

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Policy and Rules Concerning)
the Interstate, Interexchange Marketplace)
)
Implementation of Section 254(g) of the)
Communications Act of 1934, as amended)

CC Docket No. 96-61

OPPOSITION OF THE STATE OF HAWAII

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STATE OF HAWAII

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SUMMARY

The Commission's July 30, 1997 Reconsideration Order correctly held that the rate integration requirement of Section 254(g) of the Communications Act applies to Commercial Mobile Radio Service ("CMRS") providers. Consequently, the State of Hawaii (the "State") opposes, except with regards to a narrowly-crafted modification of the "affiliate" definition for CMRS providers, all of the petitions for reconsideration.

The plain language of Section 254(g) applies to all "providers of interexchange telecommunications services," including CMRS providers that offer interexchange services. The enactment of Section 254(g) did not merely incorporate the Commission's previous rate averaging and rate integration policies as applied to AT&T, but significantly expanded these policies as part of a national commitment to advance universal service.

None of the petitioners arguing for forbearance from rate integration describe how the public policy goal of universal service would be served by forbearance. There is no meaningful discussion as to how forbearance would protect consumers, or as to how they would ensure against unreasonably discriminatory rates and charges (including unreasonable regional discrimination). Indeed, forbearance from Section 254(g) would severely harm consumers. It is abundantly clear that consumers on Hawaii and other offshore points would continue to pay discriminatory CMRS rates if forbearance from rate integration were granted.

Contrary to Bell Atlantic's assertion, Section 332(c) of the Communications Act did not totally deregulate CMRS service rates. Indeed, Section 332(c) expressly requires the Commission to continue to regulate CMRS providers pursuant to Sections 201, 202, and 208 of the Communications Act. Thus, CMRS service rates remain subject to federal oversight. The detariffing of CMRS services is not the same thing as rate deregulation.

PrimeCo advocates allowing CMRS providers to rate integrate only on a market-by-market basis and Bell Atlantic wants an exception for small CMRS carriers. The Commission has already rejected such exceptions in prior orders and the petitioners have provided no new evidence to change the Commission's prior conclusions on these issues. No special treatment is justified for CMRS providers. CMRS providers are quickly starting to look like large landline LECs with affiliated nationwide interexchange services.

In ruling that AMSC's mobile services are subject to Section 254(g), the Commission has already rejected the claim that CMRS carriers cannot distinguish between interexchange and local calling. Indeed, in its August 1996 Local Competition Order, the Commission determined that CMRS providers presently can distinguish between interexchange and local calls, albeit not in real time. Furthermore, as of April 1, 1998, cellular and broadband PCS carriers are required to have deployed the technology necessary to identify in real time the location of the initial cell site or base station used to originate an enhanced 911 ("E911") call from mobile handsets.

AirTouch states that it would accept a rate integration requirement that was limited to situations where the CMRS provider has chosen to itemize interexchange service as a separate charge on a customer's bill. AirTouch's proposal is unsatisfactory because CMRS providers would have the incentive (and ability) to mislabel or otherwise hide interexchange charges on customer bills in order to avoid rate integration requirements. If a CMRS provider charges extra for interexchange service, Section 254(g) requires that the interexchange charge be rate integrated, even if the charge is not labeled as such.

Classifying CMRS calls as "local" or "interexchange" based on Major Trading Areas ("MTAs") is arbitrary. MTAs are very large in size and do not correspond with the smaller licensed service territories of many CMRS providers, including cellular providers.

Although the Communications Act does not define the term "interexchange," the proper definition of "interexchange" is "telephone toll service." Obvious examples of interexchange CMRS calls are calls that utilize resold long-distance services and calls that "roam" between different CMRS networks. In order to help determine other types of interexchange CMRS calls, the Commission should immediately require CMRS providers to be more forthcoming in producing information on the technical aspects of their wireless networks.

The State is sensitive to the competition issues presented by the complex ownership structures of the CMRS industry. Therefore, a limited modification of the "affiliate" definition may be appropriate. The State would not object if "affiliation" in the CMRS context did not apply to: (1) multiple, competing parent companies that jointly control a CMRS provider; and (2) commonly-owned CMRS providers to the extent that they compete in the same geographic service area.

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OPPOSITION OF THE STATE OF HAWAII

INTRODUCTION

The State of Hawaii (the "State")¹ hereby opposes all of the petitions for reconsideration of the Commission's July 30, 1997 Reconsideration Order in the above-captioned proceeding (except with regards to a narrowly-crafted modification of the "affiliate" definition for CMRS providers). The Reconsideration Order reiterated that the rate integration requirement of Section 254(g) of the Communications Act applies to Commercial Mobile Radio Service ("CMRS") providers.² In their petitions,³ which were filed on October 3, 1997, the seven

¹ This opposition is submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs.

² Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as amended, First Memorandum Opinion and Order on Reconsideration, CC Docket No. 96-61, FCC 97-269, at ¶ 18 (released July 30, 1997) ("Reconsideration Order").

³ It should be noted that these petitions and the Commission's Reconsideration Order address only rate integration, the requirement that the same rate structure be used for both the mainland U.S. and so-called "offshore" points. The Commission has deferred reconsideration of geographic rate averaging issues until a later date.

CMRS interests⁴ allege that: (1) the rate integration and geographic rate averaging requirements of Section 254(g) do not apply to CMRS services; (2) even if Section 254(g) does apply, the Commission should forbear from applying it to CMRS; (3) the technical configuration of CMRS services does not distinguish between local and interexchange calling, and thus integrating interexchange rates is impossible; and (4) requiring rate integration across affiliates would result in anticompetitive price fixing between competing CMRS providers.

This broad-based assault on Section 254(g) lacks validity. The plain language of Section 254(g) applies to all "providers of interexchange telecommunications services," including CMRS providers that offer interexchange services. The petitioners have not demonstrated how forbearance from Section 254(g) would protect consumers or prevent unreasonable discrimination against offshore points of the United States. With regard to distinguishing local from interexchange CMRS calls, the record demonstrates that CMRS carriers can easily make such distinctions now, and will in the near future be able to do so in real time. Lastly, with respect to rate integration across affiliates, the State recognizes that some limited modification of the definition of "affiliate" may be needed in the case of CMRS carriers competing in the same market. However, there are no valid grounds for granting a wholesale exemption from the affiliate requirement for all CMRS providers in all situations.

⁴ The seven parties filing petitions for reconsideration are all representatives of the CMRS industry: (1) AirTouch Communications; (2) Bell Atlantic Mobile; (3) BellSouth; (4) Cellular Telecommunications Industry Association ("CTIA"); (5) Personal Communications Industry Association ("PCIA"); (6) PrimeCo Personal Communications ("PrimeCo"); and (7) Telephone and Data Systems ("TDS").

I. SECTION 254(g) APPLIES TO ALL PROVIDERS OF INTEREXCHANGE SERVICES, INCLUDING CMRS PROVIDERS

Virtually all of the petitioners allege that Congress' enactment of Section 254(g) in 1996 merely codified the Commission's pre-existing rate integration policy. The petitioners allege that the Commission's pre-1996 policy applied only to landline interexchange carriers ("IXCs") and satellite common carriers and that, therefore, Congress did not intend Section 254(g) to apply to CMRS.⁵

This argument is nothing new and the Commission has expressly rejected it. As the Commission has recognized, of primary importance is the fact that the express language of Section 254(g) applies to all "providers of interexchange telecommunications services" with no exceptions enumerated."⁶ If Congress had intended to exclude CMRS providers from Section 254(g), it would have clearly done so. Many other provisions of the Telecommunications Act of 1996 expressly exempt CMRS services.⁷ One cannot credibly argue that Section 254(g),

⁵ See, e.g., Petition of PrimeCo at 3, 18-20; Petition of CTIA at 2-3; Petition of AirTouch at 2-7; Petition of TDS at 3-4; Petition of Bell Atlantic at 7-8.

⁶ Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as amended, Order, CC Docket No. 96-61, FCC 97-357, at ¶ 19 (released Oct. 3, 1997) ("Stay Order").

⁷ For example, CMRS services are expressly excluded from the 1996 Act's definition of "local exchange carrier." 47 U.S.C. § 153(26). In addition, interLATA CMRS services were expressly classified as one of the "incidental interLATA services" which the Bell companies ("BOCs") could offer without prior Commission approval. 47 U.S.C. § 271(g)(3). Similarly, CMRS services were expressly excluded from the definition of "basic telephone service" in Section 274, thus permitting the BOCs to immediately offer electronic publishing over their CMRS networks. 47 U.S.C. § 274(i)(2)(B). As a last example, the BOCs were expressly permitted to jointly market and sell CMRS services in conjunction with other services, in contrast to the Section 271(e)(1) prohibition against them jointly marketing wireline services. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, sec. 601(d) (1996).

which has no such exemption, nonetheless silently exempts CMRS services from its rate integration requirements.

