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Communications

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JUL 12 1996

Federal Communications Commission
Office of Secretary

July 11, 1996

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)
Commission Initiates Proceeding to Implement Interconnection Provisions of Telecommunications Act of 1996 (CC Docket No. 96-98).

Dear Mr. Caton:

On Thursday, July 11, 1996, I, on behalf of AirTouch Communications, Inc., spoke with Joe Farrell, Chief Economist of the FCC regarding the interim proposal prepared by AirTouch. The points of the discussion are outlined in the attached. Please associate the attached material with the above-referenced proceedings.

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

Kathleen Q. Abernathy

Attachment

cc: Joe Farrell

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AirTouch Interim Proposal
CC Docket Nos. 95-185 and 96-98

The record in this proceeding establishes conclusively that LEC-CMRS interconnection rates are well in excess of costs, sometimes as high as a thousand percent above incremental costs, and that the concept of mutual compensation, as required by Section 20.11(b)(1) of the Rules, has largely been ignored by the LECs. These excessive rates serve to inhibit the development of CMRS networks that can effectively compete against LEC services. The beneficiaries of this inequitable environment — the LECs — obviously have no incentive to alter the status quo unless forced or incented to do so. In this regard, recent ex parte filings in this proceeding clearly document that LECs are widely engaged in a strategy of delay. This pattern can be expected to persist unless the Commission implements some form of interim relief for CMRS providers. Absent such relief, existing interconnection rates will likely remain in effect for an additional nine months, thus inhibiting the development of competition between LECs and CMRS providers for an extended period.

To move the process forward, AirTouch has recommended adoption of a three-part interim proposal which would provide immediate relief for the CMRS industry while ensuring that LECs are fairly compensated for the CMRS interconnection services they provide during the interim period. Under this proposal, the Commission would (1) immediately suspend all existing LEC-CMRS interconnection rates; (2) adopt "true-up" procedures whereby LECs and CMRS providers will be compensated for the interconnection services provided during the suspension period based on the new, negotiated rate terms; and (3) set a permanent ceiling which would govern current and future negotiations between CMRS providers and LECs.

The NPRM issued in CC Docket No. 96-98 demonstrates that the Commission has the authority to adopt this proposal even if Sections 251/252 are found to govern LEC-

CMRS interconnection. For example, the Commission has tentatively concluded that Section 251(d) establishes federal authority to adopt pricing rules to ensure that interconnection rates are just, reasonable and nondiscriminatory (*NPRM* at ¶¶ 36, 117, 119, 134). The Commission has also tentatively concluded that some form of LIRC-based methodology should be adopted for interconnection rates but believes that rate ceilings may be simpler and speedier to implement (NPRM at ¶¶ 123-125, 132). Further, the Commission is considering the implementation of interim pricing mechanisms (*NPRM* at ¶¶ 132-133). The Commission does not question its authority to adopt any of these measures; it is simply exploring the efficacy of these proposals. This acknowledged authority clearly empowers the Commission to implement each element of AirTouch's three-part proposal.

AirTouch's proposed interim solution begins with the suspension of existing rates in LEC-CMRS interconnection contracts. The Commission possesses the authority to suspend such rates under the *Mobile-Sierra* doctrine, which enables an agency to modify the terms of contracts between two carriers where it determines that the terms of the existing contracts would "adversely affect the public interest." *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956); *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987) ("Under the *Mobile-Sierra* doctrine, the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful . and to modify other provisions of private contracts when necessary to serve the public interest.") The Commission recently exercised this power in the interconnection context when it ordered Tier 1 LECs to provide expanded interconnection for both special and switched access services. *See Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Report and Order, FCC Rcd 7369 (1992); Second Memorandum Opinion and Order and Order on Reconsideration, 8 FCC

Rcd 7341 (1993); Second Report and Order, 8 FCC Rcd 7374 (1993); Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994). In that proceeding, the Commission implemented policies designed to foster competition for the provision of access services traditionally provided by LECs on a monopoly basis. An important component of the Commission's plan was the adoption of a "fresh look" policy, which enabled customers to terminate their long-term arrangements with LECs so that they could acquire the access services of a competitive provider.

