

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Calling Party Pays Service)

Option in the Commercial Mobile)

Radio Services)

WT Docket No. 97-207

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COMMENTS OF
THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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The Cellular Telecommunications Industry Association ("CTIA")¹ submits its Comments in the above-captioned proceeding in support of the rapid adoption of uniform, nationwide rules governing calling customer notification for Calling Party Pays ("CPP") service.²

I. INTRODUCTION AND SUMMARY

The CMRS industry today is a flourishing, competitive industry due in large part to Congressional and Commission determinations to allow market forces to shape the industry's

¹ 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, 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.

² Calling Party Pays Service Option in the Commercial Mobile Radio Services, WT Docket No. 97-207, Notice of Inquiry, FCC 97-341 (rel. Oct. 23, 1997) ("Notice").

growth and development. Such a market-based approach is absolutely essential in the consideration of CPP issues.

As a long-time proponent of CPP, a service which has the potential to revolutionize the competitive development of the CMRS industry, CTIA recognizes the urgent need for Commission examination and action on several key issues, including notification matters, enforcement, and jurisdictional issues.³ For this reason, the Commission should issue without delay a Notice of Proposed Rulemaking to adopt CPP service rules consistent with the Comments made herein.

Specifically, in adopting rules governing CPP, it is incumbent upon the Commission to adopt a uniform national notification program which imposes the lowest associated regulatory burdens and removes all unnecessary federal, State, and local regulatory impediments to the provision of CPP. Such a plan may include requirements that a carrier notify a calling party with a distinctive tone, and, for a period of 18-24 months after the Commission's CPP order, a recorded intercept message. This message informs callers that they will be charged a fee for placing a call to the CMRS phone. CTIA believes that these

³ CTIA believes that the network elements needed to provide CPP are generally available from incumbent LECs through existing regulatory requirements. Therefore, no Commission action in this area appears to be necessary at this time. CTIA Service Report, *The Who, What and Why of "Calling Party Pays,"* 13-14 (July 4, 1997) ("CTIA CPP Report"). See also CTIA Service Description for Calling Party Pays (CPP), December, 1997 (Draft Revision 0.3) ("CPP Service Description") (Attachment) (providing the functional requirements and network information flows necessary for CPP).

notification measures will ensure that the calling party has the appropriate notice, while not unduly imposing unnecessary requirements on the development of this service.

By such action, the Commission will ensure that consumer demand for CPP can be met on a timely basis, if such demand arises. If no demand materializes for CPP, then carriers, in response to market conditions, may not offer it. Yet the Commission and the market will be no worse off in removing barriers to timely CPP implementation.

The Commission has a significant federal interest in ensuring the uniform, rapid development of CPP, free of redundant and burdensome State and local obligations. The State rate and entry preemption provisions of Section 332(c)(3)(A) of the Communications Act of 1934, as amended,⁴ provide the Commission with the requisite ability to adopt uniform, nationwide CPP customer notification rules, and to prohibit contrary State and local CPP regulation, including State and local bans on the provision of CPP service. Moreover, Section 2(b) "impossibility" jurisprudence provides the Commission with the requisite authority to preempt conflicting State and local CPP regulation.⁵

Finally, the Commission may exercise its Title II authority to permit carriers wishing to offer CPP to file data regarding CPP services which shall be made available for public inspection. These informational filings should ensure customer notification

⁴ 47 U.S.C. § 332(c)(3)(A).

⁵ 47 U.S.C. § 152(b).

of key terms, including obligations to pay for charges incurred and limitations on carrier liability. In this regard, the Commission may choose to allow permissive CPP tariff filings under Section 203,⁶ the filing of informational CPP contracts under Section 211,⁷ or the filing of periodic CPP informational reports under Section 219 of Title II.⁸

II. THE COMMISSION SHOULD RELY UPON MARKET PRINCIPLES IN ITS CONSIDERATION OF CPP ISSUES.

The Commission's primary focus in this proceeding should be the removal of regulatory impediments for those CMRS providers who choose to offer CPP service. The Commission can best promote this objective by relying upon its established determinations to permit market forces to shape CPP service development.

