

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

In the Matter of	)	
	)	
Petition of the People of the	)	PR Docket No. 94-105
State of California and the Public	)	
Utilities Commission of the State	)	
of California To Retain Regulatory	)	
Authority over Intrastate Cellular	)	
Service Rates	)	

**ORDER ON RECONSIDERATION**

**Adopted:** August 8, 1995; **Released:** August 8, 1995

By the Commission: Commissioner Chong not participating.

**I. INTRODUCTION**

1. On August 8, 1994, the Public Utilities Commission of the State of California (hereinafter "California" or "CPUC"), on behalf of that State, petitioned us to retain state regulatory authority over the rates for intrastate commercial mobile radio services ("CMRS").<sup>1</sup> In an order released on May 19, 1995, we denied the California Petition because the CPUC had failed to satisfy the statutory standard Congress established for extending state regulatory authority over CMRS rates.<sup>2</sup> On June 19, 1995, the Cellular Resellers Association, Inc. (CRA) ) filed a petition for reconsideration of the *California*

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<sup>1</sup> 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, filed Aug. 8, 1994 (hereinafter "California Petition" or "CPUC Petition").

<sup>2</sup> 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*).

*Order.*<sup>3</sup> On July 5, 1995, seven oppositions were filed against the CRA Reconsideration Petition.<sup>4</sup> On July 17, 1995, CRA filed its reply to oppositions. For the reasons stated below, we deny the petition for reconsideration filed by CRA.

## II. BACKGROUND

### A. The Budget Act.

2. In 1993, Congress amended the Communications Act (“Act”) to revise fundamentally the statutory system of licensing and regulating wireless (*i.e.*, radio) telecommunications services.<sup>5</sup> Among other things, Congress: (1) established new classifications of “commercial” and “private” mobile radio services (“CMRS” and “PMRS,” respectively) in order to enable similar wireless services to be regulated symmetrically in ways that promote marketplace competition;<sup>6</sup> (2) reallocated up to 200 megahertz of spectrum from government to private use so as to expand opportunities for innovative utilization of spectrum by the private sector;<sup>7</sup> and (3) authorized competitive bidding as a means of improving licensing efficiency within the context of the Act’s public interest goals, which include promoting investment in new and innovative wireless telecommunications technologies.<sup>8</sup>

3. Intrastate Rate Regulation. Congress also provided that, as of August 10, 1994, no state or local government shall have authority to regulate “the entry of or the rates

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<sup>3</sup> Petition for Reconsideration of Cellular Resellers Association, Inc., PR Docket No. 94-105 (filed June 19, 1995) (CRA Reconsideration Petition).

<sup>4</sup> Oppositions to the CRA Petition were filed on July 5, 1995 by the Cellular Carriers Association of California (CCAC); Cellular Telecommunications Industry Association (CTIA); GTE Service Corporation (GTE); AirTouch Communications (AirTouch); BellSouth Corporation, BellSouth Cellular Corp., and Bakersfield Cellular Telephone Company (BellSouth); Los Angeles Cellular Telephone (L.A. Cellular); and McCaw Cellular Communications (McCaw).

<sup>5</sup> See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 (“OBRA” or “Budget Act”), *codified in principal part at* 47 U.S.C. § 332.

<sup>6</sup> See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1417-18 (paras. 11-13) (1994) (*CMRS Second Report and Order*), *reconsideration pending*

<sup>7</sup> National Telecommunications and Information Administration Organization Act, § 113(b)(1).

<sup>8</sup> The competitive bidding methodology is intended to promote “the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays ....” 47 U.S.C. § 309(j)(3)(A). Regulations for the conduct of auctions under the statute, when they prescribe area designations and bandwidth assignments, are required by OBRA to promote “investment in and rapid deployment of new technologies and services.” 47 U.S.C. § 309(j)(4)(C)(iii).

charged” for CMRS and PMRS services, although states are permitted to regulate the “other terms and conditions” of CMRS.<sup>9</sup> As an exception to this general rule, Congress also provided that, if a state had “any regulation” concerning the rates for any commercial mobile radio service in effect as of June 1, 1993, it could retain its rate regulation authority by petitioning the Commission no later than August 9, 1994, and demonstrating that either: (1) “market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory;” or (2) “such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.”<sup>10</sup> The Commission was given twelve months to complete its action on any state petition “including any reconsideration.”<sup>11</sup>

4. Other Terms and Conditions. Prior to OBRA, Section 332 prohibited the states from imposing “rate ... regulation” upon certain wireless telecommunications carriers.<sup>12</sup> This prohibition was construed broadly to preclude almost all state regulatory activity.<sup>13</sup> As

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<sup>9</sup> See 47 U.S.C. § 332(c)(3)(A).

<sup>10</sup> See 47 U.S.C. § 332(c)(3)(B).

<sup>11</sup> *Id.*

<sup>12</sup> The statute provided in relevant part that “[n]o state or local government shall have any authority to impose any rate or entry regulation upon any *private* land mobile service . . . .” 47 U.S.C. § 332(c)(3) (emphasis added) (prior to revisions enacted by OBRA).

<sup>13</sup> See, e.g., *Telocator Network of America v. FCC (Millicom)*, 761 F.2d 763 (D.C. Cir. 1985) (upholding Commission’s interpretation of Section 332(c)(1), 47 U.S.C. § 332(c)(1), in determining whether preemption provisions of that section apply to a given communications system). See also, e.g., *American Teltronix (Station WNHM552)*, 3 FCC Rcd 5347 (1988) (“Congress did not intend that a private land mobile licensee who, either intentionally or inadvertently, provides service to ineligible users would thereby subject itself to state regulatory authority, including possible sanctions, for operating as a common carrier.”), *recon. denied*, 5 FCC Rcd 1955, 1956 (1990) (note omitted) (“state entry and rate regulation of a communications service offered by a private land mobile radio system is preempted by statute . . . . [A]ccompanying legislative history reveals that Congress recognized the Commission’s broad discretion to dictate which land mobile systems are to be regulated as private.”). The Commission again stated its view of preemptive authority under that provision when it adopted a Notice of Inquiry respecting Personal Communications Services. Amendment of the Commission’s Rules To Establish New Personal Communications Services, Notice of Inquiry, 5 FCC Rcd 3995, 3998 n.19 (1990):

If these services are considered to be, or classified as, radio common carrier telephone exchange services, then the states, under Section 2(b) of the Act, may impose entry and rate regulations upon intrastate operations. If we classify these services as private land mobile, such state regulation would be expressly preempted under Section

revised by OBRA, Section 332(c)(3) now prohibits states from regulating “the rates charged” for CMRS, but it expressly reserves to them the authority to regulate the “other terms and conditions of commercial mobile services.”

