

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

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In the Matter of) 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 State Regulatory)
Authority over Intrastate)
Cellular Service Rates)

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**OPPOSITION OF THE CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA
TO THE PETITION FOR RECONSIDERATION SUBMITTED BY THE
CELLULAR RESELLERS ASSOCIATION, INC.**

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Pursuant to of Section 1.106(g) of Title 47 of the Code of Federal Regulations, the Cellular Carriers Association of California (CCAC) hereby submits its opposition to the Cellular Resellers Association, Inc.'s (CRA's) Petition for Reconsideration of the Report and Order of the Federal Communications Commission (FCC or Commission) adopted May 5, 1995 in this proceeding.¹ The Report and Order denied the petition of the Public Utilities Commission of the State of California (CPUC or California) to retain state regulatory authority over cellular service rates in California.²

¹ Report and Order, FCC 95-195, PR Docket no. 94-105, (Adopted May 5, 1995, issued May 19, 1995).

² Petition of the Public Utilities Commission of the State of California to Retain State Regulatory Authority Over Cellular Service Rates, PR Docket No. 94-105, filed Aug. 8, 1994.

SUMMARY

CRA's Petition fails to comply with 47 C.F.R. §1.106(d)(2) which requires the petitioner to cite the erroneous findings and conclusions of the FCC and to "state with particularity" the changes which should be made to such findings and conclusions.

In addition, CRA's allegation that the Commission has erred by misinterpreting the evidence in the record concerning the competitive impact of personal communication service (PCS) providers (CRA Petition at 2) is completely undermined by the Commission's clear and factually supported explanation of the competitive impact which PCS providers have on cellular carriers even prior to the construction of PCS networks.

CRA's other ground for reconsideration is that the Commission improperly concluded that the CPUC failed to present "evidence of widespread consumer dissatisfaction with [commercial mobile radio service ("CMRS")] providers" or to discuss the specific regulations required to address such dissatisfaction. CRA Petition at 2. The Commission properly sought and considered such evidence of the impact of existing cellular market conditions on consumers. Its conclusion that the CPUC did not demonstrate a significant degree of consumer dissatisfaction or establish a nexus between consumer unrest and the regulations it sought to extend over cellular carriers is entirely supported by the record, and justifies denial of the CPUC petition.

Finally, the FCC cited five separate and independently sufficient bases for denying the petition of the CPUC. CRA has raised issues which only address two of the five issues. Not only has CRA failed to establish error on the part of the Commission as to the two arguments it chose to address, it has entirely ignored the remaining three findings of the FCC which are fully adequate to sustain the Commission's order.

I. THE RECORD SUPPORTS THE FINDING OF THE FCC THAT THE CPUC DID NOT ADEQUATELY EVALUATE THE IMPACT OF COMPETITION FROM PCS PROVIDERS ON THE CALIFORNIA CELLULAR MARKET

CRA argues in its Petition that the Commission has erred by concluding that one ground for denying the CPUC's petition to retain rate regulatory authority lies in California's failure to account for "the direct and fundamental changes to the duopoly cellular market structure that are being realized by [PCS] and other services...." Report and Order, FCC 95-195 (May 19, 1995) at ¶ 97. CRA argues that PCS services will not be directly available to the public during the time period over which the CPUC sought to extend its regulation of rates. CRA Petition at 3. CRA does not complete its argument by explaining why the initiation of PCS service is the sole reflection of the competitive impact of PCS providers on the wireless market. This omission is more revealing in light of the evidence in the record, and included in the FCC's Report and Order, that PCS is unquestionably having a pre-construction impact on the wireless market.

The FCC properly decided that it would look with disfavor on a state petition which "fails to consider the immediate and near term impact of PCS", going on to conclude that, "it would be difficult to ignore or downplay the importance of fundamental structural changes when considering [state petitions to retain rate regulatory authority]." Report and Order, supra at ¶ 31.

In fact, the CPUC made a concerted effort to downplay the competitive impact of PCS providers in its petition,³ going so far as to exclude PCS providers from its market concentration calculations. This exclusion contrasts vividly with the fact that accepted anti-trust analysis provides for the inclusion of parties who can enter a market with relative ease within a short period of time. Report and Order, supra at ¶ 32. When PCS providers are properly included in the analysis, the market concentration results for the California cellular market show mere "moderate concentration".⁴

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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 Intrastate Cellular Service Rates filed on or about August 8, 1994 PR Docket No. 94-105, pp 24, 63.