Efficient, decisive Commission action will best serve the public interest. That is, the Commission should not feel compelled, as a condition precedent to adopting CPP rules, to gather, for example, data regarding the current availability of CPP; empirical studies documenting the effect of CPP on traffic flows, subscribership and minutes of use (including during peak times); the level of current consumer demand for CPP; or the current pricing structure of CMRS services.⁹ Nor is it necessary

⁶ 47 U.S.C. § 203.

⁷ 47 U.S.C. § 211.

⁸ 47 U.S.C. § 219.

⁹ As CTIA has noted in other related contexts, the Commission has historically sought to remove burdensome data collection requirements on firms lacking significant market power. See Telecommunications Access Provider Survey, CCB-IAD-95-110, DA 95-2287, Comments of CTIA (filed Dec. 11, 1995). This is

to first explore whether the development of CPP will increase local competition.¹⁰ That is, the Commission should not attempt to second-guess the competitive market by engaging in industrial policy making.

As the Commission has consistently recognized, the CMRS industry is dynamic and evolving.¹¹ Because of its competitive

due to the lack of corresponding benefits, especially when such data can be retrieved from publicly available sources or may inhibit business development of competitors. See also Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Second Report, 12 FCC Rcd 11266, at 11275 (1997) (Commission decision to rely on publicly available data rather than impose additional reporting burdens on CMRS licensees) ("CMRS Second Annual Report").

¹⁰ In some instances, the Notice intimates that the Commission will act on CPP only if the record demonstrates that CPP will facilitate local competition. See Notice at ¶ 1 ("The purpose of this inquiry is to explore means of encouraging and facilitating competition in the local exchange telephone market. . . . [O]ur objective in this Notice is to explore the subject of CPP in order to develop a record for determining whether the wider availability of CPP would enable CMRS providers to more readily compete with wireline services provided by LECs. . ."). Notwithstanding the desirability of local loop competition, removing encumbrances to market forces suffices to justify Commission action.

Moreover, the Commission queries "whether the market has failed to accommodate consumer demand for this [CPP] or other service options and is likely to in the future." Id. at ¶ 8. Such action suggests that the Commission is considering whether to mandate that CMRS carriers provide CPP service. Obviously, such issues are best left to the market.

¹¹ See, e.g., CMRS Second Annual Report at 11271 ("A significant number of changes have taken place in the CMRS market since this Commission submitted its *First Report* to Congress in 1995. Most important, our *First Report* concluded that although the mobile telephone segment of CMRS was not fully competitive, entry by additional CMRS providers into mobile telephone service was very likely to

nature, market forces, and not Commission directives, should continue to determine the ultimate development of CPP services.¹² The government's role should be limited to that of quickly adopting the least burdensome rules to ensure proper customer notification. Such rules can be written independent of the factual and data inquiries made in the Notice.

It is clear that in taking action to remove regulatory obstacles to CPP, the Commission will not risk imposing undue societal costs. That is, in the event that consumer demand never materializes for CPP, carriers simply will not offer it. In this way the marketplace will most efficiently determine the ultimate efficacy of CPP, with the least associated costs for all parties, including carriers, consumers, and regulators.

III. THE COMMISSION SHOULD ADOPT A NATIONAL NOTIFICATION POLICY THAT ENSURES THAT CALLERS ARE AWARE THAT THEY WILL BE BILLED FOR COMPLETING A CPP CALL.

The Commission has requested comment on how callers should be informed that they are calling a CMRS subscriber and will be billed for their call.¹³ In addition, the Commission notes that it may be in the public interest to "develop a uniform national

take place in the near future. As this Report points out, entry is occurring in the form of new broadband PCS systems in many major markets areas." (citation omitted).

¹² Id. at 11273-74 ("The Commission has continued systematically to remove regulatory barriers in order to facilitate competition. . . . [The] Commission has also removed regulatory barriers to market entry by enabling licensees to provide additional types of services [including dispatch and fixed services] on their licensed spectrum.") (citation omitted).

