

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Assessment and Collection of Regulatory Fees)
for Fiscal Year 1998)

MD Docket No. 98-36

To: The Commission

PETITION FOR RECONSIDERATION

BellSouth Wireless Data, L.P. ("BellSouth WD"),¹ by its attorneys, hereby petitions the Commission for reconsideration of its *Report and Order*, MD Docket No. 98-36, FCC 98-115 (June 16, 1998), 63 Fed. Reg. 35847 (July 1, 1998) (*R&O*). In the *R&O*, the Commission failed to address BellSouth WD's argument that the Commission's treatment of 900 MHz Specialized Mobile Radio ("SMR") services for regulatory fee purposes is contrary to the federal mandate in 47 U.S.C. § 332, as interpreted by the Commission, to promote regulatory parity among wireless services that compete against one another. Accordingly, BellSouth WD requests that the Commission, on reconsideration, reclassify 900 MHz SMR services into the CMRS Messaging Services category along with those CMRS services with which they compete, or create a new CMRS Broadband Messaging Services category recognizing the unique position of 900 MHz SMR services.

BACKGROUND

In the *NPRM* in this proceeding, the Commission requested comment on how best to assign various CMRS services between two designated CMRS regulatory fee categories — the CMRS Mobile Service fee category and the CMRS Messaging Service fee category.² The Commission

¹ BellSouth WD was previously known as RAM Mobile Data USA Limited Partnership.

² *Assessment and Collection of Regulatory Fees for Fiscal Year 1998*, MD Docket No. 98-36, *Notice of Proposed Rulemaking*, FCC 98-40, at para. 28-31 (rel. March 25, 1998) (*NPRM*); see *R&O*

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distinguished between the two categories, as it had in previous years, on the basis of the bandwidth authorized, not the services offered. Thus, licensees operating on broadband spectrum would be subject to the Mobile Service fee of \$0.29 for FY 1998, regardless of the service(s) offered on that spectrum, while narrowband licensees would be subject to the Messaging Service fee of \$0.04 for FY 1998.³ On this basis, the Commission proposed to continue to include 900 MHz SMR licensees in the CMRS Mobile fee category.⁴

In response, BellSouth WD argued, as it had in a pending petition for reconsideration of the *1997 Regulatory Fee R&O*,⁵ that requiring 900 MHz SMR licensees to pay the Mobile Services fee was contrary to the principle of regulatory parity, since 900 MHz SMR licensees do not, and cannot, offer services that compete with true broadband systems.⁶ Not only does BellSouth WD's SMR system provide a data only service that competes with narrowband PCS, which falls under the CMRS Messaging fee category, 900 MHz SMR licensees technically cannot offer any competitive service that approximates real-time, two-way switched voice service, like that offered by true broadband technologies that are included in the CMRS Mobile fee category, because they do not have anywhere near as much spectrum.⁷

at para. 42.

³ *NPRM* at para. 28.

⁴ *See NPRM* at para. 31; *R&O* at para. 42.

⁵ *Assessment and Collection of Regulatory Fees for Fiscal Year 1997*, MD Docket No. 96-186, *Report and Order*, 12 F.C.C.R. 17161 (1997) (*1997 Regulatory Fee R&O*).

⁶ *See* Comments of BellSouth Wireless Data, L.P. at 1-3 (filed Apr. 22, 1998) ("BellSouth WD Comments"); Reply Comments of BellSouth Corporation at 1, 5-7 (filed May 4, 1998) ("BellSouth Reply Comments"); *Assessment and Collection of Regulatory Fees for Fiscal Year 1997*, MD Docket No. 96-186, Petition for Reconsideration of RAM Mobile Data USA Limited Partnership at 2-5 (filed July 28, 1997) ("RAM Petition").

⁷ *See* BellSouth WD Comments at 1-3; BellSouth Reply Comments at 1, 5-7; RAM Petition at 2-5.

