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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, DC 20554

Re: In the Matter of Policy and Rules Concerning the Interstate  
Interexchange Marketplace; Implementation of Section 254(g) of the  
Communications Act of 1934, as Amended, CC Docket No. 96-61

Dear Ms. Salas:

Transmitted herewith on behalf of the State of Alaska are an original and four (4) copies of the "Reply Comments of the State of Alaska" in the above-referenced proceeding. Also enclosed is a 3.5 inch diskette labelled and formatted in WordPerfect 5.1 for Windows.

Should there be any questions regarding this matter, please contact this office.

Sincerely,

A handwritten signature in cursive script that reads "John W. Katz".

John W. Katz  
Special Counsel to the Governor  
Director, State/Federal Relations

Enclosures

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

In the Matter of )  
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Policy and Rules Concerning the )  
Interstate, Interexchange Marketplace ) CC Docket No. 96-61  
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Implementation of Section 254(g) of the )  
Communications Act of 1934, as amended )

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**REPLY COMMENTS OF THE STATE OF ALASKA** FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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June 28, 1999

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## SUMMARY

The various comments of the CMRS interests generally fall into three categories, and the State replies to the comments in a similar manner.

First, many of the comments submitted by the CMRS industry seek to reargue the issue of whether the rate integration provision of Section 254(g) applies to the interstate interexchange services they offer. The Commission has repeatedly concluded that the statute applies to these services. If it chooses to address the issue again, the Commission should reiterate that conclusion.

Second, with respect to the specific issues posed by the Commission, the State offers the following comments:

Wide-Area Calling Plans. Rate integration, and the statutory prohibition on discriminatory rates and practices that underlies it, apply to wide-area calling plans. Section 202(a) of the Communications Act prohibits carriers from treating off-shore points differently than they treat locations in the Lower 48. Wide-area calling plans that treat Alaska or Hawaii (or any other domestic off-shore point) differently than they treat any Lower 48 state – whether in terms of rate structure, scope of local calling area, rates, or any other term or condition of service – violate the anti-discrimination provisions of Section 202(a) and cannot be permitted, whether or not they also violate Section 254(g).

Affiliation. The State has previously stated that CMRS carriers that are controlled by only a single entity must integrate their interstate interexchange

rates. This position has been endorsed by BellSouth Corporation, and should be adopted by the Commission.

Roaming. Roaming charges do not have to be integrated because roaming does not appear to be an interexchange service. Some of the contentions advanced with respect to roaming, however, must be rejected. Arguments that roaming charges originate as carrier-to-carrier charges and differ based on local competitive conditions must be rejected because acceptance of these arguments would be flatly inconsistent with Congress's and the Commission's rate integration policy.

Cellular and PCS Rate Integration. Interstate interexchange calls provided by affiliated cellular and PCS systems should be integrated because cellular and PCS services are viewed by customers as same service.

Third, the arguments made by CMRS providers seeking forbearance from the application of rate integration requirements should be rejected. The Commission has rejected these arguments previously, and there is nothing offered in these comments that should change the Commission's position on this issue.

**Before the  
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	)	
Implementation of Section 254(g) of the	)	
Communications Act of 1934, as amended	)	

**REPLY COMMENTS OF THE STATE OF ALASKA**

The State of Alaska (“the State” or “Alaska”) submits these reply comments in response to the Commission’s Further Notice of Proposed Rulemaking in this docket<sup>1</sup> and the comments of various commercial mobile radio service (“CMRS”) providers and trade associations.

**I. INTRODUCTION**

Perhaps seeking to buttress their arguments before the Court of Appeals, the CMRS interests devoted most of their attention to issues that were not at the heart of the Commission’s Further Notice. They devote a great deal of attention to an issue that was not posed by the Further Notice at all: whether the rate integration requirement contained in Section 254(g) of the Communications Act of 1934, as

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<sup>1</sup> Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, Petitions for Forbearance, CC Docket No. 96-61, *Further Notice of Proposed Rulemaking*, FCC 99-43 (released April 21, 1999) (“*Further Notice*”).

amended, applies to the interstate interexchange services they provide. The Commission has already decided that issue. The State believes that the Commission's previously stated position on that issue is unquestionably correct and compelled by the language of the statute. None of the arguments to the contrary here is new or meritorious.

The specific issues posed by the Further Notice were (1) how rate integration should apply to wide-area calling plans offered by CMRS providers; (2) how rate integration should apply to affiliated CMRS providers; (3) whether rate integration requires that roaming charges be integrated; and (4) whether the interstate interexchange services of cellular and PCS services offered by the same provider should be integrated. The State believes that the Commission should resolve those issues in a manner that meaningfully implements and is consistent with the language of the statute.

