

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

JUN - 8 1998

DOCKET FILE COPY ORIGINAL

In the Matter of )  
)  
Calling Party Pays Service ) WT Docket No. 97-207  
Option in the Commercial Mobile )  
Radio Service )  
)  
CTIA Petition for Expedited )  
Consideration )

REPLY COMMENTS OF  
THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

CELLULAR TELECOMMUNICATIONS  
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The Cellular Telecommunications Industry Association ("CTIA")<sup>1</sup> submits these Reply Comments in the above-captioned proceeding<sup>2</sup> and requests that the Commission issue a Notice of Proposed Rulemaking ("NPRM") to adopt uniform, nationwide rules for Calling Party Pays ("CPP") service. The wireless pricing model differs from wireline telecommunications services and from mobile services provided in other countries. For CMRS to develop into a closer substitute for wireline services, subscribers should no longer be required to continue paying to receive calls

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<sup>1</sup> CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including 48 of the 50 largest cellular and broadband personal communications service ("PCS") providers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

<sup>2</sup> Calling Party Pays Service Option in the Commercial Mobile Radio Services, Notice of Inquiry, 12 FCC Rcd 17693 (NOI); CTIA Petition for Expedited Consideration (filed February 23, 1998) ("CTIA Petition").

merely because of a pricing structure that is the outgrowth of historical accident.

**I. INTRODUCTION AND SUMMARY.**

The comments filed in this proceeding favor the rapid issuance of an NPRM on CPP services. Contrary to the assertions of some commenters,<sup>3</sup> CPP will not become a reality for the vast majority of Americans without Commission intervention on the few, narrow issues raised in CTIA's Petition. Immediate resolution of these issues by the Commission is critical to ensure the commercial viability of CPP and its concomitant public benefits.<sup>4</sup> Although the market will do much to resolve some of the issues raised by commenters, an NPRM is required to address the few issues still under debate; namely the billing, consumer notification, and jurisdictional issues surrounding CPP implementation.

Market forces, and not Commission rules, should determine the ultimate development of CPP. The Commission should focus on removing the existing regulatory impediments for those CMRS providers that choose to offer CPP services. This does not, however, require the creation of a new section of the Code of Federal Regulations dedicated to CPP implementation. Rather, the FCC's role should be limited to eliminating regulatory barriers and rapidly adopting the least burdensome rules to ensure

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<sup>3</sup> See, e.g., Opposition of USTA at 1.

<sup>4</sup> See Comments of Motorola at 1; Comments of Nextel Communications at 1; Comments of Omnipoint at 2; Comments of Sprint Spectrum at 2, 4; Comments of Vanguard Cellular at i.

adequate customer notification. In short, the record does not support a formal CPP mandate, rather the Commission need only lift regulatory hurdles surrounding its implementation.<sup>5</sup>

Adoption of an NPRM consistent with CTIA's proposals accords with the Communications Act of 1934, as amended ("Act"). Under Section 1 of the Act, and more recently in the Telecommunications Act of 1996, Congress empowered the Commission with the authority and a responsibility to foster "a pro-competitive, de-regulatory national policy framework . . . to accelerate rapidly private sector deployment of advanced telecommunications . . . services to all Americans. . . ." <sup>6</sup> With respect to CMRS, Congress was even more emphatic when it concluded in its revisions to Section 332 of the Act that the Commission should "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."<sup>7</sup> Moreover, Congress determined that Section 332(c)(3)(A) should also "preempt state rate and entry regulation of all commercial mobile services."<sup>8</sup> The record in this proceeding evidences that CPP will further

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<sup>5</sup> Concerns over technical limitations of CPP, such as revenue leakage, need not be resolved by the Commission. Carriers themselves, along with industry standards setting bodies, will undoubtedly analyze the recoverability of charges when considering whether or how to provide CPP services.

<sup>6</sup> S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).

<sup>7</sup> H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993) ("House Report").

<sup>8</sup> Id.

these Congressional principles and fully justifies a national CPP communications policy. It is thus incumbent upon the Commission to take the remaining, critical steps necessary to create a viable CPP service offering.<sup>9</sup>

**II. THE RECORD IN THIS PROCEEDING DEMONSTRATES NO NEED FOR REQUIRING LECs TO PROVIDE CPP BILLING AND COLLECTION AT THIS TIME.**

CTIA has consistently stated that there is no need, at this time, for the FCC to alter the existing CMRS/LEC relationship. The Commission has concluded that billing and collection is an unregulated, competitive, non-common carrier service; CTIA is not proposing any change to this policy.

