

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Petition of the People of the)
State of California and the)
Public Utilities Commission of)
the State of California to Retain)
Regulatory Authority Over)
Intrastate Cellular Service Rates)

PR Docket No. 94-105
PR File No. 94-SP3

[REDACTED]

OPPOSITION TO REQUEST FOR ACCESS TO CALIFORNIA
PETITION FOR STATE REGULATORY AUTHORITY
PURSUANT TO THE TERMS OF A PROTECTIVE ORDER

[REDACTED]

Of Counsel:

Howard J. Symons
James A. Kirkland
Cherie R. Kiser
Mintz, Levin, Cohn, Ferris
Glovsky and Popeo, P.C.
Suite 900
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004
202/434-7300

Scott K. Morris
Vice President of External Affairs
McCaw Cellular Communications, Inc.
5400 Carillon Point
Kirkland, Washington 98033
206/828-8420

James M. Tobin
Mary E. Wand
Morrison & Foerster
345 California Street
San Francisco, CA 94104-2576
415/677-7000

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To: The Commission

**OPPOSITION TO REQUEST FOR ACCESS TO CALIFORNIA
PETITION FOR STATE REGULATORY AUTHORITY
PURSUANT TO THE TERMS OF A PROTECTIVE ORDER**

McCaw Cellular Communications, Inc. ("McCaw"),^{1/} by its attorneys, hereby opposes the Request for Access to California Petition for State Regulatory Authority Pursuant to the Terms of the Protective Order filed by the National Cellular Resellers Association ("NCRA") on September 19, 1984. This request seeks access to confidential information submitted by the California Public Utilities Commission ("CPUC") in support of its petition to retain regulatory authority over cellular rates. NCRA's request lacks any legal basis, and is likely motivated by the desire to obtain access to competitively sensitive information for competitive purposes. The request should be denied.

ARGUMENT

Along with the above-captioned petition ("Petition"), the California Public Utilities Commission ("CPUC") requested that

^{1/} On September 19, 1994, McCaw became a wholly-owned subsidiary of AT&T Corp.

certain information contained in the Petition and associated exhibits not be made available for public inspection. The request specifically stated that

[T]he materials for which confidential treatment is requested contain proprietary data and materials concerning commercially sensitive information not customarily released to the public and which, if disclosed, could compromise the position of a cellular carrier relative to other carriers in offering services in various markets in California.^{2/}

McCaw, like other affected cellular carriers, is handicapped by the fact that it does not know exactly what information has been submitted by California under seal. Based on the description contained in the CPUC's Request for Proprietary Treatment, however, McCaw strongly opposes disclosure of the information.

As a threshold matter, the problem that NCRA attempts to place on the Commission's doorstep could have been avoided if the CPUC had taken care, at the outset, to present the relevant data in a format that did not reveal competitively sensitive information. The Commission should not now permit itself to be backed into releasing this information simply by the CPUC's decision to submit it in the first place. As set forth in McCaw's Opposition to the CPUC's Petition, the CPUC's submission

^{2/} California Public Utilities Commission, Request for Proprietary Treatment of Documents Used in Support of Petition to Retain Regulatory Authority Over Intrastate Cellular Service Rates, PR Docket No. 94-105 (filed Aug. 9, 1994) ("Request for Proprietary Treatment").

of this information was illegal.^{3/} The FCC should not compound the CPUC's illegal action by providing for further dissemination of this confidential material. Rather, since the Commission cannot rely on nonpublic information in rulemaking proceedings,^{4/} its only defensible choice is to delete the information from the record of this proceeding and return it to the CPUC.

The redacted information is undeniably confidential. It consists of carrier- and market-specific market share data; carrier- and market-specific system capacity utilization figures; carrier-specific revenue, cost, and subscriber growth data; carrier-specific information revealing the number of customers subscribing to particular rate plans; and information obtained by the CPUC from the California Attorney General under a promise of confidential treatment and that purportedly reveals the marketing strategies of specific cellular carriers.^{5/} It is clear that the redacted materials contain information that would be valuable to

^{3/} Opposition of McCaw Cellular Communications, Inc. to the Petition of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Services Rates, PR Docket No. 94-105, at 28-30 (filed Sept. 19, 1994) ("McCaw California Opposition"). The California Public Utilities Code also makes it a misdemeanor for any officer or employee of the Commission to divulge confidential information "except on order of the Commission", Cal. Pub. Util. Code §583 (West 1975 and Supp. 1994). No such order has ever been issued by the Commission.

^{4/} See McCaw California Opposition at 28-29; see also Motion of the Cellular Carriers Association of California to Reject Petition or, Alternatively, Reject Redacted Information at 9, 12-14, PR Docket No. 94-105 (filed Sept. 19, 1994).

^{5/} See Draft Protective Order at 2-3, PR Docket No. 94-105, DA 94-1083 (Private Radio Bureau, Released Sept. 30, 1994).

competitors in assessing a carrier's business plans and its ability to respond to market developments. It would be ironic indeed if the Commission permitted its regulatory proceedings -- designed to promote competition in the CMRS marketplace -- to be manipulated in a manner that undermined that competition.