CMRS providers were, in fact, subject to rate integration requirements articulated by the Commission prior to the enactment of the 1996 Act.⁸ In any event, the enactment of Section 254(g) did not merely incorporate the Commission's previous rate averaging and rate integration policies as applied to AT&T, but significantly expanded these policies as part of a national commitment to advance universal service. Just as Section 254 expanded universal service to include, for the first time, advanced telecommunications services for schools, libraries, and rural health care providers,⁹ so too did Section 254(g) expand the universal service concepts of rate averaging and rate integration to all interexchange carriers and all interexchange services. The Commission has repeatedly recognized the expansive nature of Section 254(g).¹⁰

⁸ The fact that the Commission may not have passed upon the violations of rate integration principles by CMRS carriers in the past cannot be used as justification for CMRS carriers to breach these principles now.

⁹ See, e.g., 47 U.S.C. §§ 254(b)(2), 254(b)(6), 254(h)(2).

¹⁰ For example, under the pre-Section 254(g) regime, AT&T had been allowed to offer promotions lasting longer than 90 days. Under the Section 254(g) regime, in contrast, the Commission determined that a maximum promotion term of 90 days "best implements the statutory mandate for geographic averaging." Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as amended, 11 FCC Rcd 9564, 9578 (1996) (emphasis added) ("First Report and Order"). The Commission also noted that "the 1996 Act extends rate integration to U.S. territories and possessions, including Guam and the Northern Marianas, because rate integration obligations apply to providers of interexchange services between 'states.'" Id. at 9589 (emphasis added).

Right from the beginning of CC Docket 96-61, the Commission recognized that Section 254(g) applied to interexchange CMRS. Consistent with the plain meaning of the statute, the Commission's Notice of Proposed Rulemaking stated that an interexchange call:

includes all means of connecting point A and point B -- wireline or wireless -- and all network paths between those points. In the future, cellular, PCS, or other wireless interexchange services may provide an effective substitute for interexchange wireline service.¹¹

In both the First Report and Order and the Reconsideration Order, the Commission also rejected AMSC's claim that Section 254(g) applied only to landline carriers, stating that AMSC's CMRS services "would appear to fall within the definition of interstate interexchange telecommunications services subject to Section 254(g)."¹²

Even some of the CMRS petitioners have made concessions regarding the applicability of Section 254(g) to CMRS. For example, CTIA does not contest the fact that Section 254(g) applies to CMRS satellite carriers such as AMSC.¹³ CTIA also states that if Section 254(g) applies to terrestrial CMRS services, CMRS carriers should not be required to cross-integrate their interexchange CMRS services with any other type of interexchange service

¹¹ Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as amended, Notice of Proposed Rulemaking, 11 FCC Rcd 7141, 7169 n.118 (1996) ("NPRM") (emphasis added). See also Stay Order at ¶ 19 & n.58.

¹² First Report and Order, 11 FCC Rcd at 9589; Reconsideration Order at ¶ 24. See also Stay Order at ¶ 19 & n.60.

¹³ CTIA Petition at 8 n.11.

(e.g., landline).¹⁴ PrimeCo states that it could accept a rule prohibiting CMRS providers from imposing a special rate category for calls to offshore points.¹⁵ Furthermore, AirTouch states that it could live with a rate integration requirement if it was limited to situations where the CMRS provider has chosen to itemize long-distance service as a discrete, separate charge on a customer's bill.¹⁶

¹⁴ BellSouth states that if CMRS services are required to be rate integrated, cellular and PCS services should be integrated separately. BellSouth Petition at 24. Such separation is not warranted because cellular and PCS are similar, substitutable services. As the BOCs (including BellSouth) have conceded, cellular and PCS "offer similar features and functionalities to customers, compete on the basis of price, quality and services, and . . . the only fundamental difference between the two services is the frequency band on which they operate." Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96-162, FCC 97-352, at ¶ 19 & n.62 (rel. Oct. 3, 1997). Also supporting the joint integration of cellular and PCS rates is the fact that PCS providers are beginning to offer both PCS and cellular service over the same mobile handset. See Mike Mills, "AT&T Joins Wireless Phone Fight", Washington Post, Oct. 15, 1997, at C13 (AT&T's PCS service uses "a phone that works in either digital or traditional 'analog' mode, and also operates at each of the two radio frequencies used by older and new cellular systems."); see also "AMPS Rides Again as PCS Carriers Turn to Analog Roaming to Increase Coverage", PCS WEEK (Oct. 22, 1997).

