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CTIA

Cellular
Telecommunications
Industry Association
1250 Connecticut
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Washington, D.C. 20036
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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

RE: Ex Parte Contact - PR Docket Nos. 94-105
Preemption of State Regulation of CMRS

Dear Mr. Caton:

On Friday, March 24, 1995, Mr. Randall S. Coleman, Vice President for Regulatory Policy and Law, the Cellular Telecommunications Industry Association (CTIA), sent the accompanying letter and its attachments to the following Commission personnel:

Chairman Reed E. Hundt	Commissioner James H. Quello
Commissioner Andrew C. Barrett	Commissioner Susan Ness
Ms. Regina Keeney	Mr. Laurence Atlas
Mr. Rudy Baca	Mr. Donald Gips
Mr. Blair Levin	Mr. Michael Katz
Ms. Lisa Smith	Mr. William Kennard
Ms. Ruth Milkman	Dr. Robert Pepper
Mr. Michael Wack	Mr. David Siddall
Mr. John Cimko	Mr. Daniel Pythyon
Mr. Stanley Wiggins	

Pursuant to Section 1.1206 of the Commission's Rules, an original and one copy of this letter and the attachments are being filed with your office.

If there are any questions in this regard, please contact the undersigned.

Sincerely,


Robert F. Roche

Attachments

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

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20541



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Randall S. Coleman
Vice President for
Regulatory Policy and Law

March 24, 1995

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: PR Docket No. 94-105 - California PUC
Petition For Exemption from Preemption

Dear Commissioner Ness:

The FCC will render its decision on the petitions to maintain or exercise regulatory jurisdiction over cellular and other wireless services filed by the California Public Utility Commission (CPUC) and seven other state regulatory authorities.

CTIA has provided the factual information demonstrating that the CPUC has failed to meet its burden of proof. The CPUC has failed to provide the required "demonstrative evidence" indicating the existence of market failure in California. The CPUC has also misread its own submissions, which further support the conclusion that competitive market forces are at work in California in spite of the CPUC's interventions. That evidence indicates that rates are declining in California, albeit more slowly than in completely deregulated jurisdictions. Such declines as have occurred have been the product of the efforts of the industry to respond to market forces, and have occurred in spite of the CPUC's grudging attitude towards innovation.

A broad consensus exists among service providers, manufacturers, retailers, legislators and consumers favoring competition over regulation in competitive markets.¹ Moreover, as the attached California Issues Paper No. 5 demonstrates, such experienced former commissioners as Dr. Stanford Levin and Mr. G. Mitchell Wilk (respectively of the Illinois Commerce Commission and the CPUC), have warned that rate regulation of such a dynamic industry is inappropriate. Dr. Levin characterized state rate regulation as

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a "relic," actually threatening to keep rates high, harm service quality and cripple investment.²

Mr. Wilk correctly observed:

"While competition is great news for consumers, it wreaks havoc with traditional ways of regulating utilities. The PUC's court-like hearings have become full-fledged forums for competitors to try to hamstring and disadvantage each other in the name of the elusive 'level playing field' to which all feel entitled; this ties up the process, which now requires at least a year and sometimes two or more, for most decisions of any consequence."³

The FCC needs to call a close to the era of mis-regulation. Congress spelled out the ground rules in 1993 for returning the competitive struggle to the marketplace. Exceptions were limited to a narrow range, subject to a PUC's demonstration of market failure. The CPUC has failed to meet the statutory and regulatory test established for exemption from preemption of state regulation. It is the CPUC itself which has failed consumers by:

- maintaining higher prices and slowing their decline.
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Attachments

² See California Issues Paper No. 5, "California PUC Regulation -- A Threat to Common-sense and the National Economy," attached, at p.5.

³ *Id.* at 2.



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March 24, 1995

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: PR Docket No. 94-105 - California PUC
Petition For Exemption from Preemption

Dear Commissioner Quello:

The FCC will render its decision on the petitions to maintain or exercise regulatory jurisdiction over cellular and other wireless services filed by the California Public Utility Commission (CPUC) and seven other state regulatory authorities.

