

DOCKET FILE COPY ORIGINAL
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Petition of Arizona Corporation) PR Docket No. 94-104
Commission for Authority to Continue) PR File No. 94-SP2
Rate and Entry Regulation Over)
Commercial Mobile Service Providers)
Within the State of Arizona)

To: The Commission

**SUPPLEMENTAL COMMENTS OF
MOBILE TELECOMMUNICATION TECHNOLOGIES CORP.**

Mobile Telecommunication Technologies Corp. ("Mtel"), by its attorneys, respectfully submits its reply comments in response to the comments filed in the above captioned proceeding. By these Reply Comments, Mtel reaffirms its urging that the Commission deny the captioned petition submitted by the Arizona Corporation Commission (the "ACC Petition") seeking authority to continue state rate and entry regulation of all CMRS.

I. BACKGROUND

In its comments in this proceeding, Mtel demonstrated that the ACC has utterly failed to make the showing required pursuant to Section 20.13 of the Commission's rules, 47 C.F.R. § 20.13, before it can extend rate and entry regulation over the paging and narrowband PCS component of CMRS. Accordingly, Mtel urged that the Commission deny the ACC Petition.^{1/}

^{1/} As it is axiomatic that the Commission must apply its rules, there is no option other than to deny the ACC Petition. See, e.g., Reuters v. FCC, 781 F.2d 946, 950-951 (D.C. Cir. 1986).

No. of Copies rec'd
List ABCDE

014

The vast majority of comments and reply comments filed in this proceeding oppose the ACC Petition.^{2/} Mtel's position that the ACC petition must be denied with respect to paging and narrowband PCS was consistent with that of at least five other paging and narrowband PCS interested parties filing comments or reply comments in this proceeding.^{3/} Further comments by parties associated with the SMR industry also advocated limiting regulation to cellular services in the event the state petition is granted.^{4/} Collectively, these comments show broad support for the position advocated by Mtel that the Commission should assess the competitive nature of various services within the CMRS marketplace before assessing which, of any, of them should be subject to continuing state regulation.

Notwithstanding the clear consensus as noted above, Mtel's review of the comments and reply comments in this proceeding reflects that at least two parties and the ACC urge that if the ACC is permitted to regulate any CMRS, it should be permitted to

^{2/} Nextel Communications, Inc. ("Nextel") and NCRA filed comments which supported continued regulation of cellular providers but not for paging or narrowband PCS services.

^{3/} See, e.g., Comments of AirTouch Paging ("AirTouch"), Paging Network, Inc. ("PageNet"), Personal Communications Industry Association ("PCIA"), Pittencrief Communications, Inc. ("Pittencrief") and Reply Comments of PageMart, Inc. ("PageMart") which further assert that the ACC failed to meet its burden with respect to paging and demonstrate that paging is a highly competitive industry which does not warrant rate and entry regulation.

^{4/} See, e.g., Comments of AMTA, E.F. Johnson Company, Nextel, and Pittencrief.

regulate all CMRS, despite the fact that the ACC Petition addressed only cellular, on the theory that if a state is able to regulate any CMRS, it must be able to regulate all CMRS. GTE Service Corporation ("GTE") and the Rural Cellular Association ("RCA") oppose Mtel's and the other parties comments which request that non-cellular services not be subject to any continued rate and entry regulation in the event the ACC is permitted to continue cellular regulation.

II. DISCUSSION

A. The ACC Has Failed to Present Any Data that Justify Continued Regulation of Paging or Narrowband PCS

At the outset, it must be fully appreciated that the ACC has not submitted even a shred of evidence which would support, or even was intended to support, the continuation of rate and entry regulation over any non-cellular CMRS service. Thus, the ACC has not made the required showing that "market conditions" for paging and narrowband PCS warrant continued regulation, and it has thus fallen woefully short of meeting its Section 20.13 obligations.^{5/} In the absence of such a showing, ACC's only hope of continuing

^{5/} At the very least, the ACC should have presented a bona fide study indicating how paging rates may be unreasonable and how there may be a lack of competition in the provision of paging services. Mtel submits that there is a simple reason that no such showing was made by the ACC (or by any other state): no such conditions exist!

regulation of these services is to "bootstrap" those services onto continued regulation of cellular.^{6/}

GTE and RCA both take issue with the commenters (including Mtel) who urge the Commission to deny the ACC Petition with respect to non-cellular services. In so doing, they argue that ACC regulation of cellular, but not other CMRS, might somehow be inconsistent with the concept of regulatory parity. See GTE Comments, at 8; RCA Comments, at 2-4. Both GTE and RCA base their urging on a recent Commission determination that "all commercial mobile radio services compete with one another, or have the potential to compete with one another." RCA Comments, at 3; GTE Comments, at 8, citing the Commission's Third Report and Order in GN Docket No. 93-252, PR Docket No. 93-144, and PR Docket No. 89-553, at para. 43.

Mtel submits that the authority cited by GTE and RCA, when viewed in proper context, simply does not support their urging for "all-or-nothing" state regulation of CMRS. Most certainly, it does not affirmatively support regulation of all CMRS as advocated by the ACC. In order to understand the significance of the Commission pronouncement quoted selectively by GTE and RCA, it is instructive to review the Commission's treatment of "substantially similar"

^{6/} While regulatory parity is a paramount goal of the Commission, there may well be situations where the extent of "similarity" among services is not sufficient to justify parallel regulatory treatment. Third Report and Order, at para. 15. Moreover, even GTE has recognized that the Commission will regard the "classes" of CMRS separately for purposes of assessing the states' petitions. See GTE Comments at 6.

services in the Third Report and Order. There, the Commission went to great lengths to explain that its finding regarding the extent of present or future competition among various CMRS was based only upon "an expansive view of the extent of actual or future competition," and that such a view was deemed to be appropriate "for purposes of examining the technical and operational rules governing these services." Third Report and Order, at para. 37.