## **B. The California Order.**

### **1. The California Petition.**

5. California requested that it be authorized to retain its existing regulatory authority over the rates of cellular service in California, including the unbundled rate elements of cellular service, “for 18 months, commencing September 1, 1994, after which time the CPUC expects that market forces, triggered by the widespread deployment of alternative competitive providers in California, will ensure just and reasonable rates for cellular service to California consumers.” California asserted that, in the interim, and in the face of the continued potential for anticompetitive behavior, “[o]ur solution as adopted in our August 3 order in I.93-12-007, is to adopt a program of wholesale rate unbundling based upon prices capped at existing rate levels.” California had argued that, without continued authority to regulate rates, it would be unable to forestall cellular carriers’ attempts to defeat increased competition from resellers by increasing their wholesale rates so as to nullify the advantages to resellers effected by the unbundling of wholesale rates.<sup>14</sup>

### **2. Preemption Decision.**

6. Preemption of State Rate Regulation. In the *California Order*, we found that for a state to prevail on the merits, Section 332(c)(3)(B) requires it to demonstrate that market conditions fail to protect subscribers adequately from unjust and unreasonable rates, or unjustly or unreasonably discriminatory rates. Based on a preponderance of the evidence, we concluded that California’s demonstration did not satisfy the statutory standard, when viewed either as a whole, or through examination of each element of that case. Therefore, we denied the CPUC’s request to retain cellular rate regulation authority through March 1, 1996.<sup>15</sup>

7. The *California Order* identified five principal bases for decision. First, un rebutted evidence shows that cellular rates in California are declining. Second, the CPUC Petition did not address the direct and fundamental changes to the duopoly cellular market

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332(c)(3).

<sup>14</sup> *California Order*, at para. 49. The *California Order* noted that CRA endorsed the CPUC’s arguments, agreeing that they are the only present source of competition in the California cellular industry, that their market shares have dropped “precipitously,” and that, absent continuing regulatory protection, they will be “squeezed out” of the cellular market. CRA Reply at 5-7. See *California Order* at para. 49 n.109.

<sup>15</sup> *California Order*, at paras. 96-141.

structure that are being realized by the advent of personal communications service (PCS) and other services, such as wide area specialized mobile radio (SMR). Third, the CPUC presented no evidence of systematically collusive or other anticompetitive practices concerning the provision of any CMRS. Fourth, the CPUC did not present evidence showing widespread consumer dissatisfaction with CMRS providers in that state, or discuss what specific rate regulations are needed to address whatever level of dissatisfaction may exist. Fifth, the CPUC failed to advance any persuasive analysis regarding the critical issue of investment by cellular licensees (or by any other CMRS providers). We found that an important indicator of market failure would be evidence that cellular firms are withholding investment in facilities as a means of restricting output and thus boosting price, and that no such demonstration existed on the record presented on the CPUC Petition.<sup>16</sup>

8. Another identified weakness of the CPUC's Petition was its view that any evidence of market imperfection is proof of a need for continued rate regulation, while all countervailing evidence is attributed to its regulatory oversight. The *California Order* found that, even assuming such an argument is reasonable in theory, the CPUC failed to establish its factual predicate. The *California Order* found that the CPUC did 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.<sup>17</sup> On the record presented, the CPUC's implicit argument that, absent continuation of its rate regulation authority, even for a limited period of time, cellular rates will quickly fall outside the zone of reasonableness was found to be unpersuasive. Finally, after citing a long list of evidentiary deficiencies in the CPUC petition, the *California Order* concluded that "the CPUC case, when viewed as a whole [is] unpersuasive."<sup>18</sup>

9. State Jurisdiction over Other Terms and Conditions. The *California Order* found that establishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions would require a more fully developed record than was presented by the California Petition and related comments. The *California Order* further found that although there is no definition of the term "the rates charged" in the statute or its legislative history, there is legislative history regarding the "other terms and

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<sup>16</sup> *California Order*, at para. 97.

<sup>17</sup> It is our understanding that the percentage difference between wholesale and retail rates in carriers' tariffs (*i.e.*, the so-called "reseller margin") was structured initially by carriers themselves, not the CPUC. There has never been a Federal requirement that carriers offer separate wholesale and retail rates. See *In the Matter of Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies*, 6 FCC Rcd 1719, 1726 (1991).

<sup>18</sup> *California Order*, at paras. 96-147.

conditions” language.<sup>19</sup> Although the legislative history largely speaks for itself, we found it possible to extrapolate certain findings. We therefore chose to comment in a preliminary manner on what regulatory activities the CPUC is entitled to continue, despite denial of California’s Petition, in the interest of minimizing future proceedings directed at this issue.<sup>20</sup>

10. First, the *California Order* found that although the CPUC may not prescribe, set, or fix rates in the future because it has lost authority to regulate “the rates charged” for CMRS, it does not follow that its complaint authority under state law is entirely circumscribed. Complaint proceedings may concern carrier practices, separate and apart from their rates.<sup>21</sup> In consequence, it is conceivable that matters might arise under complaint procedures that relate to “customer billing information and practices and billing disputes and other consumer matters.” The *California Order* viewed the statutory “other terms and conditions” language as sufficiently flexible to permit the CPUC to continue to conduct proceedings on complaints concerning such matters, to the extent that state law provides for such proceedings.<sup>22</sup>

11. Second, the *California Order* concluded that several other aspects of California’s existing regulatory system may fall outside the statutory prohibition on rate regulation. The *California Order* stated that the CPUC generally retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS providers in that state. To the extent any interested party seeks reconsideration on this issue, the *California Order* required that it specify with particularity the provisions of California’s

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<sup>19</sup> The House of Representatives Committee on Energy and Commerce, reporting on the House bill that was incorporated into the amended Section 332, noted that even where state rate regulation is preempted, states nonetheless may regulate other terms and conditions of commercial mobile radio services. The Committee stated:

By “terms and conditions,” the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state’s lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under “terms and conditions.”

H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261. See *California Order*, at paras. 142-143.

<sup>20</sup> *California Order*, at paras. 142-144.

<sup>21</sup> *E.g.*, Section 208(a) of the Communications Act authorizes complaints by any person “complaining of *anything done or omitted to be done* by any common carrier subject to this Act, in contravention of the provisions thereof.” 47 U.S.C. § 208(a) (emphasis added).

