

RECEIVED

JUL - 5 1995

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS
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 State)
Regulatory Authority Over Cellular)
Service Rates)

PR Docket No. 94-105

DOCKET FILE COPY ORIGINAL

To: The Commission

OPPOSITION OF GTE SERVICE CORPORATION,
ON BEHALF OF ITS TELEPHONE AND
PERSONAL COMMUNICATIONS COMPANIES,
TO THE PETITION FOR RECONSIDERATION FILED BY THE CELLULAR
RESELLERS ASSOCIATION, INC.

GTE Service Corporation ("GTE"), on behalf of its Telephone and Personal Communications Companies, hereby submits its Opposition to the Petition for Reconsideration filed by the Cellular Resellers Association, Inc. ("CRA") on June 19, 1995. The Federal Communications Commission ("FCC" or "Commission") correctly denied the Petition of the People of the State of California and the Public Utilities Commission of the State of California ("Petition") because the Petition failed to meet the high evidentiary burden imposed by the Omnibus Budget Reconciliation Act of 1993 ("OBR") at 47 U.S.C. 332(c)(3)(a).¹ As a result of the

¹ 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, Report and Order, (Report (continued...))

No. of Copies rec'd
List ABCDE 014

denial of its Petition, California, like the other 49 states, is now preempted from regulating cellular intrastate rates.²

Initially, it must be noted that the Public Utilities Commission of the State of California's ("CPUC") absence from the petition for reconsideration process is highly significant in two respects. First, the CPUC is most directly affected by the FCC's decision to preempt state jurisdiction of intrastate rates. Second, the CPUC is uniquely positioned to evaluate and respond to the FCC's critique of the Petition. The CRA should not be allowed to foist its will upon the CPUC which has elected not to challenge the national policy of federal regulation of rate and entry regulation adopted by Congress. The Commission should therefore deny CRA's Petition for Reconsideration.

I. CONTRARY TO CRA'S CONTENTION, CONTINUING INVOLVEMENT OF THE CPUC IN RATE MAKING IS NOT ESSENTIAL

The CRA argues that the CPUC must retain complaint jurisdiction over rate-related complaints to assure that

¹(...continued)
and Order), PR Docket 94-105, adopted May 5, 1995, released May 19, 1995, para. 148.

² Pursuant to Section 1.103 of the Commission's Rules (47 C.F.R. § 1.103), this decision by the Commission is effective.

complaints are disposed of properly. Notably, the CPUC did not share CRA's belief that this concern warranted filing a petition. Further, complainants are free to avail themselves of the FCC's complaint process.³

The Communications Act of 1934 ("the Act") states that it is the "duty" of every common carrier "to furnish such communications service upon reasonable request therefor," and declares that any "charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. . . ." ⁴ Further, the Act makes it unlawful for a common carrier "to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services. . . ." ⁵

Since 1976 the FCC has vigorously promoted resale and has continually applied this policy to cellular services from the inception of cellular regulation.⁶ The

³ 47 U.S.C. § 208.

⁴ 47 U.S.C. §201(a) and (b).

⁵ 47 U.S.C. § 202(a).

⁶ Resale and Sharing of Private Line Service Services Order, 60 FCC 2d 261 (1976); Cellular Communications Systems, Report and Order, 86 FCC 2d 469 (1981); Cellular Communications Systems, Memorandum Opinion and Order on Reconsideration, 89 FCC 2d 58 (1982); Petitions for Rule Making Concerning Proposed Changes to the Commission's

(continued...)

application and enforcement of the Commission's pro-resale policy is grounded in the requirements of Sections 201 and 202 of the Act⁷ which apply to all common carriers.⁸

II. CRA'S CRITICISMS OF THE ORDER ARE INCORRECT AND ARE NOT DECISIONALLY SIGNIFICANT.

A. PCS Entry into the Market is Coming, Will Dramatically Increase Competition, and the FCC's Cognizance of this Point is Appropriate.

Neither the CPUC nor the CRA dispute that PCS entry into the Commercial Mobile Radio Service ("CMRS") market will occur and that this will enhance competition.⁹ CRA's sole bone of contention is that its competitive effects will not be felt as quickly as the FCC and numerous carriers believe.