CMRS providers also reiterate their arguments for forbearance from the application of rate integration requirements. Recognizing that Congress has decided that rate integration is the law of the land, and that it must adhere to that decision, the Commission has rejected these arguments previously. There is nothing offered in these comments that should change the Commission's position on this issue. Forbearance is appropriate only if the Commission can determine that enforcement of the rate integration requirement is not necessary to prevent unjust, unreasonable or discriminatory practices; to protect consumers; and to protect the public interest. For example, it is not enough that forbearance is unlikely to lead to

discriminatory rates for some (or even most) consumers. To forbear, the Commission must be able to conclude that enforcement of the requirement “is not necessary to *ensure*” non-discrimination for all consumers. The statute clearly places the burden of proof on those who seek forbearance. That burden of proof has not been met here.

**II. RATE INTEGRATION APPLIES TO INTERSTATE INTEREXCHANGE SERVICES OFFERED BY CMRS PROVIDERS.**

The Commission has found on multiple occasions that rate integration applies to the provision of all interstate interexchange services, regardless of who is providing them. As the Commission stated in denying petitions for reconsideration filed by various CMRS parties, “we reaffirm our earlier determinations that the rate integration language of section 254(g) applies to all providers of interstate, interexchange services, including CMRS providers.”<sup>2</sup>

Nonetheless, various commenters seek to reargue this point. They contend that (1) rate integration never applied to CMRS providers prior to enactment of the Telecommunications Act of 1996 and Congress did not intend to expand upon the

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<sup>2</sup> *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, Petitions for Forbearance*, CC Docket No. 96-61, *Memorandum Opinion and Order*, FCC 98-347 (released December 31, 1998) at ¶ 10 (“*Rate Integration Further Reconsideration and Forbearance Order*”).

application of that principle;<sup>3</sup> (2) rate integration is tantamount to CMRS rate regulation, which Congress has precluded;<sup>4</sup> (3) the Commission's conclusion that the language of the statute unambiguously requires the application of rate integration to all interstate interexchange services is contrary to the Commission's prior conclusion that the statutory language is ambiguous in the context of affiliation issues;<sup>5</sup> and (4) the record does not justify the Commission's creation of new rules to apply to the CMRS industry.<sup>6</sup> Each of these arguments is not only outside the scope of this proceeding, but also wide of the mark.

First, various commenters suggest that in enacting Section 254(g) Congress did not intend to expand upon the Commission's prior rate integration and geographic rate averaging policies. This argument is quite obviously incorrect, as Congress unquestionably expanded the scope of these policies in numerous ways. There is no denying that the Commission's geographic rate averaging policy previously applied only to interstate interexchange services; yet, the rate averaging

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<sup>3</sup> See, e.g., Comments and Petition for Forbearance of BellSouth Corporation at 6 ("BellSouth Comments"); Comments of CommNet Cellular Inc. at 2 ("CommNet Comments").

<sup>4</sup> See, e.g., Comments of AT&T Wireless Services, Inc. at 10 ("AT&T Comments"); Comments of Bell Atlantic Mobile, Inc. at 6 ("BAM Comments"); Comments of PrimeCo Personal Communications L.P. at 13 ("PrimeCo Comments"); Sprint PCS Comments at 1.

<sup>5</sup> See, e.g., Comments of AirTouch Communications, Inc. at 2 ("AirTouch Comments"); CommNet Comments at 3.

<sup>6</sup> See, e.g., AT&T Comments at 7; BAM Comments at 7-8; PrimeCo Comments at 8-9; Sprint PCS Comments at 3.

provisions of the statute clearly apply to intrastate interexchange services as well.<sup>7</sup> The Commission's prior rate integration policy did not encompass the Commonwealth of the Northern Mariana Islands or Guam; yet, the rate integration provisions of the statute unquestionably do.<sup>8</sup> There is, therefore, no reason to assume that Congress did not intend what it said: rate integration is to apply to all providers of any interstate interexchange service.<sup>9</sup>

Second, the argument that rate integration is tantamount to CMRS rate regulation which Congress has precluded in Section 332 of the Communications Act is also without merit. This argument places rhetoric above reality and fundamentally misconstrues the nature of rate integration. Rate integration is not rate regulation. The Commission does not regulate the rates for interstate interexchange services provided by such carriers as AT&T, MCI Worldcom, and Sprint, but there is no question that rate integration applies to those services. Far from constituting rate regulation, rate integration is a long-standing, fundamental Commission policy, now codified in statute, that requires that carriers providing an

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<sup>7</sup> 47 U.S.C. § 254(g).

<sup>8</sup> Interstate communications include communications between and among any State, Territory or possession of the United States (other than the Canal Zone). 47 U.S.C. § 153(22).

