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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Policy and Rules Concerning the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	

REPLY COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST") hereby submits its Reply Comments in support of various petitions for reconsideration, forbearance and/or clarification of the Federal Communications Commission's ("Commission") Reconsideration Order in the above-referenced docket.[1]

I. INTRODUCTION

The lone parties opposing these petitions and arguing in favor of an overly broad rate integration rule which extends to Commercial Mobile Radio Service ("CMRS") carriers are the States of Alaska and Hawaii. In their oppositions, however, Alaska and Hawaii have not shown that there is any lack of CMRS

[1] 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, First Memorandum Opinion and Order on Reconsideration, FCC 97-269, rel. July 30, 1997 ("Reconsideration Order"); appeal pending sub nom. GTE Service Corporation, et al. v. FCC, 97-1538 (D.C. Cir.). Petitions filed Oct. 3, 1997 by PrimeCo Personal Communications, L.P. ("PrimeCo"), Cellular Telecommunications Industry Association ("CTIA"), Personal Communications Industry Association ("PCIA"), AirTouch Communications ("AirTouch"), Bell Atlantic Mobile, Inc. ("Bell Atlantic"), Telephone and Data Systems, Inc. ("TDS"), and BellSouth Corporation ("BellSouth").

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competition in their States or that customers are paying higher rates for interstate, interexchange CMRS service in their States than customers in mainland States. Rather, Alaska and Hawaii merely speculate about the potential for higher CMRS rates in offshore States and territories.

These unsubstantiated claims of possible CMRS rate discrimination are insufficient to justify the Commission's expansion of its existing rate integration policies to include CMRS carriers. While U S WEST recognizes that, in the years when AT&T was a monopoly, some rates for telecommunications service to and from offshore States and territories were higher than was cost-justified, that is not the case in today's highly competitive CMRS market. Moreover, in contrast to the theoretical harm posed by Alaska and Hawaii, the petitioners have presented compelling evidence demonstrating the significant anti-competitive consequences that could result if rate integration is applied to CMRS carriers.

U S WEST supports the notion that customers in offshore States and territories should have access to telecommunications service to and from the mainland at reasonable rates, but it does not believe that expansive government regulation of CMRS rates is the best solution for these customers. The overbreadth problem is magnified by the fact that Section 254(g) of the Communications Act of 1934, as amended, extended the Commission's existing rate integration policies, which historically applied to offshore States and territories, to the mainland as well. Taken to the extreme, therefore, the Reconsideration Order could be interpreted as requiring the homogenization of interstate CMRS rates throughout the entire country and across various independent affiliated companies. As a result,

further action by the Commission is needed to ensure that the rate integration provision of Section 254(g) is implemented in a reasonable manner.

II. THE COMMISSION'S SIGNIFICANT EXPANSION OF ITS EXISTING RATE INTEGRATION POLICIES CONTRAVENES THE LEGISLATIVE PURPOSE UNDERLYING SECTION 254(g)

The Commission' significant expansion of its existing rate integration requirement to include CMRS carriers contravenes the legislative purpose underlying Section 254(g). Congress clearly stated that the purpose of Section 254(g) was to "incorporate the Commission's existing rate integration policy."[2] CMRS carriers had never before been subject to any type of rate integration requirement under the Commission's existing policies. Thus, the Commission has no authority to impose rate integration on CMRS carriers as part of its implementation of Section 254.

The States of Alaska and Hawaii ignore this unambiguous legislative pronouncement and instead point to the fact that Section 254(g) extends rate integration to U.S. territories and possessions, including Guam and the Northern Marianas Islands, that were not covered by the Commission's existing rate integration policies.[3] But this only shows that when Congress intended for Section

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[2] S. Rep. No. 230, 104th Congress, 2d Sess. 1, 132 (1996) (Joint Explanatory Statement). The plain meaning of Section 254(g) is consistent with this legislative purpose. In particular, Congress refers to "providers of interstate interexchange telecommunications services" in Section 254(g), not all providers of interstate, interexchange service as it does elsewhere in the Telecommunications Act of 1996. Section 254(b)(4), for example, provides that "all providers of telecommunications services" should make an equitable and nondiscriminatory contribution to universal service. 47 U.S.C. § 254(b)(4) (emphasis added).

[3] Alaska Opposition at 4; Hawaii Opposition at 4.

