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**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

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In the Matter of

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| Petition of the People of the State of California and the Public Utilities Commission of the State of California Requesting Authority to Regulate Rates Associated with the Provision of Cellular Service within the State of California | ) | PR Docket No. 94-105 |

**OPPOSITION OF LOS ANGELES CELLULAR TELEPHONE COMPANY TO THE NATIONAL CELLULAR RESELLERS ASSOCIATION'S REQUEST FOR ACCESS TO CALIFORNIA PETITION FOR STATE REGULATORY AUTHORITY PURSUANT TO THE TERMS OF A PROTECTIVE ORDER**

Pursuant to section 1.45 of the Commission's Rules, Los Angeles Cellular Telephone Company ("LACTC") hereby opposes the National Cellular Resellers Association's ("NCRA") Request for Access to California Petition for State Regulatory Authority Pursuant to the Terms of a Protective Order ("NCRA Request"). LACTC is the nonwireline cellular carrier in the Los Angeles, California Metropolitan Service Area ("MSA"). To the extent the NCRA Request seeks the disclosure of highly sensitive and proprietary information

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concerning and belonging to LACTC, LACTC would be directly and adversely affected by a grant of the NCRA's Request.

Cellular carriers serving California markets are severely disadvantaged in their efforts to protect their legitimate interests in preserving the confidentiality of proprietary information submitted in this proceeding. Neither the Public Utilities Commission of the State of California ("CPUC") nor the FCC has informed the carriers what information the CPUC submitted about them.[1] Moreover, the Commission's rules do not contemplate or cover the situation presented here, where a third party, in this case the CPUC, obtains confidential information from the carriers which it then submits to the Commission. The rules anticipate that the party with the interest in protecting confidentiality will be the same party who submits the information, allowing that party to make a reasoned decision regarding disclosure of its own information. The CPUC has no such interest and is incapable of assessing the various trade-offs which the rules contemplate.

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1 Accordingly, the Commission should remand the CPUC Request to the CPUC so that the California cellular carriers can work with the CPUC to determine the extent of any information pertaining them filed in this proceeding.

Nevertheless, the party submitting this information, the CPUC, expressly recognized that it should be treated as confidential,[2] and consequently filed it with the FCC under those conditions. On August 9, 1994, the CPUC filed a Petition to Retain Regulatory Authority over Intrastate Cellular Service Rates ("Petition"), with Appendices and a copy filed under seal containing information covered by a Request of Proprietary Treatment of Documents Used in Support of California Petition ("CPUC Request"). Accordingly, the Commission has provided only the redacted version to the public and to the California carriers themselves. On September 1, 1994, the CPUC filed with the Commission portions of its Petition containing previously redacted information which, according to the CPUC, had been previously publicly available. On September 19, 1994, NCRA filed its Request for Access to California Petition for State Regulatory Authority Pursuant to the Terms of a Protective Order. For the following reasons, the NCRA Request must be denied.

I. NCRA's Request is Deficient on its Face and Must Be Denied.

The Commission's Rules require that any requests for inspection of records filed under conditions of confidentiality "shall . . . contain a statement

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2 See Investigation on the Commission's Own Motion Into Mobile Telephone and Wireless Communications ("California Investigation"), Administrative Law Judge's Ruling Granting Motion for Modification of July 19, 19943 Ruling, ("ALJ's Modification Ruling"), I.93-12-007 (August 8, 1994).

of the reasons for inspection and the facts in support thereof."[3] However, NCRA fails to state any reason which establishes its need for the information sought, and similarly fails to include any facts upon which its Request is based.

Rather, NCRA couches its Request for confidential information in the language of the Communications Act and a Commission Order which state that the Commission must allow public comment on any petition for regulatory authority.[4] NCRA argues therefore that any information relevant to the CPUC Petition must be made "public." This is not true. The fact that a Commission decision must be based on public information does not justify making public otherwise non-public information simply because it may be relevant to the proceeding. The information at issue is proprietary and confidential.[5] In order to meet its burden, the CPUC must make its case based on public information. That it cannot do so does not eliminate the statutory protection afforded the confidential and proprietary information pertaining to LACTC or any other carrier.

Moreover, nowhere does NCRA suggest a reason for needing to file additional comments or why its original comments are insufficient. Nor does

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3 47 C.F.R. § 0.461(c).

4 See NCRA Request at 2.

5 See infra pp. 5-7. See also 5 U.S.C. § 552(b)(4) (exempting from Freedom of Information Act requests "trade secrets and commercial or financial information obtained from a person and privileged or confidential").