The Commission also distinguished the context in which it made competitive findings in the Third Report and Order from that in which it made its intra-CMRS determinations with respect to whether regulation, or lack thereof, is appropriate. For example, the Commission expressly observed that it applied a different standard in assessing the existence of competition, and therefore the need for continued regulation, in its forbearance proceeding. Third Report and Order, at para. 47. It also made clear that its finding of competitiveness is not dispositive on the issue of which classes of service should be regulated, when it stated:

In the future, our assessment of the competitive relationships among different service providers in the mobile services marketplace might vary from the approach we are taking here if, for example, the question before us is whether to extend additional forbearance measures only to certain classes of service providers. [Footnote omitted.] The guiding principle in both instances is our goal of promoting competition and thus serving the interests of consumers.

While all of the above Commission pronouncements undermine the arguments of GTE and RCA, as well as the ACC's right to continue

regulation of paging and narrowband PCS, they do not come as a surprise to Mtel, nor do they reflect a change in Commission thinking. As Mtel observed in its comments in this proceeding, the Commission had previously held that, in assessing the status of competition for purposes of determining whether CMRS should or should not be regulated, the commission's analysis is on a service-by-service basis. Mtel Comments, at 6. Mtel submits that the Commission's treatment of this issue is clear, as evidenced by the following pronouncement:

we will proceed with an analysis that focuses on each of the various commercial mobile radio services currently offered and about to be offered, keeping in mind that our doing so is not intended to prejudice the issue of whether, and to what extent, there is competition among the various services.

Mtel Comments, at 6, citing the Commission's Second Report and Order in the captioned proceeding, 9 FCC Rcd 1411, 1467 (1994).

The Commission reiterated and expanded upon the above themes in its Further Notice in GN Docket No. 94-33.^{7/} There the Commission properly observed that the statute^{8/} gives the Commission discretion to forbear from applying specific Title II provisions to some, but not all, CMRS services. Id. The Commission also noted that the legislative history of the statute provides that "differential regulation of commercial mobile

^{7/} In the Matter of Further Forbearance from Title II Regulation of Certain Types of Commercial Mobile Radio Service Providers, 9 FCC Rcd 2164, 2165 (1994).

^{8/} Communications Act, § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A).

services is permissible, but is not required in order to fulfill the intent of this section."^{2/}

Mtel submits that the GTE and RCA urging for "all-or-none" regulation of CMRS at the state level is far too strained to be given serious consideration where, as is the case here, the underlying legislation, its legislative history, and the expert agency charged with enforcing the statute all are on record as advocating a service-by-service analysis prior to determining whether a given service should be regulated.

B. If the ACC Must Regulate Either All of CMRS or None, It Is Not Authorized to Regulate Anything, as It Has Failed to Make a Showing Sufficient to Justify Any Regulation

As set forth above, and in the comments filed by Mtel and others in this proceeding, the only service even addressed in the ACC's plea for authority to continue regulation is cellular. The gravamen of the ACC's argument is that cellular is a duopoly service and that the presence of only two competitors is insufficient to protect consumers. Even assuming that the ACC had adequately supported its argument -- and there is considerable dispute on that front -- its entire argument would be completely undermined if cellular and other CMRS were deemed to be competitive with each other, since the ACC's premise of a cellular "duopoly" would necessarily fall. Thus, it is determined that all CMRS services are competitive for purposes of preemption, the entire

^{2/} Further Notice at 2165, citing to and quoting from H.R. Conf. Rpt. No. 103-213, 103rd Cong., 1st Sess., 491 (1993).

basis for the ACC's plea for continued regulation, even with respect to cellular, must fail.^{10/}

III. CONCLUSION

As Mtel demonstrated in its comments, no showing has been made by the ACC in this proceeding which would support continued regulation of paging and narrowband PCS. No party disputes this. Rather, a select few commenters have argued that, if the ACC has justified continued regulation of cellular, then such justification should carry over to justify continued regulation of paging and narrowband PCS.

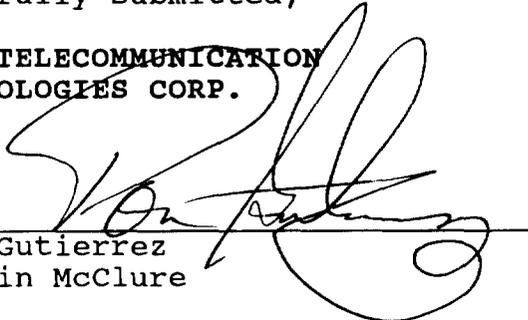
Review of the governing statute, its legislative history, and applicable Commission pronouncements all demonstrate that continued regulation of CMRS should not be on an "all-or-nothing" basis. Indeed, when assessing whether states can continue regulation, the only proper form of analysis is on a service-by-service basis. When that analysis is applied in the instant proceeding, it is clear that no basis exists for the ACC to continue regulating paging or narrowband PCS.

^{10/} A genuine question exists as to whether continued state regulation, even if justified, as required, by Section 20.13, would help or hinder competition.

For all the foregoing reasons, Mtel affirms its urging that the subject petition be denied.

Respectfully submitted,

**MOBILE TELECOMMUNICATION
TECHNOLOGIES CORP.**

By: 

Thomas Gutierrez
J. Justin McClure

Its Attorneys

Lukas, McGowan, Nace &
Gutierrez, Chartered
Suite 1200
1111 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 857-3500

October 19, 1994