254(g) to expand the Commission's existing rate integration policies it did so explicitly. It also demonstrates Congress was fully aware of the scope of the Commission's existing rate integration policies when it incorporated these policies into Section 254(g). The position taken by Alaska and Hawaii ignores the legislative purpose underlying Section 254(g) and attempts to read into the statute some broad rate integration requirement that was never intended.

III. AS A PRACTICAL MATTER, RATE INTEGRATION DOES NOT MAKE SENSE IN THE CMRS CONTEXT

The petitioners provided substantial documentation for their position that, as a practical matter, rate integration does not make sense in the CMRS context. In contrast, Alaska and Hawaii advocate several positions that reflect a lack of sensitivity to the complexities of imposing a rate integration regime on the CMRS industry. For example, they argue that the definition of interstate, interexchange calls used in the landline context also could be used to determine the scope of the rate integration requirement as applied to CMRS carriers.[4] This argument ignores the fact that CMRS service areas are structured without regard to LATA or state boundaries. Moreover, as a number of petitioners indicated, many CMRS carriers have established wide area local calling areas that could be found to be inconsistent with the Commission's rate integration rule. The practical effect of imposing a rate integration requirement in the CMRS context could be to deprive customers of the benefits of these types of arrangements.

[4] Alaska Opposition at 2-3; Hawaii Opposition at 21-22.

Hawaii even goes so far as to argue that roaming charges must be subject to the rate integration requirement, although it admits that the Commission has never required CMRS carriers to integrate these charges.[5] Once again, Hawaii does not appear to appreciate the impact that its proposed rate integration requirement would have on the CMRS industry. For example, if one of U S WEST's PCS customers with a dual mode (i.e., PCS and cellular) phone travels to Dallas, the customer may roam on the network of a PCS carrier, a cellular carrier, or switch back and forth between the two. If Hawaii's position is correct, then rate integration would appear to require that these unrelated CMRS carriers in Dallas homogenize their roaming charges so that such charges are integrated from the perspective of U S WEST's PCS customer. Such an absurd result would have a chilling effect on roaming agreements among PCS and cellular carriers, which would result in reduced service coverage for CMRS customers.

At the same time, however, Alaska and Hawaii concede that there is a need for clarification regarding the types of CMRS calls that should be subject to the rate integration requirement.[6] For example, both Alaska and Hawaii acknowledge that interstate CMRS calls for which there is not a toll charge "may not properly be subject to rate integration requirement because they are not considered interexchange calls."[7] Ultimately, Hawaii concludes that the application of rate

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[5] Hawaii Opposition at 20.

[6] Alaska Opposition at 15; Hawaii Opposition at 23.

[7] Alaska Opposition at 15; Hawaii Opposition at 20.

integration in the CMRS context is an issue that "warrants more analysis."[8] Thus, there is at least some recognition on the part of the Alaska and Hawaii that requiring CMRS carriers to integrate their rates raises complex technical issues that have yet to be resolved by the Commission.

The oppositions filed by Alaska and Hawaii further illustrate the myriad complex issues associated with applying rate integration in the CMRS context. Yet the Commission did not solicit any comment on any of the implementation issues that would be raised by CMRS rate integration, develop any factual record on these issues, or provide any explanation in the Reconsideration Order for its decision to extend rate integration to CMRS carriers. In short, the Commission has not complied with the Administrative Procedure Act, and it cannot "bootstrap notice from a comment"[9] or rely on petitions for reconsideration to cure the procedural deficiencies of its actions in this proceeding.[10] Therefore, before the Commission could lawfully impose a rate integration requirement on CMRS carriers, it would have to provide notice of its proposal and obtain public comment. Given that the only proponents of applying rate integration to CMRS carriers are the States of Alaska and Hawaii, the likely result of such a proceeding would be a more narrowly

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[8] Hawaii Opposition at 23.

[9] Fertilizer Institute v. EPA, 935 F.2d 1303, 1312 (D.C. Cir. 1991).

