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Building The Wireless Future™

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Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: *Ex Parte* Presentation, PR Docket Nos. 94-103 - 94-110
Preemption of State Regulation of CMRS

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

On Tuesday, March 21, 1995, the Cellular Telecommunications Industry Association ("CTIA"), represented by Mr. Brian Fontes, Senior Vice President for Policy and Administrations; Michael Altschul, Vice President and General Counsel and Mr. Randall Coleman, Vice President for Regulatory Policy and Law, along with AIRTOUCH Communications represented by David Gross, Washington Counsel, met with the following staff members of the Office of the General Counsel to discuss issues raised in the above referenced proceedings: Mr. William Kennard, General Counsel; Mr. Christopher Wright, Deputy General Counsel; Mr. James Olson, Chief of Competition Division; and Ms. Suzanne Tetreault, Common Carrier Bureau.

At the meeting, CTIA presented the attached documents. Pursuant to Section 1.1206(a)(1) of the Commission's Rules, an original and one copy of this letterand attachments are being filed with your office. If you have any questions concerning this submission, please contact the undersigned.

Sincerely,

Randall S. Coleman
Vice President for
Regulatory Policy and Law

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The Key to Preemption: The Legal Standard

Cellular Telecommunications Industry Association (CTIA)
and
AirTouch Communications

***Ex Parte* Presentation Concerning**
PR Dockets Nos. 94-103 - 94-110
March 21, 1995

The Statutory Standard

The Commission shall grant a state's petition to continue rate regulation only if the state can demonstrate that:

- market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable prices or rates that are unjustly or unreasonably discriminatory; or

- the market conditions, as defined above, exist and such service is a replacement for landline telephone exchange service for a substantial portion of telephone landline exchange service within such state; and

- the FCC finds that continued state rate regulatory authority is "necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory."

47 U.S.C. § 332(c)(3)(A) (1993).

The Statutory Standard for Commission Review of State Petitions

- In the legislative history accompanying Section 332(c), Congress advises the Commission to ensure that any continued regulation is consistent with the overall intent of Section 332(c), so that, consistent with the public interest, similar services are accorded similar regulatory treatment, *i.e.*, regulatory parity.[1]

- The Commission must "be mindful of the desire to give the policies embodied in Section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice."[2]

- The Commission has embraced these legislative directives in the *Second Report and Order*. It declared 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 commercial mobile radio services to ensure that similar services are accorded similar regulatory treatment and to avoid undue regulatory burdens, consistent with the public interest."[3]

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[1] The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Conference Managers Report.

[2] H.R. REP. NO. 111, 103d Cong., 1st Sess. 261 (1993).

[3] *Second Report and Order*, 9 FCC Rcd 1411, 1504 (1994).

The Regulatory Standard

In the *Second Report and Order*, the Commission adopted the statutory standard as part of its implementing regulations governing states' authority to continue regulation over intrastate CMRS rates.

Burden of Proof:

- The Commission has determined that, "in implementing the preemption provisions 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]

- Thus, the Commission places a high burden of proof squarely upon the states to demonstrate that market conditions exist in which competitive forces are not adequately protecting the interests of CMRS subscribers.

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[4] *Id.* at 1421 (emphasis added).

Demonstration of Market Failure:

States must provide the Commission with **demonstrative evidence** that:

- market conditions in the State for CMRS do not adequately protect subscribers to such services from unjust and unreasonable rates or rates that are unjustly or unreasonable discriminatory; or

- the market conditions, as defined above, exist, and that a substantial portion of CMRS subscribers in the State or a specified geographic area have no alternative means of obtaining basic telephone services.

Second Report and Order, 9 FCC Rcd at 1504-1506.

The Relevant Market for Analyzing Competition

- The Commission has found that "all CMRS services -- including paging, SMR, PCS and cellular -- are actual or potential competitors with one another, and should therefore be regarded as substantially similar for regulatory purposes...."[5]

- Similarly, the Commission explicitly rejected the suggestion that "Nextel should not be viewed as competing with cellular unless it chooses to provide 'cellular-like' service."[6] Instead, the Commission determined that the relevant product market for analyzing competitive relationships consists of "mobile services as a whole."[7]

- With regard to CMRS providers, the Commission has concluded that "[c]ompetition, along with the impending advent of additional competitors, leads to reasonable rates. Therefore, enforcement of Section 203 [regarding tariffs] is not necessary to ensure that the charges, practices, classifications, or regulations for or in connection with CMRS, are just and reasonable and are not unjustly or unreasonably discriminatory."[8]

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[5] *Nextel - OneComm*, (DA 95-263), adopted and released February 17, 1995, ¶ 26 (citing *Third Report and Order*, 9 FCC Rcd 7988, 8009 (1994).

