EX PARTE OR LATE FILED

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

February 17, 1995

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington D. C. 20554

RE: EX PARTE: PR DOCKET 94-103

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

This letter shall serve as written notification that, on February 16, 1995, representatives of GTE Service Corporation and GTE PCS met with R. Milkman, R. Baca, L. Smith, J. Luckett, S. Wiggins, J. Phillips and M. Wack of the Commission's Staff to discuss GTE's position on issues raised in the above-referenced matter. The attached materials were used during the course of the discussion.

Please include this letter, and the attached materials, in the record of this proceeding in accordance with the Commission's rules concerning ex parte communications.

Sincerely,

Whitney Hatch

Attachment

C: R. Milkman
R. Baca
J. Phillips
L. Smith
J. Luckett
S. Wiggins
M. Wack

No. of Copies rec'd 0+1
List A B C D E

REGULATORY ENVIRONMENT IN OHIO AND HAWAII

OHIO

PUCO FAILED TO FILE A PETITION - PUCO DID LITTLE MORE THAN INDICATE ITS POSSIBLE INTENTION TO FILE A PETITION AT SOME UNDETERMINED FUTURE DATE.

PUCO SEEKS TO RETAIN REGULATION OF INTER-CARRIER ROAMING AGREEMENTS AND COMPLAINTS RELATING TO RATES. HOWEVER, THESE ARE IMPERMISSIBLE FORMS OF RATE REGULATION.

> FCC SHOULD MAKE CLEAR THAT "BACK-DOOR" RATE REGULATION THROUGH COMPLAINT PROCESS IS ALSO PREEMPTED.

HAWAII

HAWAII PUC PETITION FAILS TO PROVIDE ADEQUATE EVIDENCE TO SATISFY THE STATUTORY BURDEN.

CELLULAR RATES HAVE DECLINED OVER TIME.

COMPETITORS MANIPULATE THE REGULATORY PROCESS.

> REGULATORY PROCESS IS USED TO DELAY OR QUASH COMPETITIVE INITIATIVES SUCH AS PRICE DECREASES AND NEW SERVICE/RATE PLAN OFFERINGS.

I. States have the Burden of Proof under Section 332

- Section 332 requires States wishing to retain jurisdiction over rates to bear the burden of proving that market conditions fail to protect subscribers from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory.

- The FCC determined in its Order implementing the Revision of Section 332 that Section 332 is: "clear as to . . . the criteria upon which they must base their petitions." The FCC adopted Section 20.13(a)(2) which contains a comprehensive list of the types of documentation the FCC expects Petitioners to provide.

- The FCC found that: " . . . States must, consistent with the statute, **clear substantial hurdles** if they seek to continue or initiate rate regulation of CMRS providers."

- None of the Petitions met that high standard.

II. The FCC Now Has Jurisdiction over Intrastate Rate Regulation

- The OBR preempted state regulation of wireless intrastate rates and gave the FCC the jurisdiction over wireless intrastate rates.

- The FCC **now** has authority to utilize its long-established formal and informal complaint procedures to resolve cellular subscriber complaints.

- The FCC represents a new forum for a cellular subscriber to resolve his or her intrastate rate disputes.

- An aggrieved subscriber can still choose to resolve his or her disputes directly with the licensee, or utilize organizations such as the Better Business Bureau to informally resolve matters. If the subscriber chooses, State Courts can still be utilized to resolve private contractual matters.

Pursuant to a process enacted by Congress in its amendment to Section 332 of the Communications Act of 1934 ("the Act"), eight states filed petitions requesting authority to continue regulating intrastate rates for cellular service.[1]

In Section 332(c)(3)(A) of the Act, Congress stated unequivocally that "no State or local government shall have any authority" to regulate commercial mobile radio service ("CMRS") entry or rates.[2] Thus, the clear intent of Congress in adding Section 332(c)(3)(A) was to establish a comprehensive federal regulatory framework for CMRS.