¹⁵ PrimeCo Petition at 14.

¹⁶ AirTouch Petition at 6, 17. Earlier in Docket 96-61, U S WEST, a controlling partner in PrimeCo, asked the Commission in September 1996 to clarify that it need not cross-integrate the interexchange rates of U S WEST Media Group, its CMRS subsidiary, with the interexchange rates of U S WEST Communications Group, its landline telephone subsidiary. See U S WEST, Inc.'s Petition for Clarification, or, in the Alternative, Reconsideration, at 4-6 (filed Sep. 16, 1996). At that time, U S WEST expressly acknowledged that rate integration applied to all affiliates within each "targeted stock" subsidiary, including its CMRS subsidiary. See id. at 5-6 ("[I]ndividually U S WEST Communications Group and U S WEST Media Group are, of course, subject to rate integration.") (emphasis added).

The Commission has correctly concluded that Congress intended to apply Section 254(g) to all interexchange carriers, including CMRS providers. The petitions should, therefore, be denied.¹⁷

II. CMRS CARRIERS ARE INTEREXCHANGE CARRIERS IF THEY PROVIDE INTEREXCHANGE SERVICES

AirTouch claims that the Commission, in its 1984 access charge proceeding, determined that a cellular carrier was not an interexchange carrier subject to the imposition of access charges.¹⁸ What AirTouch fails to mention is that the Commission determined in 1986 that a cellular carrier would constitute an interexchange carrier if it provided interstate, interexchange service. The Commission noted that many cellular carriers offered their customers "roaming" capability across state lines and that such services did constitute interexchange service:

[S]ome cellular carriers provide their customers with a service whereby a call to a subscriber's local cellular number will be routed to them over interstate facilities when the customer is "roaming" in a cellular system in another state. In this case, the

¹⁷ Bell Atlantic Mobile, BellSouth, and PrimeCo all argue that the Commission did not provide adequate notice that it intended to subject CMRS carriers to the rate integration requirements of Section 254(g). The issue of notice was fully briefed during consideration of PrimeCo's motion for stay, and the State incorporates its comments on the notice issue by reference. See Opposition of the State of Hawaii to PrimeCo's Motion for Stay, at 3-6 (filed Sep. 29, 1997). In its Stay Order, the Commission expressly ruled that adequate notice had been given. See Stay Order at ¶ 19. In any event, the issue of notice has been rendered de facto moot because the Commission is now considering the CMRS issue directly through its review of these petitions for reconsideration.

¹⁸ AirTouch Petition at 8 (citing MTS/WATS Market Structure, 97 FCC.2d 834, 881-83 (1984)).

cellular carrier is providing not local exchange service but interstate, interexchange service.¹⁹

Thus, contrary to AirTouch's assertion, the Commission has explicitly determined that cellular carriers are interexchange carriers when they provide interexchange service. The Commission has most recently reiterated this long-standing determination in its October 3, 1997 Stay Order when it declared: "[W]e decline to stay enforcement of our requirement that CMRS carriers provide interstate interexchange services on an integrated basis."²⁰

Curiously, AirTouch also argues that CMRS carriers are not considered interexchange carriers because the Commission did not mention them in its August 1997 reconsideration order detariffing landline interexchange carriers.²¹ The reason the Commission did not mention CMRS services had nothing to do with the classification of CMRS carriers as interexchange carriers; CMRS services were not mentioned simply because they had already been detariffed, cellular services since their inception²² and all CMRS services since 1994.²³

¹⁹ The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 59 Rad. Reg. 2d (P&F) 1275 at Appendix B n.3 (1986) (emphasis added).

²⁰ Stay Order at ¶ 14. See also Reconsideration Order at ¶ 18 ("Although CMRS is primarily a telephone exchange and exchange access service, many CMRS providers also offer interstate interexchange service as well. An interstate interexchange CMRS call enables a customer to place a long-distance call to an exchange in a different state.").

²¹ AirTouch Petition at 8.

²² See, e.g., Bundling of Cellular Customer Premises Equipment and Cellular Service, Notice of Proposed Rulemaking, 6 FCC Rcd 1732, 1734 (1991) ("[A]t the federal level cellular service has been detariffed from the start.").

²³ Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order, 9 FCC Rcd 1411, 1478-80 (1994) ("CMRS Second Report and Order").