⁶(...continued)
Cellular Resale Policies, Notice of Proposed Rule Making and Order 6 FCC Rcd. 1719 (1991); Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies, Report and Order, 7 FCC Rcd. 4006 (1992); and Cellnet Communications, Inc. v. Detroit SMSA Limited Partnership, Memorandum Opinion and Order, 9 FCC Rcd. 3341 (1994).

⁷ Cellnet Communications, Inc. v. Detroit SMSA Limited Partnership, Memorandum Opinion and Order, 9 FCC Rcd. at 3342 para. 4.

⁸ See 47 U.S.C. § 201 - § 202.

⁹ CPUC Petition at 63; CRA Petition for Reconsideration at para. 5.

GTE documented in its Comment filed in opposition to the CPUC Petition, that there is ample evidence that the CMRS market is currently competitive.¹⁰ In the cellular industry, volume, capacity and service offerings have expanded while costs to consumers have substantially decreased.¹¹ Such performance is consistent with what would be expected in a competitive market environment.¹² Other CMRS carriers have provided the FCC with similar documentation.¹³ The amount of competition in the CMRS market will further increase as PCS and other technologies enter the wireless telecommunications market.¹⁴ Indeed,

¹⁰ "[T]he realities of the [mobile telecommunications] market dynamics . . . support the view that there has been substantial competition between the two cellular operators." Report of Charles River Associates, Concentration, Competition, and Performance in the Mobile Telecommunications Services Market, Attachment A at 9 in the Comment of GTE Service Corporation, on behalf of its Telephone and Personal Communications Companies, in Opposition to the Petition of the People of the State of California and the Public Utilities Commission of California Requesting Authority to Regulate Rates Associated with the Provision of Cellular Service within the State of California, ("GTE Comment"). For a full discussion of competition in the cellular market, see id. at Attachment A at 9-13.

¹¹ Id. at Attachment A at 5.

¹² Id. at Attachment A at 1.

¹³ See e.g. Opposition of McCaw Cellular Communications, Inc.; and Response of the Cellular Carriers Association of California Opposing the Petition of the Public Utilities Commission of the State of California to Retain State Regulatory Authority over Interstate Cellular Service Rates.

¹⁴ GTE Comment at Attachment A at 13 - 19.

the FCC correctly found in its Order that the imminence of PCS entry has already stimulated pro-competitive forces.¹⁵

Contrary to CRA's contention in this proceeding, the Order reflects that the FCC engaged in a comprehensive review of the mountain of data presented and based its decision on four other separate grounds. First, the Commission stated that unrebutted evidence demonstrated that cellular rates are declining in California. Second, the Commission noted that the CPUC presented no evidence of systematic collusion or other anticompetitive behavior in California by CMRS providers. Third, the FCC cited the CPUC's failure to show any widespread consumer dissatisfaction with carriers' service. Finally, the FCC relied upon the CPUC's lack of a persuasive analysis of investment by cellular licensees as a basis for denying CPUC's Petition¹⁶ and twice noted "the carrier's

¹⁵ Report and Order, at para. 33. In addition, the FCC has previously examined the competitive nature of the cellular marketplace. In its Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd. 1411, 1478 para. 75 (1994), the Commission surveyed the CMRS marketplace and determined that the CMRS market was sufficiently competitive to forbear from tariffing CMRS service. Further, the Commission considers the effect of proposed transfers of cellular systems upon competition. Craig O. McCaw and AT&T, Memorandum Opinion and Order, 9 FCC Rcd. 5836, 5871-2 para. 57 (1994).

¹⁶ Report and Order at para. 97

reinvestment was decisionally significant."¹⁷ Thus, the FCC properly administered its duty to review the Petition and determined, pursuant to Section 20.13 of Commission's rules, that the CPUC did not meet its burden to prove market conditions failed to adequately protect subscribers from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory.

B. CRA's "Examples" of Reseller Discrimination Do Not Demonstrate Market Failure.

In its Petition for Reconsideration, the CRA criticized the FCC for its failure to consider the CPUC decisions cited in the CRA Reply Comments. However, a review of the CRA's discussion of these decisions reveals that the decisions do not represent "enforcement against unreasonable discriminatory carrier actions" as claimed by the CRA.¹⁸ Rather, the CRA produced a laundry list consisting of CPUC proceedings that included an industry-wide proceeding to develop rate policy¹⁹, a proceeding that

¹⁷ Id. at paras. 139-140.

