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

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OCT 19 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

California, Connecticut and)	Docket No. 94-105
New York Petitions To Extend)	Docket No. <u>94-106</u>
Rate Regulation Of Commercial)	Docket No. 94-108
Mobile Services)	

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

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October 19, 1994

SUMMARY

No state has demonstrated, under the established statutory standard, that regulation of non-dominant Commercial Mobile Radio Service ("CMRS") providers is necessary to protect wireless service customers from anti-competitive pricing and unreasonable market behavior. In contrast, substantial empirical evidence has been submitted by California, Connecticut and New York illustrating the overwhelming dominance cellular operators enjoy over wireless facilities and providing factual support for the continued regulation of intrastate cellular rates in those states.

The arguments of cellular carriers that the Omnibus Budget Reconciliation Act of 1993 ("Budget Act") compels equal treatment of dominant and non-dominant CMRS providers ignore provisions of the Budget Act that grant the Commission discretion when actual market conditions justify differences in regulatory treatment of certain CMRS providers. Regulatory parity is not an end in itself nor an absolute legal requirement without regard to competitive conditions and other public interest considerations.

Robust competition in the CMRS marketplace will not exist for some time. The prospect of future cellular competition, in the form of Personal Communications Services ("PCS") and Enhanced Specialized Mobile Radio ("ESMR") service, cannot now be used by cellular incumbents to

support the preemption of state regulation where states have met the statutory standard for continuing regulation. Denying states their legitimate interest in regulating companies having significant market power will only hinder the development of competition in the CMRS marketplace. There is no near-term competition to cellular service sufficient to discipline the dominant cellular carriers in regard to the rates they charge and the policies they adopt.

The need for continued rate regulation of dominant CMRS providers has been adequately demonstrated by California, Connecticut and New York. Any perceived reduction in cellular rates is not a consequence of competition, as cellular carrier comments would have the Commission believe, but rather a marketing strategy to entice customers to enter into long-term contracts with significant early termination penalties. As such, cellular incumbents seek to protect their market position to the detriment of later-entering CMRS competitors.

Finally, the Federal Communications Commission's (the "Commission") determination that interstate cellular rates need not be tariffed does not require the automatic preemption of intrastate rate regulation. The fact that the Commission decided not to impose tariffing obligations on the cellular industry does not negate the states' ability or desire to impose intrastate rate regulation on cellular

carriers, based on their own observations and experiences. Moreover, even the Commission has recognized that its determination regarding the tariffing of interstate cellular rates is preliminary pending a fuller investigation of the competitive nature of the cellular industry.

Accordingly, the petitions of California, Connecticut and New York should be granted. Authority to regulate intrastate cellular rates should be granted until market forces are capable of protecting wireless customers from anti-competitive pricing policies and practices.

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Nextel Communications, Inc. ("Nextel") hereby responds to comments filed on September 19, 1994 in response to the above referenced state petitions to continue regulation of Commercial Mobile Radio Services ("CMRS") intrastate rates. On reply, Nextel limits its comments to issues that, if not properly resolved, will threaten the development of competition in the emerging wireless marketplace.

I. INTRODUCTION

In its prior Comments, Nextel stated that no state had demonstrated, under the established statutory standard, that regulation of non-dominant CMRS providers was necessary to protect CMRS subscribers. Specifically, Nextel argued that vast differences in market power between the two facilities-based cellular service providers and emerging CMRS competitors require distinct approaches to state regulation and any assessment of state petitions to extend CMRS regulation. Unlike cellular operators that currently have significant market power in the wireless marketplace,

emerging CMRS providers have no market power and are unable to engage in unreasonable discrimination or unfair pricing. Accordingly, with respect to non-dominant CMRS providers, continued state rate regulation is not warranted. In fact, none of the petitions addressed herein have sought continued rate regulation of non-dominant CMRS providers.

Those states that sought to continue regulation of intrastate rates charged by dominant (cellular) CMRS providers based their assessment on the competitiveness of their particular intrastate cellular marketplace. They generally considered the opportunities that exist for cellular carriers to act anti-competitively in the rates that they charge, the policies they adopt, and their treatment of potential competitors. In this regard, certain states, such as California, New York and Connecticut have successfully borne their burden of proof for continued regulatory authority over cellular providers. These states have demonstrated that "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."^{1/} Accordingly, the petitions

^{1/} See Communications Act § 332(c)(3)(A)(i), 47 U.S.C. § 332(c)(3)(A)(i).

of California, New York and Connecticut should be granted.^{2/}

II. DOMINANT AND NON-DOMINANT CMRS PROVIDERS MUST BE TREATED DIFFERENTLY IN REGARD TO THE REGULATION REQUIRED TO DETER ANTI-COMPETITIVE BEHAVIOR.