For CPP to become a viable service offering, however, LECs must make available to CMRS providers the data necessary to bill for CPP. Section 251(c)(3) of the Act<sup>10</sup> obligates incumbent LECs to provide requesting telecommunications carriers, on an unbundled basis, with sufficient information to do their own billing and collection.<sup>11</sup>

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<sup>9</sup> When, as here, the record before the Commission demonstrates that specific decision making is warranted on its part, the Commission should not hesitate to take action. See 47 C.F.R. § 1.407 ("If the Commission determines that the petition discloses sufficient reasons in support of the action requested to justify the institution of a rulemaking proceeding . . . an appropriate notice of proposed rule making will be issued."); see also 5 U.S.C. § 553.

<sup>10</sup> 47 U.S.C. §251(c)(3).

<sup>11</sup> Further Comments of Bell Atlantic at 4. In addition, prior to the Telecommunications Act of 1996, the Commission determined that billing, name, and address was a Title II common carrier service, access to which other interstate common carriers were entitled. Policies and Rules Concerning Local Exchange Carrier Validation and Billing

### III. THE FCC MUST ADOPT A UNIFORM, NATIONAL SYSTEM OF CUSTOMER NOTIFICATION.

CTIA and the majority of commenters support a uniform, national system to notify callers that charges may be incurred for calls to wireless CPP customers.<sup>12</sup> Implementation of CPP will result in a significant change in the way consumers pay for calls to wireless subscribers. This modification requires that consumers receive adequate, regular notice that the person they have called has elected a new billing arrangement with the wireless carrier. Specifically, CTIA and others support the use of a distinctive tone and, for a brief period of time (18-24 months after a Commission Order), a recorded intercept message, which will inform callers that they will be charged for placing a call to a CMRS subscriber electing CPP service. This notification format will ensure that the calling party is consistently provided with sufficient information to decide whether to continue the CPP call or to terminate without incurring a charge, while not imposing undue or unnecessary requirements on the CMRS providers offering CPP service.

The Commission should not micromanage the notification message by dictating its exact content. Commenters oppose any requirement that would specify the content of the message or

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Information for Joint Use Calling Cards, CC Docket No. 91-115, *Second Report and Order*, 8 FCC Rcd 4478 (1993).

<sup>12</sup> See Comments of AirTouch at 3; Comments of Omnipoint at 1; Comments of OPASTCO at 3; Comments of Vanguard Cellular at 17; Further Comments of Bell Atlantic at 3.

require the inclusion of specific pricing information.<sup>13</sup> As noted in CTIA's prior pleadings, providing specific costs is needlessly complex as well as misleading because the intercept message will most likely be unable to account for the total charges associated with a CPP call (e.g., the associated wireline charges).<sup>14</sup> Therefore, any requirement to provide cost information would be incomplete at best, and misleading to the customer at worst.<sup>15</sup>

Moreover, the longer the message, the higher the probability that callers will become frustrated and terminate the call prior to completion. On several different occasions, the Commission has recognized the importance of minimizing the delay between call initiation and call completion.<sup>16</sup> In its implementation of number portability, the Commission rejected measures which would

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<sup>13</sup> See Comments of Rural Cellular Association at 2; Comments of Vanguard Cellular at 17.

<sup>14</sup> No party has refuted CTIA's belief that providing incomplete pricing information, which is inevitable in a CPP environment, is harmful to consumers. NOI Comments of CTIA at 10.

<sup>15</sup> The Commission has only required that intercept messages include specific cost information in those limited cases where there existed a record of significant and persistent abuse by service providers (e.g., operator services and 900 pay-per calls). See Policies and Rules Concerning Operator Service Providers, Report and Order, 6 FCC Rcd 2744, 2746 (1991); Policies and Rules Concerning Interstate 900 Telecommunications Services, Report and Order, 6 FCC Rcd 6166 (1991).

<sup>16</sup> As a measure of service quality, the Commission has consistently monitored dial-tone-delay in wireline networks. See ARMIS filing 43-06 (the general industry standard is three seconds).

result in a 1.3 second call completion delay.<sup>17</sup> The Commission reasoned "that the time it takes to receive a call is an important factor for many subscribers. . . ." <sup>18</sup> Similarly, wireless subscribers would be harmed by regulatory obligations which create a delay in call completion and an increase in caller terminations.<sup>19</sup> Mandating specific pricing information in a CPP notification system would lead to such a result.

