

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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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 Docket No. 94-105

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

94-105

To: The Commission

OPPOSITION OF McCaw Cellular Communications, Inc.

McCaw Cellular Communications, Inc. ("McCaw"), by its attorneys and pursuant to Section 1.106(g) of the Commission's rules, hereby opposes the Petition for Reconsideration ("Petition") of the Commission's Report and Order in the above-captioned proceeding^{1/} filed by the Cellular Resellers Association, Inc. ("CRA"). Although the California Public Utilities Commission ("CPUC") has chosen not to ask for reconsideration of the Report and Order, CRA asks the Commission to allow the CPUC to retain rate regulation authority. For the following reasons, CRA's Petition should be dismissed or denied.

As a threshold matter, CRA's Petition should be dismissed as moot. Section 332(c)(3) permits only the states to seek rate regulatory authority from the Commission^{2/} and, in this case, the

^{1/} Report and Order, FCC 95-195 (rel. May 19, 1995).

^{2/} 47 U.S.C. § 332(c)(3)(B); 47 C.F.R. § 20.13.

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CPUC expressly decided not to challenge the Report and Order.^{3/} When the CPUC allowed the date for a petition for reconsideration date to pass without submitting a pleading, the case was closed. CRA has no authority to seek for the CPUC the regulatory authority that the CPUC itself has decided to forgo.^{4/}

Even if CRA's Petition were not procedurally defective, it must be dismissed or denied because it does nothing to cure the CPUC's failure to make the showing necessary to retain rate

^{3/} See CPUC News Release, CPUC-051 (June 8, 1995). For similar reasons, CRA lacks standing to seek reconsideration of the Report and Order. By limiting to states the right to seek rate regulatory authority in the first instance, Congress effectively limited the class of parties who could seek reconsideration of an order denying such a request. Section 1.106(b) of the Commission's rules, 47 C.F.R. § 1.106(b), which generally permits any adversely affected party to seek reconsideration of an adjudicatory order, must be read against the statutory limitation specific to this case. If CRA is permitted to maintain its Petition and it were somehow to prevail on reconsideration, the Commission would find itself in the dubious position of ordering a state that has chosen to relinquish regulation of intrastate rates to regulate anyway. CRA should not be permitted to use the Commission's processes to force the CPUC to do what it evidently does not wish to do. If CRA is dissatisfied with the CPUC's decision not to pursue rate regulatory authority, it should so inform the CPUC.

^{4/} See Radiofone, Inc. v. FCC, 759 F.2d 936 (D.C. Cir. 1985) (case became moot, and thus no longer subject to appeal by a third party, when company that was the subject of FCC adjudication went out of business). The mootness of CRA's petition is underscored by the fact that the instant case is an "adjudicatory-type proceeding" involving the CPUC and the Commission, "not a rulemaking" in which any commenter could seek reconsideration of the Commission's decision. See Report and Order at n.309; see also Radiofone, 759 F.2d at 938 (while principle embodied in FCC decision might have practical and legal effect on petitioners, it was set forth in the context of an adjudication rather than as a rule).

regulatory authority.^{5/} Reflecting Congress's finding that a patchwork of inconsistent state regulation would undermine the growth and development of mobile services,^{6/} the Commission insisted that states seeking to retain regulatory authority must "clear substantial hurdles" in demonstrating that continued regulation is warranted.^{7/} As the Report and Order makes clear, the CPUC did not meet this standard. CRA has not provided additional evidence that would warrant reversal of the Report and Order.

CRA's allegation that the Commission placed undue reliance on future competition to cellular providers is unpersuasive.^{8/} The Commission took into account the fact that many of the new technologies were not yet operational, but it noted that the prospect of their imminent arrival already was having a

^{5/} Granting CRA's request to regulate CMRS rates until March 1, 1996 would also confer an unfair advantage on "private" carriers that offer functionally equivalent services but that will remain beyond the reach of any state regulation until 1996. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(c)(2)(B), 107 Stat. 312 396 (permitting private carriers to remain classified as private until August 1996).