¹³ Notice at ¶ 21.

method to inform the calling party of the magnitude of the charge, and of the calling party's responsibility to pay for the call."¹⁴ CTIA agrees that the Commission should implement a national policy to provide callers with adequate information and awareness that they will be billed for a call made to a CMRS subscriber who has elected CPP.

The Commission should establish a national notification policy for CMRS providers wishing to provide CPP service which consistently and adequately informs all callers that they have reached a CPP subscriber. Such a policy may include a distinctive tone that will indicate to all callers that they have called a CMRS subscriber who has elected CPP.¹⁵ In addition, for the first 18-24 months after the Commission's final order, CTIA supports the implementation of an intercept message that would serve to educate callers on the meaning of the distinctive CPP tone.

The implementation of a unique CPP tone would satisfy the most important policy goals of any notification requirement: providing the caller with enough information to decide whether to continue the call and accept charges or whether to terminate the call without incurring CPP charges. Distinctive tones are already used in a variety of settings and are easily understood by most consumers. For example, the "busy signal" is a common

¹⁴ Id. at ¶ 22.

¹⁵ See id. at n.28 ("It appears that LECs educate wireline consumers that certain types of tones indicate a toll call.")

tone that is understood throughout the nation to mean that the called party is already using the telephone. Also, many local and interexchange carriers have created their own distinctive tones which signal callers when to input their calling card numbers. Similarly, the wireless industry can develop a single, distinctive CPP tone that eventually will be recognized by all callers. Upon hearing the tone, callers will then have the option of continuing the call and incurring charges, or terminating the call without charge.

To accompany the tone for a specified time-period, the Commission could require that carriers supply an educational intercept message after the tone. Through this message, carriers can inform callers of the meaning of the unique CPP tone and indicate that the callers will be responsible for charges should they wish to continue the call. Although the Commission has raised technical questions concerning "call branding," this again seems like an issue most effectively resolved in the competitive market.¹⁶ In other words, CMRS carriers that wish to deploy CPP should themselves be responsible for taking the necessary steps to support the service;¹⁷ this would include the provision of the informational intercept message.¹⁸

¹⁶ Id. at n.34 ("Branding, in this context, is the ability to inform the caller to a CMRS phone (by use of a recorded intercept message) of additional charges applicable to the call.")

¹⁷ Of course, carriers have, and should maintain, the flexibility to realize the appropriate means of informing the caller of the meaning of the CPP tone. The Commission should permit CMRS carriers to provide the message either through their own switches or by contracting out the service

Consistent with a regulatory approach that fosters CPP without being overly burdensome, the exact content of the intercept message need not be specified by the Commission. Several elements may comprise the charge for a call made to a CPP subscriber. For example, the CMRS provider may not be the only carrier imposing charges. Other charges, including IXC imposed toll charges or message unit charges imposed by the caller's local carrier, may significantly raise the costs for calls to CPP subscribers. In addition, the CMRS provider's charges may vary with the length of the call, the time of day of the call, and the subscriber's choice of the multiple service plans typically offered by CMRS carriers. Thus, many factors will affect the cost of a CPP call. CMRS providers, through a brief educational intercept message, cannot provide callers with the exact charges for their calls.¹⁹ Practically considered, the multiplicity of

to other carriers (i.e., the LEC). So long as the caller receives the requisite information, the Commission should not specify the manner in which the message is delivered. See also CPP Service Description at 2.1 ("Responsibility for the identification and control of the CPP service lies with the home wireless carrier.")

¹⁸ Many CMRS providers already possess the technology for an intercept message which, for example, is used to notify callers that the subscriber may be outside the calling area of the carrier.

¹⁹ Lengthening the intercept message to explain all possible charges, including foreseeable and unforeseeable charges, would, in effect, make the message impractical and useless. Simply stated, an intercept message that is too long and too complicated will lead to consumers hanging-up before the message has been completed. Moreover, a longer intercept message which includes the rates and other key provisions of the call may increase the overall costs of the call. See Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the

factors make it impossible to provide the caller with completely accurate information as to the cost of the call. Requirements to provide general cost information, without regard to the particular call, would be incomplete at best, and at worst misleading to the caller.