A large number of commenters, including a number of states, agree that the Federal Communications Commission (the "Commission") must distinguish between cellular service providers and non-dominant CMRS providers in making its intrastate rate regulation preemption determination.^{3/} In fact, not surprisingly, only dominant cellular operators, or their affiliates, have expressed disagreement with this

^{2/} California requests that it be granted authority to regulate intrastate rates of cellular services on an interim basis (18 months) until effective competitive alternatives to such services emerge. See California Petition at ii-iii. Connecticut also requests that it be granted authority to regulate cellular rates until at least July 1, 1996. If the state determines after continuing review that its mobile market is not yet truly competitive, Connecticut also requests that intrastate rate regulation authority be extended until October 1, 1997. See Connecticut Petition at 5. New York requests continued authority to regulate cellular rates for an indefinite period of time. See New York Petition at 2-3. Although each of the three states proposed different periods for extending their regulation of dominant CMRS carriers, Nextel supports grant of continuing intrastate rate regulation authority over dominant carriers until August 10, 1996, the end of the transition period for private carriers reclassified as CMRS.

^{3/} See e.g. Comments of American Mobile Telecommunications Association, Inc. at 5-7; Comments of Mobile Telecommunications Technologies Corp. at 5-8; Comments of National Cellular Resellers Association at 2-5; Comments of Paging Network, Inc. at 3-6. Significantly, California, Connecticut and New York only discuss the continued regulation of cellular service and do not suggest that regulation of non-dominant CMRS is either necessary or in any way publicly beneficial.

theoretical framework, hoping to reap regulatory relief now by pointing to the future entry of wireless competitors.^{4/} The record in this and other Commission proceedings, however, as well as explicit provisions of the Omnibus Reconciliation Budget Act of 1993 (the "Budget Act"), requires that state regulation be tailored to CMRS competitive realities.

Sufficient evidence has been presented in the record to conclude that the cellular marketplace is not currently competitive. As stated by the National Cellular Resellers Association ("NCRA"), a number of federal agencies, including the Commission, have issued no less than eight reports over the last three years describing in various detail the harm caused to consumers by the duopoly cellular market structure.^{5/} Moreover, several states have submitted credible empirical evidence illustrating the overwhelming dominance cellular operators presently enjoy over wireless facilities, services and infrastructure.^{6/}

Nevertheless, foremost among the arguments presented by cellular carriers is their "Pavlovian" response to the "regulatory parity" provisions of the Budget Act as

^{4/} See e.g. Comments of CTIA at 15-21; Comments of McCaw Communications at 3.

^{5/} See Comments of the National Cellular Resellers Association at 3.

^{6/} See California Petition to Regulate Intrastate CMRS Rates; Connecticut Petition to Regulate Intrastate CMRS Rates; New York Petition to Regulate Intrastate CMRS Rates.

requiring equal regulation of CMRS carriers even when the market conditions they face are dissimilar.^{7/} These arguments ignore interpretive provisions of the Budget Act that grant the Commission discretion when actual market conditions justify differences in regulatory treatment of certain CMRS providers.^{8/}

As recognized most recently in the Commission's Order approving the AT&T/McCaw merger, regulatory parity, for its own sake, is not a Commission objective.^{9/} In fact, in response to cellular carrier assertions that the Budget Act requires all CMRS providers to be treated the same, the Commission bluntly responded that "the Communications Act does not require parity between competitors as a general principle."^{10/} Arguments that disparate regulatory treatment is contrary to statutory authority, therefore, are simply incorrect. Regulatory

7/ See e.g. Comments of Airtouch Communications at 20-21; Comments of Cellular Carriers Association of California at 74-78; Comments of CTIA at 3-5; McCaw Cellular Communications at 2; see Communications Act at § 332(c)(1). Even certain non-cellular companies, such as E.F. Johnson Company, seek to characterize ESMR as equivalent to cellular service even though ESMR service providers lack market power and cannot charge anticompetitive rates or discriminate unreasonably. See Comments of E.F. Johnson Company at 4.

8/ See Communications Act § 332(c)(1)(C); House Conf. Rep. No. 103-213 at 491.

9/ See Memorandum Opinion and Order, FCC File No. ENF-93-44 and File No. 05288-CL-TC-1-93 et al., FCC 94-238 at ¶ 32 (adopted September 19, 1994, released September 19, 1994) (hereafter "AT&T/McCaw Order").