[6] *Id.*

[7] *Id.*

[8] *Second Report and Order*, 9 FCC Rcd at 1478.

CONCLUSION

- To be lawful, *i.e.*, not arbitrary and capricious, the Commission's decision regarding the eight state petitions must be consistent with the statutory standard provided in the 1993 Omnibus Budget Reconciliation Act and the Commission's earlier decisions as discussed above.

AIRTOUCH COMMUNICATIONS ANALYSIS OF THE LEGAL STANDARD UNDER THE COMMUNICATIONS ACT

March 15, 1995

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AirTouch Communications ("AirTouch") submits this analysis of the burden of proof that the California Public Utilities Commission ("CPUC") must meet to continue to regulate rates for cellular service in California. Under the Communications Act, as amended, the CPUC must show both that market conditions in California are not adequate to protect subscribers from unjust or unreasonable rates and that the CPUC's regulation is necessary to ensure that rates are just and reasonable. The CPUC has not met its burden of proof as to either element.

The record evidence demonstrates that California market conditions are conducive to competition; in fact, California has attracted more wireless service providers than any other state. If California's market fails to protect subscribers, then, a fortiori, the market fails in all other states as well. If the Commission grants the CPUC's petition, then it must grant all state petitions.

Further, the evidence demonstrates that the CPUC's regulation, rather than protecting consumers, has inflated prices. On this record, the Commission cannot make the requisite finding that the CPUC's proposed regulatory scheme will ensure that rates are just and reasonable.

Finally, the Commission's decision whether to grant California's petition must be consistent with its own prior findings and the Budget Reconciliation Act. To grant the CPUC's Petition, however, the Commission must ignore both its prior findings on competition in the cellular industry and the Congressional mandate for symmetrical treatment of CMRS providers. There is nothing in the record to warrant the imposition of regulation in California at odds with the federal scheme for CMRS providers. Under the Congressionally-mandated regulatory framework, consumers will be adequately protected from unjust and unreasonable rates not only by competitive market forces, but by the FCC's oversight of CMRS providers as well.

I. THE COMMISSION CANNOT LAWFULLY GRANT CALIFORNIA'S PETITION BECAUSE THE STATE HAS NOT MET ITS BURDEN OF PROVING THE NEED FOR CONTINUED REGULATION OF CELLULAR SERVICE.

In the 1993 Budget Act amendments to the Communications Act, Congress created a strong statutory presumption in favor of federal preemption of state regulation of CMRS providers. The amendments expressly preempt all state regulation of rates except where a state "demonstrates that . . . market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates." 47 U.S.C. § 332(c)(3)(A) (emphasis added).

Recognizing that Congress intended to grant a very narrow exemption from federal preemption, this Commission has "vigorously implemented the preemption provisions of the Budget Act to ensure that state rate regulation of CMRS providers will be established only in the case of demonstrated market conditions in which competitive forces are not adequately protecting the interests of CMRS subscribers."[1] The Commission has noted that the states "must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers."[2] Accordingly, it has ruled that the states "shall have the burden of proof that the state has met the statutory basis for the establishment or continuation of state regulation of rates."[3]

Even if a petitioning state meets its burden of proof that market conditions in that state create unjust and unreasonable rates, it is not entitled to continue rate regulation unless it can also demonstrate that its proposed regulatory scheme will remedy the market conditions it has identified. To grant a petition, this Commission must find that continued state regulatory authority is "necessary to ensure that such rates are just and reasonable." 47 U.S.C. § 332(c)(3)(B). In the absence of a showing by the petitioning state that its regulation will remedy the "unjust or unreasonable" market conditions it has identified, this Commission would have no basis for the required finding. Recognizing that a state's burden of proof includes a requirement that it demonstrate the efficacy of its proposed regulations, this Commission required all petitioning states to "identify and describe in detail the rules the state proposes to establish if the petition is granted."[4] This requirement would be unnecessary if the state could satisfy its burden of proof solely by showing a failure of market conditions.

The CPUC's petition fails to meet either element of the state's burden of proof. The CPUC has not demonstrated that market conditions in California fail to protect consumers from unjust and unreasonable rates. Equally important, California has failed to demonstrate how its proposed regulatory scheme will do anything but increase costs to subscribers.