Specifically, the Commission has allocated 5 MHz of spectrum in each geographic region for 900 MHz SMR systems. In practice, this spectrum is licensed in 20 blocks, each consisting of 10 two-way 12.5 kHz paths, *i.e.*, 0.25 MHz per ten-channel block.⁸ The Commission has stated that in order to compete with cellular and broadband PCS, SMR systems must have the ability to use and reuse a large number of channels on contiguous frequencies — 42 contiguous two-way 25 kHz channels (*i.e.*, 84 12.5 kHz channels) and 2.1 MHz of contiguous spectrum.⁹ Because of the interleaved 900 MHz band allocation for Public Safety and Industrial and Land Transportation services, however, the 900 MHz SMR spectrum band is balkanized, preventing licensees from aggregating more than 10 contiguous 12.5 kHz channels, and few, if any hold 2.1 MHz of contiguous spectrum.¹⁰

Accordingly, BellSouth WD opposed the Commission's proposal to include its 900 MHz SMR service in the CMRS Mobile fee category with other services, such as cellular and broadband PCS, that offer real-time, two way voice services with which BellSouth WD's service does not, and technically cannot, compete. This arbitrary and disparate treatment of 900 MHz SMR services as CMRS Mobile would impose on BellSouth WD regulatory fees *more than seven times* those paid by its narrowband competitors. Accordingly, BellSouth WD argued that the Commission should recategorize 900 MHz SMR services on the basis of their predominate use (*i.e.*, the type of services offered) to resolve the regulatory disparity.¹¹

⁸ See 47 C.F.R. § 90.613.

⁹ See *Amendment of Part 90 of the Commission's Rules*, PR Docket No. 93-144, *Further Notice of Proposed Rulemaking*, 10 F.C.C.R. 7970, 7984 (1994); BellSouth WD Comments at 2; RAM Petition at 3.

¹⁰ BellSouth WD Comments at 2; RAM Petition at 3 & n.10.

¹¹ BellSouth WD Comments at 2-3; BellSouth Reply Comments at 6-7.

The *R&O* ignores BellSouth WD's regulatory parity argument entirely.¹² Instead, it simply "decline[s] to adopt suggestions to base our fees on predominate use of assigned spectrum."¹³ As shown below, the Commission must bring its decision into compliance with both the federal mandate to promote regulatory parity and the language of the statute.

DISCUSSION

I. THE FEDERAL MANDATE TO PROMOTE REGULATORY PARITY DICTATES THAT FEES FOR SIMILAR SERVICES BE EQUIVALENT

A. The 1993 Budget Act Requires the Commission to Promote Regulatory Parity Among Wireless Services that Compete Against One Another

The Omnibus Budget Reconciliation Act of 1993 created the Commercial Mobile Radio Services ("CMRS") classification and mandated that similar CMRS services be accorded similar regulatory treatment under the Commission's rules.¹⁴ In implementing this mandate, the Commission recognized that the appropriate analytical framework for determining whether services are substantially similar — in which case they must be accorded similar regulatory treatment — is whether the services compete with one another.¹⁵ In setting forth its mandate, Congress clearly

¹² See *R&O* at paras. 42-49. The Commission's failure to consider and address BellSouth WD's regulatory parity argument in its *R&O* in the first instance is reversible error. See *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 50 (1983); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

¹³ *R&O* at para. 46.

¹⁴ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312, 392 ("1993 Budget Act"); see H.R. Conf. Rep. No. 103-213 at 494 (1993) ("1993 Conference Report"); H.R. Rep. No. 103-111 at 259-60 (1993) ("1993 House Report").

