

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
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)

PR File No. 94-105

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OPPOSITION OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

Michael F. Altschul
Vice President, General Counsel

Randall S. Coleman
Vice President for
Regulatory Policy and Law

Andrea D. Williams
Staff Counsel

CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION
1250 Connecticut Avenue, N.W., Suite 200
Washington, DC 20036

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SUMMARY

The Commission should deny the petition for reconsideration of the Cellular Resellers Association ("CRA") which requests that the California Public Utilities Commission ("CPUC" or "California") retain jurisdiction over intrastate CMRS rates. The Commission's decision to preempt California's ability to continue regulating CMRS rates was well-considered and consistent with its statutory mandate. CRA, in its petition, fails to raise any new issues to establish a basis for Commission reconsideration. Instead, the CRA petition merely reasserts old arguments that the Commission properly rejected. Accordingly, the Commission must deny CRA's petition for reconsideration as repetitious.

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**OPPOSITION OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Cellular Telecommunications Industry Association ("CTIA")¹ respectfully submits its Opposition to the petition for reconsideration of the Cellular Resellers Association² in the above-captioned proceeding.³ In its petition, CRA requests that the Commission permit the State of California to retain

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service providers, including cellular, personal communications services, enhanced specialized mobile radio, and mobile satellite services.

² See Petition for Reconsideration of the Cellular Resellers Association in PR Docket No. 94-105 (filed June 19, 1995) ("CRA Petition" or "petition").

³ See 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, PR Docket No. 94-105, Report and Order, FCC 95-195 (released May 19, 1995) ("California Order" or "Order").

jurisdiction over the rates for intrastate CMRS. As demonstrated below, CRA's petition should be denied because (1) the Commission properly exercised its statutory authority to deny California's petition, and (2) CRA failed to raise any new issues relevant to this proceeding.

I. THE COMMISSION PROPERLY EXERCISED ITS STATUTORY AUTHORITY TO DENY CALIFORNIA'S PETITION TO CONTINUE REGULATING CMRS.

The Congress amended Section 332 of the Communications Act to preempt state and local government regulation of CMRS provider rates and entry⁴ in an effort to promote marketplace competition and to "foster the growth and development of mobile services that, by their nature, operate without regard to the state lines as an integral part of the national telecommunications infrastructure."⁵ In implementing the statute, the Commission properly characterized Congress' mandate that "no State . . .

⁴ 47 U.S.C. § 332(c).

⁵ H.R. Rep. No. 111, 103d Cong., 1st Sess. 260 (1993). The Commission endorsed this principle:

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.

Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1421 (1994) ("CMRS Second Report").

shall have authority to regulate"⁶ CMRS rates as conveying "an unambiguous congressional intent to foreclose state regulation [of CMRS] in the first instance."⁷

Against this general preemptive backdrop, Congress provided a very limited exception whereby states that were already regulating CMRS rates could petition the Commission to request authorization to retain such jurisdiction. In implementing this limited exception, the Commission determined that states should not be allowed to continue regulating CMRS rates unless they, "consistent with the statute, clear substantial hurdles,"⁸ i.e., provide documentary evidence in support of continuing or initiating state CMRS regulation.

The Commission, applying the statutory criteria to the CPUC petition, found that California failed to meet its statutory burden to continue state regulation of CMRS.⁹ Specifically, the Commission found, based on a preponderance of the evidence, that California failed to demonstrate that market conditions fail to

⁶ 47 U.S.C. § 332(c)(3).

⁷ California Order at ¶ 18, citing CMRS Second Report, 9 FCC Rcd at 1504.

⁸ CMRS Second Report, 9 FCC Rcd at 1421 (emphasis added). The Commission provided explicit examples of the types of evidence it would regard as pertinent for review of state petitions. See Id. at Appendix A.

⁹ California Order at ¶ 1.

protect subscribers from unjust and unreasonable rates, or unjustly and unreasonably discriminatory rates.¹⁰

Having found no basis on which to grant an exception, the Commission properly carried out congressional intent by rejecting California's petition and effectively removing California's jurisdiction to regulate CMRS rates.

