

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

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In the Matter of

Petition of the Connecticut)
Department of Public Utility Control)
To Retain Regulatory Control) PR Docket No. 94-106
of the Rates of Wholesale)
Cellular Service Providers)
in the State of Connecticut)

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**OPPOSITION OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

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SUMMARY

Movants seek a stay of the *Commission's Connecticut Report and Order* denying them the authority to continue rate and entry regulation in the Connecticut marketplace. The Movants fail to satisfy the requirements for a Motion to Stay. Specifically, the Movants have failed to demonstrate that they are likely to prevail on the merits of its pending appellate case, that they will be irreparably harmed if not allowed to continue to regulate CMRS rates and entry in Connecticut, that others will not be harmed, and that the public interest will be served by the grant of a stay.

In addition, the Movants are foreclosed from an opportunity for the Commission to act on their stay because they failed to petition the Commission for reconsideration of the Commission's *Connecticut Report and Order*.

Table of Contents

I. Background.....2

II. The Movants Are Not Likely to Succeed on the Merits..4

III. Denial of the Movant's Motion Will Not Cause
Irreparable Harm to Movants.....6

IV. Denial of the Stay Will Cause Harm to Others.....7

V. The Public Interest Will Not be Served By the
Issuance of a Stay.....8

VI. Movant's Pleading is Procedurally Flawed.....9

VII. Conclusion.....11

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**OPPOSITION OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Cellular Telecommunications Industry Association ("CTIA")¹ hereby submits its opposition to the Motion for Stay ("Motion") filed jointly by the Connecticut Department of Public Utility Control ("DPUC") and the Attorney General of Connecticut (collectively referred to as "Movants") in the above-captioned proceeding. Movants have failed to demonstrate that their request meets the standards for issuance of a stay. Specifically, the Movants have failed to demonstrate that they are likely to prevail on the merits

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.

of its pending appellate case, that they will be irreparably harmed if not allowed to continue to regulate CMRS rates and entry to the marketplace in Connecticut, that others will not be harmed, and that the public interest will be served by the grant of a stay.

I. Background

Pursuant to the Omnibus Budget Reconciliation Act of 1993², the DPUC filed a petition with the Commission requesting authority to continue regulating the rates of

² Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993).

In 1993, Congress amended the Communications Act of 1934 to create a new federal regulatory framework for wireless services that are provided for profit and are interconnected to the public switched network. These services are designated as "commercial mobile services" ("CMRS"). 47 U.S.C. § 332(c)(1).

To provide regulatory certainty to potential bidders for licensees to provide CMRS, Congress granted the FCC authority to forbear all CMRS providers, including cellular, from federal tariff requirements. *Id.* With respect to state regulation, Congress devised rules governing the preemption of state regulatory authority. Congress intended that the Commission ensure that any continued state regulation is consistent with the overall intent of §332, so that, consistent with the public interest, similar services are accorded similar regulatory treatment. *See id.* at § 332(c)(3)(B), citing H.R. CONF. REP. NO. 213, 103 Cong., 1st Sess. 494.

wholesale cellular service providers.³ On May 8, 1995, the Commission denied both the DPUC's and the Attorney General's Petition on the basis that they failed to satisfy the statutory standard Congress established for extending state regulation.⁴

Concomitantly, on July 14, 1995, Movants appealed the Commission's decision to the U.S. Court of Appeals for the Second Circuit⁵ and filed a Motion to Stay before the Commission.⁶ In its Motion, Movants argue that they

³ *In the Matter of the Connecticut Department of Public Utility Control and the Attorney General of Connecticut, Petition of the Connecticut Department of Public Utility Control, filed August 8, 1994, ("Connecticut Petition").*

⁴ *In the Matter of the Petition of the Connecticut Department Public Utility Control To Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, Report and Order, PR Docket No. 94-106, FCC 95-199, May 8, 1995, at 1 ("Connecticut Report and Order").*

⁵ *Connecticut Department of Public Utility Control, and Richard Blumenthal, Attorney General of the State of Connecticut v. Federal Communications Commission, Petition for Review, (2nd Cir. July 13, 1995).*

⁶ *In the Matter of the Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, Motion for Stay of the Connecticut Department of Public Utility Control and the Attorney General of Connecticut ("Motion"), filed July 14, 1995.*

satisfy the standards for granting a stay of the Commission's decision.