<sup>22</sup> *California Order*, at para. 145.

existing rate regulation practice at issue.<sup>23</sup>

12. Jurisdiction over Intrastate Rate Complaints. Finally, the *California Order* stated that it was not necessary at this time to address the contention that the Commission has jurisdiction over intrastate rates for CMRS, following termination of the CPUC's rate regulation authority, which we could employ to protect resellers. Rather, the *California Order* observed that the question whether we have jurisdiction over CMRS intrastate rates has been raised in petitions for reconsideration of the *CMRS Second Report and Order* and would be addressed some time in the future in the context of that proceeding. The *California Order* directed that parties seeking reconsideration of the decision to address the issue of Federal intrastate rate authority elsewhere must make a showing that resolution of the issue is necessary to resolve a material issue raised in this record. Furthermore, that showing must consist of evidence and argument establishing such a nexus and supporting the substantive position argued, *i.e.*, that we have or have not inherited intrastate rate regulation over CMRS.<sup>24</sup>

### III. PLEADINGS; DISCUSSION

#### A. CRA Petition for Reconsideration.

13. CRA requests that the CPUC be allowed to retain jurisdiction to dispose of complaints by cellular resellers as well as other members of the public concerning rates for intrastate service which are unreasonably discriminatory. In support of its request, CRA alleges that the Commission erroneously placed substantial reliance on two factors: (1) the impact on the duopoly cellular market structure being realized by new mobile services; and (2) the absence of evidence showing widespread consumer dissatisfaction with CMRS providers in that state, or carrier misconduct. According to CRA, these conclusions cannot "be squared with" the facts in the record and would needlessly expose cellular resellers and other cellular subscribers to the risk of unreasonable discrimination by cellular carriers.<sup>25</sup>

14. Impact of impending entry by rivals. CRA argues that California did take into account the advent of new mobile services and technologies and should not be criticized for failing to give proper weight to the impact of, for example, PCS and wide-area SMR services since these new technologies are unlikely to be in place prior to March 1996.<sup>26</sup>

15. Absence of evidence of customer dissatisfaction or carrier misconduct.

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<sup>23</sup> *Id.*, at para. 146.

<sup>24</sup> *Id.*, at 47.

<sup>25</sup> CRA Reconsideration Petition at 2; *quoting California Order*, at para. 97.

<sup>26</sup> CRA Reconsideration Petition at 2-3.

CRA asserts that the Commission's reliance on the absence of consumer dissatisfaction "not only misstates the record but is myopic as well." CRA argues that it is wrong for the Commission to expect a state that has long regulated intrastate rates and services to be able to produce evidence of widespread anticompetitive behavior and consumer dissatisfaction. CRA claims that to demand more in the way of a showing of such problems by California is, in effect, to require the CPUC to demonstrate that the cellular carriers have totally ignored California's State law and CPUC regulation. Despite the CPUC's vigorous enforcement of its regulatory program, CRA states that in its reply comments, it was able to provide numerous examples of unreasonable discrimination on the part of California cellular carriers against cellular reseller subscribers in the provision of intrastate rates and services. CRA maintains that its evidence showed the CPUC to be instrumental in resolving particular reseller complaint cases and in ensuring that instances of unreasonable discrimination did not become more pervasive. CRA avers that the availability of the CPUC as a forum was often sufficient by itself to chill the prospect of any anticompetitive behavior by the cellular carriers. CRA complains that the *California Order* paid insufficient attention to its evidence.<sup>27</sup>

16. Jurisdiction Over Intrastate Rate Complaints. Finally, CRA complains that the Commission's decision to "strip the CPUC of any authority to dispose of complaints involving discriminatory conduct with respect to intrastate service" will leave resellers without a forum for complaints. CRA acknowledges that the *California Order* states that the Commission will address the question of our jurisdiction over intrastate rates in the context of the pending reconsideration of the *CMRS Second Report and Order*, but argues that it is unclear when the Commission will resolve that issue or what protection the Commission will provide for resellers as well as other customers of cellular carriers in California and other states. CRA argues that the Commission should not allow a critical "void" in regulatory authority to persist for any period of time. Accordingly, CRA requests that the Commission either reconsider our decision and authorize the CPUC to retain jurisdiction over unreasonably discriminatory activities involving intrastate service, or, in the alternative, assume jurisdiction over complaints involving such matters.<sup>28</sup>

## **B. Oppositions**

17. The opponents defend the *California Order's* findings and conclusions and contest the CRA Reconsideration Petition on a number of substantive and procedural grounds. In general, they maintain that contrary to CRA's claim, the Commission's findings with respect to the impact of new mobile services and the lack of evidence of widespread anticompetitive practices and consumer dissatisfaction with cellular service are entirely consistent with the record evidence and demonstrate that market conditions in California are

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<sup>27</sup> *Id.* at 4-5.

<sup>28</sup> *Id.* at 5-7.

adequate to protect subscribers from unjust and unreasonable rates.<sup>29</sup>

18. Procedural Defects. CCAC states that CRA's petition should be rejected for failure to comply with Commission regulations and because the denial of the CPUC petition is fully supported by numerous arguments which CRA chose not to address. CCAC argues that 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 Commission and to "state with particularity" the changes which should be made to such findings and conclusions. CCAC notes that CRA's petition does not state how the *California Order* should be changed, rather, CRA merely requests that the Commission reconsider its decision, or, in the alternative, assume jurisdiction over complaints involving claims of unreasonable discrimination. CCAC argues that this rudimentary omission of particulars by CRA is not in compliance with the Commission's rules of procedure. Thus, maintains CCAC, Commission practice requires that CRA's petition be "dismissed as procedurally defective."<sup>30</sup> CTIA argues in general that the *California Order* already has addressed and rejected the concerns prompting the CRA petition seeking to maintain CPUC's existing jurisdiction, and that CRA offers no new evidence or argument for the Commission to reconsider. CTIA states that it is Commission policy that "bare disagreement [with the Commission], absent new facts and arguments properly submitted, is insufficient grounds for granting reconsideration."<sup>31</sup>

19. Moreover, CCAC and L.A. Cellular contend that CRA has raised issues which only address two of the five grounds for the Commission's decision. They contend that, not only has CRA failed to establish error on the part of the Commission as to the two grounds it chooses to address, CRA 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 *California Order*. L.A. Cellular argues that CRA completely ignores the Commission's finding with regard to the first and fifth grounds (decline in California cellular rates; lack of evidence regarding withholding of cellular investment) of the *California Order*. CCAC further argues that even if CRA had demonstrated merit in its two issues, which, CCAC maintains CRA has not, the Commission's disposition of the California Petition should nonetheless stand. CCAC argues our conclusions must be sustained if supported by substantial

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<sup>29</sup> See, e.g., AirTouch Opposition at 5; BellSouth Opposition at 3-4; CCAC Opposition at 3-11; McCaw Opposition at 3-4.