^{6/} See H.R. Rep. No. 213, 103d Cong., 1st Sess. 490 (1993) ("Conference Report") (intent of revised Section 332 is to "establish a Federal regulatory framework to govern the offering of all commercial mobile services") (emphasis supplied); see also id. at 494 ("[T]he Commission, in considering the scope, duration, or limitation of any State regulation shall ensure that such regulation is consistent with the overall intent of this subsection . . . ").

^{7/} In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1504 (1994).

^{8/} CRA Petition at 5.

substantial impact on cellular rates. Indeed, the Commission found specifically that the nature of the impending entry of new wireless competitors "bears emphasis" because, unlike the typical case in which entry is hypothetical or marginal, "PCS entry is undeniably real." Faced with near-term entry of PCS, cellular companies are lowering prices and adopting new technologies.^{9/}

Similarly, CRA's complaint that a state proposing to retain regulatory authority cannot be expected to show anticompetitive behavior, customer dissatisfaction, and other indicia of marketplace failure^{10/} should not be given credence. Under this line of reasoning, states with existing regulatory regimes would not have to make any showing whatsoever. With the enactment of Section 332(c), Congress envisioned the exercise of state entry and rate regulatory authority only in extreme cases: when significant market failure justified substituting regulation for the operation of market forces. CRA turns this congressional presumption on its head by, in effect, advocating the preservation of state regulation unless providers can prove in advance that the market will work perfectly without it. The Commission specifically considered and rejected the CPUC's argument that the threat of regulation lowers prices, finding that the CPUC's own economic study showed that "the predicted impact of regulation is extremely minimal."^{11/}

^{9/} Report and Order at ¶ 33.

^{10/} CRA Petition at 7-9.

^{11/} Report and Order at ¶ 119.

Likewise, CRA's call for an affirmation of the CPUC's authority to hear complaints regarding rate discrimination cannot be squared with the statutory framework. In the absence of a successful petition for rate authority, Section 332(c)(3) preempts the CPUC from hearing rate complaints. Any other conclusion would effectively leave the CPUC with significant authority over rates, even though it was unable to meet the statutory test for the grant of such authority.^{12/} In particular, having failed to demonstrate that "market conditions . . . fail to protect subscribers adequately from . . . rates that are unjustly or unreasonably discriminatory,"^{13/} the CPUC cannot now be permitted to adjudicate complaints regarding rate discrimination; adjudication of discrimination complaints goes to

^{12/} Id. at ¶¶ 96-141. Cf. G. & T. Terminal Packaging Co. v. Consolidated Rail Corporation, 646 F. Supp. 511 (D.N.J. 1986), aff'd, 830 F.2d 1230 (3d Cir. 1987), cert. denied, 108 S. Ct. 1291 (1988) (barring collateral complaint against alleged rate discrimination where ICC had exempted transportation of certain goods from rate regulation). In G. & T., as here, the shipper argued that the absence of a complaint procedure left it without any remedy for price discrimination. The court disagreed:

This argument ignores that the [Interstate Commerce] Commission, in granting the exemption [from rate regulation], has determined that regulation is 'not needed to protect shippers from abuse of market power.' [Citation omitted.] . . . Congress and the Commission have determined that the market is adequate protection; it is not the place of this court to disagree with that determination.

830 F.2d at 1235-36.

^{13/} See 47 U.S.C. 332(c)(3)(A)(i).

the essence of an agency's regulation of rates.^{14/} While Section 332(c)(3) reserves to states the authority to regulate the "other terms and conditions of commercial mobile services," this power is narrowly circumscribed and does not include rate discrimination or other rate issues. As the Commission has explained, a state's complaint proceedings may address only carrier practices that are "separate and apart from . . . rates," such as billing disputes and other consumer matters.^{15/}

Finally, CRA's charge that there will be a "regulatory vacuum" if the Commission does not assume responsibility for hearing discrimination complaints^{16/} is premature. The Commission stated that it would address whether it has inherited jurisdiction over intrastate rates in this proceeding only if it