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See 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 ("CCAC Response"), PR Docket No. 94-105, September 19, 1994. p. 23, Charles River report, Appendix A. pp 8-9.

The CPUC petition was, in part, a victim of timing as well as of its own ideology. After the CPUC petition was filed, the FCC made enormous strides toward activating the PCS market, by defining the six additional spectrum blocks to be licensed in each cellular market, awarding a 30 MHz pioneer preference license in the Los Angeles market, and concluding an auction awarding up to two additional 30 MHz blocks in each of the major California markets. Report and Order, supra at ¶ 103. As argued by CCAC in its submissions in the case, the entities who won these auctioned blocks of spectrum are enormous, well-financed, multi-national corporations with vast experience in successful telecommunications ventures.⁵ Their investment of over a billion dollars in licensing fees alone is dramatic evidence that they are firmly committed to an immediate development of the PCS market in California. Report and Order, supra at ¶ 32.

Moreover, the threat of imminent PCS deployment clearly has a real-world impact on current cellular investment decisions. As indicated by the Commission, California cellular carriers have continued to invest heavily to expand and reinforce their networks. Report and Order, supra at ¶ 131. This investment will have to be recouped in an environment in which PCS is an active competitor. If CRA and the CPUC believe that cellular carriers are not weighing their

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CCAC Response, pp 61-62.

current corporate investment policies with an eye toward intense rate competition with PCS competitors, they are woefully mistaken. In fact, the evidence in the record of the carriers' continuing heavy investment in expanding their cellular networks has convinced the FCC that cellular carriers are pursuing a strategy of positioning themselves to be vigorous competitors of PCS providers "for the foreseeable future." Report and Order, supra at ¶ 140. The FCC views this as "decisionally significant", as does CCAC. In short, the failure of the CPUC to adequately account for the impact of the PCS market in its market structure analysis and in its evaluation of cellular earnings and profits is a significant shortcoming in its petition, and the FCC's reliance on these defects as part of its basis for concluding that the CPUC has not established its burden of proof is supported by the record in this proceeding.

II. THE RECORD FAILS TO ESTABLISH EITHER THAT CONSUMERS ARE ADVERSELY IMPACTED BY CONDITIONS IN THE CALIFORNIA CELLULAR MARKET OR THAT THE REGULATIONS WHICH THE CPUC SOUGHT TO EXTEND WERE NECESSARY TO PROTECT SUCH CUSTOMERS

For the CPUC to prevail in its petition, it must establish either that "market conditions with respect to [cellular] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly

or unreasonably discriminatory."⁶ To that end, the FCC appropriately required states filing petitions to identify the type of regulation of cellular carriers they intended to pursue or continue.⁷ In addition, the Commission also sought evidence on cellular rates, instances of specific discriminatory rates or unjust rates, and information regarding customer satisfaction or dissatisfaction with cellular service. Id.

Contrary to the position advanced by CRA in its petition, the Commission was entirely correct in concluding that the failure of the CPUC to identify consumer dissatisfaction or to establish that its intended regime of regulation would address the root causes of such dissatisfaction is a valid ground for denying the California petition. As noted by the FCC in its decision, cellular rates in California are unquestionably declining. Report and Order, supra at ¶ 115, 122. A trend of declining rates is on its face inconsistent with, or at the very least unresponsive of, the notion of unreasonable and unjust rates. Under such circumstances, it would appear that additional evidence--and in particular evidence of consumer dissatisfaction--is required to establish that unreasonable and discriminatory rates are being charged. Yet the CPUC provided no such evidence. Nor did CRA, who complained only

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See 47 U.S.C. §332(c)(3)(B).

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See CRMS Second Report and Order, 9 FCC Rcd at 1505.

of dissatisfaction by a competitor of cellular carriers. Examples of CRA's evidence of "unreasonable discriminatory carrier actions" includes: a carrier's promotional rate which the CPUC found to discriminate "against independent resellers;"⁸; a CPUC decision addressing a complaint by resellers concerning "unfair customer losses to [a carrier's] competitors"⁹; and various complaints by resellers regarding "unreasonably discriminatory promotions" which were resolved through settlement agreements between the respective carrier and CRA.¹⁰ In the absence of substantial evidence that customers, as opposed to competitors, are dissatisfied with cellular service or rates, and given the downward trend of cellular rates, the CPUC was clearly under an obligation to explain in concrete terms what problems existed in the cellular industry, and what its regulations would do to resolve the problem. That the CPUC was unable to do this is not surprising.