<sup>30</sup> CCAC Opposition at 13, citing Annual 1989 Access Tariff Filings, 7 FCC Rcd 3024 (1992) at para. 6.

<sup>31</sup> CTIA Opposition at 4, citing Creation of Additional Private Radio Service, Memorandum Opinion and Order, Gen. Docket No. 83-26, 1 FCC Rcd 5, 6 (1986) (citing WWIZ, 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 Gulfoast Broadcasters, 37 FCC 833 (1964). See *California Order* at paras. 96-147.

evidence even if there is also substantial evidence to support contrary conclusions.<sup>32</sup>

20. Most opponents also challenge CRA's standing to file a petition for reconsideration of the denial of California's petition under Section 332(c)(3)(B).<sup>33</sup> McCaw and AirTouch, for example, argue that both Congress and the Commission have made it clear that only states or their authorized representative could petition for authority to regulate cellular service rates, and, in this case, the CPUC expressly decided not to challenge the *California Order*.<sup>34</sup> AirTouch states that Congress placed the burden solely on the petitioning states to demonstrate that "market conditions with respect to [CMRS] fail to protect subscribers adequately from unjust and unreasonable rates" under 47 U.S.C. § 332(c)(3)(B). Similarly, under the Commission's Rules, only the "state agency responsible for the regulation of telecommunication services provided in the state" has the authority to file a petition. The Commission, according to AirTouch, determined that interested parties were only entitled to file comments in support of, or opposition to, a state's petition, but there is no provision in the Commission's rules allowing an interested party to advocate continued rate regulation in the absence of a request by the responsible state agency.<sup>35</sup> Finally, AirTouch observes that

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<sup>32</sup> CCAC Opposition at 14, *citing Lorain Journal Co. v. FCC*, 351 F.2d at 828; L.A. Cellular Opposition at 4-5.

<sup>33</sup> AirTouch Opposition at 3-4; BellSouth Opposition at 2-4 (California's determination not to further pursue regulatory authority is conclusive; CRA's rights are wholly derivative of the CPUC); CTIA Opposition at 4 n.11 (CRA strains the concept of standing; Section 332 procedures suggest a congressional intent that states, and not third parties, request reconsideration of any denials of state petitions); McCaw Opposition at 1-2. *See also* GTE Opposition at 2 (CRA should not be allowed to foist its will upon the CPUC, which has elected not to challenge denial of the California Petition).

<sup>34</sup> McCaw Opposition at 1-2 n.3, *citing* CPUC News Release, CPUC-051 (June 8, 1995).

<sup>35</sup> AirTouch Opposition at 3-4, *citing CMRS Second Report and Order*, 9 FCC Rcd at 1522. In contrast, AirTouch contends, the Commission specified that an interested party could petition for discontinuance of state authority for rate regulation. *Id.* McCaw argues that in light of this, when the CPUC allowed the date for a petition for reconsideration to pass without submitting a pleading, the case was closed, and therefore, CRA's petition should be dismissed as moot. CRA, according to McCaw, has no authority to seek for the CPUC the regulatory authority that the CPUC itself has decided to forgo. McCaw also argues that Congress, in limiting to states the right to seek rate regulatory authority in the first instance, effectively limited the class of parties who could seek reconsideration of an order denying such a request. McCaw contends that 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. McCaw notes that if CRA is permitted to maintain its petition and to prevail on reconsideration, the Commission would find itself in the dubious position of ordering a state which has chosen to relinquish regulation of intrastate rates to regulate anyway. McCaw concludes that 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. McCaw Opposition at 1-2.

the California Petition only sought authority to continue to regulate cellular service rates until March 1, 1996; it did not seek indefinite authority to mediate rate disputes between resellers and carriers, as requested by CRA.<sup>36</sup>

21. Impact of impending entry by rivals. CTIA maintains that CRA's disagreement is with the Commission's conclusion regarding the imminent entry of new services, not the process by which the Commission reached this conclusion.<sup>37</sup> AirTouch contends that CRA does not, and indeed cannot, point to record evidence inconsistent with the Commission's findings regarding the competitive stimulus offered by PCS and SMR providers. AirTouch argues that CRA does not challenge the Commission's reliance on the accepted antitrust principle that a firm may properly be included in competitive analysis if it could enter the market within two years, and that CRA concedes that PCS entry is a certainty and that it will occur within two years.<sup>38</sup> AirTouch also notes that the record evidence supports the Commission's finding that cellular carriers, faced with the impending entry of PCS, are lowering prices and adopting new technologies. Under such circumstances, AirTouch argues, the Commission properly relied on the competitive impetus provided by new wireless service providers in concluding that market conditions are adequate to protect subscribers.<sup>39</sup>

22. L.A. Cellular states that the Cellular Reseller's argument with respect to the impact of new services on duopoly market structure is limited to a statement that since PCS and SMR services will not be available to substantial portions of the population until after March 1, 1996, they should not play a role in determining whether market forces are a sufficient protection against carrier misconduct. L.A. Cellular argues that the exact date when PCS will be marketable is irrelevant to these proceedings because, as the Commission properly found in the *California Order*, the advent of new technologies has already influenced the conduct of California cellular carriers. L.A. Cellular maintains that impending entry by potential rivals is an essential part of competitive analysis, and that the effects of impending PCS and SMR entry were correctly applied in this case.<sup>40</sup> CCAC observes that the *California Order* correctly found that the threat of imminent PCS deployment clearly is clearly having a direct impact on current cellular investment decisions. CCAC argues that the Commission correctly viewed the evidence in the record of the carriers' continuing heavy investment in expanding their cellular networks as decisionally significant evidence that cellular carriers are

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<sup>36</sup> AirTouch Opposition at 2-3.

<sup>37</sup> CTIA Opposition at 5-6.

<sup>38</sup> See *California Order* at paras. 32-33.

<sup>39</sup> AirTouch Opposition at 7.