The Commission has required intercept messages to provide specific pricing information in those limited cases in which there existed a record of significant and persistent abuses by service providers. Specifically, the Commission required disclosure messages to include charges in the operator service provider and the 900 pay-per-call service context. Prior to the Telecommunications Act of 1996,²⁰ the Commission imposed upon operator service providers and 900 service providers the duty to disclose their charges because of evidence of prior abuses and the consequent need for consumer protection measures.²¹ These

Communications Act of 1934, as amended, Order on Reconsideration, CC Docket No. 96-61, FCC 97-293, at ¶ 21 (rel. Aug. 20, 1997) (AT&T asserted that for dial-around services, a recorded message explaining key provisions, including rates, could delay call set-up by 1.5 to 2 minutes, and may increase the cost of the call by \$0.33 to \$0.77 per call) ("Dial-Around Reconsideration Order").

²⁰ In the 1996 Act, Congress amended Sections 226 and 228 which revised the Commission's statutory basis for regulating operator services and 900 pay-per-call services. 47 U.S.C. §§ 226, 228.

²¹ See Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Report and Order, 6 FCC Rcd 2744, 2746 at ¶ 2 (1991) ("In the NPRM, we proposed specific rules aimed at solving problems in the operator services industry that had persisted despite previous Commission action"); see also Billed Party Preference for InterLATA 0+ Calls, CC Docket No. 92-77, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 7274 at n.22 (1996) (noting that the Commission had received more than 5,000 complaints

service providers were notorious for charging excessive amounts for their services without prior notification of such charges.²² By contrast, the CMRS industry has no such record of misconduct. Moreover, there should be no expectation that the abuses that occurred in these other industries would also materialize in the CMRS environment. CMRS providers already operate in a highly competitive environment and there is no reason to suspect that CPP will not be added to the list of competitive service offerings.²³ In addition, as more carriers deploy digital systems with increased capacity, CMRS providers confront greater incentives to increase profits through increased wireless usage.²⁴

about operator service provider rates between August 1, 1994 and August 31, 1995, and that "[t]he rate of such complaints appears to be increasing."); Policies and Rules Concerning Interstate 900 Telecommunications Services, CC Docket No. 91-65, Report and Order, 6 FCC Rcd 6166 at n.2 (noting that since 1988, the Commission had "received approximately 4,300 complaints dealing with 900 services" and that they constituted the "most frequent topic of informal complaints to the Commission.") ("900 Report and Order").

²² See 900 Report and Order at ¶ 12 (concluding that "pay-per-call services have a significant potential for infringement of, and in fact are infringing, consumers' rights to make informed decisions about telephone calls that are billed at an amount often far greater than the transmission charge with which consumers are more familiar.") (emphasis added).

²³ For example, a carrier's adoption of excessive CPP charges would likely discourage calls to CMRS customers, thereby reducing demand for the service. Moreover, CPP callers are likely to know the CMRS customer they are calling and would no doubt alert the subscriber about the charges. These complaints, in turn, would likely lead the CMRS subscriber to seek another service provider offering more favorable CPP terms.

²⁴ See Analysts Differ On What Makes Reported PCS Average Revenue Per User Higher Than Cellular, Mobile Phone News,

Adoption of a nationwide, distinctive CPP tone seems favorable to the other notification methodologies currently available.²⁵ Nonetheless, the Commission should not foreclose the possibility that, in time, carriers may develop other notification methods that could better achieve the Commission's objectives.

IV. THE COMMISSION SHOULD ASSERT ITS EXCLUSIVE JURISDICTION OVER IMPLEMENTATION OF CALLING PARTY PAYS.

A. CMRS Rates And Entry Are A Subset Of CMRS Terms And Conditions Over Which State And Local Jurisdiction Has Been Removed By Section 332(c)(3)(A).

State bans or delays on CPP implementation constitute the primary obstacle to nationwide CPP offerings.²⁶ The Commission

November 17, 1997 (discussing how the conversion to digital networks has dramatically increased carrier capacity and resulted in lower per-minute usage charges to consumers). Because CPP is also a means by which carriers can increase usage and promote efficient usage of available capacity, it is reasonable to expect that similarly low per-minute usage charges will be implemented for CPP.