Other parties favor the adoption of a unique CPP area code as a substitute for a notification message.<sup>20</sup> For several reasons, the Commission should reject this suggestion. At the outset, it appears that unique area codes for "large scale CMRS carrier[s]" would not only discriminate against smaller service providers, they would not provide consistent notification to all callers. Unlike a brief notification message or unique CPP tone transmitted with the call, this proposal does not guarantee that a caller visiting an unfamiliar area will be aware which NPA

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17 Telephone Number Portability, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 7236, ¶ 24 (1997) ("[W]e agree with AT&T that the studies submitted by petitioners fail to demonstrate that 1.3 seconds of post-dial delay is imperceptible to the public.")

18 Id. at ¶ 22.

19 See Id. (In a discussion concerning the impact of call completion delay on businesses, the Commission noted that "[i]f the party making a call to a business experiences additional delay . . . that delay may negatively impact how the business is perceived. . . .")

20 Comments of Omnipoint at 8-9 ("Omnipoint advocates that separate Easily Recognizable Numbering Plan Area Codes ("ERC") should be allocated to each large scale CMRS carrier to be used exclusively in connection with that carrier's CPP service offering.")

codes are assigned for CPP. In addition, there eventually could be so many CPP area codes that consumers could not be expected to remember which ones are dedicated to CPP. Thus, this proposal could result in consumers incurring charges without prior knowledge that they have made a CPP call. Moreover, as the Commission is considering area code relief issues and number utilization in other proceedings, it seems unsound to consider implementing a measure which would only further area code depletion.<sup>21</sup> Where, as here, there is a superior method to secure caller awareness, the Commission should not adopt an area code solution which will increase the rate of NPA usage.

The Commission should invoke its preemption authority, as discussed further below, to ensure the development of a national notification policy free of redundant or contradictory State and local mandates. Any other policy would result in significant customer confusion, inefficiencies in the provision of CPP, and insurmountable obstacles for carrier compliance.<sup>22</sup> Stated

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<sup>21</sup> See Connecticut Department of Public Utility Control Files Petition for Rulemaking, Public Comment Invited, RM No. 9258, DA 98-743 (released April 17, 1998); Common Carrier Bureau Seeks Comment on Petition for Declaratory Ruling and Request for Expedited Action filed by Providers of Commercial Mobile Radio Services in Pennsylvania, NSD File No. L-97-42, *Public Notice*, 12 FCC Rcd 19502.

<sup>22</sup> See Comments of Omnipoint at 8; Comments of Sprint Spectrum at 7; Comments of Petroleum Communications at 2; Comments of Vanguard Cellular at 17-18; Further Comments of Bell Atlantic at 3-4; Comments of RTG 8.

differently, without a uniform national notification policy, it is unlikely that CPP will ever develop on a large scale.<sup>23</sup>

#### IV. THE COMMISSION HAS JURISDICTION OVER CPP.

##### A. Section 332(c) Provides The Commission With Exclusive Authority To Regulate CPP And Its Components.

State bans or delays on CPP implementation and contradictory State rules regarding CPP constitute a significant obstacle to the development of nationwide CPP service offerings.<sup>24</sup> As stated previously by CTIA, the State rate and entry preemption provisions of Section 332(c)(3)(A) of the Act<sup>25</sup> and Section 2(b) "impossibility" jurisprudence<sup>26</sup> provide the Commission with the requisite authority to adopt uniform rules and prohibit conflicting State or local CPP regulations.

Only two State advocates have challenged CTIA's jurisdictional analysis and questioned the Commission's authority

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<sup>23</sup> The failure of the Commission to take limited steps to foster CPP would be a significant handicap to the competitive status of the CMRS industry. Without the option to provide CPP, wireless carriers will not be an adequate substitute for wireline providers. This would directly contravene the Commission's goals to further LEC competition. Indeed, in a Separate Statement to the Commission's Third Report to Congress on the state of CMRS competition, Chairman Kennard stated that the Commission "should explore every available opportunity to promote [wireless] competition." (emphasis added) (May 14, 1998).

<sup>24</sup> See CTIA Service Report, *The Who, What and Why of "Calling Party Pays"* at 17-19 (July 4, 1997) (noting the bans and substantial delays imposed on CPP implementation by States like Arizona, California, Montana and Washington).

<sup>25</sup> 47 U.S.C. § 332(c)(3)(A).