<sup>9</sup> AirTouch admits that at least some CMRS calls are interstate interexchange services when it says that "CMRS services should not be found to be the type of interstate, interexchange telecommunications services [that are subject to] Section 254(g)." AirTouch Comments at 2. Of course, the statute does not say that it applies only to some interstate interexchange services and not to others.

interstate interexchange service not discriminate against those residing in remote or insular portions of the Nation. When it enacted Section 254(g), Congress was well aware of the Commission's policies not to regulate the rates of traditional landline interexchange carriers, yet it enacted this provision to ensure that consumers in all parts of the Nation benefited equally from competition in interstate interexchange services.<sup>10</sup>

Moreover, rate integration is a fundamental part of the universal service provisions of Section 254 of the Communications Act, as amended by the Telecommunications Act of 1996. Even if, contrary to the legislative history, rate integration were somehow to be viewed as rate regulation, Section 332 does not prevent the application of rate integration to CMRS providers. The Commission has already determined that if there is a conflict between Section 332 and Section 254, the latter section prevails because it was the later enacted provision.<sup>11</sup>

Third, a finding that Section 254(g) is ambiguous with respect to one issue does not mean that Section 254(g) is ambiguous with respect to an entirely different issue. The statute unambiguously requires the Commission to adopt rules requiring that each provider of interstate interexchange services offer those services

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<sup>10</sup> See *Rate Integration Further Reconsideration and Forbearance Order* at ¶ 34.

<sup>11</sup> *E.g., Federal-State Joint Board on Universal Service, Fourth Order on Reconsideration*, 13 FCC Rcd. 5318, 5485 (1997). Of course, there is no conflict between those sections in any event, as Section 332(c)(3) preempts state and local regulation of CMRS rates, and says nothing about federal rate regulation.

in a rate integrated manner.<sup>12</sup> There is no statutory language remotely suggesting that this requirement would apply only to some providers of interstate interexchange services and not to others depending on the technology used to provide part or all of that service.<sup>13</sup>

Contrary to AirTouch's and CommNet's arguments, the Commission has not concluded that the statute is ambiguous with respect to the services it is intended to cover. The conclusion to which AirTouch and CommNet refer concerned an entirely different issue. The prior issue was whether Section 254(g) applies separately to individual common carriers, or whether it applies jointly to all affiliated common

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<sup>12</sup> BAM and BellSouth suggest that rate integration requirements should be satisfied if a CMRS carrier enables customers to access a wireline interexchange carrier offering integrated rates. BAM Comments at 10, BellSouth Comments at 15. This suggestion is inconsistent with the statutory requirement that each provider of interstate interexchange service integrate its rates. Moreover, this suggestion would result in a gross inequality of service, with customers in some locations being able to make calls across the Nation at no additional cost (under "one rate" plans) and others being forced to incur a wireline interexchange carrier's additional charges. Such an inequality would violate Sections 201 and 202 of the Communications Act.

<sup>13</sup> More generally, in implementing other portions of Section 254, the Commission has concluded that one of its primary principles is to implement that section in a competitively neutral manner, that is, its rules should "neither unfairly favor nor disfavor one technology over another." *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd. 8776, 8801 at ¶¶ 46-47 (1997). Interpreting Section 254(g) in a manner that excludes interstate interexchange communications provided by CMRS providers because the technology these providers employ for all or only part of the telecommunication is different than the technology employed by other providers would violate the principle of competitive neutrality.

carriers.<sup>14</sup> The Commission's conclusion that the statute unambiguously applies to all providers of interstate interexchange telecommunications services, regardless of technology, has no logical relationship to, and is not inconsistent with, the Commission's prior statement that Section 254(g) is ambiguous with respect to the affiliate issue.

Moreover, the Supreme Court has clearly stated that the appropriate unit of analysis is the specific *issue* being addressed:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to *the precise question at issue*. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed *the precise question at issue*, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or *ambiguous with respect to the specific issue*, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>15</sup>

CMRS providers' attempt to bootstrap a Commission conclusion that Section 254(g) is ambiguous with respect to one issue into a requirement that the Commission reach the same conclusion with respect to a different issue is thus flatly contrary to Supreme Court precedent.

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<sup>14</sup> Rate Integration Reconsideration Order, 12 FCC Rcd. at 11,819, ¶¶ 14-15.

<sup>15</sup> *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (emphasis added and footnotes omitted).

Fourth, various commenters suggest that the record does not justify the Commission's creation of new rules to apply to the CMRS industry. They view this proceeding as one in which the Commission is determining whether new rules should be applied to the CMRS industry.<sup>16</sup> This perception ignores what has happened over the past three years. Congress decided in 1996 that all providers of interstate interexchange services are to integrate their rates for those services, and the Commission implemented Congress's directive in August 1996 by promulgating a regulation that tracked the language of the statute. The Commission is not creating new rules to apply now, nor is it writing on a blank slate. It is merely seeking to clarify, at the request of the CMRS industry, the manner in which the statute and its regulation are to be implemented.

**III. RATE INTEGRATION SHOULD BE APPLIED IN A MANNER THAT IS MEANINGFUL AND CONSISTENT WITH THE STATUTORY LANGUAGE.**

Many of the commenting parties have asked the Commission to take note of the "unique aspects of CMRS" in providing guidance on the application of rate integration.<sup>17</sup> The State has no objection to the Commission's provision of guidance on these issues that reflects, and is consistent with, the "unique aspects of CMRS."

