PCIA Personal Communications Industry Association

EX PARTE OR LATE FILED

March 17, 1998

VIA HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: *Clarification of the Commission's Rules on Interconnection Between LECs and Paging Carriers*, CCB/CPD 97-24

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; First Report and Order, CC Docket Nos. 96-98, 95-185

Formal Complaints of AirTouch Paging against GTE, File Nos. E-98-08, E-98-10

Formal Complaints of Metrocall against Various LECs, File Nos. E-98-14-18

Dear Ms. Salas:

This letter is a follow up to recent meetings between representatives of the Personal Communications Industry Association ("PCIA") and certain FCC staff members in which we discussed the fact that the entitlement of one-way messaging carriers to terminating compensation was specifically addressed in the appeal to the Eighth Circuit of the Local Competition First Report and was resolved in favor of the paging companies.[1/]

As requested by some of the meeting participants, PCIA is providing excerpts from the "Brief of the Mid-Sized Incumbent Local Exchange Carriers" filed November 18, 1996 in Case No. 96-3321 (and the related cases that were consolidated in the 8th Circuit). These portions of the brief contain the petitioners' argument that "the FCC's rules requiring mutual and reciprocal compensation of paging companies should be set aside" because " the origination and termination of traffic between a LEC's network and that of a paging company is not 'mutual and reciprocal' since the paging company's customers do not originate calls." MILEC Brief, p. 51.

This issue was joined in the Court by the responsive brief filed jointly on behalf of the Commercial Mobile Radio Service ("CMRS") intervenors, to which PCIA was a party. Excerpts from the "Brief for CMRS Providers in Support of Respondents" filed December 23, 1996 also are attached. An entire section of this brief was devoted to the argument that the FCC properly found paging companies to be entitled to terminating compensation. The brief demonstrates that the statute

1/ 11 FCC Rcd. 15499 (1996)

• 500 Montgomery Street • Suite 700 • Alexandria, VA 22314-1561 •
• Tel: 703-739-0300 • Fax: 703-836-1608 • Web Address: http://www.pcia.com •

does not require traffic to be reciprocal, or payments to be reciprocal, but rather requires that the obligation to compensate another carrier "for costs incurred" in terminating traffic be reciprocal. Since paging carriers originate no traffic, the LECs perform no termination functions and incur no costs. In this one-way context, the "reciprocal" recovery of costs properly results in payments flowing in one direction only.

Ultimately, the Court specifically upheld the Commission's LEC/CMRS interconnection rules **without denying paging carriers the benefits accorded other CMRS carriers**. Iowa Pub. Utils. Bd v. FCC, 120 F.3d 753, n. 21 (8th Cir. 1997). No party has challenged this ruling in the Supreme Court.

This analysis makes clear that the entitlement of paging companies to reciprocal compensation has been ruled upon by the Commission, upheld by the 8th Circuit on appeal and is now final. The Commission risks "snatching defeat from the jaws of victory" by revisiting this ruling now.

Pursuant to Section 1.1206(b) of the Commission's rules, two copies of this letter are being filed with the Secretary's office. In addition, copies of this filing are being delivered to the individuals listed below.

Kindly refer questions in connection with this matter to the undersigned.

Respectfully submitted,

Angela E. Giancarlo

Angela E. Giancarlo, Esquire
Government Relations Manager

Attachment

cc: John Cimko
Paul Gallant
Dan Grosh
Karen Gulick
Jane Jackson
Ed Krachmer
Kevin Martin
Paul Misener
Jeanine Poltronieri
Tamara Preiss
David Siddall

EXCERPTS FROM

BRIEF OF THE MID-SIZED INCUMBENT LOCAL EXCHANGE CARRIERS

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Docket No. 96-3321 (and consolidated cases)

IOWA UTILITIES BOARD, et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Respondents.

ON PETITIONS FOR REVIEW OF THE FIRST REPORT AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF THE MID-SIZED INCUMBENT LOCAL EXCHANGE CARRIERS

Mark R. Kravitz
Jeffrey R. Babbin
Daniel J. Klau
WIGGIN & DANA
One Century Tower
P.O. Box 1832
New Haven, CT 06508
(203) 498-4400

Counsel for
The Southern New England
Telephone Company

[Listing of counsel continued on reverse side]

Robert A. Mazer
Albert Shuldiner
VINSON & ELKINS L.L.P.
1455 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-1008
(202) 639-6500

Counsel for
Aliant Communications Company

Diane Smith
Carolyn C. Hill
ALLTEL Telephone Services Corp.
655 15th Street, N.W.
Suite 220
Washington, D.C. 20005
(202) 783-3974

Counsel for
ALLTEL Telephone Services Corp.

