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AIRTOUCH™
Communications

Kathleen Q. Abernathy
Vice President
Federal Regulatory

AirTouch Communications
1818 N Street N.W.
Suite 800
Washington, DC 20036

Telephone: 202 293-4960
Facsimile: 202 293-4970

March 20, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

EX PARTE

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

RE: Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers (CC Docket No. 95-185).

Dear Mr. Caton:

On Tuesday, March 19, 1996, Tom Krattenmaker and I, on behalf of AirTouch Communications met with Chairman Hundt; John Nakahata, Legal Advisor to Chairman Hundt; Richard Metzger, Common Carrier Bureau; and Daniel Grosh of the Wireless Bureau to discuss the attached memorandum. Please associate this material with the above-referenced proceeding.

Two copies of this notice are being submitted to the Secretary in accordance with Section 1.1206(a)(1) of the Commission's Rules.

Please stamp and return the provided copy to confirm your receipt. Please contact me at 202-293-4960 should you have any questions or require additional information concerning this matter.

Sincerely,

Kathleen Q. Abernathy

Attachment

cc: Chairman Hundt
Michele Farquhar
Daniel Grosh
William Kennard
Richard Metzger
John Nakahata

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STATEMENT BY THOMAS KRATTENMAKER
ON BEHALF OF AIRTOUCH COMMUNICATIONS, INC.

This memorandum is filed on behalf of AirTouch Communications in response to the ex parte letter ("Letter") submitted on February 26, 1996 by Bell Atlantic Corporation and Pacific Telesis Group (hereinafter " Filers") in CC Docket No. 95-185 and to outline issues discussed in an ex parte presentation made by AirTouch Communications, Inc. Filers claim that the Commission lacks the authority to impose "bill and keep" arrangements with respect to LEC-CMRS interconnection, a proposition based on the contention that the Telecommunications Act of 1996[1] "expressly strips the Commission of the authority to mandate the terms and conditions of local interconnection agreements." Letter at 1. As shown below, however, the 1996 Act did the exact opposite — it retained the Commission's exclusive authority over matters related to both interstate and intrastate LEC-CMRS interconnection which had earlier been prescribed in the amendments to Section 332 adopted in the Omnibus Budget Reconciliation Act of 1993.[2]

AirTouch submits that the most reasonable interpretation of the relevant sections of both the Budget Act and the 1996 Act leads to the conclusion that the FCC has jurisdiction over LEC-CMRS interconnection issues and the ability to circumscribe the authority of the states. Even if the FCC were to conclude that the jurisdictional issue is a close call, important federal interests dictate that the FCC assert its jurisdiction and preempt state regulation of LEC-CMRS interconnection. Specifically, both the Budget Act and the 1996 Act demonstrate Congressional intent to shift responsibility to the FCC for the development of a seamless,

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[1] Pub. L. No. 104-104, § 101(a), 110 Stat. 56 (Feb. 8, 1996) ("1996 Act").

[2] Ombibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, reprinted in 1993 U.C.C.C.A.N. 107 Stat. 312 ("Budget Act").

national CMRS network. In addition, interconnection is a critical component of the development of such a network and LECs have every incentive to charge interconnection rates that are likely to have substantial entry-inhibiting effects. Lastly, a scheme of separate interconnection rates for interstate and intrastate calls will not work with present or future technology because of the regional design of CMRS networks.

DISCUSSION

1. The Buget Act

The 1993 Budget Act revisions to the Communications Act of 1934 completely overhauled the regulatory scheme applicable to CMRS. The purpose of these revisions, Congress explained, was to:

> [F]oster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.[3]

In recognition of the inherently interstate nature of CMRS, Congress took action to place exclusive authority over CMRS regulations in the hands of the Commission. Congress achieved this jurisdictional shift from the states to the federal government through the adoption of Section 332(c), entitled "Regulatory Treatment of Mobile Services", which sets forth Congress' detailed regulatory blueprint for federal regulation of the CMRS industry.[4] These statutory revisions eliminate state regulatory authority over all aspects of CMRS -- including matters related to LEC-CMRS interconnection -- and without regard to any interstate or intrastate components of these services.

a. Section 332(c)(1)(B)

The pivotal statutory provision for purposes of establishing jurisdiction over LEC-CMRS interconnection, in AirTouch's view, is Section 332(c)(1)(B). This section provides:

> Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to

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[3] H.R. Rep. No. 103-111, 103d Cong. 1st Sess. 260 (1993)(emphasis added).