III. THE PETITIONERS HAVE PROVIDED NO GROUNDS FOR THE COMMISSION TO FORBEAR FROM APPLYING SECTION 254(g) TO CMRS PROVIDERS

Many petitioners argue that even if Section 254(g) does apply to CMRS providers, the Commission should forbear from applying it to CMRS because the CMRS marketplace is competitive.²⁴ Again, this argument is nothing new and the Commission has expressly rejected it. As the State noted in May 1996, competition is only one of several considerations under Section 10's forbearance test, and in no case can broad claims about promoting competition alone justify forbearance in these circumstances.²⁵ According to Section 10 of the 1996 Act, the Commission must find for specific services and markets that forbearance (1) will not jeopardize the reasonableness and nondiscriminatory nature of carriers' rates and practices; (2) will not undermine consumer protection; and (3) is otherwise in the public interest.²⁶ Competitive considerations are relevant to the third factor only.²⁷ Universal service considerations are relevant to the first two factors.

None of the petitioners arguing for forbearance from rate integration address the criteria under Section 10 or develop a sufficient factual predicate for forbearance. Nor do the petitioners' describe how the public policy goal of universal service would be served by forbearance. There is also no meaningful discussion as to how forbearance would protect consumers, or as to how they would ensure against unreasonably discriminatory rates and

²⁴ See Bell Atlantic Mobile Petition at 15-20; CTIA Petition at 8-11; PCIA Petition at 4-7; PrimeCo Petition at 21-25; TDS Petition at 4-5.

²⁵ Reply Comments of the State of Hawaii at 3, CC Docket No. 96-61 (filed May 3, 1996).

²⁶ 47 U.S.C. § 160(a).

²⁷ 47 U.S.C. § 160(b).

charges (including unreasonable regional discrimination). Indeed, forbearance from Section 254(g) would severely harm consumers. CMRS services are becoming real substitutes for such interexchange services and bring critically needed competition to offshore consumers.²⁸ It is abundantly clear that consumers on Hawaii and other offshore points would continue to pay discriminatory CMRS rates if forbearance from rate integration were granted.²⁹ Such unreasonable discrimination would violate Section 202(a) of the Communications Act and is precisely what Section 254(g) was enacted to prevent.³⁰

A. Forbearance Cannot Be Justified on Competitive Considerations Alone

In enacting Section 254(g), Congress was not ignorant of the state of competition in the interexchange market. Prior to the enactment of the 1996 Act, the Commission had already determined that all IXCs were non-dominant in the domestic market. In October 1995, the Commission declared AT&T non-dominant because it found that "most major segments of the interexchange market are subject to substantial competition today, and the vast majority of

²⁸ See NPRM, 11 FCC Rcd at 7169 n.118.

²⁹ See Opposition of the State of Hawaii to PrimeCo's Motion for Stay, at 9 (filed Sep. 29, 1997).

³⁰ Section 202(a) prohibits unreasonable discrimination based on a customer's location. Rate integration is a necessary corollary of Section 202(a) because it ensures against location-specific discrimination in the methodology of calculating prices. As the Commission has noted, "a rate structure that uses different ratemaking methods to determine the rates that different users pay for comparable services is inconsistent with the national policy prohibiting unjust or unreasonable rate discriminations, as expressed in Section 202(a)." Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, Notice of Proposed Rulemaking, 1985 FCC LEXIS 2532 at ¶ 10 (1985); see also MTS and WATS Market Structure, 81 FCC.2d 177, 192 (1980).

interexchange services and transactions are subject to substantial competition."³¹ Yet, Congress codified and expanded geographic rate averaging and rate integration in the 1996 Act. Moreover, it did so in the provision concerning universal service because it realized that competition, by bringing rates closer to cost, could make rate disparities between geographic regions worse. The very purpose of geographic rate averaging and rate integration is to promote universal service by, if necessary, subsidizing the high costs of providing telephone service in rural and other high-cost areas with revenues from low-cost areas. Congress enacted Section 254(g) specifically to protect consumers in high-cost areas from such rate disparities.

The Commission has repeatedly rejected attempts by IXCs to avoid the rate integration requirements of Section 254(g) through Commission forbearance. In its First Report and Order, the Commission expressly did not forbear from the rate integration principle for any service.³² Specifically, the Commission stated that:

We are not persuaded that we must forbear from requiring carriers to comply with rate integration, either generally or in competitive conditions, for the same reasons discussed with respect to geographic rate averaging. Our rate integration policy has integrated offshore points into the domestic interstate interexchange rate structure so that the benefits of growing competition for interstate interexchange services . . . are available throughout the nation.³³

The Commission reached the same conclusion in its January 1997 order rejecting AT&T's petition for waiver of Section 254(g), ruling that any increased regional competition that

³¹ Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd 3271, 3288 (1995).

