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December 24, 1998

Federal Communications Commission

Dear To Whom It May Concern:

Please note that we commenced attempting to file these attached comments prior to your filing deadline via the electronic filing system at your Internet website, as stated in the applicable Public Notice. However, we were unable to file either using the electronic submission protocol or the e-mail procedures, for reasons that are unclear to us despite our best efforts to remedy the situation.

We are attempting to circumvent the problem by using another computer to file via the Internet. We respectfully request that if the filing should be technically untimely that you never the less accept the filling in light of the above..

Sincerely,

/s/ Douglas D. Leeds

Douglas D. Leeds
Director of Public Policy
AirTouch Communications, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal-State)
Joint Board on) CC Docket No. 96-45
Universal Service) DA 98-2410
)
)

**COMMENTS OF AIRTOUCH COMMUNICATIONS, INC.
ON JOINT BOARD'S *SECOND RECOMMENDED DECISION***

AirTouch Communications, Inc. ("AirTouch")¹ hereby submits its comments in response to the Universal Service Joint Board's *Second Recommended Decision (Decision)*² pursuant to the Common Carrier Bureau's request for comments.³ In these comments, AirTouch addresses only the *Decision's* recommendations found in section X, paragraphs 64—73, regarding "Carrier Recovery of Universal Service Contributions From Customers."

I. INTRODUCTION

In our recently filed comments in the Commission's "Truth-in-Billing" proceeding,⁴ AirTouch expressed its support for the Commission's goals of reducing subscriber confusion, promoting end users' access to information, and providing consumers with the means to "reap the

¹ AirTouch is a Commercial Mobile Radio Services (CMRS) provider with interests in cellular, paging, PCS and mobile satellite services, both domestic and international.

² *Federal-State Universal Service Joint Board's, Second Recommended Decision*, CC Docket No. 96-45, FCC 98j-7 (Jt. Bd. rel. Nov. 25, 1998).

³ *Common Carrier Bureau Seeks Comment on Universal Service Joint Board's Second Recommended Decision, FCC Public Notice*, DA 98-2410 (rel. Nov. 25, 1998).

⁴ *In the Matter of Truth-in-Billing and Billing Format, Notice of Proposed Rulemaking (Truth-in-Billing NPRM)*, CC Docket No. 98-170, FCC 98-232 (rel. Sept. 17, 1998).

benefits of a competitive market.”⁵ Unfortunately, the universal service cost recovery recommendations proposed by the Joint Board in its *Decision* would only frustrate these goals by imposing burdensome, expensive, and constitutionally tenuous billing methodology and content requirements on competitive CMRS carriers. Accordingly, AirTouch urges the Commission to reject the Joint Board’s recommendations, at least with respect to the fiercely competitive CMRS industry.

II. THE JOINT BOARD’S RECOMENDATION TO REQUIRE CMRS CARRIERS’ TO EQUATE UNIVERSAL SERVICE LINE ITEM CHARGES WITH THEIR ASSESMENT RATE IS IMPOSSIBLE TO IMPLEMENT, UNREASONABLE TO ENFORCE AND INCONSISTENT WITH EXTANT COMPETITION

The *Decision* recommends that “for carriers that choose to pass through a [universal service line item charge to consumers, the line item assessment [should] be no greater than the universal service assessment rate.” This proposal is fundamentally flawed in a number of respects and should be rejected by the Commission.

First, as many of the comments filed in the *Truth-in-Billing* proceeding describe, such a requirement is simply impossible to implement.⁶ **The Commission’s universal service rules require carriers to contribute to the universal service fund based on the carrier’s end-user telecommunications revenue from *preceding time periods*.** The carrier then must estimate how much to collect from its customers on a going-forward basis, without knowing how many customers it will have or their level of service usage. Furthermore, CMRS carriers’ universal service calculations necessarily include such assumptions as the quantity of interstate traffic or the proportion of a

⁵ *Truth-in-Billing NPRM* at ¶ 3.

⁶ *See, e.g.*, Comments of AirTouch at 9; Comments of PCIA at 15-16; Comments of CTIA at 5-6; Comments of USCC at 8; Comments of Omnipoint Communications; Inc. at 14; Reply Comments of PrimeCo Personal

bundled rate that is leased equipment charges versus airtime charges. These assumptions inexorably lead to differences between the amount assessed on the carrier and the charge passed through to the end user. As a result, slight over- and under-collections are inevitable and simply cannot be judged either unreasonable or misleading.