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1 In the Matter of Implementation of Section 3(a) and 332 of the Communications Act--Regulatory Treatment of Mobile Services, Second Report and Order ("Second Report and Order"), 9 FCC Rcd. ¶ 16 (1994) (emphasis added).

2 Id. at ¶ 23 (emphasis added).

3 Id. at ¶ 251 (emphasis added).

4 Second Report and Order, 9 FCC Rcd. at 1522; 47 C.F.R. § 20.13(a)(4).

A. The CPUC has not demonstrated that market conditions in California fail to protect subscribers from unjust and unreasonable rates.

The CPUC must submit evidence[5] to demonstrate a failure of market conditions, not mere supposition that rates might be "too high." Contrary to the CPUC's claims, the record evidence demonstrates that:

- Cellular service in California has grown phenomenally each year. In light of the discretionary nature of cellular service, it is clear consumers find cellular rates and service to be reasonable.

- Cellular carriers in California have introduced technological innovations to meet tremendous demand while maintaining the high quality of cellular service. AirTouch does not pay dividends, but instead reinvests most of its profits in system expansion.

- The vast majority of cellular customers subscribe to discount plans, affording significant savings off the basic rate upon which the CPUC rests its case. Taking these customers into account, prices for cellular service in California have declined in the last few years and have continued to decline during this proceeding.

- Cellular carriers in California compete vigorously on the basis of coverage, service quality and technological innovation, as well as price.

- Nextel has entered the California market and cellular carriers are responding by offering customers innovative plans affording greater savings.

- Pacific Bell Mobile Services was the winner in two PCS MTA auctions, and is prepared to pay $493.5 and $202.2 million for the Los Angeles MTA and San Francisco MTA, respectively. Bell has indicated it will seek a waiver to commence construction immediately after the auctions.

The evidence demonstrates that California cellular carriers are competing in every MSA and RSA in the state and are responding to increased competition from new entrants. A finding that state regulation is warranted in California, where

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5 Second Report and Order ¶ 251.

market competition is at least as vigorous as in any other state would logically require the Commission to grant all of the states' petitions. Indeed, granting a petition by the only state where a third provider, Nextel, is providing service would necessarily be arbitrary and capricious unless the Commission is prepared to grant petitions by all other states as well.

B. The record will not support a finding that the CPUC's regulation is "necessary to ensure" just and reasonable rates.

Having conceded that prices have declined in California, the CPUC's petition rests almost entirely on its unsupported assertion that prices, regardless of recent declines, are simply too high. In making this claim, the CPUC ignores that pursuant to state law, it has found that rates for cellular service have been just and reasonable.[6] The rates that the CPUC now claims are "too high" were approved by the CPUC and thus found to be just and reasonable. Consistent with its findings that cellular rates are reasonable, the CPUC has never ordered a rate reduction for cellular service; all rate reductions that have occurred in California have been initiated by the carriers.

In any event, the record cannot support any claim by the CPUC that its proposed regulatory scheme will reduce rates in California. To the extent it can be discerned,[7] it appears the CPUC's proposed regulatory scheme includes: the retention of the existing rate band regulations; future adjustments to the rate caps under the existing regulations; the creation of two tiers of regulation for wireless competitors--one tier with onerous conditions for cellular carriers and one tier without constraints for new entrants; and new requirements to unbundle cellular service at the wholesale level to allow interconnection with a reseller switch.[8] There is no evidence whatsoever to support the CPUC's claim that its proposed regulations will protect subscribers from unjust or unreasonable rates. To the

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6 Section 6 of Article XII of the California Constitution authorizes the CPUC to establish rates for all public utilities within its jurisdiction. Pursuant to California Public Utilities Code section 728, the CPUC ". . . shall determine and fix, by order, the just, reasonable, or sufficient rates." See also Cal. Pub. Util. Code § 454 ("no public utility shall change any rate . . . except upon a showing before the commission and a finding by the commission that the new rate is justified.")

7 The CPUC failed to submit "a detailed description of the specific existing or proposed rules that it would establish." Second Report and Order ¶ 252. In setting this standard, the Commission obligated the states to demonstrate how their actual rules would protect subscribers.

8 D.94-08-022 (mimeo) at 74-75, 80-84.

contrary, the evidence demonstrates that the CPUC-mandated reseller margin (approximately 14-38%), which will be continued under California's proposal, has artificially inflated prices for consumers. The evidence further demonstrates that, if the petition is granted, the CPUC's regulatory regime will cost consumers an additional $240 million within the next 12 months.