³² First Report and Order, 11 FCC Rcd at 9588-89.

³³ Id. at 9588 (emphasis added); see also id. at 9597 ("[W]e do not view rate integration as inconsistent with flexibility and competitive responses by carriers.").

forbearance would promote does not "outweigh the benefits of the national policy of geographic averaging embodied in section 254(g) of the Act and our implementing regulations."³⁴ Again, in its July 1997 Reconsideration Order, the Commission denied IT&E's request for forbearance from rate integration, stating that:

IT&E has not shown that its rates to subscribers would be reasonable and nondiscriminatory, absent application of section 254(g). Nor has IT&E shown that application of section 254(g) is not necessary to protect consumers from discriminatory rates, or that it would be in the public interest, or that it would promote competition.³⁵

If anything, certain CMRS services, such as cellular service, function in a less competitive marketplace than landline interexchange services. Whereas the Commission has declared all landline IXCs nondominant, the Commission continues to classify facilities-based cellular carriers as dominant because spectrum constraints permit only two cellular carriers per service area.³⁶ In 1994, the Commission concluded that "the record on the degree of competition is less clear for cellular service than for the other services in the CMRS marketplace."³⁷

³⁴ AT&T's Corp.'s Petition for Waiver and Request for Expedited Consideration, 12 FCC Rcd 934, 939 (1997).

³⁵ Reconsideration Order at ¶ 33.

³⁶ CMRS Second Report and Order, 9 FCC Rcd at 1416 & n.22.

³⁷ Id. at 1470.

B. Market-By-Market Rate Integration Does Not Satisfy the Requirements of Section 254(g)

PrimeCo claims that CMRS carriers are required to integrate rates only on a market-by-market origination basis.³⁸ In its Reconsideration Order, the Commission expressly rejected a market-by-market integrated rate structure suggested by AMSC, a CMRS provider:

We are also not persuaded by the argument that it is permissible under section 254(g) to charge mobile service subscribers that originate calls while located in a state or an offshore region higher rates than calls originated in another state or offshore region, as long as all subscribers that originate calls in that state or region are assessed those rates. Applied most broadly, AMSC's interpretation of Section 254(g) would eviscerate the rate integration provisions of that section by permitting carriers to charge customers in different states different rates as long as it charged all customers within that state the same rate. The specific language of section 254(g) requires, however, that subscribers be charged rates no higher than subscribers in different states, not within a state.³⁹

C. The Enactment of Section 332(c) of the Communications Act Has No Bearing on the Authority of the Commission to Integrate CMRS Rate Structures Under Section 254(g)

Bell Atlantic argues that rate integration constitutes a form of rate regulation which Congress and the Commission have decided not to apply to CMRS providers.⁴⁰ Bell

³⁸ PrimeCo Petition at 14.

³⁹ Reconsideration Order at ¶ 25. Similarly, the Commission has rejected AT&T's attempt to charge a different rate structure in certain "corridor" markets and IT&E's plan to discriminate based on the terminating location of an interexchange call. See AT&T's Corp.'s Petition for Waiver and Request for Expedited Consideration, 12 FCC Rcd 934, 939 (1997); Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96-61, DA No. 97-1628, at ¶ 19 (released Jul. 30, 1997).

⁴⁰ Bell Atlantic Mobile Petition at 9-11.

Atlantic notes that Congress passed legislation in 1993 granting the Commission authority to forbear from applying Title II common carrier regulation to CMRS providers and preempting all state and local rate regulation of CMRS services.⁴¹

Bell Atlantic misinterprets the Congressional intent behind enacting Section 332(c) of the Communications Act. As the Commission stated in 1994, the primary intent of Congress was, consistent with the public interest, to accord similar regulatory treatment to similar services.⁴² Furthermore, Congress expressly required the Commission to continue to regulate CMRS providers pursuant to Sections 201 (just and reasonable rates, interconnection obligations), 202 (unreasonable rate discrimination prohibited), and 208 (enforcement of violations through the complaint process) of the Communications Act.⁴³ Thus, CMRS service rates remain subject to federal oversight.⁴⁴ Although the Commission was given the authority to forbear from other regulations of Title II, it could do so only if it determined that such regulations were not needed to: (1) prevent unreasonably discriminatory rates; and (2) protect consumers.⁴⁵ Even though the Commission detariffed CMRS services in 1994, the Commission

⁴¹ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b) (1993) (amending Section 332(c) of the Communications Act).

