

**BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.**

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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)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY
PR Doc. No. 94-105

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**OPPOSITION OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION
TO THE MOTION BY CALIFORNIA TO STRIKE AFFIDAVIT
AND TESTIMONY OF JERRY A. HAUSMAN**

The Cellular Telecommunications Industry Association ("CTIA")¹ respectfully submits its comments in opposition to the motion of the California Public Utilities Commission ("California PUC") filed in the above-captioned proceeding.² In its motion, the California PUC asks the Commission to strike from the record the affidavit of Dr. Jerry Hausman which is appended to and discussed in CTIA's

¹ CTIA is a trade association whose members provide commercial mobile radio services, including over 95 percent of the licensees providing cellular service to the United States, Canada, Mexico, and the nation's largest providers of ESMR service. CTIA's membership also includes wireless equipment manufacturers, support service providers, and others with an interest in the wireless industry.

² *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 (August 9, 1994).

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opposition to the California PUC's petition to retain regulatory authority over intrastate cellular service rates. For the reasons discussed below, the FCC should dismiss or deny California PUC's motion to strike Dr. Hausman's affidavit.

Background

The California PUC contends that the FCC should strike Dr. Hausman's affidavit from the record based upon what the California PUC has characterized as its need and right to review the carrier and market specific data underlying the affidavit. The California PUC claims that it will be denied an opportunity to rebut Dr. Hausman's affidavit unless it is afforded access to the highly sensitive and proprietary that Dr. Hausman collected.³ The California PUC specifically states that it has a "legal right to review and respond to all information, whether public or proprietary, which was reviewed or relied upon" by CTIA in its opposition to the

³ The California PUC also filed an emergency motion requesting the Commission to compel production of carrier and market specific data underlying Dr. Hausman's affidavit. On October 11, 1994, CTIA responded to this emergency motion. In its opposition, CTIA urged the Commission to dismiss the emergency motion because 1) CTIA does not have in its possession or control the carrier and market specific data requested by the California PUC; 2) as a trade association, CTIA is unable to authorize the release of data that carriers provided directly to Dr. Hausman pursuant to specific claims of confidentiality; and 3) the California PUC failed to provide any legal basis to support its request. The Commission has not ruled on this emergency motion.

California PUC's petition. This "legal right" is based entirely on just three cases.⁴

Discussion

The California PUC has erroneously interpreted *National Black Media Coalition*, *Home Box Office*, and *Nova Scotia Food Products* as providing an absolute legal right to review the commercially sensitive and proprietary information underlying Dr. Hausman's affidavit absent a FOIA determination. In *National Black Media Coalition* and *Nova Scotia Food Products*, the federal agency improperly failed to disclose its own internal studies and data during a rule making proceeding.⁵ While these cases require the FCC and other federal agencies to allow interested parties an opportunity to comment on the agency's internal studies and information provided to the agency through *ex parte* presentations before promulgating rules, they do not grant interested parties unfettered access to commercially

⁴ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2nd Cir. 1977); *Nat'l Black Media Coalition v. FCC*, 791 F.2d 1016, 1023 (2nd Cir. 1986).

⁵ See *National Black Media Coalition*, 791 F.2d at 1021, *Nova Scotia Food Products Corp.*, 568 F.2d at 251, *Home Box Office*, 567 F.2d at 55 (The agency relied upon information provided during *ex parte* presentations which were not disclosed to interested parties during the rule making proceeding.)

sensitive and proprietary data in a non-rule making proceeding such as the instant state preemption proceeding.

Unlike the California PUC's own petition, which redacted sections from the public record, the Hausman affidavit that CTIA submitted with its comments is in the public record. Indeed, the California PUC's proposal to compel the release of confidential data subject to confidentiality agreements would create two records, one that is available to the public for comment, and one that was not.

CTIA has done nothing to deny the California PUC, or any other party, a "reasonable opportunity" for public comment on the Hausman affidavit. The California PUC can use the market and carrier specific data available to it through its regulatory oversight of California's cellular carriers to rebut the Hausman affidavit with respect to the level of competition and the effectiveness of regulation in California. This, of course, is precisely what the Commission has indicated as being relevant to its consideration of the California petition.

There are no impediments to the California PUC's ability to comment upon the Hausman affidavit. Dr. Hausman has described fully his methodology in the appendices to his

affidavit.⁶ The California PUC has access to the relevant data for the California markets here at issue, and the sources Dr. Hausman identified as the basis of his other data.⁷ Thus, instead of seeking to strike the Hausman affidavit from the record, and given that there are no impediments to the California PUC's ability to comment upon the Hausman affidavit,⁸ the California PUC is fully able to submit its own analysis to the Commission.

Quite properly, the FCC has refused to authorize the use of its processes as a substitute for a petitioner exhausting its own avenues to challenge its opposition, particularly when the requested data could be obtained by the petitioner using its own resources and the petitioners' request for production of certain documents did not concern

⁶ Each Appendix to Professor Hausman's affidavit describes a separate regression analysis, specifying, *inter alia*, the variable, estimate, standard error, and R squared analysis.

⁷ *I.e.*, per capita personal income: Survey of Current Business, April 1992 or NPA Data Services; population: 1992 Statistical Abstract or NPA Data Services; mean commute time from home to work: 1990 U.S. Census, Tape File 3c. See Hausman Affidavit, Notes to Appendices.

⁸ The California PUC has not even attempted to demonstrate that the raw data relied upon by Professor Hausman "is a necessary link in a chain of evidence that will resolve a public interest issue." *In re Western Union Telegraph Co.*, 2 FCC Rcd 4485, 4487 (1987).

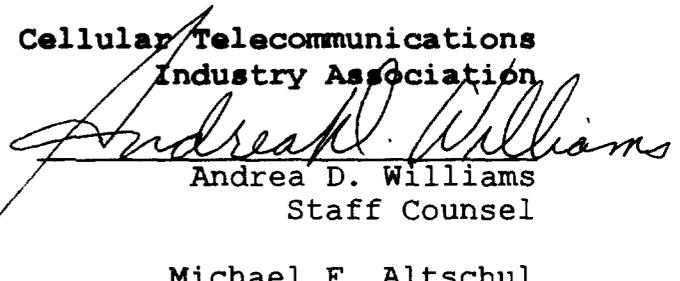
data which was exclusively within the possession of the opposing party.⁹

Conclusion

For the foregoing reasons, CTIA urges the Commission to dismiss the motion by California to strike Dr. Hausman's affidavit and testimony appended to and discussed in CTIA's opposition to the State of California's petition to retain regulatory authority over intrastate cellular service rates.

Respectfully submitted,

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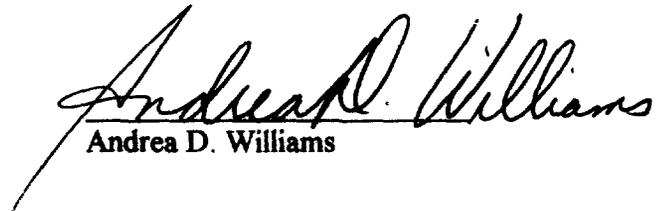
⁹ See *In re Application of Chesapeake Television, Inc. Baltimore, Maryland; For Subscription Television Authorization*, 88 FCC 2d 1711, ¶¶ 6-10 (1981).

CERTIFICATE OF SERVICE

I, Andrea Williams, hereby certify that on this 17th day of October, 1994 copies of the foregoing Opposition of the Cellular Telecommunications Industry Association were served by hand delivery upon the following parties:

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