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<sup>16</sup> *E.g.*, BAM Comments at 7 ("In this proceeding . . . the Commission is considering imposing requirements.") (emphasis in original), Sprint PCS Comments at 4 ("the Commission should require proponents of new regulation to demonstrate at least some evidence of a problem before imposing a regulatory solution").

<sup>17</sup> *E.g.*, AT&T Comments at 8.

That guidance, however, must also be consistent with the statutory language and not eviscerate the protections that Congress intended to create for consumers in high-cost, rural and insular areas when it passed all of Section 254, including subsection (g).

**A. Wide-Area Calling Plans**

Rate integration, and the statutory prohibition on discriminatory rates and practices that underlies it, apply to wide-area calling plans. In the Further Notice, the Commission suggested the possibility that an interexchange call exists only if a separate charge is assessed for the call. Under this approach, each CMRS provider would have the discretion to define its own local service area in any way it saw fit.<sup>18</sup>

The State has previously noted that, given the language of the Communications Act, CMRS calls for which there is a separate toll charge are unquestionably interexchange in nature. The issue of whether wireless calls for which there is no separately stated charge are exchange or interexchange may be resolved by interpreting the relevant definitions contained in the Communications Act. If the Commission starts with the definition of “telephone toll service,”<sup>19</sup> it might conclude that only calls for which there is a separate charge are

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<sup>18</sup> *Further Notice* at ¶¶ 11, 14.

<sup>19</sup> 47 U.S.C. § 153(48).

interexchange calls.<sup>20</sup> On the other hand, if the Commission starts with the definition of “telephone exchange service”<sup>21</sup> to determine what calls are intraexchange (with the remainder being interexchange), then it would conclude that calls outside a limited area (consisting of an exchange and a system of connecting exchanges) are interexchange. Indeed, the State understands that the Commission has used MTA boundaries as surrogates for exchange boundaries for CMRS in other contexts.<sup>22</sup>

The apparent conundrum, however, is easily resolvable. One of the fundamental purposes of Section 254(g) is to bring to the most remote areas of the United States the benefits of competition in interexchange services. CMRS interests contend that wide area calling plans promote that purpose. They do so, however, only if all areas served by a given provider are included and are treated the same way, in terms of rates and other terms and conditions of service.

The statutory basis for this requirement can be found most readily in Section 202(a) of the Communications Act. Several commenting parties have noted that

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<sup>20</sup> Although, as the Commission noted, this approach suggests that CMRS providers have discretion in determining the size of their “local” calling areas, any such discretion would not be unbridled for the reasons set forth below.

<sup>21</sup> 47 U.S.C. § 153(47).

<sup>22</sup> *Rate Integration Further Reconsideration and Forbearance Order* at ¶ 23. The State has previously indicated, and reiterates, that it has no objection to providing CMRS providers some flexibility with respect to the use of MTAs as jurisdictional boundaries, as long as that flexibility is not abused. See *Opposition of the State of Alaska To Petition For Reconsideration of Nextel Communications, Inc.*, CC Docket No. 96-61, filed April 16, 1999, at 7-8 n.15.

Sections 201 and 202 of the Communications Act apply to CMRS.<sup>23</sup> Indeed, there is nothing in those sections that limits their applicability to interexchange services. The Commission has repeatedly signaled that Section 202(a) of the Communications Act prohibits carriers from treating off-shore points differently than they treat locations in the Lower 48.<sup>24</sup> Thus, regardless of whether they are considered interexchange services, wide-area calling plans that treat Alaska or Hawaii (or any other domestic off-shore point) differently than they treat any Lower 48 state – whether in terms of rate structure, scope of local calling area, rates, or any other term or condition of service – violate the anti-discrimination provisions of Section 202(a) and cannot be permitted.

For example, a wide-area calling plan that encompasses 48 states but excludes 2 states would not be permissible. Similarly, a wide-area calling plan that

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<sup>23</sup> *E.g.*, AT&T Comments at 10; Comments of GTE at 15; PrimeCo Comments at 9.

<sup>24</sup> *Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, Supplemental Order Inviting Comments*, 4 FCC Rcd 395, 398 at ¶ 25 (Jt. Bd. 1989) (“a rate structure which averages interstate toll rates for states other than Alaska, while imposing deaveraged rates for service to and from Alaska could raise questions concerning an unjust and unreasonable discrimination pursuant to Section 202 of the [Communications] Act.”); *MTS and WATS Market Structure, Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking*, 81 F.C.C. 2d 177, 192 at ¶ 63 (1980) (“a rate structure which averages rates in 48 states and de-averages rates in 2 states may subject the residents [of] those two states to an unreasonable prejudice or disadvantage within the meaning of Section 202(a). . . . We have decided that a rate structure which uses different ratemaking methods to determine the rates which different

(continued...)

encompasses all 50 states that is offered at one rate in the Lower 48 states and at a different rate in Alaska and Hawaii would also be discriminatory and impermissible. Such a scheme would inherently involve averaging of costs, and establishing rates that are intended to cover those averaged costs, in 48 states, and then doing so separately for the other states.