¹⁵ See *Implementation of Sections 3(n) and 332 of the Communications Act*, GEN Docket No. 93-252, *Third Report and Order*, 9 F.C.C.R. 7988, 7996 (1994) ("[W]e begin . . . with our conclusion that mobile services will be treated as substantially similar if they compete against each other."); *Implementation of Sections 3(n) and 332 of the Communications Act*, GEN Docket No. 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1418 (1994) ("[T]he intent of Congress is that 'consistent with the public interest, similar services are accorded similar regulatory treatment.'")

intended the similarity in *services* offered, rather than other factors such as the bandwidth authorized, to be the triggering factor in whether to apply the regulatory parity mandate.¹⁶

The 1993 Budget Act also added a new Section 9 to the Communications Act, 47 U.S.C. § 159, which authorizes the Commission to collect and assess regulatory fees to recover the costs of certain of its regulatory activities.¹⁷ There is nothing in Section 9 or its legislative history, however, that indicates that Congress did not intend its regulatory parity mandate to apply to the assessment and collection of regulatory fees. Rules of statutory construction require the Commission to give meaning to all provisions and to read provisions consistently.¹⁸ Thus, Congress' dual requirements in the 1993 Budget Act to collect regulatory fees while treating similar mobile services similarly must be read in concert.¹⁹ In fact, the Commission has reached this conclusion itself when it discussed regulatory fees in its regulatory parity docket, stating "*we believe that principles of regulatory parity dictate that [regulatory] fees for similar services be equivalent.*"²⁰ BellSouth WD agrees.

(citing 1993 Conference Report at 494).

¹⁶ See 1993 Conference Report at 494 ("[S]imilar *services* are accorded similar regulatory treatment.") (emphasis added).

¹⁷ 1993 Budget Act, Title VI § 6003(a)(1), 107 Stat. at 397; 47 U.S.C. § 159(a).

¹⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 F.C.C.R. 15499, 16128 (1996) (subsequent history omitted); see *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990) (holding that no provision should be read so as to render superfluous other provisions in the same enactment); *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (requiring that all parts of a statute, if possible, are to be given effect); 2A Norman J. Singer, *Sutherland Statutory Construction* §§ 46.05, 46.06, 47.02 (5th ed. 1992) (stating that a statute should be interpreted so as to give effect to each of its provisions).

¹⁹ See *id.*

²⁰ *Implementation of Sections 3(n) and 332 of the Communications Act, Third Report and Order*, 9 F.C.C.R. at 8129 (emphasis added); see also *Establishment of Rule and Policies for LMDS*, CC Docket No. 92-297, *Second Report and Order*, 12 F.C.C.R. 12545, 12655-56 (1997).

B. Because Mobile Data Services Such as Those Provided By BellSouth WD Compete with Paging and Narrowband PCS, They Should be Categorized as CMRS Messaging Services for Regulatory Fee Purposes

BellSouth WD uses its 900 MHz SMR channels to deliver exclusively mobile data services, and does not offer voice service. The Commission has recently recognized this fact in its *Third Annual CMRS Competition Report*:

There are . . . a number of dedicated data networks. BellSouth Mobile Data and Ardis Company (“Ardis”) use radio frequency packet data networks to provide nationwide service, mostly to corporate users. BellSouth Mobile Data provides mobile data services through its Mobitex network. Third parties package Mobitex with their own software and hardware with the Mobitex network to provide e-mail and Internet services BellSouth Mobile Data also provides two-way messaging and services such as support for field sales and service. . . . Both networks . . . do not provide voice service.²¹

In that same order, the Commission states that the CMRS industry can be divided into two major categories: mobile telephony, which includes broadband two-way voice services, such as cellular and broadband PCS, and mobile non-telephony, which includes non-voice data services such as paging, two-way text messaging, e-mail, faxes and Internet access.²² The Commission includes 900 MHz SMR mobile data services, such as those provided by BellSouth WD, in the latter mobile non-telephony category.²³

BellSouth WD demonstrated in its comments and reply comments that 900 MHz SMR licensees like BellSouth WD do not (and cannot) offer services that compete with those true broadband services that properly fall under the CMRS Mobile fee classification, including cellular, broadband PCS, and 800 MHz SMR, all of which offer real-time, two-way switched voice service.²⁴

²¹ *Third Annual CMRS Competition Report*, FCC 98-91, at 59 (rel. June 11, 1998).

²² *See id.* at 55-60.

²³ *See id.* at 59.

²⁴ *See* BellSouth WD Comments at 1-2; BellSouth Reply Comments at 5-6.