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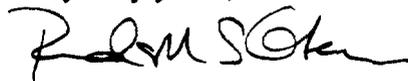
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March 24, 1995

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: PR Docket No. 94-105 - California PUC
Petition For Exemption from Preemption

Dear Chairman Hundt:

The FCC will render its decision on the petitions to maintain or exercise regulatory jurisdiction over cellular and other wireless services filed by the California Public Utility Commission (CPUC) and seven other state regulatory authorities.

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Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: PR Docket No. 94-105 - California PUC
Petition For Exemption from Preemption

**Randall S. Coleman
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Regulatory Policy and Law**

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March 24, 1995

Ms. Regina Keeney
Chief, Wireless Telecommunications Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: PR Docket No. 94-105 - California PUC
Petition For Exemption from Preemption

Dear Ms. Keeney:

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California Issues Paper No. 5



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**California PUC Regulation
-- A Threat to Common-sense and the National Economy**

March 24, 1995

California PUC Regulation **-- A Threat to Common-sense and the National Economy**

The California Public Utilities Commission's (CPUC) regulations are a threat to the national economy, as well as a burden to California consumers.

The CPUC's regulations not only deprive California's consumers of services, they have prevented or delayed a wide range of companies from implementing services. For example, Dallas-based Highway Master offers a computer and communications system that uses cellular-based communications to provide real-time tracking and voice and data communications between dispatchers and drivers.¹ In this hotly-contested, competitive market, price and capabilities are key factors for potential subscribers.² Highway Master's ability to offer its customers the most cost-effective solution to their communications needs was hampered by the CPUC. The CPUC's regulations forced Highway Master to pay three times as much for service in California as they pay in other markets. In fact, California was the last major market to be added to the Highway Master system.

This is no isolated incident. In 1993, United Parcel Service (UPS) wanted to implement a nationwide wireless data system (one which can be seen now in operation every day in the hands of UPS drivers). When UPS proposed this system in 1993, as a means of enhancing their productivity and making more effective use of existing cellular networks,³ competitors challenged UPS before the CPUC.⁴ An unregulated provider of a competitive data transmission service appealed to the CPUC to stop UPS from using cellular service to link its 50,000 drivers. The competitor -- and the California cellular resellers -- asked that the UPS service be either suspended or implemented at higher tariffed rates. The upshot was unnecessary delay and the diversion of company resources from productivity-enhancing services to regulatory hearings.

This type of importuning and this type of **CPUC intervention in deciding what applications get to the market are far from unusual.** The providers of a wide range of services which use cellular technology, including life-saving "standby" emergency communications for critical systems such as hospitals, nuclear power plants and other facilities, were forced to wait for CPUC approval of the underlying cellular system. Congress was aware of this when it passed the Omnibus Budget Reconciliation Act in 1993.⁵

¹ See Pat Dislage "High-tech Truck Tracking: Computers Help Dispatchers Communicate with Drivers," *Grand Island Independent*, October 23, 1994, at D1.

² See "Heard En Route," *En Route Technology*, September 26, 1994.

³ See Steve Higgins, Computers & Automation, *Investor's Business Daily*, March 24, 1994, at 4.

⁴ See Robert H. Bork *The Antitrust Paradox* (1978) at 159 ("the object is not then to inflict unacceptable costs upon the victim but merely to tie him up in proceedings to preserve a market position for a few years more.").

⁵ See Letter from James M. Phillips, President, Telular, to Senator Jay Rockefeller, dated May 27, 1993.

The CPUC's Reach Exceeds What It Can -- Or Should -- Grasp

Former CPUC President G. Mitchell Wilk has observed that the CPUC directly oversees one out of every 12 dollars of California's huge economy, "and it does so in a very-detail-intensive, controlling fashion, including formal court-like hearings to address virtually any issue of substance."⁶ In fact, **on the basis of information about California's role in the U.S. economy, the CPUC may directly regulate over one percent of the U.S. economy!**⁷

As Mr. Wilk has further observed:

What it doesn't control directly, its policies and decisions affect in any case. And, things are getting even more complicated. What used to be the province of monopolies now is becoming fertile ground for rapidly increasing competition, both in energy and, of course, in telecommunications.