Second, the *Decision's* recommendation would bar carriers from recovering some of the legitimate expenses attributable to the Universal Service program and is thus unreasonable. By limiting the collection of costs to the carriers' "assessment rate," the recommendation would presumably bar carriers from recovering, through a line item charge, those clearly identifiable internal costs of administering the Universal Service program. However, by definition these costs are undeniably a result of the universal service program. As such, it is not misleading or deceptive to include them as part of any pass through to the consumer. Accordingly, a requirement that a line item charge be limited to the carrier's "assessment rate" results in regulation untethered to any justifiable standard of reasonableness.⁷

Finally, the Joint Board's recommendation is particularly inappropriate when applied to the competitive wireless industry. As the *Decision* expressly states, the recommendation is designed to thwart carriers' attempts "to exercise market power" by charging customers excessive amounts under the guise of universal service.⁸ However, with five or more current wireless competitors in each market and further entry likely if not imminent, CMRS carriers simply possess

Communications; L.P (PrimeCo).; at 6. Reply Comments of Nextel Communications; Inc. at 6; Reply Comments of Sprint Corp. at 8.

⁷ AirTouch notes that several commenters in the *Truth-in-Billing NPRM* have argued that any rule that mandates the permissible amount of universal service fund recovery is effectively a form of rate regulation which would be inconsistent with the Commission's determination that CMRS carriers do not possess market power. *See, e.g.* Comments of PrimeCo at 15-16.

no market power to exercise.⁹ As a result, whether or not CMRS providers choose to attribute particular charges to specific line items, consumers can simply switch carriers if the total aggregated price of service, at a given level of quality, deviates from the competitive level. Indeed, even the Joint Board's *Decision* appears to recognize this fact, noting that, "in truly competitive markets, firms recover costs in a wide variety of ways. . . ."¹⁰ Accordingly, the Commission should reject any attempt to limit the ways in which competitive CMRS carriers may recover their costs, as inconsistent with the efficient operation of a competitive market.¹¹

III. THE *DECISION*'S RECOMMENDATION TO PROSCRIBE AND PRESCRIBE BILLING LANGUAGE SHOULD BE REJECTED AS AN UNWARRANTED ENCROACHMENT ON CARRIERS' FIRST AMENDMENT RIGHTS TO FREE SPEECH

AirTouch is concerned that the proposed rules tread dangerously close to impinging on carriers' Constitutionally protected rights to commercial speech. Furthermore, as the recommended requirements do not further either the goal of bill clarity or lower prices, there appears to be no

⁸ *Decision* at ¶ 69.

⁹ The Commission has recognized that the CMRS industry is currently highly competitive. *See 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, Third Report, FCC 98-91 (rel. June 11, 1998) at 18-21.*

¹⁰ Indeed, even the Joint Board's *Decision* appears to recognize this fact, noting that, "in truly competitive markets, firms recover costs in a wide variety of ways. . . ." *Decision* at ¶ 68.

¹¹ Furthermore, to the extent that the Joint Board's recommendation is intended to "help prevent consumers or classes of consumers from being charged excessively for a carrier's universal service assessment rate," it is unnecessary. *Decision* at ¶ 69. Should a gross inequity or over-recovery of universal service costs ever arise in the CMRS context (and the record is completely devoid of any actual instances of this) CMRS carriers remain subject to the Commission's complaint process, where their rates can be found unreasonable. *See* 47 U.S.C. § 208; 47 C.F.R. §§ 1.711-735. As a result, given the powerful market pressures that prevent the exercise of market power and drive CMRS carriers to be as competitive as possible, the Joint Board's "one size fits all" recommendation is, at best, unnecessary in the competitive wireless industry and should be rejected.

sound justification for the Joint Board’s willingness to advance recommendations that push the edge of permissible speech regulation.

The Joint Board proposes barring carriers from “incorrectly” describing universal service line item charges as “mandatory” or “federally-approved.”¹² However, the Commission has expressly determined that “carriers *are permitted* to pass through their contribution requirements to all of their customers in an equitable and nondiscriminatory manner.”¹³ Given this express authorization, as well as the fact that the universal service program is a product of federal law and regulation, prohibiting carriers from using the term “federally-approved” results in a ban on truthful, non-misleading speech and thus “cannot withstand scrutiny under the First Amendment.”¹⁴

Furthermore, as PrimeCo Communications argued in its reply comments in the *Truth-in-Billing NPRM*, even if it is not “mandatory” for a carrier to pass through universal service charges to consumers, it would appear “perfectly legitimate--and accurate—for a carrier to inform its customers that the federal government has *authorized* it to recover the costs of contributing to a *mandatory* federal program.”¹⁵ Accordingly, such a truthful communication would appear to be Constitutionally protected as well.