[10] National Tour Brokers Ass'n v. United States, 591 F.2d 896, 901 (D.C. Cir. 1978).

defined rate integration rule that does not have the same potential for anti-competitive consequences as the Commission's current rule.[11]

IV. THE STATUTORY CRITERIA FOR FORBEARANCE IS SATISFIED WITH RESPECT TO THE APPLICATION OF THE RATE INTEGRATION REQUIREMENT TO CMRS CARRIERS

U S WEST agrees with the petitioners that Section 254(g) does not require integration of CMRS rates, but if the Commission reaches the opposite conclusion, then the Commission should forbear from applying its rate integration requirement to CRMS carriers. Numerous petitioners have demonstrated that the Section 10 test for forbearance is satisfied with respect to the application of the rate integration requirement to CMRS carriers. Alaska and Hawaii disagree, arguing that rate integration is necessary to protect consumers in offshore States and territories from unreasonable rate discrimination and that the existence of competition is not itself sufficient to support forbearance.[12] These arguments are counterintuitive and are unsupported by any evidence. Giving CMRS carriers the freedom to meet consumer needs in terms of price, as well as quality and availability of service, produces significant public interest benefits that will only increase with the emergence of new CMRS competitors. Therefore, the application

[11] For example, Alaska opposes AirTouch's proposed compromise of prohibiting CMRS carriers from establishing a separate rate category for calls to offshore points because this solution does not address call originating from offshore points. Alaska Opposition at 14. Surely, an alternative solution could be crafted that addresses Alaska's concern without implementing an overly broad rate integration rule that applies to all CMRS carriers.

[12] Alaska Opposition at 11-12; Hawaii Opposition at 11-12.

of the Commission's rate integration requirement to CMRS carriers is unnecessary and detrimental to consumers.

The Commission's exercise of its Section 10 authority to forbear from applying its rate integration rule to CMRS would be fully consistent with the Commission's prior decision to exercise its Section 332 authority to forbear from regulating CMRS rates. In fact, Section 10 incorporates the same three-prong test for forbearance that is found in Section 332. Hawaii argues that CMRS rates should be integrated, irrespective of Sections 332, because rate integration promotes universal service in high-cost areas.[13] If this argument is taken to its logical conclusion, however, universal service could be used to eviscerate Section 332 and require the homogenization of all CMRS rates. Clearly, the underlying purpose of the universal service provisions of Section 254 was not to pull all CMRS rates back into an intrusive rate-regulation regime. To the contrary, Congress enacted Section 332 in recognition of the fact that the CMRS industry is highly competitive and consumers would benefit from affording CMRS carriers pricing freedom to meet customer needs.

V. THERE IS UNANIMOUS SUPPORT FOR CLARIFICATION OF THE AFFILIATE REQUIREMENT

There is unanimous support among all parties for clarifying the scope of the Commission's rate integration requirement as it applies to independent affiliated companies. For instance, Alaska and Hawaii take the position that rate integration

[13] Hawaii Opposition at 11.

should not apply across affiliated companies that are not under common control.[14] Alaska also notes that it has been discussing the affiliate requirement with members of the CMRS industry in an effort to reach a common understanding of what clarification might be required.[15] The ultimate goal of this cooperative effort should be to define "affiliate" for rate integration purposes in a manner that avoids the potential anti-competitive consequences of the affiliate requirement in its current form.

Whether or not a cooperative solution is achieved, the Commission should clarify the scope of the affiliate requirement – for both wireless and wireline carriers – in line with the express reasoning behind the rate integration rule. Clearly, rate integration should not be required across independent affiliated companies that, for legitimate business purposes, have a common ownership interest in a licensee. Such a requirement could have the effect of forcing competing carriers to share pricing information and to jointly establish an integrated rate structure, both of which would raise serious antitrust concerns. Although these competitive concerns were originally raised by PrimeCo in the CMRS context, implementation of the rate integration requirement will be equally problematic for independent affiliated companies in the wireline context. The Commission should adopt a well-defined affiliate requirement which ensures that the rate integration requirement does not result in unintended affiliate compliance problems for either wireless or wireline carriers.

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[14] Alaska Opposition at 14; Hawaii Opposition at 24.

For these reasons, the Commission should reconsider its decision to apply rate integration to CMRS carriers and clarify the scope of the affiliate requirement as it applies to both wireless and wireline carriers. In the alternative, the Commission should either exercise its Section 10 authority 10 to forbear from applying its rate integration rule to CMRS carriers or, at a minimum, commence a rulemaking proceeding to craft a sensible and more narrowly defined compromise.

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November 14, 1997

[15] Alaska Opposition at 14.

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 14th day of November, 1997, I have caused a copy of the foregoing **REPLY COMMENTS OF U S WEST, INC.** to be served, via first-class United States Mail, postage-prepaid, upon the persons listed on the attached service list.

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