Many LECs argued that the fresh look requirement was unlawful, either because it constituted an unlawful rate prescription or because it resulted in the abrogation of contracts between carriers and their customers. *See* 8 FCC Rcd at 7346-47. The Commission disagreed, concluding that the fresh look policy was a lawful exercise of its authority under Sections 201 through 205 of the Communications Act (in addition to Sections 1, 4(i) and 214(d)). The Commission determined that a continuation of LEC termination charges in excess of those specified in the proceeding would "deprive customers of the benefits of competition and tend to 'lock up' the interstate access market if they were allowed to continue", *Id.* at 7347, and thus would be unjust and unreasonable in violation of the Communications Act. The Commission acknowledged, moreover, that it is authorized under Section 205(a) to prescribe rates if, after a full hearing, it finds that an existing rate is unreasonable, and noted further that a rulemaking proceeding fulfills the requirement for a full hearing. *See* 7 FCC Rcd at 7474 n. 524, *citing U.S. v. Florida East Coast Railway Co.*, 410 U.S. 224, 238-46 (1973).

The Commission has also adopted similar fresh look requirements in other contexts. *See Competition in the Interstate Interexchange Marketplace,* Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677, 2681-82 (1992), where the Commission allowed AT&T's grandfathered 800 customers to terminate service, without termination liability,

within ninety days of the availability of 800 number portability. *See also Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands*, Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 4582, 4583-84 (1991), in which the Commission, in order to allow competition to develop in the air-ground market, allowed airlines to terminate, at their option and without penalty, contracts entered into with the monopoly provider of such services.

Each of the cited cases involves the Commission's exercise of its authority to allow customers (including carriers) to terminate their contracts with other carriers prior to the agreed-to expiration date. In the *Expanded Interconnection* proceeding in particular, the Commission suspended interconnection contracts which it found were contrary to the public interest because their continuation would inhibit competition in the access services market.

Similarly, the record developed in the instant proceeding and in CC Docket No. 95-185 clearly establishes that a continuation of existing LEC-CMRS rates, which do not provide for reciprocal compensation, would adversely affect the public interest by inhibiting the development of CMRS services that will compete with LEC services. The record also reflects that LECs have ignored their obligations under Section 20.11(b)(1) to pay "reasonable compensation" to CMRS providers when LEC originated traffic is terminated on the CMRS network. The public interest would be adversely affected by a continuation of agreements which callously disregard these requirements. Based on this record evidence and in accordance with precedent, a decision to suspend existing LEC-CMRS interconnection rates is well within the scope of the Commission's authority.

Some parties may suggest that it would be inappropriate to eliminate all payments during the suspension period. Any such argument would be unpersuasive in AirTouch's view.

The exorbitant rates paid by CMRS providers over the last decade have generated enormous unjustified profits for LECs. Requiring LECs to temporarily forego these interconnection revenues, particularly when they will be fully remunerated when the true-up is implemented, is not an unfair burden given this history. Most importantly, however, a system which provides for continued interconnection payments offers little incentive for LECs to accelerate the negotiation process. If the Commission determines, however, that some amount should be paid during the suspension period, the rate established must be low enough to provide an incentive for the LECs to bargain in good faith. As the record in this proceeding establishes, the LECs will endeavor to retain the status quo unless there is a compelling reason to do otherwise.

The second element of AirTouch's proposal is the adoption of true-up procedures. The true up would be effectuated when reasonable rates, based on the LEC's long run incremental costs, are agreed to. At that time, the LECs and the CMRS providers would be paid the amount owed under the new rate, plus interest, for the interconnection services provided during the suspension period. Should the Commission determine that Sections 251/252 govern, adoption of this interim proposal will not encroach in any way upon the states' delegated functions since the Commission could simply order that all LEC-CMRS interconnection payments cease until a new rate is negotiated pursuant to the new pricing guidelines and the requirements set forth in Section 252.

The final piece of the proposal is the establishment of a ceiling price to govern current and future LEC-CMRS interconnection negotiations. Such a ceiling will assist CMRS providers in their efforts to negotiate reasonable interconnection rates.

AirTouch submits that the adoption of this proposal will establish a fair framework for interim LEC-CMRS interconnection while the parties negotiate appropriate

interconnection rates based on the pricing guidelines adopted by the Commission. The suspension of existing agreements will bring the excessive LEC-CMRS interconnection rates to an immediate end, ensure no further violation of Section 20.11(b)(1) and provide an incentive for the LECs to bargain in good faith. The true-up will ensure that the LECs and CMRS providers are fairly compensated for all interconnection services provided during the interim period. Implementation of these procedures will also establish an environment conducive to the initiation of CMRS services that compete with LEC services. All of this can be achieved without undermining the power of the states prescribed in Section 252 of the Act should the Commission conclude that Sections 251/252 govern LEC-CMRS interconnection.