To the contrary, BellSouth WD's 900 MHz SMR data-only services compete with narrowband PCS services that fall under the CMRS Messaging category, which the Commission has recognized:

Narrowband PCS providers also face competition from other sectors of the wireless industry. For example, . . . [t]wo mobile packet data providers, Ardis Company ("Ardis") and BellSouth Wireless Data, . . . provide two-way text messaging.²⁵

Nevertheless, the Commission's *R&O* continues to include 900 MHz SMR messaging services in the CMRS Mobile category along with two-way voice services with which 900 MHz SMR services do not compete, instead of reclassifying them under the CMRS Messaging fee category with their narrowband PCS competitors or in some other category. Specifically, the Commission states:

We decline to adopt suggestions to base our fees on the predominant use of assigned spectrum and on a licensee by licensee basis. We are aware of no existing records or other information that would permit development of a sub-category of CMRS Mobile Services for those CMRS licensees who use broadband spectrum to deliver CMRS Messaging Services.²⁶

BellSouth WD submits that the federal mandate to promote regulatory parity, Commission orders interpreting that mandate, and the record submitted by BellSouth WD regarding the nature of the services provided by 900 MHz SMR licensees, provide the Commission with the "records or other information" necessary to reclassify such services, and it should do so on reconsideration. Failure to do so leaves the Commission with an *R&O* that is contrary to principles of regulatory parity and the Commission's own statement that "fees for similar services be equivalent."²⁷

²⁵ *Third Annual CMRS Competition Report* at 49.

²⁶ *R&O* at para. 46. The Commission rejects a variety of proposals because of concerns about imposing upon licensees and staff "an undue expenditure of administrative resources." *Id.* BellSouth WD's proposal, however, avoids the undue expenditure of resources that may be associated with assessing fees on a carrier-by-carrier basis by simply requesting a reclassification of 900 MHz SMR services. See BellSouth Reply Comments at 6.

²⁷ *Implementation of Sections 3(n) and 332 of the Communications Act, Third Report and Order*, 9 F.C.C.R. at 8129. Indeed, it would be anomalous if the Commission could discriminate among like services, while the carriers themselves must not discriminate among like services. See

II. THE COMMISSION'S BANDWIDTH DISTINCTION MISINTERPRETS THE STATUTE

The Commission has stated that the distinguishing characteristic between the CMRS Mobile Services fee category and the CMRS Messaging Services fee category is not the services offered, but the amount of bandwidth it has authorized.²⁸ Thus, it distinguishes between broadband and narrowband services, but will not examine the nature of the services authorized on those bands.²⁹ As shown above, regulatory parity compels an examination of the services offered in order to ensure that similar services are accorded similar treatment. In addition, however, the Commission has created an artificial distinction that seemingly misinterprets Section 9 of the Communications Act.

Specifically, the Commission relies upon Section 9(g), 47 U.S.C. § 159(g), for the proposition that fee categories should be based upon the benefit or quality of the spectrum authorized to a licensee, rather than the use a licensee makes of its spectrum.³⁰ Support for this conclusion, according to the Commission, is as follows:

Section (g) assesses a higher fee upon licensees of exclusive use spectrum than upon licensees of less valuable shared use spectrum. Similarly, the statutory fee schedule established fees for broadcast licensees that consider the type of service and class of service authorized.³¹

47 U.S.C. § 202(a).

²⁸ In attempting to explain the distinction between CMRS fee categories, the *R&O* and *NPRM* reference previous Commission decisions, notably the *1997 Regulatory Fee R&O*. See *R&O* at para. 47; *NPRM* at para. 28; *1997 Regulatory Fee R&O*, 12 F.C.C.R. at 17184-85.

²⁹ See *R&O* at para. 47; *NPRM* at para. 28; *1997 Regulatory Fee R&O*, 12 F.C.C.R. at 17184-85.