^{14/} Rate regulation indisputably includes oversight of allegedly discriminatory rates as well as rate levels. See, e.g., MCI Telecommunications Corp. v. AT&T Co., 114 S.Ct. 2223, 2226 (1994) (Communications Act authorized the Commission "to regulate the rates charged for communication services to ensure that they were . . . non-discriminatory") (emphasis supplied). Such regulation can be accomplished through case-by-case adjudication of complaints as to existing rates as well as through prospective review of proposed rates. See 47 U.S.C. § 204(a) (providing for prospective hearings on a new "charge, classification, regulation, or practice") and id. § 208(b)(1) (establishing procedures for review of complaints on the lawfulness of a "charge, classification, regulation, or practice"); see also 47 U.S.C. § 202(a) (barring unreasonable discrimination in "charges, practices, classifications, regulations, facilities, or services"). In the case of cable television, rate regulation of the basic service tier is prospective; the rates for cable programming services are regulated in response to complaints. 47 U.S.C. §§ 543(b)(1)(2) (basic service tier), 543(c) (cable programming services).

^{15/} Report and Order at ¶ 145.

^{16/} CRA Petition at 11.

was persuaded that resolution is necessary to resolve a material issue raised in this record.^{17/} CRA has presented no evidence of market failure in the absence of the state regulation that would require the Commission to step in at this time. Accordingly there is no imminent reason for the Commission to determine whether it has the authority to do so.

For the foregoing reasons, CRA's Petition should be dismissed or denied.

Respectfully submitted,

MCCAW CELLULAR COMMUNICATIONS, INC.

Cathleen A. Massey *by SFS*

Howard J. Symons
Sara F. Seidman
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
Suite 900
701 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Of Counsel

Scott K. Morris
Senior Vice President - External
Affairs
Cathleen A. Massey
Vice President - External Affairs
McCaw Cellular Communications, Inc.
1150 Connecticut Avenue, N.W.
4th Floor
Washington, D.C. 20036
202/223-9222

July 5, 1995

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^{17/} Report and Order at ¶ 147.

CERTIFICATE OF SERVICE

I, Tanya Butler, do hereby certify that a copy of the foregoing Opposition of McCaw Cellular Communications, Inc. was served on the following by hand or first class mail, postage prepaid this 5th day of July 1995:

Regina Keeney*
Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20036

Michael Wack*
Deputy Chief, Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1919 M Street, N.W., Room 644
Washington, D.C. 20554

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

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

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

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

Peter A. Casciato
8 California Street, Suite 701
San Francisco, CA 94111
Cellular Resellers Association, Inc.,
Cellular Service, Inc., and ComTech, Inc.

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

Michael Sharnes, Esq.
1717 Kettner Boulevard, Suite 105
San Diego, CA 92101
Utility Consumers' Action Network
Towards Utility Rate Normalization

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

Ellen S. LeVine
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

David A. Gross
AirTouch Communications
1818 N Street, N.W.
Washington, D.C. 20036
Attorneys for AirTouch
Communications

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

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

Adam A. Anderson
Bay Area Cellular Telephone Company
651 Gateway Boulevard
Suite 1500
San Francisco, California 94080

Michael B. Day
Wright & Talisman, P.C.
100 Bush Street, Shell Building
Suite 225
San Francisco, California 94104

Michael F. Altschul
Cellular Telecommunications
Industry Association
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

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

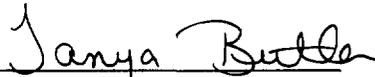
Jeffrey S. Bork
U.S. West Cellular of California,
Inc.
1801 California Street
Suite 5100
Denver, Colorado 80202

Mark J. Golden, Vice President
Personal Communications Industry
Association
1019 19th Street, N.W.
Suite 1100
Washington, D.C. 20036

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

Douglas B. McFadden
McFadden, Evans & Sill
1627 Eye Street, N.W.
Suite 810
Washington, D.C. 20006
Attorney for GTE Services
Corporation on behalf of Its
Telephone and Personal
Communications Companies

Katherine T. Wallace
Skadden, Arps, Slate, Meagher & Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005-2107
Attorney for Los Angeles Cellular
Telephone Company


Tanya Butler

*By Hand
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