II. THE COMMISSION SHOULD REJECT CRA'S PETITION BECAUSE IT PROVIDES NO BASIS FOR THE COMMISSION TO RECONSIDER ITS ORDER.

CRA's petition for continued regulation of intrastate CMRS essentially boils down to two points: (1) CRA takes issue with the plain language of Section 332; i.e., it quibbles with the standard established by Congress to govern state rate regulation; and (2) CRA takes issue with the Commission's application of Section 332 to its case. Neither of these arguments raises sufficient grounds for granting reconsideration.¹¹

¹⁰ Id. at ¶¶ 96-99 (After a long list of evidentiary deficiencies in the CPUC petition, the Commission concluded that "the CPUC case, when viewed as a whole [is] unpersuasive." See also 47 U.S.C. § 332(c)(3).

¹¹ CRA strains the concept of standing before the Commission by even filing its petition for reconsideration in this proceeding. Section 332 and its implementing regulations clearly address State preemption and invite a State to file a petition requesting authorization to retain its jurisdiction. See 47 U.S.C. § 332(c)(3)(B). Congress provides, in the same statutory section, that the Commission will also entertain petitions for reconsideration. This suggests Congress intended the States, not third parties, to request such reconsideration.

To the extent that CRA desires to construe Section 332 contrary to its plain language, its complaint lies with Congress and not the Commission. Moreover, it is Commission policy that "bare disagreement [with the Commission], absent new facts and arguments properly submitted, is insufficient grounds for granting reconsideration."¹² The Commission's California Order already has addressed and rejected the concerns prompting the CRA petition seeking to maintain CPUC's existing jurisdiction.¹³ CRA offers no new evidence or argument for the Commission to reconsider.

CRA reargues several issues. All of them were considered and rejected by the Commission. Specifically, CRA claims that, contrary to the Commission's conclusion, CPUC did adequately account for the emergence of PCS, ESMRs, and other new mobile technologies in its petition to retain regulatory authority. CRA claims that the Commission placed undue reliance upon the

(..continued)

California's decision not to seek reconsideration raises a serious question as to CRA's standing to do so.

¹² Creation of an Additional Private Radio Service, Memorandum Opinion and Order in Gen Docket 83-26, 1 FCC Rcd. 5, 6 (1986) (citing WWIZ, Inc., 37 FCC 685, 686 (1964), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966); Florida Gulfcoast Broadcasters, Inc., 37 FCC 833 (1964)).

¹³ See California Order at ¶¶ 96-147.

imminent entry of such services.¹⁴ In fact, the Commission was entirely justified in its reliance upon imminent entry of new services.¹⁵ CRA's disagreement is with the Commission's conclusion, not the process by which it reached it.

CRA also argues that the Commission must consider a state petition to retain authority over CMRS differently from a state petition to inaugurate CMRS regulation. That is, CRA claims that where a state has been regulating CMRS providers, evidence of anticompetitive behavior is more difficult to demonstrate, and the Commission should account for this factor with a relaxed standard of proof.¹⁶ This argument presupposes that the Commission can simply ignore the statutory mandate. Section 332 specifically conditions the continued existence of current CMRS

¹⁴ CRA petition at 2-4.

¹⁵ See, e.g., California Order at ¶ 32 ("While PCS is not yet available to the public, it is an accepted antitrust principle that a firm may be considered in competitive analysis if it could enter the market in question. Under the caselaw potential entry must be reasonably prompt, a typical period being two years from the present in order to expect a significant impact on existing competitors, and there is little doubt that PCS licensees will enter the market for CMRS in competition with cellular providers within this timeframe.") (citations omitted). Such a conclusion is further bolstered by the Commission's recent licensing of the A and B block broadband PCS licenses. See FCC News Release, "FCC Grants 99 Licenses for Broadband Personal Communications Services in Major Trading Areas" (released June 23, 1995).

¹⁶ CRA petition at 4 (citing CRA Reply Comments (October 19, 1994)).

regulation upon a showing that market forces fail to adequately protect subscribers from anti-competitive behavior.¹⁷ Contrary to CRA's claims, the Commission was fully justified, and in fact required, to hold CPUC to the letter of the statute. To the extent that CRA takes issue with the Commission on this point, it is addressing the wrong forum. Rather, its complaint properly lies with Congress, and not the regulatory authority charged with implementing its mandate.

Even apart from the statutory language, there is another reason to reject CRA's petition out of hand: it is a morass of contradictions. CRA claims that the showing necessary to justify continued regulation should be low because regulation will have suppressed bad acts. Immediately thereafter, CRA claims, apparently notwithstanding existing state regulation, that there are "numerous examples" of discrimination.¹⁸ Yet CRA makes absolutely no effort to supplement the record -- a record which the Commission already found deficient to justify continuation of regulation -- with factual evidence of discrimination. In effect, CRA is asking the Commission to lower the hurdle

¹⁷ 47 U.S.C. § 332(c)(3)(A), (B) (states wishing to retain existing regulation must make the showing required under § 332(c)(3)(A)(i) or (ii), as do states wishing to initiate regulation).