While competition is great news for consumers, it wreaks havoc with traditional ways of regulating utilities. The PUC's court-like hearings have become full-fledged forums for competitors to try to hamstring and disadvantage each other in the name of the elusive "level playing field" to which all feel entitled; this ties up the process, which now requires at least a year and sometimes two or more, for most decisions of any consequence. . . .

It's time to go back to basics. What's broken? Simply stated, old PUC ways of making decisions, designed to prevent abuse of monopoly customers, have been gradually extended and co-opted into trying to control competition.

But competition is dynamic, unpredictable and difficult to control; thus, staid court-like hearing processes that dominate the commission have become terribly slow, expensive and confused, while commissioners are increasingly asked to decide which competitors to favor rather than how to protect customers of remaining monopoly services. . . .

The need for reform permeates all levels and processes at the commission. The PUC bureaucracy is terribly jealous of its ability to become involved in all sorts of business decisions; indeed, many who now make a living in PUC hearings would have their livelihoods threatened if the agency refocused on monopoly

⁶ See G. Mitchell Wilk, "How to break Up Gridlock at the California PUC," *San Francisco Chronicle*, December 27, 1993, at p.D3.

⁷ In 1990, California's GDP was \$ 745 billion, and the U.S. GDP was \$ 5.55 trillion. The CPUC therefore regulated over one percent of the entire U.S. economy ($0.745 \div 5.55 = .134 \times 1/12 = 1.12$) in 1990. If the ratio remains constant, the CPUC directly oversaw \$ 71.4 billion in 1993. *Statistical Abstract of the U.S.*, at pp.446, 450, Table 684 (reporting 1993 national number) and Table 689 (reporting 1990 numbers) (1994).

utility services and got out of the "level playing field" business of competition-handicapping.⁸

California-style regulation is simply too costly and burdensome -- indeed, it is an unnecessary burden on the economy. Congress has recognized that such burdens should not be borne by competitive industries. In 1993, Congress passed the telecommunications provisions of the Omnibus Budget Reconciliation Act in order to eliminate such state regulations. In 1994, Congress passed yet more legislation aimed at eliminating unnecessary state regulation of competitive industries -- in that case, the trucking industry.⁹

But the CPUC still doesn't get it. William Schulte, head of the transportation division of the CPUC, was quoted unhappily noting that deregulation will "bring about revolutionary changes in all of the states."¹⁰ And CPUC counsel Joseph De Ulloa observed of the telecommunications industry: "The technological advances are pushing the industry forward faster than ever before. The picture is blurring, which makes our job as regulators more difficult. The line between market forces and regulation is becoming harder to define, and defining that line is where we come in."¹¹

Ironically, while the CPUC has claimed its ultimate objective is to eliminate barriers to competition and "to see the market regulate itself," its actions have spoken louder than those words -- and sent the opposite message.¹² As Steve Carlson, Executive Director of the Cellular Carriers Association of California recently observed:

Almost every other state has done just the opposite of California. Individual state regulation interferes with creation of a seamless national telecommunications system. Other states realize that and are not hampering the process by adding extra layers of government.¹³

Indeed, the CPUC stands practically alone in its advocacy of continued, and more stringent, regulation of competitive markets. While seven other state regulatory commissions also filed to exercise or "preserve" their regulatory jurisdiction, one -- the Wyoming Public Service Commission -- has been forced to withdraw its petition, as the Wyoming state legislature recently deregulated the Commercial Mobile Radio Services (CMRS) that the Wyoming PSC wanted to regulate.

⁸ *Id.*

⁹ See Jonathan Marshall, "Cheap Trucking: The Deregulation of Intrastate Trucking Will Save Shippers -- and Consumers -- A Bundle," *National Review*, November 7, 1994. As Mr. Marshall noted, under CPUC regulations, companies had to pay more to ship materials 15 miles from San Francisco to Oakland than they had to pay to ship the same materials interstate from San Francisco to Reno.

¹⁰ *Id.*

¹¹ Tim Deady, "Industry Advances Shake Up Regulatory Environment," *Los Angeles Business Journal*, August 15, 1994, at A2.