⁴² CMRS Second Report and Order, 9 FCC Rcd at 1418 & n.29 (citing H.R. Rep. 103-213, 103rd Cong., 1st Sess. 494 (1993)).

⁴³ 47 U.S.C. § 332(c)(1)(A).

⁴⁴ The fact that Section 332(c) preempts states from regulating the retail rates of intrastate CMRS services has no bearing on the Commission's authority -- mandated by Section 254(g) -- to integrate the rates of interstate CMRS services.

⁴⁵ 47 U.S.C. § 332(c)(1)(A).

emphasized that the rates of CMRS carriers remain subject to federal oversight and that enforcement action would be taken if CMRS rates were unreasonable or discriminatory:

[T]he continued applicability of Sections 201, 202, and 208 will provide an important protection in the event there is a market failure. . . . In the event that a carrier violated Sections 201 or 202, the Section 208 complaint process would permit challenges to a carrier's rates or practices and full compensation for any harm due to violations of the Act.⁴⁶

Similarly, Section 10 of the Communications Act permits the Commission to forbear only if the forbearance does not threaten "just and reasonable" rates or risk "unreasonably discriminatory" rates.⁴⁷

Thus, contrary to Bell Atlantic's assertion, CMRS rates have never been totally deregulated. Detariffing is not the same thing as rate deregulation. The Commission cannot, pursuant to Section 332(c) or Section 10 of the Communications act, forbear from applying rate integration to CMRS services because forbearance would allow CMRS carriers to unreasonably discriminate against offshore points, in violation of Section 202(a) of the Communications Act.

D. The Fact That Some CMRS Carriers Are Smaller or New Entrants Does Not Justify Forbearance

Bell Atlantic claims that a rate integration requirement would discourage small and/or new CMRS entrants from building out competitive networks, especially in rural markets.⁴⁸ This claim is unsupported, based on pure speculation, and involves the same "small

⁴⁶ CMRS Second Report and Order, 9 FCC Rcd at 1478-79.

⁴⁷ 47 U.S.C. § 160(a)(1).

⁴⁸ Bell Atlantic Mobile Petition at 13-14.

carrier" argument that has already been considered and rejected by the Commission. In the First Report and Order, the Commission ruled:

We are also not persuaded that we should forbear from applying rate integration to smaller carriers serving high-cost areas on the grounds that they might have difficulty competing against nationwide carriers. These carriers have provided only conclusory allegations of harm and have not shown that they will be unable to compete with larger carriers in a rate-integrated environment, much less that they have satisfied all three of the requirements set forth in Section 10 for exercise of our forbearance authority.⁴⁹

This analysis applies to both landline and wireless small carriers, and Bell Atlantic Mobile has provided no new evidence to change the Commission's prior conclusions on this issue.

The pleas by CMRS providers for special treatment are suspect. CMRS services are increasingly not small and are offering nationwide services.⁵⁰ In addition, CMRS providers are now using their radio frequencies for fixed wireless services.⁵¹ Thus, CMRS providers are quickly starting to look like large landline LECs with affiliated nationwide interexchange services. Bell Atlantic's proposal to exclude new wireless entrants from the rate integration

⁴⁹ First Report and Order, 11 FCC Rcd at 9589; see also Reconsideration Order at ¶ 33.

⁵⁰ See, e.g., Mike Mills, "AT&T Joins Wireless Phone Fight", Washington Post, Oct. 15, 1997, at C13 ("What makes AT&T's service stand apart is that users can 'roam' practically anywhere nationwide"); Rebecca Cantwell, "Sprint Unveils Dual Band Digital, Cellular Phones", Rocky Mountain News, Oct. 15, 1997, at Ed. F, Pg. 2B ("Sprint officials say customers using the new phones will be able to automatically 'roam' in more than 75 percent of the cellular coverage area in the United States and make calls using credit cards elsewhere.").

⁵¹ See Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96-162, FCC 97-352, at ¶ 36 (rel. Oct. 3, 1997) ("We believe that in the wake of the development of fixed wireless services, incumbent LECs and CMRS operators are increasingly likely to be direct competitors.").

requirements of Section 254(g) is not based on credible premises and should, therefore, be rejected.