The fact that costs may be higher in some areas than in others is not a sufficient basis to exclude the higher cost areas from averaging. Contrary to the comments of some parties,<sup>25</sup> the advent of satellite technology did not make the cost of interstate interexchange costs the same throughout the country. AT&T's costs for providing service to and from Alaska remained significantly higher than its costs of providing service elsewhere.<sup>26</sup> Nonetheless, the Commission was clear that those higher costs did not justify establishing higher rates for calls to and from Alaska. Section 202(a) required that if AT&T was to have a uniform rate structure for the entire Nation, it could not exclude Alaska. Similarly, if CMRS providers offer wide-area calling plans that encompass multiple geographic areas and offer a common rate for some of those areas, they may not discriminate against the other areas they

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(...continued)

users pay for comparable services is inconsistent with the national policy expressed in Section 202(a).”).

<sup>25</sup> *E.g.*, BellSouth Comments at 12, PrimeCo Comments at 14.

<sup>26</sup> It is precisely that cost differential that led to the Joint Board proceeding in CC Docket No. 83-1376.

serve by excluding them from those plans, or by including them, but only at higher rates or subject to other discriminatory terms or conditions.

**B. Affiliation**

The Further Notice recognized that the Commission has always required rate integration across affiliates.<sup>27</sup> Requiring integration across CMRS affiliates, therefore, is not new policy.

Various CMRS parties have told the Commission that the affiliation rule must be modified (or eliminated) as applied to CMRS providers.<sup>28</sup> The Further Notice offered two specific suggestions for determining whether CMRS carriers should be deemed to be affiliates of each other: (1) 51 percent or greater ownership control; or (2) 80 percent ownership control resulting in accounting on a consolidated basis.<sup>29</sup> The State does not believe either of these suggestions is the best solution to the issue presented.

As the Commission discussed in the Further Notice, the State has previously expressed the view that all CMRS operations that are commonly controlled by the same single entity should be required to integrate their interstate interexchange service rates.<sup>30</sup> If a single firm controls the operations of multiple CMRS providers

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<sup>27</sup> *Further Notice* at ¶ 18.

<sup>28</sup> *Id.* at ¶ 20.

<sup>29</sup> *Id.* at ¶ 23.

<sup>30</sup> *Id.* at ¶ 23. In the State's view, an entity, like PrimeCo, that is ultimately controlled by more than one separate entity would not have to integrate with  
(continued...)

and does not share that control with others, this control should be sufficient for affiliation purposes, regardless of the amount of equity ownership. This position has been endorsed by BellSouth, which states that “a carrier is affiliated with another entity only if the carrier exercises management control over the entity even if it holds less than a 50% equity interest in the entity.”<sup>31</sup>

Some commenters suggest that only entities that share 100 percent common ownership should be deemed affiliates.<sup>32</sup> There is no reason in law or policy to require 100 percent common ownership. A firm could avoid rate integration obligations simply by divesting itself of a small ownership interest in a given CMRS property without losing one iota of control.

The major reason offered by those seeking to impose rate integration only on 100 percent commonly owned carriers (or not on affiliates at all) is that many CMRS licensees are partnerships and the controlling partner has fiduciary duties to non-controlling partners.<sup>33</sup> A controlling partner may indeed have fiduciary duties to maximize the economic performance of each individual partnership. More importantly, however, the controlling partner has a fiduciary, as well as a legal,

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(...continued)

those other entities, but would have to integrate its rates within its own operations.

<sup>31</sup> BellSouth Comments at 19-20.

<sup>32</sup> *E.g.*, BAM Comments at 17; Joint Comments of Aerial Communications, Inc. and United States Cellular Corporation at 3 (“Aerial and U.S. Cellular Comments”).

<sup>33</sup> *E.g.*, AT&T Comments at 13, CommNet Comments at 8.

duty to operate the businesses it controls in compliance with applicable law.

Compliance with many laws reduces economic returns, but that fact does not give controlling partners (or shareholders) any right –let alone duty – to ignore them. If the Commission determines, as it should, that all carriers that are ultimately commonly controlled by a single entity are affiliates for rate integration purposes, then compliance with rate integration is a matter of law and cannot expose the controlling entity to claims that it is breaching its fiduciary duties to other partners.