¹² *Id.*, quoting Joseph De Ulloa.

¹³ See "Cellular Companies Tell Legislators that State Regulations are Costing California its Telecommunications Leadership Edge," *PR Newswire*, February 27, 1995.

In California itself, the CPUC is practically isolated in its attempt to continue its rate regulations. A broad, bipartisan consensus exists in the California Assembly and Senate opposing the CPUC petition.¹⁴ Likewise, California consumers have expressed their preference for competition over regulation for such high technology industries as cellular or wireless communications.¹⁵ Manufacturers, retailers, service providers, and businesses in general have also spoken out against the CPUC petition.¹⁶

Some analysts are concerned that **the CPUC's persistent over-regulation of the wireless marketplace threatens to undercut both Californians' ability to enjoy new services and products at affordable rates, and the contributions California's economy makes to the balance of trade.** California companies employ over 524,000 in high technology occupations.¹⁷ Cellular service providers alone have invested almost \$ 3 billion in California, and almost 3 million people subscribe to cellular services.¹⁸ The California Manufacturers Association has stressed that "led by California's wireless firms, cellular telephones and technology are fast becoming internationally omnipresent, providing a balance of trade that tips strongly in California's and the country's favor."¹⁹ (Indeed, California's importance is also accentuated as the jump-off point for Pacific Rim growth.)

As a major market for wireless services -- indeed, as one of the most mobile states in the U.S., and with about the most mobile population in the world -- California is, or should be, a proving ground for mobile services and equipment. But the CPUC's mistrust of the marketplace and lethargy towards service innovation threatens that status. Just over a year ago, **former CPUC President G. Mitchell Wilk expressed concern about "the huge impact this agency's decisions has on virtually every sector of the state's economy, particularly those that can create or kill jobs."** As he observed,

¹⁴ See Letter from Mickey Conroy, Chair, and Diane Martinez, Vice-Chair, California Assembly Utilities and Commerce Committee, and State Senator Jim Costa, and 42 colleagues, to FCC Chairman Reed Hundt, dated March 7, 1995.

¹⁵ See California Issues Paper No. 1, "Californians Give a Wake-Up Call to State Regulators -- Cellular Users Say "No" to State Cellular Regulation," filed March 10, 1995, in PR Docket No. 94-105, at 1. See also California Issues Paper No. 2, "Californian Legislators Oppose Regulation of Wireless -- Urge FCC to Reject California PUC Petition to Regulate," filed March 13, 1995, in PR Docket No. 94-105, at 1.

¹⁶ See Letter from Mark Nielson, President/CEO, Subscriber Computing, Inc., and John Murphy, President/CEO, DS Technology, on behalf of American Electronic Association Orange County Council, to FCC Chairman Reed Hundt, dated March 15, 1995; Letter from Allan Zaremborg, California Chamber of Commerce, to FCC Chairman Reed Hundt, dated March 7, 1995; Letter from William Campbell, President, California Manufacturers Association, to FCC Chairman Reed Hundt, dated March 6, 1995; and Letter from Bill Dombrowski, President, California Retailers Association, to FCC Chairman Reed Hundt, dated March 15, 1995.

¹⁷ "High Technology Grades California Business Climate," American Electronics Association release, *Business Wire*, February 8, 1995.

¹⁸ "Cellular Companies Tell Legislators that State Regulations are Costing California its Telecommunications Leadership Edge," *ibid.* See also Letter from William Campbell, President, California Manufacturers Association, to FCC Chairman Reed Hundt, dated March 6, 1995.