³⁰ See *id.*

³¹ *NPRM* at para. 28; *1997 Regulatory Fee R&O*, 12 F.C.C.R. at 17185. The Commission also states that “interested parties should note that in the past our CMRS fee schedules have adhered to *Congress’ principle* that our fee categories are to be based on the authorization provided to a licensee rather than the use a particular licensee makes of its authorized spectrum,” *R&O* at para. 47, *NPRM* at para. 28, *1997 Regulatory Fee R&O*, 12 F.C.C.R. at 17185 (emphasis added), but does not cite to any supporting documentation. Neither Section (g), nor the legislative history, appear to state or require compliance with any such “principle.” See 47 U.S.C. § 159; H.R. Conf. Rep. No.

There are several problems with this analysis. First, the exclusive use versus shared use distinction in the regulatory fee schedule in Section (g) to which the Commission refers applies only to private radio services.³² In any event, the Commission certainly cannot contend that all broadband CMRS spectrum is exclusive use and all narrowband CMRS spectrum is shared use, thus justifying the distinction it has created. According to the fee schedule, the only exclusive use services are land mobile, microwave, IVDS.³³ Second, the Commission's reference to the treatment of broadcast licensees undermines rather than supports its position by stating that the "type of service" provided, *i.e.*, the use to which the spectrum is put, *should* be considered. This is contrary to the Commission's conclusion in the CMRS context that predominate use/services offered will not be considered.

Most significantly, however, another section of the statute, Section 9(b)(3) specifically allows for the type of services offered to be considered by the Commission in amending its regulatory fee collections, by providing that "the Commission shall add, delete, or *reclassify services* in the Schedule to reflect additions, deletions, or changes in the nature of its *services* as a consequence of Commission rulemaking proceedings or changes in law."³⁴ The Commission has treated data only SMR services as distinct from two-way voice services provided by cellular, broadband PCS and 800 MHz SMR providers in several recent rulemaking proceedings,³⁵ and this

103-213 at 499 (1993) (citing H.R. Rep. No. 102-207 (1991)).

³² 47 U.S.C. § 159(g).

³³ *Id.*

³⁴ 47 U.S.C. § 159(b)(3). The legislative history states that the Commission may "make changes to the fee schedule, including adding, deleting, or reclassifying services when the Commission determines that such changes are necessary to ensure such fees are reasonably related to the benefits provided to the payor of the fee by the Commission's activities." H.R. Conf. Rep. No. 103-213 at 499 (1993).

³⁵ See *Interconnection and Resale Obligations Pertaining to CMRS*, CC Docket 95-54, *First Report and Order*, 11 F.C.C.R. 18,455, 18,466 (1996) (*Resale Order*); *Enhanced 911 Emergency Calling Systems*, CC Docket 94-102, *Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 18,676, 18,716-17 (1996) (*E911 Order*), *recon.*, 12 F.C.C.R. 22,665 (1997); *Interconnection and Resale Obligations Pertaining to CMRS*, CC Docket 94-54, *Second*

gives it the authority to reclassify 900 MHz SMR services for regulatory fee purposes under Section 9(b)(3). Such a result will also allow the Commission to apply Section 9 in a manner consistent with the regulatory parity mandate.

CONCLUSION

For the foregoing reasons, BellSouth WD urges the Commission to reconsider its *R&O* by reclassifying 900 MHz SMR services into the CMRS Messaging Services category along with those CMRS services with which they compete, or creating a new CMRS Broadband Messaging Services category recognizing the unique position of 900 MHz SMR services.

Respectfully submitted,

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July 31, 1998

CERTIFICATE OF SERVICE

I, Brooke Wilding, hereby certify that on this 31st day of July, 1998, copies of the foregoing "Petition for Reconsideration" in MD Docket No. 98-36 were served by first class U.S. mail, postage prepaid, upon the following:

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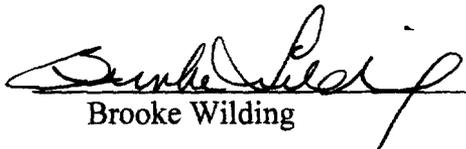
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