Douglas E. Hart
Jack B. Harrison
FROST & JACOBS LLP
2500 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 651-6800

Counsel for
Cincinnati Bell Telephone Company

Thomas E. Taylor
Sr. Vice President and General Counsel
Cincinnati Bell Telephone Company
201 East Fourth Street
Cincinnati, Ohio 45202
(513) 397-1504

Counsel for
Cincinnati Bell Telephone Company

Jerry W. Amos
James H. Jeffries IV
AMOS & JEFFRIES, L.L.P.
Suite 1230 Renaissance Plaza
230 North Elm Street
Post Office Box 787
Greensboro, North Carolina 27402
(910) 273-5569

Counsel for
The Concord Telephone Company and
North State Telephone Company

Donn T. Wonnell
Pacific Telecom, Inc.
805 Broadway
Vancover, WA 98660

Counsel for
Pacific Telecom, Inc.

M. John Bowen, Jr.
Margaret M. Fox
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

Counsel for
Rock Hill Telephone Company

George Petrutsas
Paul J. Feldman
FLETCHER, HEALD & HILDRETH P.L.C.
1300 N. 17th Street, 11th Floor
Rosslyn, VA 22209
(703) 812-0400

Counsel for
Roseville Telephone Company

Madelyn M. DeMatteo
Alfred J. Brunetti
The Southern New England
Telephone Company
227 Church Street
New Haven, CT 06510
(203) 771-5200

Counsel for
The Southern New England
Telephone Company

telecommunications carriers." In turn, the Act requires state commissions to determine wholesale rates "on the basis of retail rates . . . excluding the portion thereof attributable to any marketing, billing, collection, and other **costs that will be avoided** by the local exchange carrier." § 252(d)(3) (emphasis added). Section 251(c)(4) thus requires wholesale rates to be based on costs **actually** avoided, not costs that a LEC might, could, or should avoid. Once again, however, the FCC has put a spin on the Act that is at odds with the ordinary meaning of its words. It has defined avoided retail costs as "those costs that **reasonably can be avoided** when an incumbent LEC provides a telecommunications service for resale at wholesale rates to a requesting carrier." (Rule § 51.609(b))(emphasis added).

The FCC rests its interpretation, once again, not on the text of the Act but upon its unsupported understanding of the intent of the provision: "We do not believe that Congress intended to allow incumbent LECs to sustain artificially high wholesale prices by declining to reduce their expenditures to the degree that certain costs are readily avoidable." (Report ¶ 911). However, the FCC offers not a single citation to anything in the legislative history of the Act that supports its "beliefs" regarding Congress's intent. In any event, the best evidence of legislative intent is the language that Congress chose. Jones, 811 F.2d at 447. And § 252(d)(3) could not be clearer: wholesale rates are to be determined by reference to actual "avoided" costs, not hypothetically "avoidable" costs.

4. The FCC's rules requiring LECs to compensate paging companies for traffic that originates on the LEC's network is also contrary to the plain language of the Act. Section 251(b)(5) imposes upon incumbent LECs the duty to "establish reciprocal compensation arrangement for the transport and termination of telecommunications." Section 252(d)(2)(A) provides that, for the purposes of § 251(b)(5), the terms of a reciprocal

compensation arrangement must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." Read together, as they must be, these provisions of the Act make clear that a LEC must provide compensation to a fellow LEC for terminating a call that originated on the LEC's network only if the origination and termination of traffic by customers of the two carriers is "mutual and reciprocal."

Inexplicably, the FCC's rules require reciprocal compensation to be provided to paging providers for terminating traffic that originates with LECs. (Rule §§ 51.701 - 51.717; Report ¶ 1008). But paging customers cannot originate a "telephone call," or any other kind of telecommunication's traffic, on the paging company's network for termination on the LEC's network. That is, traffic runs in one direction -- from the LEC's customers, to the paging company, and thence to the paging company's customer. As such, the origination and termination of traffic between a LEC's network and that of a paging company is not "mutual and reciprocal" since the paging company's customers do not originate calls. Under such circumstances, a requirement that LECs compensate paging companies for calls originating on the LECs' networks means that the LECs are effectively subsidizing the paging company. Nothing in §§ 251(b)(5) or (d)(2)(A) warrants so anomalous a result. Accordingly, the FCC's rule requiring mutual and reciprocal compensation of paging companies should be set aside.

* * * *

The net result of the FCC's rules on pricing, promotions, interconnection and unbundling described above is to disable incumbent LECs, particularly mid-sized and small

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BRIEF FOR INTERVENORS CMRS PROVIDERS IN SUPPORT OF RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3321 (and consolidated cases)

IOWA UTILITIES BOARD, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

On Consolidated Petitions for Review of An Order
of the Federal Communications Commission

**BRIEF FOR INTERVENORS CMRS PROVIDERS
IN SUPPORT OF RESPONDENTS**

David A. Gross
AIRTOUCH COMMUNICATIONS, INC.
1818 N Street, N.W.
8th Floor
Washington, D.C. 20036
(202) 293-4955

Counsel for AirTouch Communications, Inc.

Leonard J. Kennedy
Michael D. Hays
Laura H. Phillips
DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

Counsel for Comcast Corp.

Robert A. Long, Jr.
Ernest A. Young
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Michael F. Altschul
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
(202) 785-0081

Counsel for Cellular Telecommunications Industry Association

[Names of additional counsel appear on inside front cover]

December 23, 1996

Werner K. Hartenberger
Laura H. Phillips
J.G. Harrington
DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

Counsel for Cox Communications, Inc.