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Cellular Resellers Association et. al. Reply To Opposition To The Petition Of The People Of The State Of California And The Public Utilities Commission Of The State Of California ("CRA Reply"), PR File No. 94-SP3, dated October 19, 1994 pp. 12-13.

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Id. at 13.

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Id. at 15-17

As explained by the FCC itself, CPUC rate regulation did not involve the CPUC in actively setting cellular rates¹¹, but rather acted as a bureaucratic sea anchor to slow down carriers' efforts to make any changes in cellular rate tariff filings through a process which allowed protests to certain rate filings and extended the effective date of others.¹² Therefore, extension of the CPUC's regulatory regime for 18 months, or even 18 years, would not cause any appreciable change in cellular rates. Yet, the CPUC was primarily concerned with rates, and returns, as the focus of its argument that rate regulation was needed. Neither the CPUC nor CRA were able to present any concrete evidence to establish that the protests and delayed effective dates for new rates which characterized CPUC regulation were the least bit effective in modifying cellular pricing. Indeed, the only credible evidence on this score was that presented by the

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"The CPUC does not appear to have prescribed any particular pricing or rate development formula, and with minor exceptions, all currently effective and previously effective cellular rates in California appear to have been carrier-initiated." Report and Order, supra at ¶ 98.

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See CCAC Response at 81; Opposition of McCaw Cellular Communications, Inc., PR File No. 94-SP3 dated September 19, 1994 at 46; and Response By Los Angeles Cellular Telephone Company To Petition By The Public Utilities Commission of the State of California To Retain State Regulatory Authority Over Intrastate Cellular Service Rates, PR File No. 94 SP3, dated September 19, 1994, pp. 40-45

carriers to explain how such rate regulation actually decreases competition and results in higher rates.¹³

In addition, the CPUC was "caught" by the FCC in the embarrassing position of trying to have it both ways, blaming any evidence of market imperfection on the carriers and calling for regulation, while simultaneously claiming that any favorable evidence regarding the California cellular market was due in some unspecified way to CPUC regulation. Report and Order, supra at ¶ 98.

Even more to the point is the FCC's own independent analysis of cellular rates in California, which concluded that rates in the major Los Angeles market have declined substantially in recent years, specifically by more than 15% in 1994 alone. Report and Order, supra at ¶ 122. As the FCC stated, "this evidence reflects a positive price performance pattern, and undercuts the CPUC's claim that market conditions utterly fail to protect consumers adequately from unjust and unreasonable, or unjustly or unreasonably discriminatory rates." Id. In the face of such compelling factual evidence of rate competition between carriers, which is completely unrelated to CPUC regulations, the hollow boast of CRA that, "the CPUC has been vigorous in enforcing" the requirement for reasonable and nondiscriminatory rates¹⁴ proves nothing at all.

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AirTouch Opposition, Hausman Affidavit at para 11.

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CRA petition at 5.

In addition, it is clear that the cellular rate decreases reported by CCAC and the carriers, and observed by the FCC, are totally unrelated to the CPUC requirement for a wholesale rate margin. The record does not support the conclusion that cellular resellers provide any meaningful retail rate competition. Cellular resellers are price followers, content to collect their mandatory margins on retail rates. Indeed, the consumer advocacy arm of the CPUC itself has concluded that the mandatory margin requirement for resellers has, "serve[d] only to protect the business opportunities of independent resellers...".¹⁵ As explained above, CPUC cellular rate regulation consists of time-consuming paper shuffling and the wholesale margin requirement for resellers. Neither type of CPUC regulation was proven to reduce rates, eliminate any alleged discrimination, or otherwise benefit customers. The CPUC clearly failed to meet its burden of proof in this regard, and the FCC's decision properly reflected that failure as one of the grounds for denial.

III. THE COMMISSION'S REPORT AND ORDER DOES NOT LEAVE ANY JURISDICTIONAL GAP WITH RESPECT TO COMPLAINTS OVER RATE DISCRIMINATION

CRA attempts to raise the prospect of a jurisdictional gap in the wireless market by claiming that customers who seek

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The Division of Ratepayer Advocates' Comments, filed February 15, 1994 in CPUC I.93-12-007, p. 25.

redress for unfair rates will have no forum due to the FCC's determination that it should defer to another proceeding its consideration of whether to assume jurisdiction over consumer complaints of discriminatory intrastate cellular rates. See, Report and Order, supra at ¶ 147. No such gap has been created. Jurisdiction over all rate matters lies with the FCC.