<sup>40</sup> L.A. Cellular Opposition at 4-5, citing *California Order*, paras. 32-33 & n.88. Accord GTE Opposition at 5-6; McCaw Opposition at 3-4; CCAC Opposition at 3-6.

pursuing a strategy of positioning themselves to be vigorous competitors of PCS providers for the foreseeable future, and that California's failure to adequately account for this was a significant shortcoming of its petition.<sup>41</sup>

23. Absence of evidence of customer dissatisfaction or carrier misconduct.

Several opponents point out that CRA's argument that a state proposing to retain regulatory authority cannot reasonably be expected to provide evidence of anti-competitive behavior or consumer dissatisfaction is essentially an argument against the statutory standard established by Congress in Section 332(c)(3)(B).<sup>42</sup> L.A. Cellular, for example, states that in essence, CRA takes issue with the congressionally defined standard of review for a petition under OBRA. Section 332(c)(3)(B) requires a showing that "market conditions . . . fail to protect subscribers adequately" from unjust, unreasonable, or discriminatory rates.<sup>43</sup> Congress made no exception for states with existing regulatory schemes; indeed, L.A. Cellular contends, the Section 332 standard of review applies only to such states. Relying on that statutory standard, L.A. Cellular continues, the Commission properly determined that petitions under Section 332(c)(3)(B) must be based on demonstrable evidence of anti-competitive activity, or unjust and unreasonable, or unreasonably discriminatory, rates. L.A. Cellular argues that neither California nor CRA failed to carry their burden under OBRA to show widespread dissatisfaction with rates or service quality, and that under these circumstances, the problem is not with the standard of review imposed by Congress, it is with the failings of California's showing.<sup>44</sup>

24. CTIA observes that CRA's argument for a relaxed standard of proof in cases where a state has been regulating CMRS providers presupposes that the Commission can simply ignore the statutory mandate. CTIA argues that contrary to CRA's claims, the Commission was fully justified, and required, to hold CPUC to the letter of the statute which specifically conditions the continued existence of current CMRS regulation upon a showing that market forces fail to adequately protect subscribers from anti-competitive behavior.<sup>45</sup> CTIA further claims that even apart from the statutory language, an additional reason exists to reject CRA's petition: "it is a morass of contradictions." CTIA notes that CRA makes the

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<sup>41</sup> CCAC Opposition at 5-6.

<sup>42</sup> See, e.g., L.A. Cellular Opposition at 6-8; CTIA Opposition at 6-8; AirTouch Opposition at 8-10.

<sup>43</sup> 47 U.S.C. § 332 (c)(3)(B).

<sup>44</sup> CCAC Opposition at 6-7.

<sup>45</sup> CTIA Opposition at 6-7, citing 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).

contradictory claim that the showing necessary to justify continued regulation should be low because regulation will have suppressed bad acts, whereas immediately thereafter, CRA claims that notwithstanding state regulation, there are numerous examples of discrimination. CTIA argues that despite these allegation, CRA makes no effort to supplement the record with factual evidence of discrimination.<sup>46</sup> McCaw adds that 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."<sup>47</sup>

25. Similarly, CCAC argues that the Commission was entirely correct in concluding that the failure of the CPUC to identify consumer dissatisfaction or to establish that its intended regime or regulation would address the root causes of such dissatisfaction is a valid ground for denying the California petition. CCAC contends that the trend of declining cellular rates in California noted in the *California Order* at paragraphs 115 and 122 is on its face inconsistent with, or at the very least unsupportive of, the existence of unreasonable and unjust rates. CCAC submits that under such circumstances, additional evidence -- and in particular evidence of consumer dissatisfaction -- is required to establish that unreasonable and discriminatory rates are being charged. CCAC notes that neither the CPUC, nor CRA, who complained only of dissatisfaction by a competitor of cellular carriers, provided the requisite evidence. In the absence of substantial evidence that customers, as opposed to competitors, are dissatisfied with cellular service or rates, the CPUC, argues CCAC, was clearly under an obligation to explain in concrete terms what problems existed, and what its regulations would do to resolve the problem. CCAC maintains that the CPUC clearly failed to meet its burden of proof in this regard, and the Commission's decision properly reflected that failure as one of the grounds for denial.<sup>48</sup>

26. GTE argues that CRA's examples of reseller discrimination do not demonstrate market failure. GTE states that a review of CRA's discussion of these decisions reveals that the decisions do not represent state regulatory enforcement against unreasonably discriminatory carrier actions, as claimed by CRA, but rather constitute a laundry list of old generalized CPUC proceedings. GTE argues that contrary to CRA's implication, these cases were not decisionally significant, as they fall far short of demonstrating market failure in California. GTE notes that although CRA argues continued CPUC involvement in rate-related complaints is essential, the CPUC's election not to file a Petition for Reconsideration of the

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<sup>46</sup> CTIA Opposition at 7-8. *Accord* McCaw Opposition at 4 (under CRA's reasoning, states with existing regulatory regimes would not have to make any showing whatsoever, which turns congressional presumption on its head).

<sup>47</sup> McCaw Opposition at 4, *citing California Order*. at para. 119.

<sup>48</sup> CCAC Opposition at 7-11.

*California Order* suggests otherwise.<sup>49</sup>

27. Jurisdiction Over Intrastate Rate Complaints. Several opponents challenge CRA's request that either the CPUC be permitted to continue its complaint authority over discriminatory intrastate rates and practices, or the FCC should offer itself as a forum for resolution of such disputes.<sup>50</sup> McCaw argues that CRA's request 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)(B) preempts the CPUC from hearing rate complaints. McCaw contends that 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. McCaw further argues this is particularly true of adjudication of complaints regarding rate discrimination because such proceedings are the essence of an agency's regulation of rates.<sup>51</sup>

28. BellSouth argues that CRA's request for continued CPUC complaint jurisdiction is nothing more than a back door attempt to involve the state in rate regulation without meeting the burdens contained in the statute, rather than offering a basis for reconsideration of the *California Order* denying the CPUC continued rate authority. Moreover, BellSouth notes, as to the issue of FCC jurisdiction, paragraph 147 of the *California Order* stated that this issue will be addressed "in the context of [the petitions for reconsideration of the *CMRS Second Report and Order*] proceeding." Further, in that same paragraph, the Commission specifically stated that it would address the issue on reconsideration in this proceeding "only upon a showing by petitioners that resolution of the issue is necessary to resolve a material issue raised in this record. That showing must consist of evidence and argument establishing such a nexus and supporting the substantive position argued, *i.e.*, that we have or have not inherited intrastate rate regulation over CMRS." BellSouth argues that CRA's petition clearly fails to meet this standard.<sup>52</sup>

29. AirTouch, CCAC and McCaw also claim that CRA has failed to produce anything more than allegations that denial of the California Petition unnecessarily exposes cellular resellers and other subscribers to the risk of unreasonable discrimination by cellular carriers.<sup>53</sup> McCaw submits that 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 and

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<sup>49</sup> GTE Opposition at 7-8.

<sup>50</sup> See AirTouch Opposition at 10-13; BellSouth Opposition at 7-8; CCAC Opposition at 12-13; L.A. Cellular Opposition at 8-9; McCaw Opposition at 5-7.