NCRA cite any authority or justification for its untimely request to extend the comment period. Neither the cited section of the Communications Act nor the Commission's Order stands for the proposition that an interested party may be granted additional time to file a second set of comments. To the contrary, Congress has imposed a rigid deadline of twelve months on the regulatory review proceeding.[6] Because of NCRA's complete failure to articulate any legal reason or factual justification for its Request, its Request must be denied.[7]

## II. The Information Which NCRA Seeks is Competitively Sensitive and Should Not Be Disclosed.

In acting on a request to inspect confidential information, Section 0.461(f)(4) of the Commission's Rules states that "the considerations favoring disclosure or non-disclosure will be weighed in light of the facts presented . . ."[8] In this instance, the NCRA has presented no facts that favor disclosure. The facts favoring non-disclosure, however, are overwhelming. First, LACTC provided the CPUC commercially sensitive information such as the number of

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6 See Omnibus Budget Reconciliation Act of 1993, § 6002(c)(3)(B).

7 In addition, in the California Investigation, the Cellular Resellers Association was the only party to object to the confidential treatment of information submitted to the CPUC by the cellular carriers. See ALJ's Modification Ruling at 4. This pattern along with NCRA's inability to justify its Request gives rise to the suspicion that NCRA's only motivation is to undermine competition by gaining an unfair competitive advantage through access to confidential information.

8 47 C.F.R. § 0.461(f)(4).

subscribers on each rate plan and cell site capacity and utilization. A CPUC administrative law judge ruled that disclosure of this type of information would cause LACTC "imminent and direct harm of major consequence."[9] The ALJ found that with this information a competitor "could assess the carrier's strengths and weaknesses and adjust its marketing strategy accordingly."[10] Indeed, the ALJ classified such information as containing "trade secrets" because it possesses "independent economic value."[11]

Moreover, in filing its Petition with the Commission the CPUC properly sought confidential treatment for information submitted to it by cellular carriers. The CPUC had itself found the information to be "proprietary data and materials concerning commercially sensitive information not customarily related to the public."[12] The CPUC affirmed that disclosure of such information "could compromise the position of a cellular carrier relative to other carriers in offering service in various markets in California."[13]

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9 See ALJ's Modification Ruling at 4.

10 Id.

11 Id. at 6.

12 CPUC Request at 1-2 (August 8, 1994).

13 Id.

More generally, this Commission itself refrains from accepting and making public information of even lesser competitive significance because it knows that disclosure will harm competition. Thus, the Commission removed certain information filing obligations concluding that the anticompetitive harm to the public was not justified by any regulatory benefits.[14] In this case, making available such commercially sensitive information will not only place LACTC at a serious competitive disadvantage, but will also undermine the public benefits produced by a competitive environment in California's cellular markets.

Finally, at least some of the information which the CPUC submitted to the Commission consists of material gathered by the California Attorney General's Office in its investigation of mobile and wireless communications. Those materials were submitted to the Commission without notice to LACTC. LACTC does know what information, if any, about it or other carriers gathered in the California Attorney General's investigation has been filed in this proceeding. LACTC has not waived and does not waive any objections it may have to the disclosure of any such information that may affect LACTC.

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14 The Commission found that in competitive environments "requiring tariff filings would create a risk that competitors would file rates merely to send price signals and thereby manipulate prices." In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd. at 1411, 1479 (1994).

Further, LACTC strenuously objects to the disclosure of allegations compiled in an investigatory setting, without scrutiny as to their truthfulness, substantiation, or probative value. Not only would disclosure violate the due process rights of LACTC and any other affected party, but such disclosure may constitute a violation of criminal law.[14]

## CONCLUSION

For all the reasons stated above, Los Angeles Cellular Telephone Company respectfully requests the Commission deny NCRA's Request for access to the confidential portions of the CPUC Petition.

Respectfully submitted,

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[14] The CPUC's disclosure of confidential data obtained from the California Attorney General may constitute a criminal violation under California Government Code section 11183.

## CERTIFICATE OF SERVICE

I, Katherine T. Wallace, do hereby certify that true copies of the foregoing "Opposition of Los Angeles Cellular Telephone Company to the National Cellular Resellers Association's Request for Access to California Petition for State Regulatory Authority Pursuant to the Terms of a Protective Order" were sent this 4th day of October, 1994, by first-class United States mail, postage prepaid, to the following:

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