<sup>26</sup> 47 U.S.C. § 152(b).

to regulate CPP.<sup>27</sup> Mistakenly, their analysis is founded on the belief that CPP is a LEC service, thus implicating a complicated regulatory structure involving extensive State oversight. The PUC of Ohio specifically states that CPP "bears directly on rate issues for landline LEC customers."<sup>28</sup> This, however, is not the standard under which a State may invoke jurisdiction. Under this reasoning, the PUC of Ohio would claim jurisdiction over interexchange services or federal universal service contribution requirements because they may "bear directly" on the rates charged to landline users. As noted below, it is the nature of the services which determine the federal and State boundaries.

CPP is a CMRS service and should be regulated as such.<sup>29</sup> In fact, any assertion to the contrary plainly disregards the possibility that CPP callers can and will be other CMRS subscribers or interstate callers clearly outside the jurisdiction of State regulatory authorities. Moreover, with respect to purely intrastate services, CPP is a CMRS service over which the States' limited authority does not apply.<sup>30</sup> It is an optional CMRS service that a carrier may elect to make available to its own CMRS customers. Conceptually, it is no different from

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<sup>27</sup> Comments of the Public Utilities Commission of Ohio at 5-6; Comments of WUTC at 3.

<sup>28</sup> Comments of the Public Utilities Commission of Ohio at 5.

<sup>29</sup> Further Comments of Bell Atlantic at 3; Comments of Petroleum Communications at 2; Comments of RTG at 7.

<sup>30</sup> 47 U.S.C. § 332(c)(3)(A) ("[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service. . . .")

any other CMRS rate mechanism -- it provides the subscriber with the option of transferring costs to the cost imposer, the caller.<sup>31</sup> Callers unwilling to accept charges can terminate the call without incurring a charge.

Under Section 332(c)(3)(A) of the Act, the FCC has exclusive jurisdiction over CMRS rates and entry.<sup>32</sup> This operates as a bar to State CPP regulation. Regulation of any aspect of CPP by a State intrinsically involves the regulation of rates charged by CMRS providers for this CMRS service and the manner in which those charges are assessed. Therefore, CPP should appropriately be described as a CMRS rate mechanism subject to the Commission's exclusive jurisdiction.<sup>33</sup> This means that a State's ability to regulate the "other terms and conditions" of CMRS services does not change this outcome.<sup>34</sup>

Regulation of CPP by States also runs afoul of the prohibition on entry regulation. Section 332(c)(3)(A) clearly

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<sup>31</sup> CPP is a CMRS service because it involves the provision of interconnected, for-profit mobile communications. The only difference between it and any other CMRS offering is that the originating caller pays for the charges associated with the mobile telephone call. The fact that the CMRS subscriber does not pay the associated charges is irrelevant to the statutory analysis of whether CPP is a CMRS service.

<sup>32</sup> 47 U.S.C. § 332(c)(3)(A). See NOI Comments of CTIA at 12.

<sup>33</sup> The Commission may also invoke its exclusive jurisdiction over CPP pursuant to the Section 2(b) "impossibility" exception to preempt conflicting State requirements. See NOI Comments of CTIA at 14-15.

<sup>34</sup> See Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997) (noting the FCC's statutorily created jurisdiction over CMRS providers, even in their relationship with LECs).

prohibits any direct or indirect CMRS rate or entry barriers. State bans or delays on CMRS CPP service offerings effectively operate as a ban on entry by restricting consumer service options and impairing the nationwide business plans of CMRS providers. As such, CPP should be regulated in the same manner as other CMRS services, pursuant to Section 332(c) of the Act.

**B. The Section 2(b) "Impossibility" Exception.**

The Section 2(b) "impossibility" exception ensures that inconsistent State regulation does not thwart the goals to be achieved by uniform, nationwide CPP notification mechanisms. In situations where interstate and intrastate jurisdictions overlap, "state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>35</sup>

The provision of CPP by CMRS providers is one such situation where jurisdiction overlaps. Calls to and from wireless customers may be interstate or intrastate.<sup>36</sup> So too will CPP calls, functioning in tandem with interstate wireless calls. In this circumstance, the Commission may preempt inconsistent State regulation of CPP notification pursuant to the "impossibility

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<sup>35</sup> Louisiana Pub. Serv. Comm'n., 476 U.S. 355, 374 (1986) (citations omitted). Even a very limited interstate component will impart federal jurisdiction. See National Ass'n of Regulatory Util. Comm'rs v. FCC, 746 F.2d 1492, 1498 (D.C. Cir. 1984).