### C. Roaming

Roaming charges do not need to be integrated because roaming does not appear to be an interexchange service. It is the State’s understanding that roaming charges apply equally to “local” calls made on the roamed-upon system, calls made from the roamed-upon system to the home system, and calls from the roamed-upon system to a third carrier’s system.<sup>34</sup> All of these calls cannot be considered interexchange calls, and thus the charge to facilitate these calls does not appear to be interexchange in nature.<sup>35</sup>

The Commission should recognize, however, that several arguments made in the attempt to avoid the application of rate integration to roaming charges are fundamentally flawed and, if accepted, would eviscerate rate integration. Some

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<sup>34</sup> See BellSouth Comments at 19-20.

<sup>35</sup> According to Sprint PCS, most calls for which roaming charges are assessed are “local” calls made within the roamed-upon system. Sprint PCS Comments at 15. This point strengthens the conclusion that roaming is not an interexchange service.

commenters argue that roaming charges should not be integrated because they are carrier-to-carrier charges or are charges that vary based on local competitive conditions.<sup>36</sup> These charges may originate as carrier-to-carrier charges, but when they appear on end-users' bills, they become carrier-to-customer charges. Access charges paid by wireline interexchange carriers to wireline local exchange carriers are also carrier-to-carrier charges, and although there is no requirement that they be integrated (they are not interstate interexchange services), differences in access charges or other carrier-to-carrier charges do not justify deviations from rate integration for the interstate interexchange services to which those access charges relate.<sup>37</sup>

Differences in local competitive conditions also do not justify deviations from rate integration for interstate interexchange calls. The Commission, for example, previously denied a request from AT&T to permit it not to integrate interstate

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<sup>36</sup> *E.g.*, PrimeCo Comments at 18-19 (“Roaming, however, is more accurately described as a contractual relationship between carriers, in which one carrier pays another for the right to have its subscribers utilize the other’s network.”), Aerial and U.S. Cellular Comments at 6 (roaming charges “primarily reflect competitive local market conditions”).

<sup>37</sup> For example, the Commission did not permit AT&T to deviate from rate integration because a joint services arrangement between AT&T and Alascom (a carrier-to-carrier agreement that reflected local conditions) obligated AT&T to pay Alascom all of its costs plus a rate of return equal to AT&T’s prescribed return. AT&T estimated that this arrangement cost it \$80 million more than the revenue generated from calls between the Lower 48 states and Alaska. *Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, Memorandum Opinion and Order*, 9 FCC Rcd. 3023, 3024-25 at ¶ 12 n.11 (1994).

interexchange calls in areas of New Jersey where it faced competition from Bell Atlantic for interstate interexchange calls along two specific interLATA corridors.<sup>38</sup>

**D. Cellular and PCS Rate Integration**

Interstate interexchange calls provided by affiliated cellular and PCS systems should be integrated because cellular and PCS services are viewed by customers as same service. Indeed, some commenters quote the portion of the Commission's third annual report on competition in commercial mobile services that concludes that much of the price reduction in cellular services during 1997 was "due to cellular operators lowering their prices in response to broadband PCS operators."<sup>39</sup> The competition from PCS, even at lower prices, would not cause a decline in cellular prices if consumers did not see the services as interchangeable.

Various commenters in this proceeding also see cellular and PCS services as interchangeable. They point, for example, to the percentage of the population that has access to three or more CMRS operators – encompassing both cellular and PCS operators – in an effort to establish that application of rate integration to CMRS services is not necessary.<sup>40</sup> The total number of cellular and PCS providers is

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<sup>38</sup> *AT&T Request for Waiver of Section 64.1701 of the Commission's Rules*, 12 FCC Rcd. 934 (Com. Car. Bur. 1997).

<sup>39</sup> *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Third Annual Report*, 12 (P&F) Comm. Reg. 623, 633 (1998) ("*Third Annual Report*"). See, e.g., BellSouth Comments at 9, PCIA Comments at 14, PrimeCo Comments at 7.

<sup>40</sup> See, e.g., PCIA Comments at 5 (stating that 87 percent of the nation's POPs having three or more operators providing mobile wireless service and over 68 percent of the nation's POPs having four to six providers"). See also PrimeCo  
(continued...)

irrelevant if those services are not perceived by consumers as providing essentially the same service.<sup>41</sup>

Some parties, such as PrimeCo, argue that the application of rate integration to cellular and PCS affiliates will stifle competition by requiring PCS firms to adopt the same prices as their cellular affiliates.<sup>42</sup> This claim is erroneous. First, rate integration applies only to some calls, not all calls. Rate integration does not require that rates for calls that are not interstate interexchange in nature to be integrated. And, it does not preclude price competition with respect to interstate interexchange calls; rather, it requires only that rates for those calls be integrated.

Second, as various commenters have stated, CMRS providers compete in a wide variety of ways. As PrimeCo itself stated, “CMRS providers compete locally on a number of additional levels, such as the size of the home coverage area, the roaming footprint, rate plans, and packaged service offerings.”<sup>43</sup> The use of digital

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(...continued)

Comments at 7 (quoting Chairman Kennard as stating that “in many markets, consumers have a choice of as many as 5 wireless providers . . .”).