¹⁸ CRA petition at 5.

(something the Commission has no authority to do) while claiming, but not demonstrating, that it can clear a higher hurdle. But that is not all. CRA's petition for the continuation of state regulation is accompanied by the quite explicit allegation that state regulation has been ineffective.¹⁹ Assuming, for the sake of argument, that CRA's accusation is meritorious, the Commission would be remiss (as well as violative of the congressional mandate) to entrust consumer welfare to a state agency that according to CRA has demonstrated itself incapable of adequately protecting subscribers.²⁰

CRA also claims that the Commission has stripped the CPUC of "any authority to dispose of complaints involving discriminatory conduct with respect to intrastate service"²¹ and that preemption will create a "regulatory vacuum" that will enable cellular carriers to establish unreasonably discriminatory

¹⁹ Id.

²⁰ Section 332 specifically contemplates that, before the Commission may permit a state to continue intrastate rate regulation, the Commission must determine that such regulation will be adequate to protect consumers. See 47 U.S.C. § 332(c)(3)(B) ("If the Commission grants such petition [for continued regulation], the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.") (emphasis added).

²¹ CRA petition at 5-6.

rates.²² However, the Commission already considered and rejected these arguments, based on the evidence presented: "On this record, we are not persuaded by the CPUC's implicit argument that, absent continuation of its rate regulation authority, even for a limited time, cellular rates will quickly fall outside the zone of reasonableness."²³ Without such a showing on the part of CPUC, the Commission is simply without authority to permit continued regulation.

The Commission retains authority to investigate and resolve allegations of unreasonable or discriminatory interstate CMRS rates or practices under Section 208 of the Act.²⁴ CRA criticizes the Commission for failure to adequately explain how complaints of intrastate discrimination will be resolved²⁵; however, as with the larger issues of continued state rate regulation, CRA has made no attempt at all to make the specific demonstrations the Commission articulated in paragraph 147 of the California Order.

²² Id. at 6.

²³ California Order at ¶ 98.

²⁴ See CMRS Second Report, 9 FCC Rcd at 1479 ("In the event that a [commercial mobile radio services] carrier violated Section 201 or 202 [of the Act], the Section 208 complaint process would permit challenges to a carrier's rates or practices and full compensation for any harm due to violations of the Act.")

²⁵ CRA petition at 5-6.

In short, CRA, by its arguments, presents no new evidence to refute the Commission's findings; rather, it merely summarily repeats claims that were previously rejected. Essentially, CRA takes issue with the plain language of Section 332 and takes exception to the Commission's failure to agree that California has the authority to regulate CMRS. California, though, apparently does not share CRA's concerns: It did not seek reconsideration.

In sum, CRA's concerns have already been addressed and answered by both Congress (in its deliberations) and by the Commission (in the California Order) -- in the negative.²⁶ Without more, the Commission must reject CRA's petition.

²⁶ Cf. Creation of an Additional Private Radio Service, 1 FCC Rcd. at 6 ("[w]e agree with those commenters who stated that the petitioners have not presented any information which the Commission did not consider in its original decision. Also, the petitioners have failed to demonstrate that our original decision was based on flawed reasoning, or an incomplete review of the record.")

CONCLUSION

For the foregoing reasons, CTIA respectfully requests that the Commission deny CRA's petition for reconsideration of the decision to preempt the authority of the State of California to regulate entry to and the rates of CMRS.

Respectfully submitted,

**CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION**



Michael F. Altschul
Vice President, General Counsel

Randall S. Coleman
Vice President for
Regulatory Policy and Law

Andrea D. Williams
Staff Counsel

1250 Connecticut Avenue, N.W.
Suite 200
Washington, DC 20036

July 5, 1995

CERTIFICATE OF SERVICE

I, Andrea D. Williams, certify that I served a copy of this "Opposition of the Cellular Telecommunications Industry Association" to the petition for reconsideration today, July 5, 1995, via first-class mail to the parties listed below:

William Caton*
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

ITS*
1919 M Street N.W., Room 246
Washington, D.C. 20554

Lewis J. Paper
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005-3919

Peter A. Casciato,
A Professional Corporation
Suite 701
8 California Street
San Francisco, CA 94111


Andrea D. Williams

* Hand delivery