[4] As discussed below, through an amendment to Section 2(b) of the Act, Congress also clarified that the Commission would possess authority over CMRS offerings provided on an intrastate basis.

> establish physical connections with such service pursuant to the provisions of section 201 of this Act. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act.

Even Filers agree that this section governs LEC-CMRS interconnection.[5] Having made this point, however, Filers then attempt to sweep the significance of this provision aside, as follows:

> Section 332(c)(1)(B) simply states that physical interconnection arrangements must be established "pursuant to the provisions of section 201 of this Act." Section 201 has never been thought to trump state rate making authority under Section 152(b). Nor does it now trump the new interconnection agreement procedures of Section 251 and 252.[6]

AirTouch submits that Filers' cursory analysis is entirely at odds with the language and purposes underlying the provision. Instead, this Section of the Budget Act clearly establishes federal jurisdiction over LEC-CMRS interconnection matters.

Turning first to the language of Section 332(c)(1)(B), under this Section the Commission is vested with the authority to order interconnection requested by <u>any</u> CMRS provider, and, in doing so, the Commission is expressly empowered to rely on the provisions of Section 201. In turn, Section 201 requires carriers to furnish interconnection upon reasonable request, and at just and reasonable rates. The Commission's clearly assigned role under Section 332(c)(1)(B), then, is to ensure that all CMRS providers are able to obtain interconnection from

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[5] <u>See</u> Letter at 5 ("Interconnection between LECs and CMRS is covered by Section 332(c)(1)(B), not 332(c)(3) . . . ."). Section 332(c)(3), which preempts state rate and entry authority over CMRS, is discussed in detail below.

[6] <u>Id.</u>

LECs at reasonable costs.[7] This is precisely what the Commission is proposing to do in this proceeding.[8]

The second sentence of Section 332(c)(1)(B) provides that "[e]xcept to the extent that the Commission is required to respond to a [CMRS provider's request for interconnection], this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act." This sentence in no way undermines the Commission's jurisdictional grant over CMRS interconnection issues; it only confirms that the Commission's authority under Section 201 is unchanged by Section 332(c)(1)(B) except where the Commission is dealing with interconnection requests by CMRS providers. In other words, the Budget Act expands the Commission's Section 201 jurisdiction, but only insofar as LEC-CMRS interconnection is involved. The Commission's jurisdiction with respect to non-CMRS telecommunications services is unaffected by Section 332(c)(1)(b).

The legislative history underlying the adoption of Section 332(c)(1)(B) further supports the conclusion that the Commission, rather than the states, was assigned the exclusive

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[7] Thus, the Commission is therefore assigned the responsibility to ensure that the charges, practices, classifications, and regulations associated with LEC-CMRS interconnection are just and reasonable.

[8] Section 201 of the Communications Act has served as the jurisdictional basis for numerous industry-wide Commission mandated interconnection requirements. See e.g., Expanded Interconnection with Local Telephone Company Facilities and Amendment of the Part 69 Allocation of General Support Facility Costs, CC Dockets 91-141 and 92-222, Memorandum Opinion and Order, 9 FCC Rcd 5154, ¶¶ 18-20 (1994) (implementing expanded interconnection for Tier I LECs, and related rate structure and pricing policies); The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carriers (Cellular Interconnection), Declaratory Order, 2 FCC Rcd 2910, ¶¶ 17, 21 (1987) (asserting jurisdiction over the physical interconnections between cellular and landline carriers and mandating that the terms and conditions of cellular interconnection be negotiated in good faith).

authority to oversee matters related to LEC-CMRS interconnection. Section 332(c)(1)(B) was adopted because:

> [t]he Committee considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network.[9]

The Commission was thus charged with the responsibility to "promote" interconnection in order to further Congress' vision of a national CMRS network. Significantly, there is no mention of any state role or function in the achievement of these goals.