10/ Id.

parity is not an end in itself, nor a talisman to correct all regulatory anomalies, nor an absolute legal requirement, without regard to competitive conditions and other public interest considerations.

The legislative history of the Budget Act's regulatory parity provisions reinforces the conclusion that Congress intended only to subject similarly-situated CMRS providers to uniform regulatory treatment.^{11/} Indeed, Congress explicitly permitted the Commission, in carrying out its Congressional mandate, to consider the fact that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services.^{12/}

This is all that the petitioning states have asked to be able to do. For example, the state of California, after an extensive investigation, has found that the incumbent cellular carriers in California have market power and that effective competition for such services is nascent at best. The state asks that for a limited time it be able

^{11/} See House Report No. 103-111 at 259 (Commission directed to "review its rules and regulations to achieve regulatory parity among services that are substantially similar").

^{12/} See House Conf. Rep. No. 103-213 at 491 ("For instance, the Commission may ... forbear from regulating some providers of commercial mobile services if it finds that such regulation is not necessary to promote competition, or to protect consumers against unjust or unreasonable rates or unjustly or unreasonably discriminatory rates.").

to continue its existing regulation of dominant carrier rates in order to protect consumers from unreasonable rates and unreasonable discrimination possible because a few carriers have overwhelming market power.

Among other things, the California Public Utilities Commission ("CPUC") is currently considering whether eliminating its existing restrictions on the bundling of cellular equipment and service would promote competition or whether such action would, given the market dominance of the incumbent cellular carriers, hinder the development of competition. Allowing the CPUC to complete these proceedings would not permit manipulation, as Airtouch mistakenly alleges,^{13/} but rather would permit the CPUC to continue to determine how wireless competition can most effectively be fostered in California. An eighteen month extension of California's jurisdiction over dominant CMRS providers' intrastate rates is a reasonable and balanced approach to protecting the public and creating conditions under which competition can develop.

III. ROBUST COMPETITION IN THE CMRS MARKETPLACE WILL NOT EXIST FOR SOME TIME.

In an attempt to convince the Commission that competition exists in the cellular marketplace, a number of parties have argued that the advent of PCS and ESMR, as viable alternatives to cellular service, will compete

^{13/} See Comments of Airtouch Technologies at 66.

immediately with entrenched cellular providers, such that market conditions will deter anti-competitive activities, thereby making intrastate rate regulation unnecessary.^{14/} Such arguments are intended merely to distract attention from the unavoidable conclusion that the wireless marketplace, now consisting of only cellular service in most areas of the country, is not competitive.

CTIA, for instance, seeks desperately to paint a competitive picture of the cellular marketplace. In so doing, it states that:

[e]xisting CMRS providers currently offer a wide range of mobile services to compete with cellular, including advanced and wide-area paging, specialized mobile radio ("SMR"), enhanced specialized mobile radio ("ESMR"), PCS, wireless cable, traditional radio services, mobile satellite, basic exchange telecommunications radio service ("BETRS"), wireless facsimile, and broadband video (28 GHz LMDS).^{15/}

This assertion is both factually incorrect and defines the wireless market so broadly that CTIA would have the Commission find any radio-based communication, whether data-driven or entertainment-based, to be a substitute for wide-area, two-way wireless communications.

14/ See e.g. Comments of Cellular Telecommunications Industry Association at 15-21; Comments of GTE Service Corporation at 15-18; Comments of McCaw Cellular Communications at 35; Comments of Cellular Carriers Association of California at 57-62.

15/ See Comments of CTIA at 16.

PCS spectrum has not yet been assigned and will not pose a competitive threat to cellular operators until proposed systems are constructed and placed into operation. Even in the most commercially attractive markets, this could take a minimum of several years, during which cellular operators will be permitted to enhance their already considerable market position.^{16/} Moreover, although Nextel has made impressive strides in implementing its ESMR service in California, it cannot yet challenge the significant market power of cellular incumbents.^{17/}

The states of California, Connecticut and New York each recognize that the cellular telephone service market is highly concentrated and therefore not truly competitive. Moreover, each of these states acknowledges that the competitive success of emerging CMRS competitors, such as Nextel, depends on having a realistic opportunity to compete. For instance, the state of Connecticut acknowledges that the eventual entry of CMRS competitors does not warrant the abandonment of current CMRS rate

^{16/} In most cases, it will take considerably longer as PCS operators seek to relocate microwave incumbents in order to initiate their operations on a large scale.