¹⁹ *Id.*

“those who might have had California on the list of states in which to invest are increasingly concerned. Indeed, anyone with interest in investing their money here has a right to be skeptical.”²⁰ Only last month, when the American Electronics Association issued its fourth annual report card, improvements in the California business climate (in infrastructure reform, etc.) were offset by a dismal “F” for the state’s legal environment.²¹

As **Dr. Stanford Levin**, Chairman of the Department of Economics at Southern Illinois University, and a former commissioner with the Illinois Commerce Commission, **observed** last August, **the CPUC “should realize that rate regulation is a relic unnecessary in such a dynamic industry.** Cellular competition is evident in the scramble for customers, the intense ad campaigns and the development and rollout of new digital and data technologies. Customers who are not satisfied switch to other carriers. And they will soon be able to switch to alternative wireless providers such as Nextel, an ‘enhanced specialized mobile radio’ company, and personal communications service providers who will soon have twice as much radio spectrum available as cellular.”²²

Dr. Levin warned, “regulating cellular rates in the most mobile of states could actually keep customer rates high, lower service quality and cripple investment in a system where the supply of cellular service is still at a premium.”²³

Indeed, the evidence before the FCC supports the conclusion that it is the CPUC’s own regulations which interfere with and distort the operations of the competitive wireless marketplace in California.²⁴ In spite of these impediments, service providers have sought to respond to competitive market forces, introducing (albeit under difficult conditions) promotional plans for the benefit of consumers.²⁵

The CPUC Did Not Meet the Statutory or Regulatory Test

Congress established a strict standard for state regulators who seek to grandfather existing regulations. The state regulators must demonstrate that “market conditions . . . fail to protect subscribers adequately from unjust and unreasonable prices or rates that are

²⁰ G. Mitchell Wilk, “How to break Up Gridlock at the California PUC,” *San Francisco Chronicle*, December 27, 1993, at p.D3.

²¹ “High Technology Grades California Business Climate,” American Electronics Association release, *Business Wire*, February 8, 1995.

²² Stanford Levin “California is Lagging in Cellular Deregulation,” *The San Francisco Chronicle*, August 31, 1994, at A21.

²³ *Id.*

²⁴ See e.g., Letter from Kathleen Abernathy, AirTouch Communications, to William F. Caton, Acting Secretary, FCC, PR Docket No. 94-105, filed March 15, 1995, and attached supplemental AirTouch Communications’ Materials. See also California Issues Paper No. 4, at 1-2, 3-4 (listing instances of regulatory delay and deprivation of customer choice).

²⁵ As AirTouch indicated, over 50% of its L.A. customers subscribe to one of its three low-cost promotional plans, and only 17 % are on the basic plan. See AirTouch filing of March 15, 1995, at 1.

unjustly or unreasonably discriminatory.”²⁶ Alternately, the state regulators must demonstrate that such market failure exists **and** “such service is a replacement for landline telephone exchange service for a substantial portion of telephone landline exchange service within such state.”²⁷ In each case, the FCC must find that continued state regulatory authority is “**necessary** to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.”²⁸

The FCC’s **Second Report and Order** in the CMRS rulemaking subsequently recognized **and** adopted as its guiding principle Congress’ intention to “generally . . . 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.”²⁹

The FCC recognized that the states must provide demonstrative evidence of **market failure in order to meet their burden of proof and retain regulatory authority over cellular and other wireless services.**

The CPUC clearly failed to meet its burden of proof. Instead, the CPUC offered unsupported assertions and a superficial analysis which misconstrued their own submissions (such as ignoring the actual decline in rates in California, a decline which was outstripped by rate declines in unregulated states).³⁰ The CPUC has ignored the fact that it is the CPUC’s own misguided regulations which are impeding competition.

The PUC itself is responsible for slowing the decline in rates, impeding competition, and denying consumers the benefits of competition available in deregulated states.

The CPUC must be preempted, having:

- failed to meet its burden of proof;
- demonstrated only that it is out of touch with the needs of California’s consumers; and
- proposed the implementation of new regulations which threaten the well-being of the economy of California and the United States.

²⁶ 47 U.S.C. Section 332(c)(3)(A) (1993).

²⁷ *Id.*

²⁸ *Id.*

²⁹ 9 FCC Rcd. 1411, 1504 (1994).

³⁰ See e.g., AirTouch filing of March 15, 1995. See also Letter from Thomas E. Wheeler, President/CEO, CTIA, to FCC Chairman Reed Hundt, dated March 10, 1995, transmitting a study by Dr. Jerry A. Hausman, “The Cost of Cellular Telephone Regulation,” dated January 3, 1995, at Section VI.