The foregoing discussion demonstrates Congress' intent to delegate to the Commission exclusive regulatory authority over LEC-CMRS interconnection. All that Filers offer in response is their conclusory claim that "Section 201 has never been thought to trump state rate making authority under Section 152(b)." Letter at 5. While this may be true as a general proposition, it is clearly not the case with LEC-CMRS interconnection. Prior to the adoption of the Budget Act in 1993, the Commission's jurisdiction under Section 201, with some exceptions, was limited to interstate services by virtue of Section 2(b) of the Act, which reserved to the states jurisdiction over intrastate services. The Budget Act revisions to Sections 2(b) and 332 of the Communications Act, however, changed all that and eliminated the interstate/intrastate jurisdictional dichotomy with respect to CMRS. Specifically, Section 2(b) was amended to clarify that the reservation of state authority over intrastate services expressly

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9 H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 260 (1993).

did not extend to services covered by Section 332 -- namely, mobile services.[10] As shown above, moreover, pursuant to Section 332(c)(1)(B), jurisdiction over LEC-CMRS interconnection was delegated exclusively to the Commission without regard to any interstate or intrastate components of the underlying CMRS services.

b. Section 332(c)(3)(A)

Section 332(c)(3)(A) expressly preempts state rate and entry authority over CMRS. This section provides, in pertinent part, that "[n]otwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . ." Filers concede that under this provision, "[a]rguably, the FCC may have jurisdiction to ensure that, in setting or approving particular interconnection agreements, the States do not effectively preclude entry by CMRS providers." Letter at 5. Filers therefore grudgingly admit that state actions with respect to LEC-CMRS interconnection which serve to inhibit entry would properly be subject to preemption by the Commission. High interconnection rates certainly inhibit entry — especially CMRS entry into local loop competition with LECs. Thus, Section 332(c)(3)(A) also provides FCC jurisdiction over LEC-CMRS interconnection issues.[11]

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[10] Section 2(b), as amended, now reads: "Except as provided in . . . Section 332 . . . nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service by wire or radio of any carrier . . ."

[11] We note that Filers seek to minimize the impact of this interpretation by asserting that "a general authority to sweep away state-imposed barriers to entry does not entail any authority to mandate the particular terms and conditions of interconnection." Letter at 5. But as noted above, the Commission's authority to direct LEC-CMRS interconnection arrangements need not be found in Section 332(c)(3)(A), which preempts state entry jurisdiction. Rather, the Commission's authority to do so is clearly articulated in Section 332(c)(1)(B), which directs the Commission to order LEC-CMRS interconnection "pursuant to the provisions of section 201 of this Act."

Beyond this, Filers contend that the scope of Section 332(c)(3)(A) does not support the preemptive action proposed by the Commission in this proceeding. They claim that the phrase "rates charged by any commercial mobile service" refers to the "amount charged by CMRS providers to their subscribers, rather than the amount CMRS providers pay for interconnection." Letter at 4. AirTouch submits, however, that Filers' interpretation does not withstand scrutiny. One critical deficiency is the absence of the word "subscribers" in the sentence under review. Had Congress intended to limit the scope of preemption to rates charged to mobile subscribers, as Filers suggest, then the provision would more appropriately have been worded to limit the states' power "to regulate the entry of or the rates charged for any commercial mobile service."

Filers' interpretation of Section 332(c)(3(A) is also unpersuasive when the language of the provision is viewed in its entirety. Filers focus on the term "rates charged by". But the statute limits the power of the states "to regulate the entry of or the rates charged by any commercial mobile service . ." The term "any commercial mobile service" thus refers back to "entry of", in addition to "rates charged by". Congress surely was not directing itself to problems associated with the entry of commercial mobile service subscribers. Read in its entirety, then, the preemptive scope of Section 332(c)(3)(A) should be interpreted as precluding state authority over entry of or rates charged by commercial mobile service providers. This more logical reading would also extend, of course, to preemption over interconnection rates charged by CMRS providers.

Finally, Filers' strained attempt to focus the analysis on rates paid by CMRS "subscribers" in Section 332(c)(3)(A), is understandable because the broader interpretation

severely undermines their arguments regarding the applicability of the 1996 Act to the question at hand. For if the Budget Act did preempt state authority over CMRS to LEC interconnection rates (leaving aside the question of whether the preemption also covers LEC to CMRS interconnection rates), then the question arises how the states are to arbitrate LEC-CMRS interconnection disputes under Section 252 of the 1996 Act when they hold no authority over one of the two negotiating parties. Had Congress actually intended the states to serve as arbitrators in LEC-CMRS interconnection disputes, as opposed to interconnection disputes involving non-CMRS telecommunications carriers, Section 332(c)(3)(A) would presumably have been modified to clear up the resulting confusion over the scope of the states' authority to act in this capacity. But Congress did no such thing — in fact, it expressly preserved the Commission's existing authority under Section 332(c)(3).[12]