Congress created two limited exceptions to its broad preemption of state regulation of CMRS rates, one of which was for states that had rate regulation in effect as of June 1, 1993.[3] Such states were permitted to petition the Commission for authority to regulate CMRS rates, provided that they met the requirements of Section 332 of the Act. The states of Arizona, California, Connecticut, Hawaii, Louisiana, New York, Ohio, and Wyoming have filed their petitions pursuant to this provision. The Commission can readily determine that each of these petitions has not met the evidentiary burden set forth by Congress in Section 332, and thus the Commission should deny each state's request to continue to regulate intrastate cellular rates.

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[1] See Petition to Extend State Authority over Rate and Entry Regulation of All Commercial Mobile Services, PR Docket No. 94-104, filed by the Arizona Corporation Commission; Petition 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; Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, PR Docket No. 94-106; Petition of Public Utilities Commission, State of Hawaii, for Authority to Extend Its Rate Regulation for Commercial Mobile Radio Services in the State of Hawaii, PR Docket No. 94-103; Petition on Behalf of the Louisiana Public Service Commission for Authority over Commercial Mobile Radio Services Offered within the State of Louisiana, PR Docket No. 94-107; Petition to Extend Rate Regulation Filed by the New York State Public Service Commission, PR Docket No. 94-108; Statement of the Public Utilities Commission of Ohio's Intention to Preserve its Right for Future Rate and Market Entry Regulation of Commercial Mobile Radio Services, PR Docket No. 94-109; State Petition for Authority to Maintain Current Regulation of Rates and Market Entry, PR Docket No. 94-110, filed by the Public Service Commission of Wyoming.

[2] 47 U.S.C. § 332(c)(3)(A).

[3] 47 U.S.C. § 332(c)(3)(B).

I. The Evidentiary Burden

To implement Revised Section 332 of the Communications Act, the Commission adopted Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, (Second Report and Order), 7 FCC Rcd 1411 (1994) [hereinafter 2nd R&O]. The 2nd R&O adopted rules which would govern the substance of and filing of State Petitions. The Commission determined that its new rules, which placed a high burden of proof upon the states, were consistent with the intent of Congress:

> First, in implementing the preemption provision of the new statute we have provided that states must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers.[4]

Congressional intent is readily apparent from the language of Section 332. Congress required that petitioning states bear the burden of demonstrating either that: 1) market conditions with respect to CMRS were such that they failed to protect subscribers adequately from unjust and unreasonable rates or rates that were unjustly or unreasonably discriminatory; or, 2) that such market conditions existed and that CMRS was a replacement for landline telephone service for a substantial portion of the landline service within that state.[5]

After reviewing the plain language of Section 332, the Commission stated that:

> We believe that Congress, by adopting Section 332(c)(3)(A) of the Act, intended generally to preempt state and local rate and entry regulation of all

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[4] 2nd R&O at 1504 (emphasis added).

[5] See 47 U.S.C. § 332(c)(3)(A)(i)-(ii). The Commission notes that the conference agreement between the House of Representatives and the Senate states that, with respect to petitions of states filed pursuant to Section 332(c)(3)(B),

> [i]f . . . several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of this service, it is not the intention of the conferees that States should be permitted to regulate these competitive services simply because they employ radio as a transmission means.

H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 493 (1993).

commercial mobile radio services . . . .[6]

Further, the Commission determined that Section 332(c)(3) is "clear as to . . . the criteria upon which they must base their petitions."[7]

The Commission has issued regulations implementing Section 332(c)(3), which regulations establish the requirements that state petitions are minimally expected to meet. First, Section 20.13(a)(5) places the burden of proof on the petitioning state[8] to demonstrate that market conditions fail to protect subscribers from unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory. Second, Section 20.13(a)(1) requires states to include "demonstrative evidence" proving the market condition exceptions of Section 332(c)(3)(A).[9] Finally, Section 20.13(a)(2) provides an extensive, detailed list of the type of information that states are expected to produce to meet their burden of proof:

> (1) The number of commercial mobile radio service providers in the state, the types of services offered by commercial mobile radio service providers in the state, and the period of time that these providers have offered service in the state;
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> (2) The number of customers of each commercial mobile radio service provider in the state; trends in each provider's customer base during the most recent annual period or other data covering another reasonable period if annual data is unavailable; and annual revenues and rates of return for each commercial mobile radio service provider;
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> (3) Rate information for each commercial mobile radio service provider, including trends in each provider's rates during the most recent annual period or other data covering another reasonable period if annual data is unavailable;
>
> (4) An assessment of the extent to which services offered by the commercial mobile radio service providers the state proposes to regulate are substitutable for services offered by other carriers in the state;

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[6] 2nd R&O at 1504.

[7] Id.

[8] 47 C.F.R. § 20.13(a)(5).

[9] 47 C.F.R. § 20.13(a)(1).

(5) Opportunities for new providers to enter into the provision of competing services, and an analysis of any barriers to such entry;

(6) Specific allegations of fact (supported by affidavit of person with personal knowledge) regarding anti-competitive or discriminatory practices or behavior by commercial mobile radio service providers in the state;

(7) Evidence, information, and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates, or rates that are unjust or unreasonably discriminatory, imposed upon commercial mobile radio service subscribers. Such evidence should include an examination of the relationship between rates and costs. Additionally, evidence of a pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces will be considered especially probative.

(8) Information regarding customer satisfaction or dissatisfaction with services offered by commercial mobile radio service providers, including statistics and other information about complaints filed with the state regulatory commission.[10]

Although the Commission gave petitioning states the discretion to set forth such evidence in support of their continued regulation of intrastate rates as they saw fit,[11] Section 20.13(a)(2) contains a comprehensive list of anticipated documentation to place states on notice of the type of proof that the Commission would find persuasive. For example, with regard to anti-competitive behavior, the Commission expects states to produce "specific allegations of fact" to be supported by a sworn affidavit of an individual with personal knowledge.[12] Evidence of unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, is expected to demonstrate the state's position "with particularity," and such evidence "should" incorporate analysis of the relationship between costs and rates.[13] The Commission also deemed "especially probative" evidence of a pattern of unjust and unreasonable rates,

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[10] 47 C.F.R. § 20.13(a)(2).

[11] 2nd R&O at 1504.

[12] 47 C.F.R. § 20.13(a)(2)(vi).

[13] 47 C.F.R. § 20.13(a)(2)(vii).

or rates that are unjustly or unreasonably discriminatory.[14] In sum, a petitioning state that expects to meet its evidentiary burden must provide specific data, factual evidence, and reasoned analysis.

Finally, the high burden placed upon the states is warranted by the public interest considerations inherent in preemption. In its review of Congress' decision to adopt Section 332(c)(3)(A), the Commission found that Congress intended preemption to "ensure that similar services are accorded similar regulatory treatment and to avoid undue regulatory burdens . . . ."[15] The Commission has found that "competition is a strong protector of these interests and that state regulation in this context could inadvertently become as a burden to the development of this competition."[16] Further, the Commission found that "Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our federal mandate for regulatory parity."[17] Thus, in order to overcome the public interest inherent in preemption, it is appropriate for state petitions to be subjected to a high burden of proof.

None of the petitions submitted by the states can survive analysis under these exacting, explicit and demanding standards. These petitions simply fail to document that market conditions with respect to CMRS fail to protect subscribers adequately from unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory. In fact, GTE and others have documented that in California, for example, cellular rates have declined in real terms while cellular service areas and quality of service have increased.[18]

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[14] Id.

[15] 2nd R&O at 1504. Similar services cannot be accorded similar regulatory treatment if states remain free to promulgate regulation which conflicts with the Commission's uniform regulatory scheme. For example, the California Public Utilities Commission apparently intends to establish disclosure and informational tariff requirements for CMRS carriers. While this issue is not now before the Commission, the imposition of such a regulatory burden would contravene the express intent of Congress to establish, under the Commission's aegis, regulatory parity.

[16] Id. at 1421.

[17] Id.