²⁵ Some alternatives, such as 1+ dialing may contradict the Commission's previous determinations regarding technology neutral numbering administration. See Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech - Illinois, Declaratory Ruling and Order, IAD File No. 94-102, 10 FCC Rcd 4596 at ¶ 29 (1995) ("We believe that assignment of numbers based on whether the carrier provides wireless service is not consistent with these [technology neutral] objectives and could hinder the growth and provision of new beneficial services to consumers.") Moreover, to the extent that a State seeks to impose a 1+ dialing notification requirement on a CMRS carrier offering CPP, the Commission can and should preclude such action pursuant to its exclusive grant of authority over numbering administration. See 47 U.S.C. § 251(e)(1).

²⁶ See CTIA CPP Report at 17-19 (noting the bans and substantial delays imposed on the implementation of CPP by States such as Arizona, California, Montana, and Washington).

should eliminate State bans or delays on CPP pursuant to the grant of exclusive federal authority over CMRS rates and entry found in Section 332(c)(3)(A). The Commission summarily addressed the regulatory classification of CPP customer billing practices in its Arizona decision.²⁷ It noted that "billing practices are considered 'other terms and conditions' of CMRS offerings, not rates" thereby allowing State regulation.²⁸ Perhaps because the classification of CPP was somewhat peripheral to the issue at hand in Arizona, the Commission's decision does not evidence any examination into the nature of CPP. It is now appropriate for the Commission to engage in an in-depth analysis.

Rote classification of CPP as a CMRS "term and condition" fails to resolve the issue of whether State jurisdiction is permitted by Section 332(c)(3)(A). The phrase "terms and conditions," generally used, includes CMRS rates and entry. Indeed, Congress itself referred to CMRS rates and entry as terms and conditions of CMRS:

[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.²⁹

²⁷ Petition of Arizona Corporation Commission, To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services and Implementation of Sections 3(n) and 332 of the Communications Act, PR Docket No. 94-104 and GN Docket No. 93-252, Report and Order and Order on Reconsideration, 10 FCC Rcd 7824 at ¶ 59 (1995) ("Arizona").

²⁸ Id.

²⁹ 47 U.S.C. § 332(c)(3)(A) (emphasis added). The House Report mentions the preemption of State and local regulation of

The use of the word "other" demonstrates Congress' view that CMRS rates and entry are generally "terms and conditions."

Notwithstanding this classification, Congress removed from State and local jurisdiction the regulation of the CMRS rate and entry subset of terms and conditions. Hence, before a determination can be made that States possess authority over particular terms and conditions pursuant to Section 332(c)(3)(A), the Commission must first determine whether the terms and conditions at issue are rate and entry related. Therefore, although the Arizona decision's characterization of CPP as a "term and condition" may be technically correct, the analysis must proceed further to determine whether CPP is contained within the subset of terms and conditions that are exempt from State and local regulation -- CMRS rates and entry.

B. Regulation Of Calling Party Pays Constitutes CMRS Rate And Entry Regulation.

CPP is a mechanism designed to compensate wireless carriers for calls made to wireless customers. Conceptually, it is no different from any other CMRS rate mechanism, except for a change in the entity charged. Regulation of CPP involves the regulation of rates charged by CMRS providers for CMRS service and the manner in which those charges are assessed.³⁰ Therefore, CPP is

CMRS rates and entry, and, again, states that "nothing here shall preclude a [S]tate from regulating the other terms and conditions of commercial mobile services." H.R. Rep. No. 111, 103rd Cong., 1st Sess. 261 (1993). ("House Report")

³⁰ Regulation of CMRS rate mechanisms is contemplated by the reference in Section 332(c)(3)(A) to CMRS rates. See, e.g., Iowa Utils. Bd. v. F.C.C., 120 F.3d 753, n.21 (8th Cir.

appropriately characterized as a CMRS rate mechanism for which the Commission retains exclusive regulatory jurisdiction.³¹

