



EX PARTE OR LATE FILED
OF
ORIGINAL

Kathleen Q. Abernathy
Vice President
Federal Regulatory

AirTouch Communications
1818 N Street N.W.
Suite 800
Washington, DC 20036

Telephone: 202 293-4960
Facsimile: 202 293-4970

March 24, 1995

EX PARTE

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

RECEIVED
MAR 24 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

DOCKET FILE COPY ORIGINAL

RE: PR Docket No. 94-105; Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates

Dear Mr. Caton:

The attached material was distributed to Lisa Smith, Legal Advisor to Commissioner Barrett; Rudy Baca, Legal Advisor to Commissioner Quello; David Siddall, Legal Advisor to Commissioner Ness; and Dan Phythyon and Michael Wack of the Wireless Bureau. Please associate this material with the above-referenced proceeding.

Two copies of this notice are being submitted to the Secretary in accordance with Section 1.1206(a)(1) of the Commission's Rules.

Please stamp and return the provided copy to confirm your receipt. Please contact me at 202-293-4955 should you have any questions or require additional information concerning this matter.

Sincerely,

Kathleen Q. Abernathy
Kathleen Q. Abernathy

Attachment

No. of Copies rec'd 021
List A B C D E



Kathleen Q. Abernathy
Vice President
Federal Regulatory

AirTouch Communications
1818 N Street N.W.
Suite 800
Washington, DC 20036

Telephone: 202 293-4960
Facsimile: 202 293-4970

March 24, 1995

Ms. Ruth Milkman
Senior Legal Advisor
Office of Chairman Hundt
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

RECEIVED
MAR 24 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: Ex Parte - PR Docket 94-105

Dear Ms. *Ruth* Milkman:

Thank you for meeting with us Tuesday to discuss the legal issues raised by the Petition filed by the California Public Utilities Commission ("CPUC"). Pursuant to our discussion, this letter provides additional analysis of the statutory standard that the CPUC must meet for its Petition to be granted.

I. THE CPUC HAS FAILED TO MEET ITS BURDEN OF PROOF THAT MARKET CONDITIONS, RATHER THAN ITS RESTRICTIVE REGULATION, HAVE LED TO HIGHER RATES IN CALIFORNIA.

Under the Communications Act of 1934 (the "Act"), the FCC's rules and common law evidentiary standards, the CPUC is obligated to prove its case through evidence, rather than unsupported claims. The Budget Act amendments expressly preempt all state regulation of rates except where a state affirmatively "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). The CPUC cannot legally "demonstrate" a failure of market conditions through mere allegations devoid of evidentiary support.

The CPUC clearly has the burden of proof to show that market failure has led to unjust and unreasonable rates. The FCC has concluded that states:

Ms. Ruth Milkman
March 24, 1995
Page 2

"must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers.¹ . . . With respect to petitions seeking to demonstrate that prevailing market conditions will not protect CMRS subscribers adequately from unjust and unreasonable rates . . . states must submit evidence to justify their showings . . . [and] shall have the burden of proof that the state has met the statutory basis for the establishment or continuation of state regulation of rates."²

In administrative proceedings, the customary standard of proof is the preponderance of the evidence test. Sea Island Broadcasting Corp. v. Federal Communications Commission, 627 F.2d 240, 243 (1980), cert. denied 449 U.S. 834 (1980) ("the use of the 'preponderance of the evidence' standard is the traditional standard in civil and administrative proceedings."); In the Matter of Revocation of the License of Sea Island Broadcasting Corporation, 69 F.C.C. 2d 1796 (1978). Thus, the CPUC must present evidence that is of greater weight or is more convincing than the evidence offered in opposition to it.

"The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his claim by a preponderance of the evidence. If the proof should fail to establish any essential element of the plaintiff's claim by a preponderance of the evidence in this case, the jury should find for the defendant as to that claim....a preponderance of the evidence in the case means such evidence as, when compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case."

Devitt, Blackmar and Wolff, Federal Jury Practice and Instructions § 72.01; see also Charlton v. F.T.C., 543 F.2d 903, 907 (D.C. Cir. 1976) (proponent in an administrative proceeding

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. ¶ 23 (1994) (emphasis added).

2 Id. at ¶ 251 (emphasis added).

Ms. Ruth Milkman
March 24, 1995
Page 3

bears the burden by a "preponderance of the evidence," i.e. the "greater convincing power of the evidence.")