<sup>51</sup> McCaw Opposition at 5-6. See also *California Order* at para. 145.

<sup>52</sup> BellSouth Opposition at 7-8.

<sup>53</sup> AirTouch Opposition at 11; CCAC Opposition at 12; McCaw Opposition at 6-7.

therefore, there is no imminent reason for the Commission to determine if it has the authority to do so. AirTouch adds that because the issue of resolution of disputes involving intrastate rates potentially affects consumers in all states, the Commission correctly decided to address the question in the CMRS rulemaking docket, based on a more fully developed record than has been created in this adjudication proceeding.<sup>54</sup>

30. AirTouch, CCAC and L.A. Cellular take issue with CRA's contention that absent action on the part of the Commission in this proceeding, there will be a "critical void in regulatory authority" when preemption for California takes effect.<sup>55</sup> AirTouch and CCAC argue that no such regulatory gap has been created because the FCC has jurisdiction over interstate and intrastate rate matters under OBRA. AirTouch elaborates by observing that the Budget Act amended section 2(b) of the Communications Act to specifically exempt the Commission's authority provided in section 332(c) from the general prohibition on federal jurisdiction over intrastate communications. Section 332(c) provides that CMRS is to be treated as common carriage service, subject to Title II regulation, except to the extent that the Commission decides to forbear from applying sections other than 201, 202, and 208. According to AirTouch, because there is nothing in section 332(c) that limits this authority only to interstate service, "the Commission now has jurisdiction over intrastate CMRS rates." Continuing, AirTouch argues that the absence in section 332(c) to a reference to intrastate service is irrelevant.<sup>56</sup> Therefore, AirTouch concludes, in the absence of CPUC supervision carriers will not, as CRA contends, be free to unreasonably discriminate against the resellers or any other customer, because they will be still be subject to the FCC's Title II authority. Additionally, the CPUC will have continuing jurisdiction to conduct complaint proceedings on matters involving only terms and conditions of service to the extent state law provides for such proceedings. Thus, AirTouch concludes, there can be no "regulatory vacuum" as claimed by CRA.

31. L.A. Cellular contends that pending resolution of the wider jurisdictional issues raised in the CMRS proceeding, the Commission currently has jurisdiction to entertain reseller complaints about discriminatory rates. L.A. Cellular explains that the Commission's

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<sup>54</sup> AirTouch Opposition at 11; McCaw Opposition at 6-7

<sup>55</sup> AirTouch Opposition at 11-12; CCAC Opposition at 12; L.A. Cellular Opposition at 6-9.

<sup>56</sup> AirTouch Opposition at 11-13. AirTouch maintains that other sections similarly exempted in section 2(b) from the prohibition on the FCC's jurisdiction over intrastate service also do not specifically refer to intrastate rates. Yet, it argues, the FCC has interpreted those sections as giving it authority over intrastate service, *citing* In the Matter of Regulations Concerning Indecent Communications by Telephone, 5 FCC Rcd 1011, 1012 (1990) (observing that section 223(b) extends to "intrastate as well as interstate communications," even though that section does not specifically refer to intrastate communications); In the Matter of the Telephone Consumer Protection Act of 1991, 7 FCC Rcd 2736, 2740 (1992) (observing that section 227 gives the FCC jurisdiction over intrastate telephone solicitation despite the lack of any specific reference to intrastate communications). *Id.*

continuing policy, which has remained unchanged from well before enactment of the Budget Act to the present, has been to prohibit any form of unreasonable discrimination against resellers. Further, it argues, Commission declarations on this subject have made no distinction between interstate and intrastate services, and these should provide the resellers with the assurances they seek.<sup>57</sup>

### C. Reply

32. In its reply, CRA argues that the opponents' argument that it lacks standing to petition for reconsideration of the *California Order* is wrong. CRA cites Section 405(a) of the Act, which states, in pertinent part, that:

After an order, decision, report, or action has been made or taken in any proceeding by the Commission . . . any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration. . . .<sup>58</sup>

CRA claims that Section 1.106(b) of the Commission's implementing rules mirrors the statutory language: "any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition for reconsideration of the action taken." 47 C.F.R. § 1.106(b). CRA argues that it is a party to the instant proceeding and that it is clearly aggrieved by the Commission's decision, and that none of the opponents claims otherwise.<sup>59</sup>

33. Rather, CRA notes, the opponents argue that the reconsideration rights provided by Section 405(a) of the Act and Section 1.106 of the Commission's rules were limited by the Budget Act's revisions to Section 332, under which Congress intended to limit reconsideration petitions to States, as evidenced by its limiting the right to file initial petitions under Section 332(c)(3)(B) to the States. CRA argues that although Section 332(c)(3)(B) authorizes only States to file initial petitions, nothing in that section amends Section 405(a) or Section 1.106 of the Commission's rules. CRA notes that the new language of Section 332(c)(3)(B) refers to "any reconsideration" (emphasis added), not just to reconsideration sought by States. Further, it maintains that the failure to limit reconsideration rights granted by another section of the same statute is conclusive proof that Congress did not

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<sup>57</sup> L.A. Cellular Opposition at 8-9, *citing* Petitions for Rule Making Concerning Proposed Changes to the Commission's Resale Policies, 6 FCC Rcd 1719, 1725-26 (1991) (cellular carriers must permit resellers to take service on the same terms and conditions as any other cellular customer would take service); In the Matter of Bundling of Cellular Customer Premises Equipment and Cellular Service, Report and Order, CC Docket 91-34 (1992) at n.48

<sup>58</sup> CRA Reply at 4, *citing* 47 U.S.C. § 405(a).