The centerpiece of the CPUC's proposed regulatory scheme is its requirement that cellular carriers "unbundle" the wholesale tariff based on capped rates. The CPUC asserts, without providing any evidence to support that assertion, that this proposal will somehow lower rates. Unbundling will not, however, cause lower rates because it neither reduces current rates nor increases capacity.

California's further requirement that the carriers interconnect to a reseller switch is another attempt to protect the resellers from competition. California will retain the reseller margin, at least temporarily, to ensure that the switch will remain economically viable rather than allowing the market to determine this question. The evidence in the record demonstrates conclusively that the CPUC's past efforts to insulate the resellers from competition have not resulted in lower prices for consumers.

In contrast to the CPUC's unsupported assertions that its proposed regulations will lower rates, the record demonstrates that elimination of state regulation of rates in California will result in price reductions:

- Consumers will no longer be forced to pay prices inflated by the retail margin.
- Consumers will have the benefits of discounts available through bundled offerings of CPE and service.
- Consumers will have greater savings through customer specific contracts.
- New service offerings will not be delayed by competitors' protests.
- Competitors' incentives to offer innovative plans will not be dampened through tariffing.[9]

The CPUC simply has not met its burden of demonstrating that its regulation is necessary to protect subscribers from unfair and unreasonable rates. On this record, there is no

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9 The Commission has recognized that tariffs, by their very nature, are not in the public interest for CMRS providers. Second Report and Order ¶ 177.

basis on which this Commission may make the required finding that California's proposed regulations will "ensure just and reasonable rates." 47 U.S.C. § 332(c)(3)(B).

II. CONSISTENT WITH THE COMMISSION'S PRIOR FINDINGS ON WIRELESS COMPETITION, THE PETITION MUST BE DENIED.

The decision in this proceeding must be consistent with the Commission's findings on competition in the CMRS marketplace. The Commission has found that cellular carriers face "sufficient competition" to eliminate the tariff filing requirement under the statutory test.[10] Based on the strength of competition between the cellular carriers, as well as impending competition, the Commission has decided to forbear from tariffing requirements for CMRS providers:

> . . . [T]here is no record evidence that indicates a need for full scale regulation of cellular or any other CMRS offerings . . . Competition, along with the impending advent of additional competitors, leads to reasonable rates. Therefore enforcement of Section 203 [regarding tariffs] is not necessary to ensure that the charges, practices, classifications, or regulations for or in connection with CMRS, are just and reasonable and are not unjustly or unreasonably discriminatory. We have determined that although the record does not support a finding that the cellular services market is fully competitive, the record does establish that there is sufficient competition in this marketplace to justify forbearance from tariffing requirements[11] . . . . Cellular providers do face some competition today, and the strength of the

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10 Second Report and Order ¶ 145.

11 The Commission has consistently found that cellular carriers compete: "Cellular operating companies do not possess a monopoly of bottleneck facilities; each will be competing against a nonwireline carrier. . . ." Cellular CPE NPRM, 1984 F.C.C. LEXIS 2461, C.C. Dkt. No. 84-637, F.C.C. 84-271 (released June 26, 1984) "[I]n a competitive market, such as exists in mobile communications services, market forces compel service providers to offer the quality and quantity of products sought by customers." Cellular Auxiliary Service Offerings, 3 Rcd 7033, 7038 (1988). "It appears that facilities-based carriers are competing on the basis of market share, technology, service offering and service price." Bundling of Cellular Customer Premises Equipment and Cellular Service, Report and Order in CC Docket 91-34, 7 Rcd 4028, 4034 (1992). "[T]here is no indication that anticompetitive conduct is occurring" in the cellular service market.

> competition will increase in the near future . . . In light of the social costs of tariffing, the current state of competition, and the impending arrival of additional competition, particularly for cellular licensees, forbearance from requiring tariff filings from cellular carriers . . . is in the public interest.[12]

The record in this proceeding is consistent with the Commission's findings supporting elimination of tariffing. Cellular carriers are competing on the basis of price, service quality, coverage areas and technology and are facing additional competition from new entrants. Accordingly, the Commission must, consistent with its prior findings, conclude that competition, along with impending competition has lead to reasonable rates in California.

By statute, the Commission could forebear from tariff regulation only upon a finding that enforcement of the provision is not necessary to ensure just and reasonable rates. The Commission was also required to consider, consistent with the public interest, the extent to which tariff regulation would promote competitive conditions[13]. Therefore, the FCC has already concluded that the cellular market is working well enough to ensure just and reasonable rates without a tariffing requirement. Based on the record in this case, it would simply be inconsistent to find that forbearance from tariffing is warranted, but not preemption of the more restrictive regulation imposed by the CPUC. As demonstrated in the preceding section, continued CPUC regulation, including its tariffing requirements, will thwart rather than facilitate competition.