In granting a Motion to Stay, the Commission must consider whether: (1) the movant has made a strong showing that he is likely to prevail on the merits, (2) the movant will suffer irreparable harm in the absence of a stay, (3) other parties will be harmed by the issuance of a stay; and (4) the public interest will be served by the issuance of a stay.⁷ CTIA maintains that the Movants fails to meet any of the standards necessary for the Commission to grant a stay. Accordingly, the stay should be denied.

II. The Movants Are Not Likely to Succeed on the Merits.

To obtain a stay, a petitioner must make a strong showing that he is likely to succeed on the merits. This demands that the applicant prove that its cause is considerably more likely to succeed than fail.

The Movants contend that in the *Connecticut Report and Order*, the Commission failed to apply the appropriate standard of review as mandated by Congress and as

⁷ *Virginia Petroleum Jobbers Assoc. v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958).

articulated by the Commission in its *Second CMRS Report and Order*.⁸ This simply is not true.

Pursuant to the statutory test created by Congress for extending state regulatory authority over CMRS rates, the state must prove that "market conditions with respect to such services fail[ed] to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory."⁹

The Commission concluded that the Movant's failed to satisfy the test.¹⁰ Most notably, based upon evidence submitted by the DPUC, the Commission analyzed the conclusions reached by the DPUC in its own investigation of cellular market conditions. The Commission found that the DPUC did not conclude that market conditions failed to adequately protect consumers. The Commission stated that while "the record ... is inconclusive relative to the cellular carriers' rate of return and their financial

⁸ See *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 (1994) ("*Second CMRS Report and Order*").

⁹ See 47 U.S.C. §332(c)(3)(A).

¹⁰ *Connecticut Report and Order* at ¶¶ 67-68.

performance ... it did not find that these data demonstrated unjust or unreasonable, or unjustly or unreasonably discriminatory rates."¹¹

Based on the evidence presented and applying the standard set forth by Congress, the Commission appropriately concluded that market conditions in Connecticut do not fail to protect subscribers adequately from unjust, unreasonable rates and unjustly or unreasonably discriminatory rates, and, therefore, there exists no adequate basis to justify continued state regulation of CMRS rates.¹²

III. Denial of the Movant's Motion Will Not Cause Irreparable Harm to Movants.

The Movants fail to show that denial of its continued state regulation will cause irreparable harm if the stay is not granted. They argue that without an ability to continue to regulate CMRS rates during the pendency of their appeal, consumers will be unprotected and the DPUC will be denied a meaningful appeal. Further, the Movants contend that the regulation of rates must remain in place as the wireless market moves toward a more competitive basis sufficient to

¹¹ *Connecticut Report and Order* at ¶¶ 67-68.

¹² *See id.* at ¶ 68.

adequately protect consumers. They claim that existing wireless carriers have the potential of using their market power to disadvantage new entrants.¹³

This argument is fallacious. The mere lack of meaningful relief does not constitute irreparable harm. In determining whether the harm suffered during the course of litigation is irreparable, the U.S. Supreme Court has ruled that "the possibility that adequate compensatory or other corrective relief will be available at a later date weighs heavily against a claim of irreparable harm."¹⁴ Any harm that would result from the Commission's denial of the Movant's stay could be corrected if the U.S. Court of Appeals overrules the Commission's decision allowing Movants to continue regulating CMRS rates in their state. Accordingly, there exists no irreparable harm to Movants.

IV. Denial of the Stay Will Cause Harm to Others.

The third prong of the test assesses the harm that other interested parties would suffer as a result of a stay.

¹³ Motion at 9.