Regulation of CPP can rise to the level of entry regulation, as well. State or local government attempts to ban or delay CPP operate as CMRS entry barriers. The explicit and absolute prohibition against CMRS entry regulation by States in Section 332(c)(3)(A) comprehends State and local regulation of CPP as well. That is, any entry barriers, whether entirely or merely partially effective, whether direct or indirect, whether applicable to all CMRS services or only to particular CMRS services, are prohibited.³² State bans on particular CMRS service offerings, such as CPP, can operate with the same effect as full-scale bans on entry by restricting choices for consumers and impairing nationwide service plans of CMRS providers. The Commission should clarify that States are preempted by Section 332(c)(3)(A) from imposing bans or delays on the implementation of CPP.³³

1997) (finding that the FCC retains exclusive jurisdiction over CMRS-LEC reciprocal compensation - a CMRS-LEC interconnection rate mechanism - pursuant to Section 332).

³¹ As an alternative to engaging in the regulatory classification of CPP, the Commission may preempt State regulation of CPP pursuant to a Section 2(b) impossibility exception analysis as explained in detail below (as applied to CPP customer notification requirements).

³² To illustrate in a non-CPP context, the Commission would be fully justified in preempting any State or local regulation which prohibited the offering of CMRS roaming services.

³³ Alternatively, because calls provided pursuant to a CPP arrangement are telecommunications services, Sections 253(a) and (d) grant the Commission authority to preempt State bans on the use of CPP to complete CMRS calls, regardless of

C. The Commission Retains Jurisdiction Pursuant To Section 332(c) (3) (A) To Preempt State Regulation Of CPP Notification Mechanisms.

As demonstrated above, CPP as a whole service is not lawfully regulated by State and local governments. Its components, too, may be exempt from State and local jurisdiction. Caller notification mechanisms offer an example.

The legislative history of Section 332(c) (3) (A) mentions consumer protection as an interest that normally falls within the traditional "terms and conditions" properly subject to State and local regulation.³⁴ In the CPP context, regulation of customer notification mechanisms is more appropriately characterized as rate regulation than as a method of consumer protection because of the enabling effect of customer notification mechanisms on market-based CMRS rate regulation.

CPP notification mechanisms are intrinsically tied to CMRS rates because they facilitate market regulation of CMRS rates. The Commission has the authority to establish rates that CMRS providers charge for the use of their network in completing calls

whether the ban involves interstate or intrastate CPP offerings. See 47 U.S.C. § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.")

³⁴ See House Report at 261 ("By 'terms and conditions,' the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority.")

placed to wireless customers. However, the Commission determined that traditional methods of rate regulation would disserve the marketplace and that competition within the CMRS industry can be relied upon to ensure just and reasonable rates.³⁵ Nonetheless, CMRS rates in a CPP environment, without notification procedures, could lead to callers incurring charges for calls of which they were unaware (and, possibly, that they would not have chosen to incur) -- resulting in predictable calls for more heavy-handed Commission regulation. Notification mechanisms resolve this potential problem by informing the consumer that a charge will occur. Consequently, notification methods permit the Commission to allow the market to determine rates that callers of wireless customers will pay to complete a call. For this reason, CPP notification operates as a market-based rate enabling mechanism over which the Commission retains CMRS ratemaking authority under Section 332(c)(3)(A).

D. The Commission May Preempt Inconsistent Or Additional State CPP Customer Notification Requirements.

The Act and the cases interpreting it provide a second basis of exclusive Commission authority over CPP customer notification mechanisms: the Section 2(b) impossibility exception. Through operation of the impossibility exception, the Commission retains jurisdiction to ensure that inconsistent State regulation does

³⁵ See Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 at ¶ 175 (1994) ("there is sufficient competition in [the CMRS] marketplace to justify forbearance from tariffing requirements").

not thwart uniformity of nationwide CPP notification mechanisms. In addition to Section 332(c)(3)(A)'s prohibition on State and local government regulation of those terms and conditions of CMRS that bear upon CMRS rates and entry, a traditional Section 2(b) analysis reveals the Commission's authority to preempt State regulation of CPP customer notification practices.