The 1996 Act

The Budget Act revisions to Sections 332 and 2(b) of the Communications Act, as demonstrated above, clearly delegated to the Commission exclusive jurisdiction over LEC-CMRS interconnection matters, both interstate and intrastate. The remaining question at issue, then, is whether Congress reversed its position less than three years later when it enacted the 1996 Act. As discussed herein, there are points to be raised on both sides of the issue. Upon final analysis, however, AirTouch submits that Congress intended to leave undisturbed the regulatory measures adopted in the Budget Act, Filers' arguments notwithstanding. Having already established a comprehensive regulatory scheme to govern CMRS, Congress directed

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[12] See Section 253(e) of the 1996 Act.

itself to the remainder of the telecommunications industry with the regulatory changes adopted in the 1996 Act.[13]

Filers claim that Section 251 of the 1996 Act expressly preserves state authority over the terms and conditions of local interconnection arrangements, and that Section 252 authorizes the states to serve as arbitrators in interconnection disputes. Some of what Filers say is true, but in AirTouch's view, Filers do not satisfactorily come to grips with the principal question at hand — that is, how to reconcile the power taken away from the states by the Budget Act with respect to CMRS interconnection, and the general interconnection authority given to the states in the 1996 Act. Among telecommunications services providers, Congress clearly carved out a distinct regulatory scheme for CMRS in the Budget Act, removing even intrastate services — including LEC-CMRS interconnection — from the purview of state authority. In AirTouch's view, Congress would have been quite explicit in the 1996 Act on the particular issue of LEC-CMRS interconnection had it intended to rescind the Budget Act provisions and hand that jurisdiction back to the states. It did not do so.

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[13] This point was underscored by Representative Fields when Congress commenced consideration of the legislation leading up to the 1996 Act:

> Last year we began the process of building a national telecommunications infrastructure when we adopted a regulatory framework for wireless services built on the same concepts contained in H.R. 3636. Today we will take the next step in the process of crafting a national telecommuni-cations policy as we turn our attention to other sectors of the telecommunications industry.

To Supersede the Modification of Final Judgment Entered August 24, 1982, in the Antitrust Action Styled United States v. Western Electric, Civil Action No. 82-0192, United States District Court for the District of Columbia To Amend the Communications Act of 1934 To Regulate the Manufacturing of Bell Operating Companies, and for Other Purposes: Hearings on H.R. 3626 Before the Subcomm. on Telecommunications and Finance of the House Committee on Energy and Commerce, 103d Cong., 1st Sess. 117 (1993)(statement of Rep. Fields).

Indeed, Congress expressly stated in the 1996 Act that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under Section 201."[14] The scope of the Commission's authority under Section 201, as explained above, was expanded by the revisions of Section 332 and 2(b) in the Budget Act, which vested the Commission with exclusive authority over both interstate and intrastate CMRS interconnection matters. Filers' claims that Sections 251 and 252 are "consistent with 151(b)'s preservation of state authority over charges for intrastate communications services", Letter at 2, and that Section 251 "expressly preserves State authority over the terms and conditions of local interconnection arrangements", Id., while true as general propositions, are flatly mistaken in the CMRS context, where Congress has previously eliminated state jurisdiction over intrastate CMRS offerings. Thus, Congress could not "preserve" state authority because such authority had already been rescinded by virtue of the Budget Act. Instead, Congress needed to expressly reinstate that authority if it so chose. Its failure to do so leads to the conclusion that, pursuant to the Budget Act revisions left unchanged in the 1996 Act, regulation of CMRS and LEC-CMRS interconnection continues to fall within the plenary jurisdiction of the Commission.[15]

Moreover, Filers' arguments, taken to their logical extension, would lead to untenable results. Specifically, Filers note that Section 251(c) "imposes certain interconnection

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[14] Section 251(i) of the 1996 Act. See also H.R. Rep. No. 458, 104th Cong., 2d Sess. 123 (1996)("New section 251(i) makes clear the conferees' intent that the provisions of new section 251 are in addition to and in no way limit or affect, the Commission's existing authority to order interconnection under section 201 of the Communications Act").