[18] See Comment of GTE Service Corporation at 28-32 (September 19, 1994), filed in 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

II. Commission Jurisdiction over Intrastate Rate Regulation

When Congress preempted state regulation of cellular rates, Congress simultaneously empowered the Commission with the authority to address cellular subscribers' complaints. Rather than create a jurisdictional vacuum in which states were preempted and the FCC would be powerless to remedy subscriber grievances, Congress amended Sections 152(b) and 332 to enable the FCC to decide complaints arising from intrastate as well as interstate wireless communications. As will be discussed below, even before Congress' revision of 152(b) and 332, the Commission has had jurisdiction over the activities and operations of the common carriers that it licenses.

A. Commission Jurisdiction over Common Carriers

Since enactment of the Communications Act of 1934, the Commission has had jurisdiction over common carriers. Common carriers are defined by the Act as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or in interstate or foreign radio transmission of energy . . . ."[19] Commission jurisdiction over common carriers is also set forth by the Act, for the very purpose of the Commission is to "regulat[e] interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . ."[20]

Congress established in Sections 201 and 202 of the Communications Act of 1934 several duties and obligations that all common carriers must fulfill. The Act states that it is the "duty" of every common carrier "to furnish such communication service upon reasonable request therefor," and declares that any "charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . . ."[21] Further, the Act makes it unlawful for any common carrier "to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services . . . ."[22]

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the Provision of Cellular Service within the State of California, PR Docket No. 94-105.

[19] 47 U.S.C. § 153(h).

[20] 47 U.S.C. § 151.

[21] 47 U.S.C. § 201(a) and (b).

[22] 47 U.S.C. § 202(a).

To ensure compliance, Congress authorized the Commission to hear the complaints and grievances of "any person, any body politic or municipal organization" against "anything done or omitted to be done by any common carrier" in contravention of the Act.[23] The Commission may order a common carrier to pay damages to a complaining party after hearing a complaint.[24] The Commission has over 60 years' experience in regularly enforcing Sections 201 and 202 by 1) entertaining informal and formal complaints; and 2) assessing forfeitures where appropriate.

B. Extension of Commission Jurisdiction Pursuant to Section 332

In the Omnibus Budget Reconciliation Act of 1993, Congress amended not only Section 332, which expressly preempted state regulation of CMRS rates, but also amended Section 152(b), which had long precluded the Commission for exercising its authority over most wireless intrastate communications. Before the 1993 amendments to the Act, Section 152(b) stated that with certain limited exceptions, nothing in Chapter 5 of Title 47 "should be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ."[25] The Supreme Court construed Section 152(b) as it was then written to mark a general division between the jurisdiction of state utilities commissions and the FCC.[26]

In Louisiana Public Service Commission, et al. v. F.C.C., 476 U.S. 355 (1986), the Supreme Court reviewed the tension between the broad powers given to the FCC pursuant to Section 151 and the limiting language of Section 152(b) and concluded that Section 152(b) reined in the otherwise expansive jurisdiction of the Commission. The Supreme Court determined that the Act, as then written, did not provide the FCC with authority to regulate intrastate rates. The Court found that although Section 151's proclamation of the Commission's purpose was extremely broad, and that it thus might be read to "impliedly" prohibit "state regulation which frustrates the ability of the FCC to perform its statutory function of ensuring efficient, nation-wide phone service," nevertheless, Section 152(b) "express[ly]" limited the

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[23] 47 U.S.C. § 208.

[24] 47 U.S.C. § 209.

[25] 47 U.S.C. § 152(b) (1992).

[26] Louisiana Public Service Commission, et al. v. F.C.C., 476 U.S. 355 (1986).

Commission's jurisdiction in this area.[27] Thus, the Court appears to have concluded that "but for" the limiting language of Section 152(b), the Commission would have jurisdiction over intrastate as well as interstate communications.