The Commission stated that its jurisdiction over CMRS intrastate rates should be resolved in the context of reconsideration of the CMRS Second Report and Order. Id. That is entirely logical, since the CMRS Second Report and Order addresses general rules necessary to implement Sections 3(n) and 332 of the Communications Act of 1934, as amended by Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, rather than the particulars of individual state petitions.

Nevertheless, the Commission expressed a willingness to address the jurisdiction issue in the instant proceeding given sufficient reason. However, CRA has not attempted to make the required showing that resolving the jurisdiction question must be "necessary to resolve" material issues in this proceeding. Id.

Should it become necessary, the FCC could also directly address the jurisdictional issue at such time as a party filed a formal or informal complaint with the Commission pursuant to

Commission rules.¹⁶ However, resolution of the issue is not critical for purposes of concluding that the CPUC has not met its burden to justify continued state rate regulation in the face of the strong preference expressed by Congress for preemption of such state regulation.

IV. CRA'S PETITION SHOULD BE REJECTED FOR FAILURE TO COMPLY WITH FCC REGULATIONS AND BECAUSE THE DENIAL OF THE CPUC PETITION IS FULLY SUPPORTED BY NUMEROUS ARGUMENTS WHICH CRA CHOSE NOT TO ADDRESS

CRA's Petition fails to comply with 47 C.F.R. §1.106(d)(2), which requires the petitioner to cite the erroneous findings and conclusions of the FCC and to "state with particularity" the changes which should be made to such findings and conclusions. CRA's petition does not state how the FCC's Report and Order should be changed. Instead, CRA merely requests that the Commission "reconsider its decision" or, in the alternative, "assume jurisdiction over complaints involving such matters."¹⁷ This rudimentary omission of particulars by CRA is not in compliance with the FCC's rules of procedure. Thus, FCC practice requires that CRA's petition be "dismissed as procedurally defective."¹⁸

¹⁶ 47 CFR Ch. 1.711 et. al.

¹⁷

CRA at 7.

¹⁸

See In Re Annual 1989 Access Tariff Filings, 7 FCC Rcd 3024, May 13, 1992 Released; Adopted April 30, 1992. ¶ 6.

The Commission has said that reconsideration is appropriate only where the petitioner either raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters or shows material error or omission in the original order.¹⁹ CRA has failed to make either showing.

The FCC cited five separate and independently sufficient bases for denying the petition of the CPUC. Report and Order, supra at ¶ 97, 98. CRA has raised issues which only address two of those five grounds for the Commission's decision. Not only has CRA failed to establish error on the part of the Commission as to the two arguments it chose to address, it has entirely ignored the remaining three findings, which are fully supported by substantial evidence and each of which is adequate of itself to sustain the Commission's order. Even if CRA had demonstrated merit in its two issues (which it has not), the Commission's decision would nevertheless stand, as the FCC's conclusions must be sustained if supported by substantial evidence even if there is also substantial evidence to support contrary conclusions.²⁰

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See In Re Application of Walter S. Kelley, 10 FCC Rcd 4424. ¶ 11, (1995); 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.

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Lorain Journal Co. v. FCC, 351 F.2d at 828.

V. CONCLUSION

The Commission's rejection of the CPUC's petition to retain jurisdiction serves to further Congress's pro-competitive goals of generating more competition between wireless carriers, more options for customers, lower total costs for the wireless industry, and greater savings for wireless customers. Stripped of its pretense, CRA's petition simply states its discontent with a properly reasoned Commission decision and reiterates CRA's position against state preemption. The Commission has considered that position and properly rejected it. Accordingly, CRA's Petition For Reconsideration should be denied.

Respectfully submitted,

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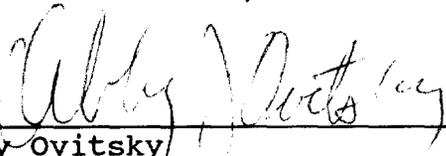
Dated: July 5, 1995

CERTIFICATE OF SERVICE

I, Abby Ovitsky, certify that I have this date caused the foregoing **OPPOSITION OF THE CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA TO THE PETITION FOR RECONSIDERATION SUBMITTED BY THE CELLULAR RESELLERS ASSOCIATION, INC.** to be served by United States mail on the parties on the attached list in Docket PR 94-105.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed on July 5, 1995 at San Francisco, California.



Abby Ovitsky

PR Docket No. 94-105
PR file No. 94-SP3
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