¹⁸ CRA Reply to Oppositions to the Petition of the People of the State of California and the Public Utilities Commission of the State of California at 12-17.

¹⁹ CPUC Decision 90-06-025

occurred in the infancy of the cellular industry²⁰ and a handful of cases which delineate the appropriate administration of volume user rates.²¹ Contrary to CRA's implication, these cases are not decisionally significant, as they fall woefully short of demonstrating market failure in California. While the CRA argues that the CPUC's continued involvement in rate-related complaints is essential, the CPUC's election not to file a Petition for Reconsideration suggests otherwise.²²

III. CONCLUSION.

The FCC was presented with the daunting task of reviewing mountains of data and information from twenty commenters. After an exhaustive review, the Commission produced a lengthy Order which contained a comprehensive review of the California CMRS market and properly concluded that the CPUC failed to meet its evidentiary burden to demonstrate that market conditions do not adequately protect subscribers from unjust or unreasonably discriminatory

²⁰ CPUC decision 85-07-024. This case involved the appropriateness of an aspect of a tariff filed nearly ten years ago and only two months after GTE began cellular service. This was only the second cellular tariff GTE filed in California.

²¹ CPUC Decisions 90-12-038, 91-12-002 and 93-01-014.

²² Further, as discussed in Section I supra, if a reseller feels it is discriminated against, it may file a complaint with the FCC.

rates. Nothing contained in CRA's Petition for Reconsideration mandates that the FCC alter its ultimate conclusion - that state regulation of CMRS in California is not warranted.

WHEREFORE, for the reasons stated above, GTE respectfully asks that the Commission deny the Cellular Resellers Association's Petition for Reconsideration.

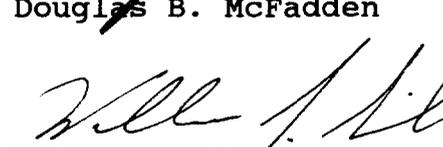
Respectfully submitted,

GTE SERVICE CORPORATION ON
BEHALF OF ITS TELEPHONE AND
PERSONAL COMMUNICATIONS
COMPANIES

Andre J. Lachance
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 463-5276



Douglas B. McFadden



William J. Sill
Robert M. Winteringham
McFadden, Evans & Sill
1627 Eye Street, N.W.
Suite 810
Washington, DC 20006
(202) 293-0700

July 5, 1995

CERTIFICATE OF SERVICE

I, Robert M. Winteringham, do hereby certify that true copies of the foregoing document were sent this 5th day of July, 1995, by first-class United States mail, postage prepaid, to the following:

Peter Arth, Jr., Esquire
Edward W. O'Neill, Esquire
Ellen S. Levin, Esquire
State of California
Public Utilities Commission
505 Van Ness Avenue
San Francisco, California 94102
Attorneys for the People of the
State of California and the
Public Utilities Commission
of the State of California

National Cellular Resellers Association
Joel H. Levy
William B. Wihelm, Jr.
Cohn and Marks
Suite 600
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

*Regina M. Keeney, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
Room 5002
2025 M Street, N.W.
Washington, D.C. 20054

*John Cimko, Chief
Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
Room 644; Mail Stop 1600D
1919 M Street, N.W.
Washington, D.C. 20054

*Dan Phythyon, Sr. Legal Assistant
Wireless Telecommunications Bureau
Federal Communications Commission
Room 5002
2025 M Street, N.W.
Washington, D.C. 20054

David A. Gross, Esquire
Kathleen Q. Abernathy, Esquire
AirTouch Communications
1818 N Street, N.W.
8th Floor
Washington, D.C. 20036
Attorneys for AirTouch Communications

Mary B. Cranston, Esquire
Megan Waters Pierson, Esquire
Joseph A. Hearst, Esquire
Pillsbury Madison & Sutro
P.O. Box 7880
San Francisco, CA 94120-7880
Attorneys for AirTouch Communications

Alan R. Shark, President
American Mobile Telecommunications
Association, Inc.
1150 18th Street, N.W.
Suite 250
Washington, D.C. 20036

Elizabeth R. Sachs, Esquire
Lukas, McGowan, Nace & Gutierrez
1111 19th Street, N.W.
Suite 1200
Washington, D.C. 20036
Attorney for American Mobile
Telecommunications Association, Inc.