<sup>59</sup> *Id.*

intend to limit reconsideration rights.<sup>60</sup>

34. CRA also maintains that it has satisfied the standard for reconsideration of the decision to defer resolution of the issue of Commission jurisdiction over intrastate rate discrimination claims contained in paragraph 147 of the *California Order*. CRA argues that it demonstrated that anticipated competition from PCS and wide-area SMR will do nothing to deter cellular carriers from engaging in unreasonable rate discrimination now and by no means prior to March 1, 1996, the date by which the CPUC estimated there could be meaningful competition in California. CRA insists that the impact, to the extent it exists, of these new services, is confined to reduced rates and accelerated construction schedules. CRA argues that such impact has nothing to do with the ability of cellular carriers to engage in unreasonable price discrimination now. According to CRA, cellular carriers have both the ability and the incentive -- particularly in light of impending competition -- to eliminate their only current and meaningful form of competition -- cellular resellers -- through price-based discrimination. CRA warns that if the Commission avoids resolving the question of who has jurisdiction over intrastate rate discrimination complaints, cellular resellers have no effective recourse.<sup>61</sup>

35. Finally, CRA reiterates its belief that a "regulatory void" exists and points to the differing approaches to the issue taken by the opponents as proof that the issue before the Commission is ripe for resolution at this time. CRA contends that if carriers such as L.A. Cellular and AirTouch are correct, the Commission should simply confirm that it has jurisdiction and will expeditiously dispose of complaints concerning intrastate rate discrimination. On the other hand, CRA offers, if carriers like CCAC are correct, then the Commission should just eliminate the ambiguity. CRA argues that the absence of clarification will only protect the cellular carriers. Further, CRA states that if the resolution is against this Commission's exercise of jurisdiction, the complainant will have lost valuable time and perhaps the opportunity for effective relief in another forum.<sup>62</sup>

#### **D. Discussion**

36. Summary. We have carefully reviewed CRA's reconsideration petition

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<sup>60</sup> CRA Reply at 5, citing Rusello v. United States, 464 U.S. 16, 23 (1983) (Congress is presumed to act "purposely and intentionally" when it fails to limit the application of language in one statutory provision to another provision using the same language). CRA also argues that there is no merit in the opponents' contention that the relief CRA seeks is moot because California chose not to seek reconsideration because CRA is a party in this proceeding and the Commission is in a position to provide the relief it seeks. CRA also argues that McCaw's reliance on Radiofone, Inc. v. FCC, 759 F.2d 936 (D.C. Cir. 1985) is totally misplaced. *Id.* at 5-6 n.3.

<sup>61</sup> CRA Reply at 6-7.

<sup>62</sup> CRA Reply at 8.

and related pleadings, as well as the record of this proceeding as a whole, and conclude we must deny that CRA's request that we reconsider our decision denying the California Petition to retain regulatory authority over intrastate cellular service rates. CRA has entirely failed to demonstrate that the *California Order's* findings with respect to the impact of new mobile services and the lack of evidence of widespread anticompetitive practices and consumer dissatisfaction with cellular service were erroneous or inconsistent with the record evidence. CRA has also failed to demonstrate error in the *California Order's* findings that market conditions in California are adequate to protect subscribers from unjust and unreasonable rates. Finally, CRA has failed to produce the specific showing required by the *California Order* itself for petitioners seeking reconsideration of the decision to address the issue of this Commission's jurisdiction over intrastate CMRS rates in the context of the further proceedings in GN Docket 93-252.<sup>63</sup>

37. Procedural Defects. As a threshold matter, we agree with opponents that 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 *California Order* should be changed, it merely requests that we reconsider our decision, or, in the alternative, assume jurisdiction over complaints involving claims of unreasonable discrimination. In the *California Order* we addressed and rejected the concerns prompting the CRA petition seeking to maintain CPUC's existing jurisdiction, and CRA has offered no new evidence or argument for the Commission to reconsider.<sup>64</sup> It is well settled Commission policy that "bare disagreement [with the Commission], absent new facts and arguments properly submitted, is insufficient grounds for granting reconsideration."<sup>65</sup> In addition, we agree with opponents that CRA's reconsideration petition took issue with only two out of the five principal grounds for decision in the *California Order*. Even assuming *arguendo*, that we were to find merit in CRA's arguments regarding the grounds it challenges, we conclude that the remaining three principal grounds are more than sufficient to support the *California Order's* conclusion that California had failed to meet its statutory burden of demonstrating that market conditions in California fail to protect subscribers adequately from

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<sup>63</sup> In view of our decision to deny CRA's reconsideration petition on the merits, we choose not address the opponents' contention that CRA lacks standing to seek reconsideration of the denial of the California Petition.

<sup>64</sup> See *California Order* at paras. 96-147.

<sup>65</sup> See Creation of Additional Private Radio Service, Memorandum Opinion and Order, Gen. Docket 83-26, 1 FCC Rcd 5, 6 (1986) (citing *WWIZ*, 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*, 37 FCC 833 (1964)).

unjust and unreasonable rates or unjustly or unreasonably discriminatory rates.<sup>66</sup>

38. Impact of impending entry by rivals. We find that CRA's reconsideration petition amounts to little more than disagreement with the *California Order's* conclusion regarding the imminent entry of new services, not the process by which we reached this conclusion.<sup>67</sup> We agree with opponents that CRA does not point to record evidence inconsistent with the Commission's findings regarding the competitive stimulus offered by PCS and SMR providers. Nor does CRA challenge our reliance on the accepted antitrust principle that a firm may properly be included in competitive analysis if it could enter the market within two years, and that CRA concedes that PCS entry is a certainty and that it will occur within two years.<sup>68</sup> In addition, as opponents noted, the record evidence supported the finding that cellular carriers, faced with the impending entry of PCS, are lowering prices and adopting new technologies.<sup>69</sup> Nor does CRA's reply to oppositions, which merely reiterates CRA's fundamental disagreement with the *California Order's* conclusions regard to the impact of new services, cure the defects of its petition on this issue. Under such circumstances, we conclude that CRA has failed to demonstrate that the *California Order* erred in its reliance on the competitive impetus provided by new wireless service providers in concluding that market conditions are adequate to protect subscribers.

39. Absence of evidence of customer dissatisfaction or carrier misconduct. For two reasons we conclude that CRA's argument that a state seeking to retain rate regulation authority cannot be expected to submit evidence of anti-competitive behavior or consumer dissatisfaction does not provide an adequate basis for reconsideration of the *California Order*. First, even if we were to accept CRA's argument, the order is grounded on other bases that independently support denial of the CPUC's petition. Second, CRA is claiming, in effect, that in evaluating the petition of a state seeking to continue regulating rates, we should view all evidence of market imperfections as proof of a need for such regulation, and attribute all countervailing evidence to the effectiveness of the state's regulatory oversight. We examined this claim in the *California Order*, and concluded that the CPUC had not established its

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<sup>66</sup> See *California Order* at paras. 96-141. See also *Lorain Journal Co. v. FCC*, 351 F.2d at 828 (Commission's conclusions must be sustained if supported by substantial evidence even if there is also substantial evidence to support contrary conclusions).

<sup>67</sup> *California Order* at paras. 15-34; 96-104.

