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December 8, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

William F. Caton
Acting Secretary
Federal Communications Commission, Room 222
1919 M Street, NW
Washington, DC 20554

Re: Ex parte meetings: Implementation of Sections 3(n) and 332 of the Communications Act - Second Report and Order, GN Docket No. 93-252

Dear Mr. Caton:

This is written to report various meetings attended by Cathleen A. Massey of AT&T Wireless Services, Inc. and Howard J. Symons and Sara Seidman of this firm, with David Solomon and Suzanne Tetreault (December 7); Commissioner James Quello, Lauren Belvin, and Rudy Baca (December 6); James Casserly (December 6); Richard Welch, Suzanne Toller, and David Furth (December 6); Todd Silbergeld and Lisa Smith (December 6, Sara Seidman not present); Michele Farquhar, Laurence Atlas and Michael Wack (December 5, Gerard Salemme of AT&T Wireless Services, Inc. attended also, Sara Seidman not present); John Nakahata (December 1, Sara Seidman not present) to discuss matters raised in a Petition for Clarification filed by AT&T Wireless Services, Inc. (formerly named McCaw Cellular Communications, Inc.) on May 19, 1994 in the above-referenced proceeding. In particular, issues involving mutual compensation and nondiscriminatory interconnection rates for intrastate wireless telecommunications were discussed. Please associate the attached document, which was distributed at the meetings, with the above-referenced docket.

An original and one copy of this letter have been submitted in accordance with Commission's rules.

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Should you have any questions regarding this matter, please contact me.

Sincerely,

Sara F. Seidman

Enclosure

cc (w/o encl.):
Commissioner James T. Quello
John Nakahata
Michele Farquhar
Laurence Atlas
Michael Wack
Todd Silbergeld
Lisa Smith
Lauren Belvin
Rudy Baca
James Casserly
Richard Welch
Suzanne Toller
David Furth
David Solomon
Suzanne Tetreault

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AT&T WIRELESS SERVICES, INC.
Ex Parte Presentation - GN Docket No. 93-252

October 27, 1995

THE FCC SHOULD CLARIFY THAT THE PRINCIPLES OF MUTUAL COMPENSATION AND NONDISCRIMINATORY CHARGES APPLY TO INTRASTATE AS WELL AS INTERSTATE WIRELESS TELECOMMUNICATIONS

Introduction

With the enactment of Section 332(c) of the Communications Act in 1993, Congress deliberately chose a federal regulatory framework for commercial mobile radio services ("CMRS").[1] States were preempted from imposing entry barriers to the provision of CMRS under any circumstances.[2] States were also barred from regulating CMRS rates, even rates for intrastate CMRS, unless they could demonstrate that significant market failure required governmental intervention.[3] The Commission has acknowledged the broad nature of this statutory preemption: "Congress has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile radio services without regard to Section 2(b)" of the Communications Act, which otherwise acts as a bar on federal regulation of intrastate services.[4] Congress adopted this federal framework because it found that mobile services are inherently interstate in nature and because it sought to minimize the regulatory burdens on the providers of such services.

While the FCC has allowed the states to retain jurisdiction over the rates charged by local exchange carriers ("LECs") for CMRS interconnection,[5] the exercise of this jurisdiction cannot be divorced from the principles embodied in the federal law and regulations. The FCC requires LECs to provide "reasonable and fair interconnection for all commercial mobile radio services" and explicitly preempted state and local regulations

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

[2] 47 U.S.C. § 332(c).

[3] 47 U.S.C. § 332(c)(3).

[4] 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, ¶ 256 (1994) ("Second Report and Order").

[5] Id. at ¶ 231.

regarding "the kind of interconnection to which CMRS providers are entitled."[6] The Commission further held that mutual compensation, whereby LECs are required to compensate CMRS providers for the costs incurred in terminating traffic that originates on the LEC network, is a primary element of this "reasonable interconnection" obligation. LECs are also required to provide reasonable charges for interstate interconnection, and to refrain from discriminating in the form of interconnection arrangements offered to CMRS providers.[7]

Although the FCC declined to preempt state jurisdiction over LEC intrastate interconnection rates, the agency reiterated its 1987 commitment to intervene on state rate matters if LEC charges "effectively preclude interconnection" and thereby "negate the federal decision to permit interconnection."[8] The FCC also ruled that, with respect to interconnection rates, the LEC would bear the burden of demonstrating that different rates for the same type of interconnection did not constitute unreasonable discrimination.[9]

Despite these federal policy objectives, a number of states have recently adopted or proposed regulations that provide competitive landline carriers with mutual compensation and reasonable, nondiscriminatory rates, but prevent wireless providers from qualifying for these essential interconnection components. While these state proceedings were commenced for the purpose of promoting the development of competition in the local telecommunications marketplace, they are, instead, effectively preventing an innovative industry segment from living up to its full competitive potential. This discrimination not only violates the federal policies established by Congress and the FCC, it frustrates the very goals the states seek to accomplish.[10]

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[6] Id. at ¶ 230.