David A. Simpson, Esquire
Young, Vogl, Harlick & Wilson
425 California Street
Suite 2500
San Francisco, CA 94101
Attorney for Bakersfield Cellular
Telephone Company

Adam A. Anderson, Esquire
Suzanne Toller, Esquire *
Bay Area Cellular Telephone
Company
651 Gateway Boulevard
Suite 1500
South San Francisco, CA 94080

Richard Hansen, Chairman of
Cellular Agents Trade
Association
11268 Washington Blvd.
Suite 201
Culver City, CA 90230

Michael B. Day, Esquire
Jeanne M. Bennett, Esquire
Michael J. Thompson, Esquire
Jerome F. Candelaria, Esquire
Wright & Talisman, P.C.
100 Bush Street
Shell Building, Suite 225
San Francisco, CA 94104
Attorneys for Cellular Carriers
Association of California

Michael F. Altschul, Esquire
Randall S. Coleman, Esquire
Andrea D. Williams, Esquire
Cellular Telecommunications Industry
Association
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

Mark Gascoigne
Dennis Shelley
Information Technology Service
Internal Services Department
County of Los Angeles
9150 East Imperial Highway
Downey, California 90242
Attorneys for County of Los Angeles

Russell H. Fox, Esquire
Susan H.R. Jones, Esquire
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005
Attorneys for E.F. Johnson Company

David M. Wilson, Esquire
Young, Vogl, Harlick & Wilson
425 California Street
Suite 2500
San Francisco, CA 94104
Attorney for Los Angeles Cellular
Telephone Company

Scott K. Morris
Vice President of External Affairs
McCaw Cellular Communications, Inc.
5400 Carillon Point
Kirkland, Washington 98033

Howard J. Symons, Esquire
James A. Kirkland, Esquire
Cherie R. Kiser, Esquire
Kecia Boney, Esquire
Tara M. Corvo, Esquire
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
Suite 900
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Attorneys for McCaw Cellular
Communications, Inc.

James M. Tobin, Esquire
Mary E. Wand, Esquire
Morrison & Foerster
345 California Street
San Francisco, CA 94104-2576
Attorneys for McCaw Cellular
Communications, Inc.

Thomas Gutierrez, Esquire
J. Justin McClure, Esquire
Lukas, McGowan, Nace &
Gutierrez, Chartered
1111 Nineteenth Street, N.W.
Suite 1200
Washington, D.C. 20036
Attorneys for Mobile Telecommunications
Technologies Corp.

Jeffrey S. Bork, Esquire
Laurie Bennett, Esquire
U.S. West Cellular of California, Inc.
1801 California Street
Suite 5100
Denver, CO 80202

Leonard J. Kennedy
Laura H. Phillips
Richard S. Denning
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, D.C. 20037
Attorneys for Nextel Communications, Inc.

Mark J. Golden, Acting President
Personal Communications Industry
Association
1019 Nineteenth Street, N.W.
Suite 1100
Washington, D.C. 20036

Michael Sharnes, Esquire
1717 Kettner Blvd. Suite 105
San Diego, CA 92101
Attorney for Utility Consumer's Action
Network and Towards Utility Rate
Normalization

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

Lewis J. Paper
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005
Attorneys for Cellular Resellers
Association, Inc., Cellular Service, Inc.,
and ComTech, Inc.

Judith St. Ledger - Roty, Esquire
James J. Freeman, Esquire
Reed, Smith, Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036
Attorneys for Paging Network, Inc.

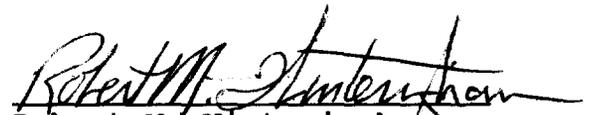
Michael J. Thompson, Esq.
Jerome F. Candelaria, Esq.
Wright & Talisma
100 Bush Street
Shell Building, Suite 225
San Francisco, CA 94104

Thomas J. Casey
Jay L. Birnbaum
Katherine T. Wallace
Skadden, Arps, Slate,
Meagher & Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005

*International Transcription Services
c/o Federal Communications
Commission
Room 246
1919 M Street, N.W.
Washington, D.C. 20554

Thomas H. Bugbee
Chief, Regulatory Affairs
Telecommunications Branch
County of Los Angeles
P.O. Box 2231
Downey, California 90242

*By hand


Robert M. Winteringham