The Commission has concluded that competition is increasing, especially in California:

- "[T]he existence of two facilities-based carriers has created a degree of rivalry not present in the 'wireline' exchange services under the former Bell system, and competition from other wireless systems, such as PCS, is on its way."[14]

- "[A]ctual competition among certain CMRS services exists already and, more importantly, the potential for competition among all CMRS services appears likely

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12 Second Report and Order ¶¶ 174-177.

13 47 U.S.C. §332(c)(1)(A)(B)(C).

14 In re Applications of Craig O. McCaw and AT&T, 9 FCC Rcd 5836 ¶ 39 (1994).

to increase over time due to expanding consumer demand and technological innovation."[15]

- "All CMRS services--including paging, SMR, PCS and cellular--are actual or potential competitors with one another, and should therefore be regarded as substantially similar for regulatory purposes . . . . Although technical variations exist among wireless services, their functions frequently overlap with one another and functional overlay can be created easily with moderate investment . . . . For consumers, this results in a wide array of competitive alternatives to choose from, regardless of the service in which a particular provider is licensed."[16]

- "Nextel has successfully begun offering wide-area digital SMR service in competition with cellular carriers in California markets," and "wide-area SMR operators are in competition with cellular carriers."[17]

- "The large number of companies that have expressed interest in PCS licenses allays the concern that we might otherwise have with 'potential competition' . . . . In addition, we believe that the changing technology will enable CMRS licensees to use their licensed spectrum to provide competing services that respond to consumer demand. For example, wide area specialized mobile radio service (SMR) service illustrates the dynamic nature of the CMRS marketplace . . . Wide-area SMR service could develop as a competitor to the cellular industry, with Nextel beginning to offer service in competition with cellular carriers in California markets."[18]

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15 Third Report and Order (G.N. Docket No. 93-252 et al.) FCC 94-212, adopted August 9, 1994; released September 23, 1994 ¶ 27.

16 Order In the Matter of Applications of Nextel Communications, Inc. for Transfer of Control of OneComm Corporation, N.A., and C-Call Corp. (D.A. 95-263), adopted February 17, 1995; released February 17, 1995, ¶¶ 26, 28.

17 Third Report and Order ¶ 72 (emphasis added); see also ¶ 73.

18 In re Applications of Craig O. McCaw and AT&T ¶ 41.

In light of these findings on the existence of competition and the strength of the emerging competitors,[19] any decision by this Commission finding that continued state regulation is warranted in California would be arbitrary and capricious. California is the only market in which the Commission acknowledges that the new entrants are already competing. The Commission simply cannot, consistent with its prior findings on the state of competition in the wireless industry, grant the CPUC's petition.

III. THE CPUC'S REGULATORY SCHEME IS FLATLY AT ODDS WITH CONGRESS' INTENT.

Congress has established the goals that regulation should "enhance competition and advance a seamless national network" of wireless services and should "foster the growth and development of [such] services[, which], by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[20] Recognizing that "disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services," Congress sought to ensure that "similar services are accorded similar regulatory treatment."[21] As the Commission acknowledged, it must "implement the congressional intent of creating regulatory symmetry among similar mobile services" such as cellular, ESMR, and PCS.[22]

The CPUC's Petition to extend and augment its regulation of cellular carriers is flatly at odds with these federal goals. The CPUC has created a new asymmetrical regulatory framework, classifying cellular carriers as "dominant" and other wireless service providers as "nondominant." The CPUC's unbundling directive, imposed solely on cellular carriers, and not other wireless competitors, creates the very type of disparate regulatory burden that Congress sought to eliminate. Under the CPUC's scheme, cellular carriers would also remain bound by rate regulation, while "nondominant" providers would be subject to minimal registration requirements. The CPUC's proposal would allow Nextel to continue its current efforts before the CPUC to

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19 The legislative history of the Budget Act specifically identified the number of CMRS providers within the state as an issue that must be considered when assessing the level of competition. H.R. Rep. No. 111, 103d Cong., 1st Sess. 259-261 (1993).

