, if it is also demonstrated that there is a basis for concluding that such a pattern signifies the inability of the CMRS marketplace in the state to produce reasonable rates through competitive forces.

(8) Information regarding customer satisfaction or dissatisfaction with services offered by CMRS providers, including statistics and other information regarding complaints filed with the state regulatory commission.[6]

However, Arizona wholly fails to make the statutorily required showing to continue to regulate CMRS rates. As an initial matter, Arizona provides none of the kinds of evidence suggested by the FCC as pertinent to such a showing. It provides no evidence as to unjust or unreasonable pricing, or that the pattern of CMRS rates in the state demonstrate a lack of competition. Indeed, Arizona's assertion that the cellular market is not competitive is completely unsubstantiated. Its cursory analysis of the state of competition ignores other services with which cellular increasingly competes, such as SMR, ESMR, conventional two-way radio, and PCS. Indeed, in contrast to

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[6] Id. at 1504-05.

Arizona's claims, the petition itself even refers to the increasingly competitive telecommunications market in Arizona.[7]

Further, Arizona's general statements as to the benefits its regulatory scheme affords to consumers are not sufficient to meet the heavy burden imposed by the statute. Although Arizona mentions certain safeguards it has adopted in the past to ensure reasonable CMRS rates, it fails to provide sufficient evidence as to why current market conditions require that such rate regulation be continued. The FCC Order is explicit that specific and substantiated evidence as to why rate regulation is needed must be provided.[8]

Arizona's argument that rate regulation is necessary to ensure universal service is also unavailing. The Commission's rules provide the state with sufficient flexibility to ensure universal service without requiring rate regulation that would otherwise not be necessary. Finally, the fact that Arizona's constitution specifically authorizes such regulation is simply irrelevant. Thus, under the statutory standards, the Arizona petition may not and should not be granted.

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[7] Arizona Petition at 6.

[8] Although Arizona attempts to suggest that cellular is a substitute for landline telephone service in the state, this by itself does not justify continuation of state rate regulation. As made clear in the legislative history and the FCC Order, the statute requires that the state also demonstrate that market conditions do not adequately protect consumers from unjust, unreasonable or unreasonably discriminatory rates. See Conference Report at 1182; Order at 1505-06. As noted above, it has failed to do so.

III. CONCLUSION

For the foregoing reasons, Arizona has not met the statutory standard for continued CMRS entry and rate regulation. Accordingly, its petition must be denied.

Respectfully submitted,

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September 19, 1994

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 1994, I caused copies of the foregoing "Comments of Century Cellunet, Inc." to be mailed via first-class postage prepaid mail to the following:

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