The Act's dual regulatory scheme generally provides State jurisdiction over intrastate communications and Commission jurisdiction over interstate and foreign communications.³⁶ However, in the event that federal and State jurisdictions overlap, "[S]tate 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."³⁷ Even a very limited interstate communications component suffices to impart Commission jurisdiction.³⁸

³⁶ See 47 U.S.C. § 152; see also Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 360 (1986).

³⁷ Louisiana Pub. Serv. Comm'n, 476 U.S. 355 at 374 (citations omitted); see also Computer and Communications Indus. Ass'n v. F.C.C., 693 F.2d 198, 214 (D.C. Cir. 1982) ("Courts have consistently held that when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme"), cert. denied, 461 U.S. 938 (1983).

³⁸ See National Ass'n of Regulatory Util. Comm'r v. F.C.C., 746 F.2d 1492, 1498 (D.C. Cir. 1984) ("purely intrastate facilities and services used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use"); see also Puerto Rico Tel. Co. v. F.C.C., 553 F.2d 694, 700 (1st Cir. 1977) ("no matter how frequently or infrequently a subscriber places interstate calls, he is entitled to have the conditions

In this instance, the Commission may preempt inconsistent State regulation of CPP notification pursuant to the "impossibility 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.³⁹

When considered in the context of the instant matter, it becomes apparent that the impossibility exception applies to CPP customer notification requirements.

Calls placed to wireless subscribers clearly retain both interstate and intrastate attributes. Eighty-two percent of the MTA-based PCS license areas are interstate, encompassing more than 90 percent of the U.S. population, while 23 percent of the BTA-based PCS license areas are interstate, encompassing 36 percent of the U.S. population.⁴⁰ In addition, cellular licensees' efforts to expand their footprints, either through acquisition or agreements with other carriers, have resulted in the marketing of cellular service across State boundaries.

placed on access to the interstate telephone system measured against federal standards of reasonableness").

³⁹ Public Serv. Comm'n of Maryland v. F.C.C., 909 F.2d 1510, 1515 (D.C. Cir. 1990) (citations omitted).

⁴⁰ See Letter from Randall S. Coleman, CTIA, to The Honorable Reed E. Hundt, FCC Chairman, (Dec. 4, 1995) (on file in Docket No. 94-54).

Moreover, callers of wireless subscribers obviously place calls into a multitude of jurisdictions. CPP will function in tandem with the substantial number of interstate wireless calls. The considerable interstate component of CPP satisfies the first prong of the impossibility exception.

As explained above, a uniform method of CPP notification will promote the nationwide viability and availability of CPP. In turn, the greater availability of CPP should expand CMRS subscribership and distribution of wireless telephone numbers and should induce greater use of wireless services. Such a result is fully consistent with Congress' goals for the CMRS industry. In revising Section 332, Congress envisioned that all CMRS providers would be subject to "uniform rules"⁴¹ and intended "to establish a Federal regulatory framework to govern the offering of all commercial mobile services."⁴² Thus, the uniform growth and development of wireless services, including CPP services, and the efficient and intensive use of the spectrum constitute valid

⁴¹ See House Report at 259.

⁴² See H.R. Conf. Rep. No. 213, 103rd Cong., 1st Sess. 490 (1993) (emphasis added). See also 139 Cong. Rec. S7995 (daily ed. June 24, 1993). Congress incorporated by reference the findings of both the House bill and the Senate version. Section 402(13) of the Senate version finds that "because commercial mobile services require a Federal license and the Federal Government is attempting to promote competition for such services, and because providers of such services do not exercise market power vis-à-vis telephone exchange service carriers and State regulation can be a barrier to the development of competition in this market, uniform national policy is necessary and in the public interest." (emphasis added).

federal regulatory objectives, the protection of which satisfies the second prong of the impossibility exception.⁴³

By contrast, if each interstate carrier is required to adopt a separate and distinctive method for CPP notification, it is likely that the effort may outweigh any of the possible market benefits of the service.⁴⁴ Thus, a fractured notification policy may effectively eliminate most carriers' interest in providing the CPP service.