^{17/} At present, Nextel provides ESMR service in three areas in California: Southern California (Los Angeles Basin, from Santa Barbara to Palm Springs), Northern California (San Francisco area, from San Jose to Santa Rosa), and the Central Valley (from Bakersfield to Redding). Its current ESMR customer base in California is three one-thousandths (0.003 or 0.3%) of the cellular carriers' customer base in California of approximately two million mobile units in service.

regulation because the potential for new entry (and their eventual success in creating a viable competitive alternative) is still speculative.^{18/} The fact that Nextel's service may someday be a substitute for cellular offerings in Connecticut does not mean that it can be viewed as a competitor today, such that the cellular industry can use the Budget Act provisions to preempt state regulation of cellular intrastate rates.

There is no near-term competition in the wireless marketplace sufficient to discipline the current cellular marketplace.^{19/} Until effective competition develops, continued rate regulation may be necessary in some states to restrain the dominant market power of cellular duopolists.

IV. ADEQUATE EVIDENCE HAS BEEN PRESENTED TO PERMIT CONTINUED REGULATION OF CELLULAR INTRASTATE RATES

The need for continued rate regulation of dominant CMRS providers has been adequately demonstrated by California, Connecticut and New York. As illustrated through empirical evidence, the cellular markets within

^{18/} After an extensive investigation of Connecticut's cellular marketplace and a seven day hearing focusing on such issues as rate of return, market penetration and cost of service, the state's Department of Public Utility Control determined that Connecticut's cellular market was not effectively competitive. Accordingly, based on this finding, the Department determined that it should file a petition with the Commission. See Comments of Attorney General of the State of Connecticut at 1-6.

^{19/} See Second Report and Order, 9 FCC Rcd 1411, 1470 (1994) Regulatory Parity, ("since ... additional competition [e.g. PCS, ESMR] will not be a reality for some time, it imposes no direct constraint on current pricing behavior").

these states are not competitive. State rate regulation, therefore, is necessary to protect the public from unjust rates and unreasonable rate discrimination, at least until the CMRS market evolves to the point where no specific participant or technology provides the wherewithal to control prices or the supply of wireless service.

A. Any perceived reduction in cellular prices further evidences the cellular industry's ability to act anti-competitively in the CMRS marketplace.

Cellular carriers seeking to deny the non-competitive state of the CMRS marketplace argue that the state petitions ignore decreasing cellular prices and the competitive impact of volume discounts as evidence of competition in the delivery of cellular service.^{20/} What the cellular carriers do not account for, however, is that discounted rates are only provided to those cellular customers who commit to service for significant periods of time with substantial early termination penalties.^{21/} These long-term "discount" plans allow cellular carriers to lock-in customers and reinforce their market power by

^{20/} See e.g. Comments of Airtouch Communications, Inc. at 45-47; Comments of Bay Area Cellular Telephone Company at 17-22; Comments of Cellular Carriers Association of California at 65-69; Comments of GTE Service Corporation at 33-36; Comments of McCaw Cellular Communications at 38-40.

^{21/} See California Petition to Regulate CMRS Intrastate Rates at 43 (indicating that any rate reductions offered to cellular customers in California also involved reduced flexibility, risk of termination fees and foregone access to emerging technologies).

effectively preventing a customer from switching its service to later-entering CMRS providers.

This is not the first instance in which the Commission has considered efforts by market incumbents to "capture" customers before the entry of new competitors. In the Commission's Expanded Interconnection proceedings, for example, the Commission noted that the existence of certain LEC long-term special access contracts raised potential anti-competitive concerns because they tended to "lock-up" the access market, preventing customers from obtaining the benefits of the new, more competitive access environment.^{22/} Accordingly, the Commission provided for a 90-day "fresh look" period, giving customers an opportunity to terminate long-term LEC contracts for service at a specific LEC central office in favor of new entrants beginning when the first expanded interconnection arrangement became operational at a particular LEC central office.^{23/}

Not unlike LEC efforts to combat the market effectiveness of newly interconnected competitive access providers ("CAPs"), cellular carriers are also using their

^{22/} See Second Memorandum Opinion and Order on Reconsideration, Expanded Interconnection With Local Telephone Company Facilities, 8 FCC Rcd 7341, 7342 (1993).