IV. DISTINGUISHING BETWEEN INTEREXCHANGE AND LOCAL CALLS IN THE CMRS CONTEXT

The CMRS petitioners next attempt to avoid rate integration on technical grounds. Specifically, they argue that it is technically impossible to determine which CMRS calls are interexchange and which are local.⁵² This argument has been proffered by AMSC continuously since April 1996⁵³ and the Commission has repeatedly rejected it.⁵⁴

In ruling that AMSC's mobile services are subject to Section 254(g), the Commission has already rejected the claim that CMRS carriers cannot distinguish between interexchange and local calling. CTIA does not support reconsideration of the Commission's decision to apply rate integration to AMSC, presumably because it knows that AMSC can distinguish the jurisdictional nature of its customers' mobile calls.⁵⁵ If AMSC can make such distinctions, so can other members of the CMRS industry. The CMRS petitioners provide absolutely no support for their assertion of technical infeasibility. Until they do, the Commission should reject their assertion as groundless.

⁵² CTIA Petition at 4; AirTouch Petition at 12.

⁵³ Comments of AMSC Subsidiary Corporation at 3 (filed Apr. 19, 1996) ("AMSC typically cannot tell whether customers are using its system for interexchange or local service."); Reconsideration Order at ¶ 22 ("AMSC contends that the design of its satellite system prevents AMSC from distinguishing local and international traffic from interstate traffic.").

⁵⁴ First Report and Order, 11 FCC Rcd at 9589; Reconsideration Order at ¶ 24.

⁵⁵ See supra n.13 and accompanying text.

Indeed, CTIA fails to mention that this issue of technical feasibility arose in the context of the Local Competition Order's discussion of mutual compensation between CMRS and landline systems. In that August 1996 order, the Commission determined that CMRS providers presently can distinguish between interexchange and local calls, albeit not in real time. In particular, the Commission decided that a CMRS call would be classified as "local" or "interstate" based on either: (1) the location of the initial cell site when a call begins; or (2) the point of interconnection between the LEC and CMRS systems at the beginning of the call.⁵⁶

CMRS customers are billed on a monthly basis. There is, consequently, no need to determine the classification of a CMRS call in real time. CMRS carriers have plenty of time prior to billing to make such classifications and, therefore, should integrate their CMRS interexchange rates as required by Section 254(g). Furthermore, as of April 1, 1998, cellular and broadband PCS carriers are required to have deployed the technology necessary to identify in real time the location of the initial cell site or base station used to originate an enhanced 911 ("E911") call from mobile handsets.⁵⁷ In conclusion, the technology exists now to identify in a timely fashion the jurisdictional nature of CMRS calls and, within the next six months, technology will be deployed that makes such identifications in real time. The Commission should, therefore, reject the claims of technical infeasibility alleged by the CMRS petitioners and order them to integrate interexchange CMRS rates, as required by Section 254(g).

⁵⁶ See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 16017 (1996) ("Local Competition Order").

⁵⁷ 47 C.F.R. § 20.18(d); Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 18676, 18682-84, 18707-18 (1996).

V. ALL INTEREXCHANGE CMRS CALLS WITH A SEPARATE CHARGE FOR INTEREXCHANGE SERVICE -- HOWEVER THE EXTRA CHARGE MAY BE LABELLED -- MUST BE RATE INTEGRATED PURSUANT TO SECTION 254(g)

AirTouch argues that even if differentiating interexchange and local calls is technically possible, many carriers offer wide-area calling plans that charge a uniform rate regardless of whether the call is interexchange or local. Consequently, AirTouch argues that integration of interexchange "rates" has no meaning in such a context.⁵⁸ The State favors wide-area calling plans that offer distance-insensitive charges because they promote the public policy of universal service and non-discrimination. Such plans are similar to extended area service ("EAS") in the landline concept, which have often been beneficial to local ratepayers.⁵⁹ However, the CMRS petitioners concede that many so-called "wide-area calling plans" do not, in fact, provide uniform, distance-insensitive charges.⁶⁰ Rather, many such calling plans charge for interexchange service separately. For such calling plans, Section 254(g) requires that the interexchange charge be rate integrated.

AirTouch states that it would accept a rate integration requirement that was limited to situations where the CMRS provider has chosen to itemize interexchange service as a separate

⁵⁸ AirTouch Petition at 11; see also Bell Atlantic Mobile Petition at 17 n.21.

⁵⁹ A caveat is in order. At some point, if the EAS area became large enough, one could have postalized long distance rates for the mainland U.S. or a major portion thereof. Were the State of Hawaii excluded from such a postalized rate structure, then the fundamental nondiscrimination concerns that gave rise to the rate integration policy would be triggered.

⁶⁰ See PrimeCo Petition at 12-13 ("[A] carrier which provides wide-area local calling plans in some markets may assess a separate toll charge in other markets."); CTIA Petition at 7.