¹⁴ *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (quoting *Virginia Petroleum Jobbers*, 259 F.2d at 925). See *Hughes Network Systems v. InterDigital Communications Corp.*, 17 F.3d 691, 694 (1994).

The Movants fail to demonstrate that other interested parties will not be affected by the grant of a stay. The CMRS providers in Connecticut will be adversely affected if the stay is granted. The Commission determined that marketplace conditions in Connecticut protect consumers against any potential abuse from carriers.¹⁵ On the effective date of the *Connecticut Report and Order*, May 19, 1995, CMRS carriers in Connecticut were no longer obligated to file tariffs, or other documentation pursuant to the DPUC's exercise of regulatory authority. These carriers also began developing business plans that did not contemplate continued DPUC authority over CMRS services. Having relied upon the Commission's decision, these carriers will undoubtedly suffer harm if the stay is granted during the pendency of the Movant's appeal.

V. The Public Interest Will Not be Served By the Issuance of a Stay.

The Commission must consider Congress' decision to create a uniform federal regulatory scheme for CMRS services. The regulatory parity amendments to the Communications Act were specifically created by Congress to establish a new federal regulatory scheme for CMRS and

¹⁵ See *supra* note 4.

afford similar services like regulatory treatment.¹⁶

Congress envisioned a competitive marketplace for CMRS services and recognized that to ensure the continued competitiveness of the wireless industry, a single federal regulatory framework must exist. At the time of the amendments, eight states, including Connecticut, regulated cellular rates in their respective jurisdictions. If Connecticut is allowed to continue regulating rates, an important government interest will be derailed, thereby, potentially slowing down further wireless competition and the deployment of wireless telecommunications services in Connecticut.

VI. Movant's Pleading is Procedurally Flawed.

In addition to the foregoing substantive arguments to deny the Movant's Motion, there is a grave procedural error which defeats the Movant's request.

The Movants are requesting the Commission to stay a *Report and Order* denying them the authority to continue to regulate CMRS rates in Connecticut. The purpose of a stay is to place the applicant in the position he would have been in had the final action not been taken, *i.e.*, preserve the

¹⁶ See *supra* note 2.

status quo. At the time of the filing of the Movant's Motion on July 14, 1995, the Movants had no authority to continue state regulation of CMRS services, because they failed to seek reconsideration by the date for filing petitions for reconsideration established in the *Connecticut Report and Order*, i.e., June 19, 1995.¹⁷ Its failure to timely file a Petition for Reconsideration forecloses the Movants from attempting to stay the Commission's decision. Given the administrative finality of the proceeding, the request for a stay cannot have the effect of reopening the proceeding and restoring Connecticut's authority to regulate CMRS providers.

Section 1.13 of the Commission's rules¹⁸, provides rules related to the filing of petitions for review and notices of appeals of Commission orders; § 1.429¹⁹ provides rules for the filing of petitions for reconsideration, and requests for a stay. It is clear that the Commission's rules do not provide for a stay given the absence of a Petition for Reconsideration, and the Movants cite no

¹⁷ *Connecticut Report and Order* at ¶ 86.

¹⁸ 47 C.F.R. § 1.13.

¹⁹ *Id.* at § 1.329.

authority to the contrary. Because the Movants failed to petition the Commission for reconsideration of the *Connecticut Report and Order*, Connecticut no longer has a statutory right to seek a stay.

VII. Conclusion

The Movants have failed to prove the factors necessary for a grant of a stay. In addition, the Movants filed a stay in the absence of a Petition for Reconsideration of the *Connecticut Report and Order* and are now procedurally foreclosed from having the Commission consider the arguments raised in its Motion for Stay.

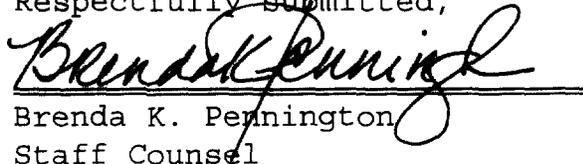
For all of the above reasons, the Commission must deny the Movant's Motion for a Stay.

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July 21, 1995

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