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July 23, 1996

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JUL 23 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

**Re: Ex Parte Presentation
CC Docket No. 95-185 (Interconnection Between Local
Exchange Carriers and Commercial Mobile Radio
Service Providers) and CC Docket No. 96-98
(Implementation of the Local Competition Provisions in
the Telecommunications Act of 1996)**

Dear Mr. Caton:

On Tuesday, July 23, 1996, the attached letter and legal memorandum were delivered to FCC Commissioner Rachelle B. Chong; Mr. James Coltharp, Special Advisor to Commissioner James H. Quello; Ms. Pete Belvin, Senior Legal Advisor to Commissioner James H. Quello; and Mr. Rudy Baca, Legal Advisor to Commissioner James H. Quello.

Pursuant to Section 1.1206 of the Commission's Rules, an original and one copy of this letter and the attachments are being filed with your office. If you have any questions concerning this submission, please contact the undersigned.

Sincerely,

Robert F. Roche

Attachments

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BY HAND DELIVERY

The Honorable Rachelle B. Chong
Commissioner
Federal Communications Commission
1919 M Street, NW, Room 844
Washington, DC 20554

Brian F. Fontes
Senior Vice President for
Policy and Administration

Dear Commissioner Chong:

As promised, attached is a legal memorandum setting forth the FCC's basis for retaining jurisdiction over CMRS/LEC interconnection.

Should you have any questions, please do not hesitate to call me (202) 736-3216.

Sincerely,

Brian F. Fontes

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JUL 23 1996

**THE COMMISSION SHOULD ADOPT A PARALLEL FEDERAL REGULATORY SCHEME
FOR LEC-CMRS INTERCONNECTION**

FEDERAL

COMMISSION

Office of Secretary

The 1993 amendments to Section 332 of the Communications Act¹ sharply limited state jurisdiction over the wireless industry. How sharply is subject to interpretation, but the FCC and the courts have tended to read the preemption possibilities expansively. That has contributed to a very favorable outcome since 1993, with large increases in numbers of licensees, significant new investment, and unprecedented levels of consumption. Securing the continuation of these developments presumably is a high priority.

The regime of federal jurisdiction under which these things have occurred should be retained if possible. Reestablishing state jurisdiction over the matters covered by the 1993 amendments to Section 332 creates large and unnecessary risks to the CMRS industry and to the consumers it serves. Those risks take the form of delay in the satisfactory resolution of fundamental network interconnection issues and of inconsistencies in the treatment of firms licensed by the FCC to engage in multistate service. Reestablishing state jurisdiction will mean increased industry costs and reduced industry dynamism.

The jurisdictional effect of the Telecommunications Act of 1996 ("1996 Act")² has become a matter of debate in the CMRS interconnection proceeding. Plausible arguments can be mounted for either side of the question of whether it supersedes the amended Section 332. The FCC's view of this issue is likely to be decisive because of the Supreme Court's Chevron doctrine.³

The FCC can preserve its Section 332⁴ jurisdiction over CMRS and accord competitive firms equal treatment (i.e., can maintain regulatory parity) by creating a parallel federal regulatory program for CMRS-LEC interconnections. Rather than remit CMRS-LEC interconnection to Section 251 and the other Part II provisions in the 1996 Act, the Commission could adopt equivalent arrangements which it, rather than the state public service commissions, would oversee.

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

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

³ Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984).

⁴ 47 U.S.C. § 332.

CMRS firms would be required to negotiate for interconnection with LECs in the same manner as CLECs. The same Commission limitations with respect to symmetrical termination prices, termination price ceilings, etc. that apply to CLECS pursuant to Section 251 would apply.

At least five matters need to be specified in connection with the process of arriving at a parallel LEC-CMRS interconnection arrangements:

1. Whether the rates between networks be symmetrical or asymmetrical?
2. Whether the arrangements be worked out by negotiations between carriers or by prescription by the government?
3. Assuming the adoption of an initial preference for negotiations, what time limits, if any, should be imposed?
4. In the event that negotiations fail, what federal regulatory default process should be used?
5. What transition arrangements, if any, should exist for previously negotiated LEC-CMRS interconnection?

From a CMRS industry perspective, these questions can be answered satisfactorily with (1) symmetrical rates; (2) reached by negotiation rather than government prescription, but within a framework prescribed by the federal government including both a ceiling on the settlement rate and (3) a limited time to conclude negotiations; (4) subject to FCC prescription and oversight in the event negotiations fail. Finally, (5) existing interconnection arrangements, at the election of the CMRS firm, would be subject to ratification or nullification within 60 days of the release of the FCC's order.

Negotiations rather than prescription would permit individual circumstances to be accommodated and has the further advantage of being consistent with the process that will govern incumbent LEC-other network interconnection under the 1996 Act. Concepts such as time limits and a systematic government prescription process in the event of failure of the negotiations also are found in the 1996 Act, although the time limits could be shorter because the CMRS issues are less novel than those involving other networks, and the FCC, rather than the state regulatory agencies and the federal District Courts, would exercise jurisdiction. An opportunity to grandfather existing arrangements as well as a time limit within which to exercise upset rights seem both prudent and fair in light of the inevitably unforeseeable aspects involving the transition from one interconnection regime to another.