[15] It is noteworthy that Congress did expressly modify the regulatory scheme for CMRS adopted in the Budget Act where necessary to achieve its objectives. For example, the Commission's forbearance authority under Section 332(c)(1)(A) was expanded pursuant to new Section 401(a).

obligations on incumbent LECs alone in their relations with 'any requesting telecommunications carrier'," including CMRS providers. Letter at 2. The terms and conditions of interconnection, Filers assert, "are to be worked out by agreement among the carriers, subject to the negotiation, arbitration, and approval procedures set forth in Section 252." Id. Piecing this together, all telecommunications carriers requesting interconnection pursuant to Section 251, including CMRS providers, are subject to the negotiation, arbitration, and approval procedures set forth in Section 252. This interpretation, at least facially, appears to follow the language of the statute, particularly given the broad definition of "telecommunications carrier" which clearly encompasses CMRS providers. But there is a gaping hole in this logic. The fallacy is highlighted by Filers' contentions that (1) "the FCC has no authority to dictate any particular form of compensation arrangement beyond Section 251's general mandate of reciprocal compensation", Letter at 3; and (2) "[t]he Commission itself has no role to play in the Section 252 process, unless a state Commission simply fails to act." Id. This would mean that the Commission has essentially been denied jurisdiction over all interconnection matters — including purely interstate LEC-CMRS interconnection — and that the states now have been chosen by Congress to serve in that role. Obviously, this was not Congress' intent, as evidenced, in part, by the express retention of the Commission's Section 201 authority.[16] Thus, even under the 1996 Act, there is, at a minimum, concurrent jurisdiction over matters related to interconnection. When read in this context, Congress' delegation to the Commission of plenary

[16] See Section 251(I).

jurisdiction over LEC-CMRS interconnection must logically be interpreted as having been undisturbed by the 1996 Act.

Inseverability

Relevant precedent establishes that preemption of state regulatory authority is warranted in situations where the interstate and intrastate components of a service are inseverable.[17] To the extent that parties are unable to distinguish between interstate and intrastate CMRS calls, preemption by the Commission would therefore be appropriate notwithstanding any statutory ambiguities related to the jurisdictional questions. Filers surprisingly devote almost no attention to this important issue. Letter at 3-4, n.2. This is a critical deficiency, in AirTouch's view, because the record in this proceeding reflects that there are already a significant number of situations where CMRS and LEC networks do not have the technical capability to distinguish between interstate and intrastate calls.

This phenomenon is most pronounced in multi-state markets served by a single MTSO. Assume, for example, a cellular or PCS system which covers states A, B and C, but which is served by a single MTSO located in state B. A LEC central office in State B will assume that all calls received from that MTSO are intrastate. The LEC is not equipped to ascertain that most of the calls delivered through that MTSO may, in fact, be interstate since they originated in State A or state C. There are a significant number of multi-state cellular systems that currently are served by a single MTSO, and the number of such systems will soon increase dramatically with the deployment of PCS systems based on multi-state MTAs.

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[17] See e.g., Louisiana Public Serv. Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986).

Cases addressing the inseverability doctrine have recognized that physical inseverability occurs where enforcement of an inconsistent state regulation would require impractical alterations to the physical network. See, Comments of CTIA at 78-79 and cases cited therein at n.154. Thus, inseverability would apply with respect to multi-state CMRS systems since it would be impractical, and grossly inefficient, to construct redundant MTSOs in each state simply as a means to distinguish between interstate and intrastate calls.

Inseverability also arises in circumstances where a caller or called party using a mobile handset travels across state lines while the call is in progress. These situations underscore that the uniquely mobile nature of CMRS makes such services inherently interstate in nature.

Filers make no attempt to refute these points. Instead, they merely point to the Commission's stated belief in 1994 that interstate and intrastate traffic can be served for regulatory pricing purposes.[18] AirTouch submits that an up-to-date analysis of this issue, based on a thorough review of the comments and reply comments in this proceeding, will fully support the Commission's more recent statement that "preemption under Louisiana PSC may well be warranted here on the basis of inseverability."[19]

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[18] Letter at 4, n.2, citing CMRS Second Report and Order, 9 FCC Rcd 1411, at ¶ 231 (1994).

[19] Notice at ¶ 111.