20 H.R. Rep. No. 111, 103d Cong., 1st Sess. 259-261 (1993).

21 H.R. Conf. Rep. 103-213, 103rd Cong., 1st Sess. 494 (1993), 1993 U.S.C.C.A.N. 1088 ("Conference Report").

22 Second Report and Order ¶ 2.

restrict cellular carriers' ability to offer innovative pricing plans. The CPUC's regulation is in direct conflict with the Commission's finding that "[s]uccess in the marketplace . . . should be driven by technological innovation, service quality, competition based pricing decisions and responsiveness to consumer needs--and not by strategies in the regulatory arena."[23]

The CPUC's new regulations also include physical interconnection requirements affecting interstate calls that are plainly preempted under section 2(a) of the Communications Act and potentially in conflict with this Commission's jurisdiction over interconnection requirements generally.[24] The CPUC's interconnection order does not distinguish between interstate and intrastate calls and appears to require interconnection of all calls. D. 94-08-022 at 82. Because of the inseparable nature of the plant used in interconnection,[25] this matter should not be handled on an ad hoc basis by a single state, but rather should be addressed in the Commission's rulemaking on interconnection to ensure that national standards are established that do not conflict with federal goals.

The Commission has recognized that its "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."[26] It is undisputed that the CPUC's regulation will "impede [the] federal mandate for regulatory parity." Thus, the Commission should implement its preemption rules and deny the CPUC's Petition. Denial of the Petition is the only decision that will "give the policies embodies[d] in section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by [Congress]."[27]

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23 Id. at ¶ 19.

24 47 U.S.C. § 152(a). The Commission has noted that "state regulation of the intrastate service that affects interstate service may be preempted where the state regulation thwarts or impedes a valid federal policy." Second Report and Order ¶ 256, fn. 515.

25 Equal Access NPRM ¶¶ 142-143.

26 Second Report and Order ¶ 23.

27 House Report at 261-262.

IV. THE COMMISSION RETAINS THE JURISDICTION TO PROTECT CONSUMERS.

Preemption of state regulation will not create a regulatory "void." The Budget Act amended section 2(b) of the Communications Act specifically to exempt the Commission's authority provided in section 332(c) from the general prohibition on federal jurisdiction over intrastate communications.[28] Section 332(c) provides that CMRS is to be treated as a common carrier subject to Title II regulation, except to the extent the Commission decides to forbear from applying sections other than 201, 202 and 208.[29] Nothing in section 332(c) limits this authority only to interstate service.[30] Thus, the Commission now has jurisdiction over intrastate CMRS rates without regard to the Supreme Court's test in Louisiana Public Service Comm'n v. FCC, 476 U.S. 355 (1986).

The fact that section 332(c) does not specifically refer to intrastate service is irrelevant. Other sections similarly exempted in section 2(b) from the prohibition on Commission jurisdiction over intrastate service also do not specifically refer to intrastate rates. Yet the Commission has interpreted those sections as giving it authority over intrastate service. See, e.g., In the Matter of Regulations Concerning Indecent Communications by Telephone, 5 FCC Rcd 1011, 1012 (1990) (observing that section 223(b) extends to "intrastate as well as interstate communications," even though that section does not specifically refer to intrastate communications); In the Matter of the Telephone Consumer Protection Act of 1991, 7 FCC Rcd 2736, 2740 (1992) (observing that section 227 gives the Commission jurisdiction over intrastate telephone solicitations

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28 Second Report and Order ¶ 256 ("Congress has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile services without regard to Section 2(b).").

29 NPRM (Dkt. No. 93-252), 8 FCC Rcd 7988, 7898 (1993). Section 201 of the Communications Act requires, inter alia, that "[a]ll charges . . . for and in connection with such communication service, shall be just and reasonable, and any such charge . . . that is unjust and unreasonable is hereby declared to be unlawful . . . ." Similarly, section 202(a) of the Communications Act states that [i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges . . . ." (Emphasis added.)

30 Congress amended section 2(b) to give the Commission jurisdiction over cellular rates in recognition that "mobile services . . . by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." House Report at 260.

despite the lack of any specific reference to intrastate communications).

This framework will provide ample protection to consumers, even in the absence of state rate regulation. Sections 201 and 202 prohibit unjust, unreasonable or discriminatory rates, and section 208 provides a mechanism for resolving consumer complaints. Additionally, the Commission has indicated that it will institute a number of proceedings regarding CMRS providers, including a proceeding to monitor cellular licensees.[31] States will also retain jurisdiction over "terms and conditions," including billing disputes and other consumer protection matters.[32]

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31 Second Report and Order ¶¶ 138, 162, 194.

32 House Report at 261.