^{23/} Id. at 7343. It is instructive to the issue of continued state regulation to note that the Commission has fashioned specific customer choice safeguards in similar situations.

power over the pricing of wireless services to lock-in mobile communications subscribers to long-term service contracts that carry prohibitive termination penalties. In this way, cellular operators hope to perpetuate their market position to the detriment of potential CMRS competitors.^{24/} Indeed, in the absence of rate regulation, cellular carriers' will likely alter their rates to appropriate excessive economic rents prior to the entrance of new competitors.

B. The Federal Communications Commission's determination that interstate cellular rates need not be tariffed does not require the preemption of intrastate rate regulation.

Cellular carriers also argue that the Commission has already made the determination that rate regulation is unnecessary given that the Commission declined to require cellular providers to file interstate services tariffs under Title II.^{25/} This position, however, disregards the separate and distinct treatment of these issues in the Budget Act and the Commission's explicit findings in determining the appropriate regulatory framework for CMRS.

Pursuant to Congressional mandate, the Commission was charged with two discrete tasks: (1) to determine what

^{24/} In fact, the cellular industry's lip service to their competitors' ability to satisfy "untapped demand" is betrayed by their flagrant attempts to restrict their customers from benefiting from new competition. See Comments of CTIA at 15.

^{25/} See Comments of GTE Service Corporation at 5-10.

sections of Title II of the Communications Act would apply to particular services; and (2) to provide the states an opportunity to regulate the rates of any CMRS if a sufficient showing is made. Each task was discussed in separate sections of the Budget Act, indicating that Congress intended the Commission to consider the competitiveness of the CMRS marketplace on two levels -- once on a federal level and once on a state level.

Thus, the fact that the Commission decided not to impose interstate tariffing obligations on the cellular industry, as a whole, does not negate the states' ability to present evidence that could support intrastate rate regulation based on their own experience and observations. Although the Commission may have determined initially that interstate tariffing is not necessary, it did not, and statutorily could not, deprive the states of the opportunity to regulate cellular rates if they meet the established standard for continued regulation. States continue to have a strong, legitimate interest in regulating rates charged for the provision of local and intrastate service by dominant CMRS providers.

Moreover, a closer examination of the Commission's findings in the Second Report and Order illustrates that its determinations were not as clear cut as the cellular industry would now have the Commission believe. Although

the Commission determined not to require the filing of tariffs at this time it explicitly stated that:

an important aspect of this conclusion is that we have decided to initiate a further proceeding in which we will propose to establish extensive and ongoing monitoring of the cellular marketplace as a means of ensuring the forbearance action we take in this Order does not adversely affect the public interest.^{26/}

Thus, the Commission's initial tariffing decision was just that -- an initial determination on the present record. Should the record supplied by the states in petitioning for continued intrastate rate regulation under Section 332(c)(3)(B) demonstrate that regulation on the state level is required to protect cellular subscribers, the Commission is empowered to grant the requested relief. Nextel submits that the record in the above-referenced proceedings are more than sufficient to impose rate regulation on dominant CMRS providers.^{27/}

^{26/} See Second Report and Order, Regulatory Parity at 1467-1468. On a global basis the Commission has previously determined that the cellular marketplace is not "fully" competitive. See Second Report and Order, Regulatory Parity at 1468 and 1472. Accordingly, it plans to monitor the industry to determine if existing market conditions are sufficient to protect the public. As correctly recognized by the National Cellular Resellers Association, however, the Commission has not yet initiated this investigative proceeding and state regulation is the only current oversight available to protect wireless telecommunications customers from anti-competitive and discriminatory pricing practices.

^{27/} An issue has been raised regarding the disclosure of certain information to the Commission contained in the CPUC
(continued...)

V. CONCLUSION

For the foregoing reasons, Nextel urges the Commission to grant the petitions of California, New York and Connecticut to continue existing intrastate rate regulation authority over dominant cellular providers. Moreover, because non-dominant CMRS providers have no market power and are not able to charge unreasonable rates or to discriminate unreasonably among CMRS customers, there is no basis for state rate regulation of these service providers.

Respectfully submitted,
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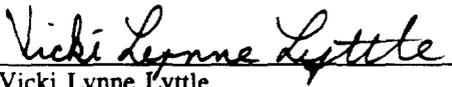
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27/ (...continued)

Petition, and the fact that additional information has been withheld from public scrutiny. There is adequate evidence in the public record, however, for continued intrastate rate regulation of cellular service providers.

CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, a secretary at Dow, Lohnes & Albertson, hereby certify that on this 19th day of October, 1994, I caused a copy of the foregoing Reply Comments of Nextel Communications, Inc. to be served by first-class mail, postage prepaid, to the parties included on the attached service list.


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