Jerome K. Blask
GURMAN, BLASK & FREEDMAN, CHARTERED
1400 Sixteenth Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 328-8200

Counsel for ProNet Inc.

Judith St. Ledger-Roty
Robert J. Aamoth
REED SMITH SHAW & MCCLAY
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005
(202) 414-9237

Counsel for Paging Network, Inc.

Caressa D. Bennet
Gregory Whiteaker
BENNET & BENNET, PLLC
1019 Nineteenth Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 530-9800

Counsel for Rural Telecommunications Group

Cathleen A. Massey
AT&T WIRELESS SERVICES, INC.
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 223-9222

Counsel for AT&T Corp.

Robert A. Long, Jr.
Ernest A. Young
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Joseph M. Gensheimer
Andrew W. Buffmire
SPRINT SPECTRUM L.P.
4900 Main Street
Kansas City, MO 64112
(816) 559-2516

Jonathan M. Chambers
SPRINT SPECTRUM L.P.
Suite M-112
1801 K Street
Washington, DC 20036
(202) 835-3617

Counsel for Sprint Spectrum L.P.

Raymond G. Bender, Jr.
J.G. Harrington
Richard S. Denning
DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

Counsel for Vanguard Cellular Systems, Inc.

Louis Gurman
Doane F. Kiechel
Stephen E. Holsten
GURMAN, BLASK & FREEDMAN, CHARTERED
1400 Sixteenth Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 328-8200

Gene DeJordy
WESTERN WIRELESS CORPORATION
2001 N.W. Sammamish Road
Suite 100
Issaquah, Washington 98027
(206) 313-7775

Counsel for Western Wireless Corporation

Rule is so bound up with the technical, and exclusively federal, judgments involved in radio licensing that this Court should defer to the FCC's judgment on the issue.

C. The FCC Properly Applied § 251(b)(5)'s Reciprocity Requirement To Paging Companies.

The only specific reference to CMRS in petitioners' briefs is the assertion by the Mid-Size LECs ("MILECS") that "[t]he FCC's rules requiring LECs to compensate paging companies for traffic that originates on the LEC's network [are] . . . contrary to the plain language of the Act." MILEC Br. at 50. The MILECs argue that the one-way nature of paging traffic prevents a compensation arrangement between a LEC and a paging company from being "mutual and reciprocal." If this argument prevails, the LECs will actually charge the paging company for originating calls from the LECs own subscribers to paging units, rather than paying the paging company for termination services.

This argument makes no sense. Section 252(d)(2) specifically envisions the "recovery . . . of costs" incurred.[22] The undisputed evidence is that paging companies incur substantial costs for terminating LEC-originated calls.[23] Payment for call termination therefore involves no "subsidy" to paging carriers; indeed, the only subsidy occurs when LECs -- without any statutory support whatsoever -- charge for originating calls, even though origination costs are fully borne by the LECs' subscribers.[24]

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[22] If there is no traffic, there are no costs; thus, the absence of compensation in the absence of any traffic is entirely consistent with § 252.

[23] See Comments of Paging Network, Inc., CC Docket No. 96-98, filed May 16, 1996, at 11 (App. at 32).

[24] LECs benefit from paging interconnection because the ability to complete calls to pagers enhances the value of the LEC's network to its subscribers, which further undermines the subsidy argument.

The MILECS confuse "mutuality" of traffic flows with "mutuality" of obligation to compensate the other carrier for costs incurred. The FCC concluded that an obligation is "reciprocal" under § 251(b)(5) if each carrier is required to compensate the other for costs incurred in terminating the other carrier's calls, whether those costs are large, small, or nonexistent. That interpretation of the statute is reasonable and entitled to deference. Indeed, it is hard to see how the MILECs' definition of mutuality would not bar compensation whenever traffic flows were unequal, which they concede is often the case.[25]

Requiring paging companies to be compensated for terminating traffic also is necessary to avoid discrimination. Many telecommunications carriers offer paging along with other services, and will be paid for terminating pages as well as for terminating other communications over their facilities.[26] It would be unreasonable for a paging-only carrier not to be compensated for terminating a functionally equivalent one-way communication. Accordingly, the agency's interpretation of § 251(b)(5) as applied to paging companies must be upheld.

IV. The CMRS Provisions Are Severable From The Provisions Challenged By Petitioners.

Although petitioners attack only selected provisions of the FCC's 700-page Order, they have asked this Court to vacate the entire Order, including the many provisions which the LECs have not directly challenged or even mentioned. This "guilt by association" strategy cannot succeed absent an argument that the challenged and unchallenged provisions are so

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[25] LECs argued to the FCC that the imbalance in two-way mobile traffic flow entitled them to greater compensation than they would receive under a "bill and keep" arrangement. See Order ¶ 1109, at 537-38.

[26] LEC network architecture does not distinguish between calls that terminate as two-way voice communications and calls that terminate as pages.