<sup>41</sup> Arguments by some that cellular and PCS services are different because they operate in different spectrum or use different technology (*e.g.*, BAM Comments at 22) are beside the point. In determining whether cellular and PCS services should be integrated, the appropriate vantage point is that of the consumer.

<sup>42</sup> *E.g.*, PrimeCo Comments at 2, 23 (“Under rate integration, however, all of the competitive and pricing advantages of new PCS entrants will be lost.”).

<sup>43</sup> PrimeCo Comments at 12. *See also* BellSouth Comments at 14.

technology is another basis on what CMRS providers can compete. Competition can still thrive given these other dimensions of CMRS service.

#### **IV. THE STANDARDS FOR FORBEARANCE HAVE NOT BEEN SATISFIED.**

Most of the CMRS industry commenters again ask the Commission to forbear from applying rate integration to them. Their arguments have been made previously, and were properly rejected by the Commission previously.<sup>44</sup> There is nothing materially new in their arguments.<sup>45</sup>

Under the Communications Act, forbearance is appropriate only if the Commission concludes that enforcement of the rate integration requirement is not necessary to prevent unjust, unreasonable or discriminatory practices; to protect consumers; and to protect the public interest.<sup>46</sup> It is not enough that forbearance is

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<sup>44</sup> *Rate Integration Further Reconsideration and Forbearance Order* at ¶¶ 26-36.

<sup>45</sup> BellSouth seeks to up the ante by styling its comments as a petition for forbearance in an attempt to start a one-year clock for ruling on that request. That issue, however, is currently pending before the Court of Appeals. In its Petition for Review, CTIA challenged the Commission's decision not to forbear as "arbitrary, capricious, abusive of discretion, and otherwise not in accordance with law." *Cellular Telecommunications Industry Ass'n v. Federal Communications Commission*, Case No. 99-1045, Petition for Review at 3 (D.C. Cir., petition filed Feb. 9, 1999). In their statements of issues to be presented (filed with the Court on April 5 and 8, 1999, respectively), both PCIA and U S West also stated an intent to challenge the Commission's decision not to forbear from enforcing rate integration requirements on CMRS providers. The Commission, of course, has no control over the timing of any appellate court decision. BellSouth's petition should be dismissed because of the pendency of that issue before the appellate court.

<sup>46</sup> 47 U.S.C. § 160. *See also* H.R. Report 104-458, 104<sup>th</sup> Cong., 2d Sess. at 184-85 (forbearance requires Commission finding that "enforcement of a requirement is not necessary to ensure that charges, practices, classifications  
(continued...)

not likely to cause discriminatory rates for, or not likely to harm, some (or even most) consumers. For example, to forbear, the Commission must be able to conclude that enforcement of the requirement “is not necessary to *ensure*” non-discrimination. Given that forbearance is permitted only if the Commission can make the required findings, the burden of proof is clearly on those who seek forbearance. That burden of proof has not been met here.

In its prior order on forbearance, the Commission concluded, with respect to the first prong of the forbearance test, that the application of rate integration to interstate interexchange CMRS services “is necessary to ensure that nondiscriminatory charges and practices are offered with respect to CMRS services to and from the offshore points.”<sup>47</sup> The Commission was “concerned that, without rate integration, CMRS providers would, when consistent with their economic interests, discriminate against the offshore points.”<sup>48</sup> It also found no persuasive evidence that rate integration interferes with competition or consumer choice.<sup>49</sup>

With respect to the second prong, the Commission concluded there was no evidence that rate integration was not necessary to protect consumers. It noted

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(...continued)

or regulations for such carrier or service are just and reasonable and not unjustly or unreasonably discriminatory; protect consumers; and protect the public interest”).

<sup>47</sup> *Rate Integration Further Reconsideration and Forbearance Order* at ¶ 30.

<sup>48</sup> *Id.* at ¶ 29.

<sup>49</sup> *Id.* at ¶ 30.

that the existence of calling plans in the Lower 48 under which charges for long distance calls between two points in the Lower 48 and a point in the Lower 48 and Alaska are the same does not protect consumers in Alaska because Alaskan consumers would generally not be paying those long distance charges.<sup>50</sup>

The Commission also concluded that forbearance from applying all rate integration requirements to CMRS would not be consistent with the public interest. Consistent with Congressional intent, the Commission found that the public interest here “is in the integration of offshore points into the interexchange rate patterns of CMRS services to prevent discrimination against those locations.”<sup>51</sup>

Those who advocate forbearance raise two general arguments in response to these Commission findings. They first argue that the advocates for application of the statutory requirement have failed to demonstrate that the application of rate integration is necessary. AT&T, for example, states that “Even though Hawaii and Alaska argue that rate integration should apply to wireless carriers, they fail to cite circumstances in which their residents have been treated in a less than equitable fashion.”<sup>52</sup>

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<sup>50</sup> *Id.* For this reason, the suggestion by SBC Wireless that the Commission can simply require that carriers charge the same toll rate (if postalized rates are used) or employ the same rate methodology on calls to offshore points is inadequate. *See* Comments of SBC Wireless, Inc. at 9.