[7] Id. at ¶¶ 232-234.

[8] Id. at ¶ 228 citing Interconnection Order, 2 FCC Rcd. 2910, 2912 (1987).

[9] Id. at ¶ 233.

[10] As discussed below, AT&T Wireless Services, Inc. ("AT&T"), formerly named McCaw Cellular Communications, Inc., filed a petition seeking clarification of the FCC's policy on intrastate mutual compensation. Petition for Clarification of McCaw Cellular Communications, Inc., Docket No. 93-252, at 6-7, filed May 19, 1994 ("McCaw Petition"). Pursuant to that still-pending petition, the FCC could restate its long-standing policies applying the principles of mutual compensation and non-discriminatory charges to intrastate LEC-to-CMRS interconnection.

State Interconnection Policies Discriminate Against Wireless Carriers

Earlier this year, several states concluded proceedings that addressed LEC-to-CMRS interconnection and compensation issues. In Connecticut, for example, the Department of Public Utility Control ("DPUC") released a decision on September 22, 1995, which expressly prohibits the local telephone company from entering into reciprocal compensation agreements with wireless carriers.[11] Apparently recognizing that it lacks jurisdiction to prevent CMRS providers from charging for their own interconnection services, the state attempts to control wireless activities indirectly by forbidding LECs from paying CMRS providers for terminating landline-originated traffic. Significantly, the DPUC justifies its decision to deny wireless carriers mutual compensation on the state's inability to impose local service obligations on such providers.[12] Thus, while the DPUC has mandated mutual compensation between LECs and competitive landline carriers, it contends, perversely, that Congress's establishment of a national regulatory framework in Section 332 permits the state to deny equal treatment to competitive wireless providers.[13]

The mutual compensation rules adopted by the California Public Utilities Commission ("CPUC") do not explicitly exclude wireless carriers but they condition eligibility for such compensation on certification as a competitive local carrier.[14] The CPUC will grant such certification to carriers that submit to its extensive entry and rate regulation, including, among other things, tariff and contract filing (which the FCC has

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[11] State of Connecticut Department of Public Utility Control, DPUC Investigation into Wireless Mutual Compensation Plans, Docket No. 95-04-04, Decision, September 22, 1995.

[12] Id. at 15, 16. Notably, Connecticut, like several other states, has taken the position that it has the authority "to impose universal service, Lifeline, and TRS funding responsibilities on wireless carriers." Id. AT&T does not agree that states have retained such authority under Section 332. In any case, to the extent a state expects wireless carriers to contribute to network subsidies of this sort, AT&T submits that the state must also treat CMRS providers equally in terms of benefits, such as mutual compensation, as well as access to such subsidies.

[13] The DPUC permits wireless carriers to seek certification as competitive local exchange carriers and accede to the state's jurisdiction as a means to qualify for mutual compensation. Id.

[14] California Public Utilities Commission, Competition for Local Exchange Service, D.95-07-054, R.95-04-043, I.95-04-044, at 15, 35 (July 24, 1995).

precluded for CMRS providers), prior notification of rate changes, and approval before discontinuing service.[15]

Other states currently are examining mutual compensation issues as part of overall local competition proceedings. In New York's Competition II proceeding, the Public Service Commission ("NYPSC") has proposed that local exchange carriers be "entitled to compensation for the costs of the traffic and services provided to each other."[16] To assert the right to intercarrier compensation, a firm must be certified to provide local exchange service.[17] Certification, in turn, requires carriers to provide a number of services, such as 911 access, statewide relay system access, and Lifeline service, as well as comply with the NYPSC's Open Network Architecture principles and service quality standards.[18]

While many of these certification requirements are inapposite to the type of service provided by wireless carriers, the NYPSC has made clear that the right to mutual compensation will be conditioned on certification and that cellular licenses will not be entitled to certification as local exchange carriers even though they provide the equivalent of local dial tone and have NXX assignments.[19] Under the proposed rules, cellular carriers are not precluded from negotiating compensation arrangements in New York, but they cannot assert a right to inter-carrier compensation unless they meet the tests for certification.[20]

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[15] Id. at 35-36. The CPUC recognizes that it is preempted from regulating entry and rates of CMRS providers. It nonetheless appears to require wireless providers to meet the entry and rate eligibility criteria for mutual compensation. Id. at 15.

[16] New York State Department of Public Service, The Level Playing Field, An Interim Report, Case 94-C-0095, at 69 (September 1, 1994).

[17] Id. at 75. The firm must also have an NXX allocation for the purpose of providing local exchange service and provide local dial tone to customers. Id.