Against this historical background, Congress' decision to amend Section 152(b) so as to vacate those provisions which deprived the Commission of jurisdiction over wireless intrastate communications has monumental significance. Congress created a new, special exception to Section 152(b)'s pervasive reach by providing: "Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title . . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to"[28] wireless services. Henceforth, the Commission's jurisdiction over CMRS matters which are the subject of Section 332 is not constrained by the limiting language of Section 152(b).

After repealing the restrictions on FCC jurisdiction over intrastate mobile services, Congress went on, in Section 332(c)(1)(A) to ordain that commercial mobile service providers be treated as "common carrier[s]." As noted above, the term "common carrier" is defined in the Act to refer to persons providing interstate or foreign common carrier communications services. All CMRS providers are therefore deemed to be "interstate" for purposes of the Act. Congress also expressly prohibited the Commission from exempting CMRS carriers from the application of Sections 201, 202, and 208 of the Act.[29] The Commission's jurisdiction over CMRS carriers is thus well-established, and its authority to entertain complaints against common carriers on the basis of unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, is clear.[30]

That Congress intended to enlarge the Commission's jurisdiction to include wireless intrastate rate regulation is confirmed by the provisions of Section 332(c)(3)(A), where Congress declared that "[n]otwithstanding sections 152(b) and 221(b)" of Title 47, "no State or Local government shall have any authority to regulate entry of or the rates charged by any commercial mobile

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[27] Id. at 370.

[28] 47 U.S.C. § 152(b) (1994) (emphasis added).

[29] 47 U.S.C. § 332(c)(1)(A).

[30] See, e.g., Booth v. American Telephone & Telegraph Co., et al., 253 F.2d 57 (7th Cir. 1958) (FCC has the responsibility for determining just and reasonable rates for long distance service).

service . . . ."[31] Congress used the language "no State or local government shall," which is mandatory. By use of this mandatory language, Congress' intent is unequivocal. Congress, with this amendment, has given the FCC pervasive regulatory authority over CMRS carriers.

It is evident from the 1993 amendments to the Act that Congress intended to extend the Commission's jurisdiction over wireless intrastate rates while simultaneously revoking the states' jurisdiction in that area. Congress's authority to do so is unquestionable, given the extensive power provided to Congress under the Commerce Clause of the Constitution.[32] As the Supreme Court itself has noted, virtually all equipment and facilities used by common carriers for the transmission of intrastate communications is also used for the transmission of interstate communications.[33] Thus, the Commission's jurisdiction over CMRS intrastate rates is limited only by the decisions of Congress.

While the Commission is empowered by the Communications Act of 1934 as revised to decide subscriber complaints of both interstate or intrastate CMRS issues, this does not preclude a subscriber or other aggrieved party from utilizing other fora for dispute resolution. Ideally, subscribers and carriers would work out differences without the need for third party intervention. However, in the event that assistance is required to resolve a subscriber's dispute, the subscriber has a panoply of sources from which to solicit assistance. Individuals remain free to turn to organizations such as the Better Business Bureau for informal resolution of disputes. Further, state courts remain available for resolution of subscriber disputes arising from private contractual matters.

CONCLUSION

Congress clearly intended to preempt state entry and rate regulation over CMRS carriers by amending Section 332 of the Act. Although states may, in certain circumstances, petition the Commission for authority to regulate CMRS rates, the Act requires that states demonstrate that certain specific conditions exist, and the Commission's rules require that states bear a substantial burden of proof.

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[31] 47 U.S.C. § 332(c)(3)(A).

[32] See, e.g., Pennsylvania v. Union Gas Co., 491 U.S. 18, 20 (1989) ("It would be difficult to overstate the breadth and depth of the commerce power.")

[33] Louisiana Public Service Commission, et al. v. F.C.C., 476 U.S. 355 (1986).

Congress' intent to extend the Commission's jurisdiction over wireless intrastate rate complaints is also evident from the amendments to Sections 332 and 152 of the Act. While the states' authority to hear wireless intrastate rate complaints has been preempted, Congress did not intend to leave consumers without any recourse. Instead, as part of establishing a comprehensive CMRS regulatory framework, Congress eliminated existing statutory impediments to permit the Commission to address intrastate rate complaints.