<sup>36</sup> As CTIA has previously noted, 82% of the MTA-based PCS license areas and 23% of the BTA-based PCS license areas are interstate. Many cellular licensees have also expanded their footprints to cross State lines.

exception." The impossibility exception allows Commission preemption when:

(1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would "negate[] the exercise by the FCC of its own lawful authority" because regulation of the interstate aspects of the matter cannot be "unbundled" from regulation of the intrastate aspects.<sup>37</sup>

When considered in the context of the instant matter, it becomes apparent that the impossibility exception applies to CPP customer notification requirements. Particularly clear is that States could not implement a permissible, separate notification methodology which would not conflict with the Commission's jurisdiction over interstate telecommunications.<sup>38</sup> As a practical matter, it is impossible to implement separate notification procedures for intrastate and interstate calls. Until the caller agrees to accept charges for the call, which is obviously subsequent to any notification, the carrier is not necessarily aware of the location of the subscriber. Thus, it would be impossible for the carrier to predetermine which notification governs, i.e., whether a federal or state-mandated notice should be provided, until after the caller has heard the notice and consented to complete the call.

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<sup>37</sup> Public Serv. Comm'n of Maryland v. F.C.C., 909 F.2d 1510, 1515 (D.C. Cir. 1990) (citations omitted).

<sup>38</sup> Permitting States to regulate consumer notification over intrastate calls in this instance would be akin to granting them jurisdiction over Customer Premises Equipment for intrastate telephone calls.

The inherent interstate nature of CMRS has been recognized by Congress. When revising Section 332, Congress contemplated that all CMRS providers would be subject to "uniform rules"<sup>39</sup> and clearly intended "to establish a Federal regulatory framework to govern the offering of all commercial mobile services."<sup>40</sup> A uniform method of CPP customer notification will foster these Congressional goals by promoting the nationwide viability of CPP, resulting in expanded CMRS subscribership and use of wireless services generally.

As stated above, if each State is permitted to adopt its own notification policies, CMRS providers would be compelled to adopt a separate and distinct customer notification in each jurisdiction. Such efforts would outweigh any of the market benefits of the CPP service and potentially eliminate most carriers' interest in providing CPP. Disparate notification requirements would also risk customer confusion by not guaranteeing that every caller is aware that each time he or she makes a CPP call, he or she is responsible for charges incurred for that call.<sup>41</sup>

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<sup>39</sup> See House Report at 259.

<sup>40</sup> See H.R. Conf. Rep. No. 213, 103rd Cong., 1st Sess. 490 (1993) (emphasis added). See also 139 Cong. Rec. S2995 (daily ed. June 24, 1993).

<sup>41</sup> CTIA Petition at 7. The Virginia/Maryland/District of Columbia example provided previously by CTIA illustrates the confusion that could result from inconsistent State regulation. If, for example, State regulators in Maryland require a distinct tone with an intercept message, while regulators in D.C. require a unique CPP NXX code and those in Virginia require 1+ dialing, tremendous customer confusion will inevitably result. The cost of implementing

V. **THE COMMISSION SHOULD PROVIDE CMRS PROVIDERS OF CPP WITH A MEANS TO ENFORCE CHARGES IMPOSED.**

CTIA reiterates its proposal that the Commission exercise its Title II authority to ensure parties using CPP service have binding obligations with CMRS providers. The Commission may do so by providing CMRS carriers that offer CPP with the opportunity to file publicly-available data regarding CPP services such as informational tariffs<sup>42</sup> or CPP contracts<sup>43</sup> or periodic informational CPP reports.<sup>44</sup> Such filings will serve to promote customer awareness about CPP charges as well as to ensure the enforceability of CPP charges incurred and limitations on carrier liability.<sup>45</sup>

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each requirement will effectively prohibit the provision of CPP service as well.

<sup>42</sup> 47 U.S.C. § 203.

<sup>43</sup> 47 U.S.C. § 211.

<sup>44</sup> 47 U.S.C. § 219.

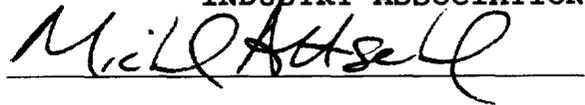
<sup>45</sup> USTA suggests that the Commission issue a declaratory ruling that CMRS providers, as common carriers, have the right to collect or to contract with others to collect, charges from consumers for CPP calls. Opposition of USTA at 8.

**VI. CONCLUSION.**

The Commission has spent eleven months collecting comment on CPP. All interested parties have had full opportunity to comment on these matters. Pursuant to the Commission's Rules, the time has come to issue an NPRM on this topic and promote the nationwide implementation of CPP.

Respectfully submitted,

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