<sup>68</sup> *Id.* See especially paras. 32-33 & n.85; citing *McCaw Personal Communications, Inc. v. Pacific Telesis Group*, 645 F. Supp. 1166, 1174 (N.D. Cal. 1986) ("the existence of low barriers to entry may rebut a prima facie showing of illegality, even where the combined market shares of the merged firms is quite high"), citing *United States v. Waste Management, Inc.*, 743 F.2d 976, 982-83 (2d Cir. 1984). See also *American Bar Association, I ANTITRUST LAW DEVELOPMENTS (THIRD) 307-11* (1992) and cases cited therein.

<sup>69</sup> *California Order* at paras. 122; 137-40.

factual predicate (*i.e.*, that the scale and scope of the CPUC regulatory system were sufficient to allow one to attribute the absence of anti-consumer and anti-competitive evidence to that system's effectiveness).<sup>70</sup> CRA has not submitted any new evidence that persuades us to reach a different conclusion here. Absence such evidence, CRA's argument falls of its own weight.

40. Jurisdiction Over Intrastate Rate Complaints. CRA has asked for either reconsideration of our decision to deny the CPUC authority to retain jurisdiction to dispose of reseller and other complaints concerning discriminatory intrastate cellular service rates, or, in the alternative, a statement that this Commission "will assume jurisdiction of such complaints and be prepared to dispose of them expeditiously." In effect, CRA seeks reconsideration of our determination that it is not "necessary at this time to address the contention that we have jurisdiction over interstate rates for CMRS, following termination of the CPUC's rate regulation authority, which we can employ to protect resellers."<sup>71</sup> The *California Order*, contemplating petitions on this issue, specifically provided:

If we are persuaded upon reconsideration of the instant proceeding that it is *necessary* to address the issue here, we will do so, but only upon a showing by petitioners that resolution of the issue is *necessary to resolve a material issue raised in this record*. That showing must consist of evidence and argument establishing such a nexus and supporting the substantive position argued, *i.e.*, that we have or have not inherited intrastate rate regulation over CMRS.<sup>72</sup>

41. CRA's petition is entirely devoid of both the threshold showing that it is *necessary* to address the jurisdictional issue here and the evidence and argument we requested in support of that showing. CRA fails to identify what *material issue* raised in this proceeding it believes the jurisdictional issue bears upon. CRA merely speculates that the absence of CPUC jurisdiction over intrastate rate matters "will allow the cellular carriers to establish whatever rate differentials they choose, regardless of how unreasonably discriminatory they may be."<sup>73</sup> CRA has presented no new or additional factual evidence for

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<sup>70</sup> See *California Order*, at para. 98.

<sup>71</sup> *California Order* at para. 147.

<sup>72</sup> *Id.* (emphasis added).

<sup>73</sup> CRA Reconsideration Petition at 6, citing Application of Los Angeles Cellular Telephone Co., Dkt. NO. A.94-02-018. CRA does not supply this application with its petition; rather, CRA describes the action as one in which a carrier has proposed to negotiate private contracts with subscribers. It is impossible to tell from this citation what relevance the application has to the reconsideration under consideration.

this record demonstrating that we *need* to resolve the question of our jurisdiction over intrastate rate matters by August 9, 1995 in the context of *this* proceeding. CRA's observation that it is "unclear" when we will address the issue or what protection this Commission will provide is not a substitute for actual evidence of unreasonable discrimination or imminent harm to resellers or other customers in California. Nor does this argument provide a nexus between the jurisdictional issue and the material issue in this proceeding (*i.e.*, whether California has satisfied the statutory test for retaining jurisdiction). In addition, CRA fails to present an affirmative and substantiated legal argument that we possess jurisdiction over intrastate CMRS rates, it merely requests that we exercise such jurisdiction. CRA's reply to oppositions adds little to the arguments made in its petition for reconsideration. It merely demonstrates that certain parties to this proceeding disagree about the nature and extent of our intrastate rate discrimination jurisdiction, not that the underlying jurisdictional issue is material to the question whether California met its statutory burden.

42. Finally, we agree with opponents that because the issue of resolution of disputes involving intrastate rates may affect consumers in all states, the *California Order* correctly decided to address this issue in GN Docket 93-252, the CMRS general rulemaking docket. Moreover, we do not believe that the practical effect of this decision will, as CRA intimates, leave resellers or other customers in the State of California or any other State wholly without regulatory recourse. Our continuing policy, which has remained unchanged from well before enactment of the Budget Act to the present, has been to prohibit any form of unreasonable discrimination against resellers.<sup>74</sup> Our rules reflect this policy, and provide, in pertinent part, that: "[a] cellular system licensee shall permit unrestricted resale of its services . . . ." <sup>75</sup> Under these circumstances, we do not believe it necessary, for the protection of resellers, that we reconsider our decision to defer consideration of the question of whether we "inherited" intrastate CMRS rate jurisdiction under the Budget Act.

#### IV. CONCLUSION

43. We conclude that CRA's request for reconsideration of our decision denying the California Petition to retain regulatory authority over intrastate cellular service rates must be denied. CRA entirely failed to demonstrate that the *California Order's* findings with respect to the impact of new mobile services and the lack of evidence of widespread

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<sup>74</sup> Petitions for Rule Making Concerning Proposed Changes to the Commission's Resale Policies, 6 FCC Rcd 1719, 1725-26 (1991) (cellular carriers must permit resellers to take service on the same terms and conditions as any other cellular customer would take service); In the Matter of Bundling of Cellular Customer Premises Equipment and Cellular Service, Report and Order, CC Docket 91-34 (1992) at n.48.

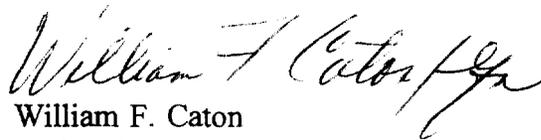
<sup>75</sup> 47 C.F.R. § 22.914. In addition, the precise question of the scope and nature of the resale obligations of all CMRS providers is currently under consideration in a separate docket. See In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket 94-54, Second Notice of Proposed Rule Making, FCC 95-149 (released April 20, 1995).

anticompetitive practices and consumer dissatisfaction with cellular service were erroneous or inconsistent with the record evidence. CRA has also failed to demonstrate error in the *California Order's* findings that market conditions in California are adequate to protect subscribers from unjust and unreasonable rates. Finally, CRA has failed to produce the specific showing required by the *California Order* itself for petitioners seeking reconsideration of the decision to address the issue of this Commission's jurisdiction over intrastate CMRS rates in the context of further rulemaking proceedings.

## V. ORDERING CLAUSES

44. Accordingly, pursuant to Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, IT IS ORDERED that the Petition for Reconsideration of the Cellular Resellers Association, Inc. IS DENIED for the reasons set forth above.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script that reads "William F. Caton".

William F. Caton  
Acting Secretary