In addition to carriers’ Constitutional right to communicate truthful and non-misleading information to its customers, the United States Supreme Court has established that common carriers have the right not to be compelled to speak, much less compelled to speak a particular message. As the Supreme Court stated in *Pacific Gas*, “[f]or corporations as for individuals, the choice to speak

¹² *Decision* at ¶ 70

¹³ *Federal - State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd. 8776, 9212 (1997) (emphasis added).

¹⁴ *NPRM* ¶ 15 (citing 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996)).

¹⁵ Reply Comments of PrimeCo at 5 (emphasis in original).

includes within it the choice of what not to say.”¹⁶ Nevertheless, the Joint Board “urges” the Commission to adopt the universal service line item designation, “Federal Carrier Universal Service Contribution,” *accompanied by* “an explanation that the carrier has chosen to separate its universal service contribution from its other costs of business, and to display the contribution as a line item.”¹⁷ Such a requirement comes perilously close to compelled speech and should be rejected by the Commission absent a clearly demonstrated need.¹⁸

Notably, the Joint Board’s *Decision* makes no effort to demonstrate a need for the proposed regulations as applied to CMRS carriers. Instead, it, like the Commission, merely lumps CMRS carriers in with other telecommunications carriers that may more appropriately be the subject of regulation aimed at mitigating the effects of continued market power and absence of consumer choice.

For example, it appears that the *Decision*’s recommended universal service bill explanation is specifically designed to demonstrate to consumers that the explicit costs imposed on carriers, and ultimately consumers, through universal service contributions are balanced by reductions in access charges. In this respect the recommendations are clearly misapplied to CMRS providers.¹⁹

The problem with including CMRS carriers in regulation designed for other types of telecommunication carriers is that such inclusion actually undermines the important objectives of

¹⁶ *Pacific Gas and Elec. V. Calif. Public Util. Comm’n*, 475 U.S. 1, 25 (1986) (*plurality*).

¹⁷ *Decision* at ¶ 70.

¹⁸ Furthermore, though it might be expected that, given the First Amendment’s protection of “the choice of what not to say,” the Joint Board would choose to tread lightly when considering prescribing billing language, there is no evidence that the Joint Board gave any consideration to the significant costs of imposing on carriers a line item of 46 characters (including spaces) and a corresponding bill “explanation.” Nevertheless, these considerations are necessary in order for the Joint Board’s recommendation to pass constitutional muster. *Cf. Central Hudson Gas and Elec. Corp. v. Public Service Comm’n of New York*, 447 U.S. 557, 566 (balancing test).

¹⁹ *See Decision* at ¶ 70 (“it is important for consumers to understand that universal service support has long been implicit in the rates for various intrastate and interstate telecommunications services”).

bill clarity and lower prices. Instead, these objectives are most efficiently, effectively and appropriately accomplished, at least within the fiercely competitive CMRS industry, through operation of extant market forces. These competitive market forces serve to naturally drive CMRS providers to meet their customers' needs for adequate customer bill descriptions and disclosures without the need for additional government intervention.

For example, CMRS carriers currently have strong incentives to properly explain any universal service charges they may place on their bills. Any new charge to a bill naturally results in a plethora of telephone calls from subscribers. The number of these calls are directly related to the adequacy of the printed explanations. Since calls to customer service representatives are expensive to handle, carriers try to minimize customer service calls through billing language. Accordingly, all new charges placed on AirTouch's bills as a result of governmental action are accompanied by a full explanation of the nature of the new charge. Without such an explanation, carriers' call centers would be flooded with calls, customer satisfaction would suffer, and the service disconnection rate would increase dramatically.

Given the existing robust competition in the wireless industry, it is likely that any government regulation that imposes a "one-size-fits-all" solution on all telecommunications carriers' bills, such as the Joint Board's recommendations, would merely result in waste, inefficiency, higher prices, and decreased, not increased, customer satisfaction.

For these reasons, AirTouch respectfully submits that the Joint Board's as well as the Commissions legitimate concerns regarding truth in billing and recovery of universal service costs are best addressed, at least with respect to the CMRS industry, through the marketplace, and not through the proposed regulations.²⁰

²⁰ AirTouch also notes that Congress, in preempting the states' authority to regulate wireless rates, expressly preserved the states authority to regulate the "other terms and conditions of mobile services."

IV. Conclusion

For the reasons herein discussed, the Commission should refrain from imposing burdensome, expensive, and constitutionally tenuous billing format and content requirements on the vigorously competitive CMRS carriers.

Respectfully submitted,
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47 U.S.C. § 332(c)(3)(A). Accordingly, AirTouch is concerned that the *Decision's* recommendations, if imposed on CMRS carriers, could conflict with state regulations, further raising both carriers' costs and customers' confusion.