Here, the CPUC has attempted to meet its burden of proof by claiming that rates are unjust and unreasonable, and thus market conditions must have failed. The CPUC's circular argument does not constitute evidence necessary to meet its burden of proof. The CPUC has not demonstrated that rates in California are unjust or unreasonable.³ Nor has the CPUC presented evidence to demonstrate that the alleged unjust and unreasonable rates arise from a failure of market conditions rather than some other factor, such as the CPUC's heavy handed regulation. The CPUC only speculates that regulation "certainly has not contributed to higher rates." CPUC Petition at 46. The CPUC supports this claim merely by misquoting a statement by Alfred Kahn, which in reality greatly undermines the CPUC's case.⁴

The CPUC must present evidence of greater weight and more convincing than the evidence offered in opposition to its

3 The record evidence demonstrates that since the inception of cellular service in California customers have benefitted from significant price declines, enhanced service quality and expanded coverage areas. Prices have continued to decline during this proceeding. See e.g. "Opposition of AirTouch Communications To CPUC Petition To Rate Regulate California Cellular Service," dated September 19, 1994 (hereinafter, "AirTouch Opposition"), at 45-50; AirTouch Opposition, Appx. E (Hausman Affidavit) at 10-11; AirTouch Opposition, Appxs. H-K (passim); "Reply Of AirTouch Communications In Opposition To CPUC Petition To Rate Regulate California Cellular Service," dated October 19, 1994 (hereinafter, "AirTouch Reply"), at 20; "Comments of AirTouch Communications on the Confidential Data Submitted by the California Public Utilities Commission in Support of Its Petition to Rate Regulate California Cellular Service," dated February 24, 1995, at 6-9; "Comments of AirTouch Communications on the Confidential Data Submitted by the California Public Utilities Commission in Support of Its Petition to Rate Regulate California Cellular Service," dated February 24, 1995, Appx. A (Hausman Affidavit) at 1-4, 8, Table 1; "Reply Comments of AirTouch Communications on the Confidential Data Submitted by the California Public Utilities Commission in Support of Its Petition to Rate Regulate California Cellular Service," dated March 3, 1995, at 4; Ex Parte submissions of AirTouch, dated March 10, 15, 17, 23, 1995 (passim).

4 See AirTouch Communications Opposition, Appendix G.

Ms. Ruth Milkman
March 24, 1995
Page 4

claims. As the FCC has noted, "some persuasive showing" through "credible evidence" is necessary to meet the burden of proof. In the Matter of Investigation of Access and Divestiture Related Tariffs; MTS and WATS Market Structure, 1984 FCC LEXIS 2764, released May 15, 1984. The CPUC has presented no evidence, however, to rebut the affidavits and analysis submitted by the cellular carriers demonstrating that the CPUC's restrictive regulation, not a failure of market conditions, has led to higher rates. The undisputed evidence demonstrates that rates in all state regulated markets, including California, are higher than unregulated market rates.⁵ Under such circumstances, the CPUC has not met its burden of proof. See Oliver v. Washington Fed. Sav. Bank, 1994 U.S. LEXIS 36625 (D.C. Cir. 1994), (summary judgment proper where no competent evidence had been offered to contradict the moving party's affidavit); Haase v. Webster, 807 F.2d 208, 212 (D.C. Cir. 1986) (because plaintiff presented no evidence contradicting the affidavits of defendant, summary judgment against plaintiff was proper).

The unsupported arguments raised by the CPUC in an attempt to undermine the evidence submitted by the carriers do not constitute evidence required to meet the CPUC's burden of proof.⁶ See e.g. United Mine Workers 1974 Pension v.

5 See AirTouch Opposition at iv, 42-46, 61-72; AirTouch Opposition, Appx. E (Hausman Affidavit) at 3-11, 25-26, Appx. 1; AirTouch Opposition, Appx. N (passim); AirTouch Reply at 21-24; "Comments of AirTouch Communications on the Confidential Data Submitted by the California Public Utilities Commission in Support of Its Petition to Rate Regulate California Cellular Service," dated February 24, 1995, at 3, 6, 8-9, 19-22; "Comments of AirTouch Communications on the Confidential Data Submitted by the California Public Utilities Commission in Support of Its Petition to Rate Regulate California Cellular Service," Appx. A (Hausman Affidavit), at 8-10, Table 2; "Reply Comments of AirTouch Communications on the Confidential Data Submitted by the California Public Utilities Commission in Support of Its Petition to Rate Regulate California Cellular Service," dated March 3, 1995, at 10-12; Ex Parte submission of AirTouch dated March 10, 1995 (passim).