Finally, multiple burdensome and potentially inconsistent State customer notification requirements likely will lead to consumer confusion and raise barriers to the implementation of CPP -- effects which would negate realization of the Commission's valid federal objectives. As noted in the CTIA CPP Report, States have implemented a variety of methods to provide consumers with CPP notification. These include bill inserts, advertisements, unique NXX codes, 1+ dialing, and specialized

⁴³ The Commission is entitled to substantial deference in identifying a valid federal regulatory objective consistent with the Communications Act. See Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 381 (1969); see also Electronic Indus. Ass'n Consumer Electronics Group v. F.C.C., 636 F.2d 689, 695 (D.C. Cir. 1980) ("We accord the Commission broad discretion in implementing its controlling statutes").

⁴⁴ Individual State-by-State notification requirements are not only a logistical burden on interstate carriers, but they reduce the economies of scale that are realized by one national notification methodology. Whatever final notification strategy the Commission determines best satisfies the public interest, it will obviously result in an additional cost to carriers. These costs can be minimized, however, by allowing carriers to realize certain efficiencies through a national approach.

tones and intercept messages.⁴⁵ A State-by-State approach renders it highly possible that, under certain notification methodologies, a caller in one State who is calling into another, may not receive adequate notice of a CPP call. For instance, if the State into which the party calls requires billing inserts, while the caller's home state requires a unique tone, the caller may not know that a completed call was made to a CPP subscriber. Because the caller may have believed that CPP only applied if there was a unique tone, the caller would be unaware that he or she was responsible for payment for that call. In addition, similar confusion may arise as callers travel from one state to another, unknowingly making calls to CMRS subscribers who have elected CPP. If the Commission permits each State to adopt its own CPP notification requirement, CPP rules will be fractured along State boundaries with predictable customer confusion.

The Commission faced similar issues in the context of its Caller ID proceeding. From the initial stages of interstate Caller ID development, the Commission recognized the need to preempt inconsistent State regulations to ensure its "goal of facilitating the development of interstate calling party number based services" and to establish nationwide uniformity in consumer privacy protection mechanisms.⁴⁶ Recently, the

⁴⁵ CTIA CPP Report at 14-16; see also Notice at ¶ 20.

⁴⁶ Rules and Policies Regarding Calling Number Identification Service - Caller ID, CC Docket No. 91-281, Report and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd 1764 at ¶¶ 71-72 (1994).

Commission observed that "a patchwork quilt of differing local regulations may well discourage regional or national strategies by telecommunications providers, and thus adversely affect the economics of their competitive strategies."⁴⁷ The same analyses apply to differing State regulations for CPP notification.⁴⁸ The potential for additional or inconsistent State regulations to negate uniform federal CPP notification requirements satisfies the third prong of the impossibility exception. Moreover, the maintenance of differing CPP obligations for interstate and intrastate CMRS calls is impractical, rendering futile attempts to "unbundle" State and federal authority over CPP notification mechanisms.

For the foregoing reasons, the Commission should assert exclusive jurisdiction over CPP and preempt State and local bans or delays on CPP implementation. Moreover, the Commission can

⁴⁷ TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253, CSR-4790, Memorandum Opinion and Order, FCC 97-331 at ¶ 106 (rel. Sep. 19, 1997).

⁴⁸ The Commission need not demonstrate that realization of its valid federal goals would be rendered absolutely impossible by inconsistent State regulations. To the contrary, economic infeasibility of compliance as well as the inability to divide the subject matter practically have both been deemed sufficient bases for invoking the impossibility exception. See, e.g., North Carolina Utils. Comm'n v. F.C.C., 552 F.2d 1036, 1043 (4th Cir. 1977) (noting the infeasibility, practically and economically, of separating the use of CPE between interstate and intrastate transmissions), cert. denied, 434 U.S. 874 (1977); Illinois Bell Tel. Co. v. F.C.C., 883 F.2d 104, 116 (D.C. Cir. 1989) (noting the absence of a practical way to divide Centrex marketing practices between interstate and intrastate jurisdictions and approving the Commission's preemption).