[18] Id. at 74-75. Significantly, requiring wireless carriers to provide Lifeline service necessarily involves New York in regulating the rates charged by CMRS providers, thereby violating Section 332(c)'s proscription on state rate regulation.

[19] Id. at 75, n.2.

[20] Id. While AT&T and NYNEX currently have a mutual compensation agreement in place pursuant to an incentive regulation scheme, AT&T's right to seek continuation of this arrangement on a permanent basis depends on the outcome of the Competition II proceeding.

Louisiana also has proposed local competition rules that would classify CMRS operators as telephone service providers ("TSPs").[21] While all TSPs are ensured "equal treatment and rates" for the "mutual exchange of local traffic,"[22] they likewise are subject to a full panoply of state entry and rate regulation, including prior certification, mandatory showings of financial, technical, and managerial competence, and tarriffing.[23]

In addition to the lack of mutual compensation, states regularly permit LECs to charge wireless carriers significantly higher rates than landline competitive access providers ("CAPs") for intrastate interconnection. In New York, for instance, CAPs are paying between 0.5 and 0.75 cents per minute for intrastate interconnection; CAPs covered by mutual compensation arrangements effectively pay nothing for interconnection. Wireless providers, by contrast, pay an average of 2.6 cents per minute and, as described above, are ineligible for mutual compensation. Similar disparities in the treatment of cellular carriers and CAPs exist in the states served by Ameritech.

These State Actions Violate Federal Interconnection Policies and Regulatory Goals

Conditioning mutual compensation and reasonable interconnection charges on a wireless carrier's satisfaction of state-imposed entry requirements, many of which are inapplicable to non-wireline service, and otherwise sanctioning interconnection rates that discriminate against CMRS providers, constitute barriers to the effective provision of wireless services. Since 1987, the FCC has made clear that state authority over LEC-to-CMRS interconnection charges is not unbounded and that the agency will intervene if intrastate rates effectively prevent wireless carriers from exercising their federal right to interconnection.[24] As described above, states have sanctioned a five-fold disparity between wireless and landline interconnection charges with no evidence from LECs that the difference has any basis whatsoever in the costs of providing the interconnection service. These discriminatory LEC charges, which flow directly from state policies disfavoring CMRS, effectively deny wireless carriers their right to nondiscriminatory interconnection with LECs. It is incumbent upon the FCC to rectify this imbalance.

These state actions also undermine the congressional objective set forth in Section 332(c) of ensuring a consistent and coherent national regulatory regime that fosters the growth and development of mobile services. Congress intended that the CMRS marketplace

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[21] Louisiana Public Service Commission, Second Revised Proposed Regulations for Competition in the Local Telecommunications Market, Docket U-20883, at 5 (October 9, 1995).

[22] Id. at 34.

[23] See id. at 6-10, 12-20, 34-35, 40.

[24] Second Report and Order at ¶ 228, citing Interconnection Order, 2 FCC Rcd at 2912.

operate with a minimum of regulatory interference, whether federal or state. Policies, such as those adopted by Connecticut and proposed by New York, effectively allow states to dismantle the regulatory framework so carefully crafted by Congress and the FCC by holding hostage essential elements of interconnection until CMRS providers submit to state jurisdiction. Introduction of these regulatory disparities between wireline and wireless carriers erects significant barriers to wireless entry and directly conflicts with Section 332(c). In addition, it is fundamentally inconsistent with the FCC's desire to "help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our federal mandate for regulatory parity."[25] The FCC should not tolerate state regulations that relegate CMRS service to second-class status vis a vis landline competitive carriers.

Specifically, with regard to mutual compensation, AT&T has previously asked the FCC to clarify that the principle applies to intrastate interconnection arrangements.[26] AT&T explained that, although the FCC chose not to preempt state regulation of the rates for intrastate LEC-to-CMRS interconnection, mutual compensation is not a rates issue. Rather, reciprocal compensation is an essential component of the "reasonable interconnection" standard and is not segregable between the intrastate and interstate jurisdictions. Accordingly, the FCC should clarify that the principle of mutual compensation must be applied to all LEC-to-CMRS interconnection arrangements.

Conclusion

For all of these reasons, the FCC should restate clearly that the principles of mutual compensation and nondiscriminatory charges apply to intrastate interconnection arrangements between LECs and providers of CMRS. While Section 332(c) and FCC precedent do not require the Commission to set rates, the agency must plainly articulate the principles that govern the establishment of such charges. The FCC has the obligation to require states to refrain from conditioning mutual compensation and cost-based interconnection charges on compliance with state entry and rate regulation. Through prompt action on AT&T's pending petition for clarification, the FCC can ensure that the wireless industry has an equal opportunity to grow, and that the competitive national marketplace Congress envisioned has a chance to develop.

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[25] Id. at ¶ 23.

[26] See McCaw Petition at 6-7.