6 The CPUC raised arguments in an attempt to challenge the regression analysis performed Dr. Jerry Hausman demonstrating that regulation has inflated prices in California. Dr. Hausman has submitted evidence demonstrating that the CPUC's arguments have no merit. See "Comments of AirTouch Communications on the Confidential Data Submitted by the California Public Utilities
(continued...)

Ms. Ruth Milkman
March 24, 1995
Page 5

Pittston, Co ., 984 F.2d 469 (D.C. Cir . 1993) (summary judgment appropriate where opposing party's mere arguments found to be insufficient to contradict the affidavits and documents submitted by the moving party); Bias v. Advantage Int'l, Inc., 905 F.2d 1558, 1563 (D.C. Cir. 1990), (summary judgment in favor of defendant warranted where defendant's affidavits established that plaintiff could not meet its burden; plaintiff's reliance on "bare arguments and allegations or on evidence which does not actually create a genuine issue for trial" was insufficient); Palestine Information Office v. Shultz, 853 F.2d 932, 944 (D.C. Cir. 1988) (mere assertion of an argument or theory without putting forward any significant evidence to support such argument or theory is insufficient to withstand summary judgment in favor of other party).

The CPUC has not presented a scintilla of evidence to rebut the evidence that regulation, rather than market conditions, has inflated prices, and thus its petition fails as a matter of law. Under such circumstances, the CPUC has not met its burden of producing evidence to "demonstrate" a failure of market conditions as required under the Congressional standard.

II. THE RECORD DOES NOT SUPPORT A FINDING THAT THE CPUC'S PROPOSED REGULATORY SCHEME IS NECESSARY TO ENSURE JUST AND REASONABLE RATES.

The Communications Act of 1934 expressly provides that to grant a state petition the FCC must, among other things, conclude that the state's proposed regulatory scheme is necessary to ensure just and reasonable rates, as well as determine the proper duration for such regulation:

"If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable . . ."
47 U.S.C. § 332(C)(3) (emphasis added).

Thus, for the Commission to grant a state's petition, it must "deem" the authority requested by the state to be "necessary to ensure" just and reasonable rates for at least

6(...continued)

Commission in Support of Its Petition to Rate Regulate California Cellular Service," Appx. A (Hausman Affidavit), at 8-10, Table 2; Ex Parte submission of AirTouch dated March 10, 1995 (passim).

Ms. Ruth Milkman
March 24, 1995
Page 6

some "period of time." There would be no need for this provision if Congress had intended that the FCC grant petitions regardless of the impact of the proposed regulation on consumers. To the contrary, Congress intended that state regulation only be permitted in extraordinary circumstances where there is a demonstrated failure of market conditions and the regulation will ensure just and reasonable rates. There simply would be no logical or legal justification for allowing continued state rate regulation if it would not correct the alleged failure of market conditions by ensuring just and reasonable rates. This conclusion is especially apparent since, absent state rate regulation, sections 201 and 332 of the Communications Act require carriers to charge customers just and reasonable rates for interstate and intrastate cellular services.

Consistent with the express language of the Act, the FCC has acknowledged that it must assess whether the proposed regulation would ensure just and reasonable rates:

"If the Commission grants the petition, it shall authorize the state to regulate rates for commercial mobile radio services in the state during a reasonable period of time, as specified by the Commission. The period of time specified by the Commission will be that necessary to ensure that rates are just and reasonable . . ." 47 CFR §20.13 (emphasis added).

Clearly, the FCC cannot specify any period of time if the regulation does not ensure just and reasonable rates.

The FCC's requirement that "[p]etitions must identify and describe in detail the rules the state proposes to establish" (ibid.) similarly reflects the correct understanding that to protect consumers the FCC must assess the efficacy of the proposed regulation. This requirement is useless if the FCC must automatically accept whatever regulation the state proposes--even if it greatly harms consumers.

The FCC cannot make the findings required to grant the CPUC's Petition. The CPUC failed to provide a detailed description of its proposed rules that would allow the FCC to determine whether the proposed regulation is necessary to ensure just and reasonable rates. To the contrary, the record in this proceeding shows that the CPUC's past and proposed future regulations greatly harm cellular customers resulting in high rates.

Ms. Ruth Milkman
March 24, 1995
Page 7

In summary, 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. Nor has the CPUC demonstrated that its proposed regulation is necessary to ensure just and reasonable rates.

If you have any questions regarding the foregoing analysis, please contact me. I am filing a copy of this letter with the Secretary to be included in the record of this proceeding in accordance with the Commission's rules concerning ex parte communications.

Very truly yours,



Kathleen Q. Abernathy

cc: Rudy Baca
Dan Phythyon
David Siddall
Lisa Smith
Michael Wack