While the injury to cellular carriers from the disclosure of this proprietary information is readily apparent, NCRA's need for such data and the bona fides of its request for access to them are impossible to discern. Its stated rationale, based on an alleged desire to facilitate public comment on the issues in this proceeding, is untimely and lacks credibility. NCRA chose to press its claim for access a full 40 days after the redacted CPUC Petition was filed. In fact, NCRA waited until it had actually completed its own comments in response to the state rate petitions before making the subject request for access. A cursory review of those comments casts substantial doubt on the validity of NCRA's request. For each state, including California, its comments consist solely of identical conclusory, unsubstantiated arguments about the state of competition in the cellular marketplace. It has made no effort to analyze the data included with any of those petitions, including the CPUC's, and there is no reason to believe that NCRA is prepared to engage in any analysis whatsoever with respect to the carrier-specific information submitted by the CPUC under seal. To the contrary,

NCRA's request appears motivated by a desire to obtain access to competitively sensitive information for use by its members.^{6/}

CONCLUSION

For the foregoing reasons, the NCRA's request for access to the confidential data submitted by the CPUC in this proceeding should be denied.

Respectfully submitted,

MCCAW CELLULAR COMMUNICATIONS, INC.



Scott K. Morris
Vice President of External Affairs
McCaw Cellular Communications, Inc.
5400 Carillon Point
Kirkland, Washington 98033
206/828-8420

Of Counsel:

Howard J. Symons
James A. Kirkland
Cherie R. Kiser
Mintz, Levin, Cohn, Ferris
Glovsky and Popeo, P.C.
Suite 900
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004
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^{6/} This conclusion is buttressed by the terms of the so-called "Protective Order" submitted with the NCRA request. For example, Section 7 of the proposed Protective Order permits attorneys with access to documents subject to the Protective Order to rely on such confidential information in rendering advice to their clients.

CERTIFICATE OF SERVICE

I, James A. Kirkland, do hereby certify that on this fourth day of October, 1994 a copy of the foregoing Opposition to Request for Access to California Petition for State Regulatory Authority Pursuant to the Terms of a Protective Order was served by either first class mail, postage prepaid, or by hand delivery on the following:

Regina Harrison
Senior Attorney
Private Radio Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5202
Washington, D.C. 20036

Peter Arth, Jr.
Edward W. O'Neill
Ellen S. Levine
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, California 94102

International Transcription Service*
1919 M Street, N.W.
Room 246
Washington, DC 20036

Joel H. Levy
William B. Wilhelm, Jr.
Cohn and Marks
1333 New Hampshire Ave., N.W.
Suite 600
Washington, D.C. 20036

Michael Shames,
1717 Kettner Boulevard
Suite 105
San Diego, California 92101

Thomas H. Bugbee
County of Los Angeles
Telecommunications Branch
P.O. Box 2231
Downey, California 90242

**Peter A. Casciato
A Professional Company
8 California Street
Suite 701
San Francisco, California 94111**

**Lewis J. Paper
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005**

**John Cinko, Chief
Mobile Services Division
Federal Communications Commission
1919 M Street, N.W.
Room 644
Washington, D.C. 20054**

**David A. Gross,
Kathleen Q. Abernathy,
AirTouch Communications
1818 N Street, N.W.
8th Floor
Washington, D.C. 20036**

**Mary B. Cranston,
Megan Waters Pierson,
Joseph A. Hearst,
Pillsbury Madison & Sutro
P.O. Box 7880
San Francisco, California 94120-7880**

**Alan R. Shark, President
American Mobile Telecommunications
Association, Inc.
1150 19th Street, N.W.
Suite 250
Washington, D.C. 20036**

**Elizabeth R. Sachs,
Lukas, McGowen, Nace & Gutierrez
1111 19th Street, N.W.
Suite 1200
Washington, D.C. 20036**

David A. Simpson,
Young, Vogl, Harlick & Wilson
425 California Street
Suite 2500
San Francisco, California 94101

Adam A. Anderson,
Susanne Toller,
Bay Area Cellular Telephone
Company
651 Gateway Boulevard
Suite 1500
South San Francisco, California 94080

Richard Hansen
Chairman of Cellular Agents
Trade Association
11268 Washington Boulevard
Suite 201
Culver City, California 90230

Michael B. Day,
Jeanne M. Bennet,
Michael J. Thompson,
Jerome F. Candelaria,
Wright & Talisman, P.C.
100 Bush Street
Shell Building, Suite 225
San Francisco, California 94104

Michael F. Altschul,
Randall S. Coleman,
Andrea D. Williams,
Cellular Telecommunications Industry
Association
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

Mark Gascoigne
Dennis Shelley
Information Technology Service
Internal Services Department
County of Los Angeles
9150 East Imperial Highway
Downey, California 90242

Russell H. Fox,
Susan H.R. Jones,
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005

David M. Wilson,
Young, Vogl, Harlick & Wilson
425 California Street
Suite 2500
San Francisco, California 94101

Thomas Gutierrez,
J. Justin McClure,
Lukas, McGowan, Nace &
Gutierrez, Chartered
1111 Nineteenth Street, N.W.
Suite 1200
Washington, D.C. 20036

Jeffrey S. Bork,
Laurie Bennett,
U.S. West Cellular of
California, Inc.
1801 California Street
Suite 5100
Denver, Colorado 80202

Leonard J. Kennedy
Laura H. Phillips
Richard S. Denning
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, D.C. 20037

Mark J. Golden
Acting President
Personal Communications
Industry Association
1019 Nineteenth Street, N.W.
Suite 1100
Washington, D.C. 20036

Judith St. Ledger-Roty,
James J. Freeman,
Reed, Smith, Shaw, & McClay
1200 18th Street, N.W.
Washington, D.C. 20036

**Richard McKenna
GTE Service Corporation
600 Irving Ridge
HQEO3J36
Irving, Texas 75015-6363**

**Donald V. Evans
William J. Sill
R. Bradley Koerner
McFadden, Evans & Sill
1627 Eye Street, N.W.
Suite 810
Washington, D.C. 20006**


James A. Kirkland

***By Hand**

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