<sup>51</sup> *Rate Integration Further Reconsideration and Forbearance Order* at ¶ 31.

<sup>52</sup> AT&T Comments at 6. *See also* BellSouth Comments at 10 (noting no “outpouring” of complaints).

In addition to being inconsistent with the statute's burden of proof, this argument ignores the fact that, except with respect to wide area calling plans and affiliation issues (compliance with which was stayed in late 1997), rate integration has in fact applied to interstate interexchange services provided by CMRS carriers for years. As the Commission stated in denying the prior petitions for forbearance, there is no reason to believe that the existence of rate integrated CMRS pricing plans – and the absence of complaints – is not due in significant part to the application of the statutory requirement.<sup>53</sup> Indeed, the vigor with which members of the CMRS industry continue to seek forbearance from the application of rate integration strongly suggests that continued application of the requirement is indeed necessary to prevent carriers from adopting unintegrated rates.

Advocates of forbearance also argue that competition alone is sufficient to guarantee that rates will not be discriminatory and that consumers will be protected.<sup>54</sup> Yet, this argument cannot prevail for several reasons. Given the limited number of CMRS providers that serve any particular area, it does not appear that competition in CMRS is any greater than competition in wireline interexchange services. When Congress enacted Section 254(g), it knew that the

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<sup>53</sup> *Rate Integration Further Reconsideration and Forbearance Order* at ¶ 30.

<sup>54</sup> *E.g.*, BellSouth Comments at 8, PrimeCo Comments at 8 (“Consumers can easily replace any CMRS provider that charges disproportionate rates for interstate, interexchange calls. . . . [M]arket forces are sufficient to ensure just, reasonable and nondiscriminatory rates because competition removes the opportunity and incentive for any carrier to adopt anticompetitive and prejudicial rates, and terms and conditions of service.”).

Commission had concluded that AT&T, by far the largest interexchange carrier, was no longer to be regulated as a dominant carrier. The Commission's decision was necessarily based on the finding that competition in the interexchange business was sufficiently competitive that the carrier with the largest market share did not have market power. Nonetheless, Congress concluded that a statutory requirement for rate integration was necessary to make sure that all Americans benefited from competition. As the Commission stated in denying the prior forbearance requests, "we find that Congress's enactment of section 254(g), even after the Commission's determination that major segments of the interexchange market were subject to substantial competition, establishes the importance Congress placed on a nationwide policy of rate integration that was applicable to all providers of interstate, interexchange services."<sup>55</sup>

Even if rate integration were not to apply to markets that have demonstrated some competitive characteristics, CMRS providers have not established that competition is sufficiently robust and uniform throughout the Nation to justify forbearance from rate integration for CMRS in a manner that is consistent with these Congressional and Commission decisions. For example, in contrast to the

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<sup>55</sup> *Rate Integration Further Reconsideration and Forbearance Order* at ¶ 34. The Commission also recognized that competition alone is an insufficient basis for forbearance from rate integration in denying AT&T's request for a waiver of the rate integration rule. *AT&T Request for Waiver of Section 64.1701 of the Commission's Rules, supra.*

Commission's decision to treat AT&T as a non-dominant carrier, the Commission has not found CMRS providers to be non-dominant.

Indeed, in the third annual report on the status of competition in wireless telecommunications on which numerous commenters rely, the Commission stated that the CMRS industry was not fully competitive and that competition was not uniform throughout the Nation. It said that although there has been "substantial progress towards a truly competitive mobile telephone marketplace," "this development is still in its early stages" and "there is ample room for improvement." The Commission found that "many less populated areas are still awaiting the arrival of mobile telephone competition."<sup>56</sup>

The just-released fourth annual report reaches a similar conclusion:

[T]here is still much progress that remains to be made. Most operators have still been concentrating their deployment of new mobile telephone networks on more densely populated urban and suburban markets. While many of these operators are now starting to turn their attention toward smaller cities, many less populated areas are still awaiting the arrival of mobile telephone competition.<sup>57</sup>

These findings, in the State's view, preclude a conclusion that there is no need for rate integration to be applied to CMRS.

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<sup>56</sup> *Third Annual Report*, 12 (P&F) Comm. Reg. at 663.

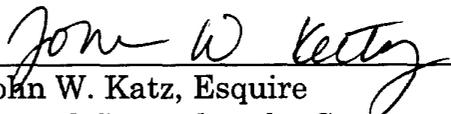
<sup>57</sup> *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Fourth Report*, FCC 99-136 at 63 (released June 24, 1999).

V. CONCLUSION

The Commission should apply rate integration requirements to CMRS providers in a manner that is consistent with, and does not eviscerate, Section 254(g) of the Communications Act.

Respectfully submitted,

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