THE COMMISSION HAS THE AUTHORITY TO ADOPT A PARALLEL REGULATORY REGIME FOR LEC-CMRS INTERCONNECTION

The Commission has the authority to adopt a parallel federal procedure for regulating CMRS interconnection. This authority derives from Sections 151, 152, 154(i) and 332 of the Communications Act, among others. The courts consistently have recognized the broad grants of authority these provisions provide the Commission in determining how best to serve the public interest.⁵ In general, the courts have accorded the Commission substantial latitude to employ the Communications Act's broad grants of authority over communications by wire and radio as changing circumstances warrant.⁶ The Commission's latitude includes the ability to choose which regulatory tools and jurisdictional powers it will exercise to further the public interest.

Courts have also emphasized the Commission's need for flexibility in performing its statutory obligations in light of the dynamic nature of the communications market.

⁵ See FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981) ("Our opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference") (citations omitted).

⁶ See Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282, 284 (D.C. Cir. 1966) ("Congress, in passing the Communications Act of 1934, could not, of course, anticipate the variety and nature of methods of communications by wire and radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry").

⁷ Id. ("In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective"). See Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198, 214 (D.C. Cir. 1982) (holding that the Commission's choice of regulatory tools must be upheld unless arbitrary or capricious).

⁸ See Computer and Communications Industry Ass'n v. FCC, 693 F.2d at 213 ("In designing the Communications Act, Congress sought 'to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications.'") (quoting

The substantial discretion generally allowed the F.C.C. in determining both what and how it can properly regulate, is often attributed to the highly complex and rapidly expanding nature of communications technology. Because Congress could neither foresee nor easily comprehend the fast-moving developments in the field, it "gave the Commission not niggardly but expansive powers."⁹

The Commission's plenary authority over electronic communications affords it the requisite flexibility to accomplish the intent of Congress. Specifically, this flexibility enables the Commission to more effectively protect the public interest by implementing different regulatory structures to reflect changing conditions in the communications field. Recognizing the important role of flexible Commission authority, the courts have avoided placing undue restrictions on the execution of that authority.¹⁰

The changing nature of the communications field results in the frequent development of new technologies and services. The expansive jurisdictional authority of the Commission permits it to develop a regulatory program for new forms of communications not mentioned in the Communications Act. Such was the view of the Court when it found lawful the Commission's regulation of cable television, despite the absence of express statutory reference to the technology.¹¹ The "Commission's authority extends to all regulatory actions 'necessary to ensure

General Telephone Co. of the Southwest v. United States, 449 F.2d 846, 853 (5th Cir. 1971)).

⁹ National Ass'n of Regulatory Utility Comm'rs v. FCC, 525 F.2d 630, 638 n.37 (D.C. Cir. 1976) (quoting NBC v. United States, 319 U.S. 190, 219 (1943)).

¹⁰ See U.S. v. Southwestern Cable Co., 392 U.S. 157, 172 (1968) (noting that "it was precisely because Congress wished 'to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission,' that it conferred upon the Commission a unified jurisdiction and broad authority") (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)).

¹¹ See id., at 178 (holding that the Commission's authority over all interstate wire or radio communication permits regulation of cable television). The Court reaffirmed that decision in United States v. Midwest Video Corp., 406 U.S. 649 (1972).

the achievement of the Commission's statutory responsibility.¹² Hence, in the absence of explicit statutory direction, the Commission may devise a regulatory structure necessary to protect the public interest and otherwise fulfill its broad statutory duties.

The Commission devised an elaborate regulatory program for cable television without the benefit of substantive statutory guidelines specific to cable. It derived the substance by reference to its substantive regulation of broadcasting.¹³ This provides a close analogy to the present proposal. The procedural and substantive aspects of CMRS-LEC interconnection are patterned on the CLEC-ILEC arrangements implementing Part II of the 1996 amendments, but jurisdiction remains in the FCC pursuant to sections 151, 152, and 332. In light of the Court's approval of the cable television regulatory program, the Commission should feel assured that incorporating the substance of section 251 competitive local exchange carrier interconnection into a parallel section 332 procedure for regulating LEC interconnection with CMRS providers would be upheld.

CONCLUSION

The adoption of a parallel federal regulatory regime for LEC-CMRS interconnection would:

1. Maintain as separate both the considerations governing, and the substance of, CMRS interconnection policy from that of other networks seeking LEC interconnection under Section 252.
2. Preserve federal jurisdiction and minimize state jurisdiction over most important aspects of CMRS service. In other words, it will preserve the 1993 deregulation of the CMRS business.
3. Improve interconnection prices for the CMRS industry from levels that the FCC regards as unsustainably high.
4. Avoid deviation from the principles of negotiation rather than prescription to arrive at interconnection

¹² Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 700 (1984) (quoting FCC v. Midwest Video Corp., 440 U.S. 689, 706 (1979)).

¹³ See United States v. Southwestern Cable Co., 392 U.S. at 178 (holding that the Commission's authority to regulate cable is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting").

arrangements and of symmetrical rather than asymmetrical termination rates.

The Commission has the authority to adopt this parallel LEC-CMRS interconnection structure.