

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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

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Reply Comments of the State of Hawaii

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SUMMARY

The comments filed in this proceeding reflect two starkly different approaches to the important issues raised by the Commission. Consistent with Section 254(g)'s universal service goals, proponents of rate integration have approached this proceeding with the goal of ensuring that the benefits of competition in the provision of interstate, interexchange CMRS services are made available to consumers throughout the Nation. By contrast, most of the CMRS commenters have approached this proceeding with the apparent goal of resisting the Commission's efforts to faithfully implement the universal service mandates of Section 254(g). These parties recycle discredited and unfounded allegations about the scope of Section 254(g) and the appropriateness of forbearing from this section's universal service mandates.

In their comments, the CMRS parties also seriously understate the risk of rate discrimination and the importance of the universal service mandates found in Section 254(g). At the same time, the CMRS commenters overstate: the impact of wide area calling plans; the extent to which CMRS is local in nature; the differences between CMRS and wireline interstate, interexchange services; and the state of competition in the CMRS long distance market.

Wide Area Calling Plans. To ensure that the benefits of competition in the market for interstate, interexchange CMRS services are made available to all consumers, the State believes that the Commission should apply Section 254(g) to all CMRS calls in a consistent manner. In the past, the Commission has turned to the Act's definition of the term "telephone exchange service" and determined that MTAs should be used to distinguish between exchange and interexchange CMRS calls. The Commission should apply this standard consistently.

The State opposes the notion that all calls with bundled rates should be classified as “local” and, therefore, exempt from the requirements of Section 254(g). Such an approach would: be at odds with the plain language of the Communications Act; lead to the inconsistent regulatory treatment of CMRS calls; undermine the universal service goals of Section 254(g)’s rate integration and geographic averaging requirements; arguably place limitations on the Commission’s jurisdiction over wide area calling plans; and require a showing that the forbearance criteria found in Section 10 of the Act are satisfied.

Affiliation. The State has previously suggested that the Commission adopt a “control” test to identify affiliated CMRS providers. Notably, one of the CMRS commenters, BellSouth, also supported this approach. As explained by BellSouth, a control standard would address the concerns raised by the current affiliation standard.

Roaming Charges. Roaming charges that do not vary depending on whether a call is local or interexchange, and do not contain a bundled interexchange rate, need not be integrated. However, the Commission should reject the argument advanced by some of the parties that Section 254(g) does not apply to charges that are unique to CMRS, are the result of carrier to carrier negotiations, or vary from region to region

Cellular and PCS Rate Integration. In determining whether to require the integration of cellular and PCS services, the Commission should consider: the extent to which these services are viewed as substitutes for each other; offer similar functions and features; compete on the basis of quality of service, compete on the basis of price, and are marketed towards the same consumers.

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The State of Hawaii,¹ by its attorneys, hereby replies to the comments submitted in response to the *Notice of Proposed Rulemaking* in the above-captioned proceeding.²

INTRODUCTION

The comments filed in this proceeding reflect two starkly different approaches to the important issues raised by the Commission. Consistent with Section 254(g)'s universal service goals, proponents of rate integration – including the State of Hawaii – have approached this proceeding with the goal of ensuring that the benefits of competition in the provision of interstate, interexchange CMRS services are made available to consumers throughout the Nation.

¹ The State submits these comments acting through its Department of Commerce and Consumer Affairs.

² See *Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, FCC 99-43, CC Docket No. 96-61 (rel. April 21, 1999) (“Notice”).

The State is more than willing to enter into a constructive dialogue on the issues addressed in the *Notice* and, as reflected in its prior submissions, to have the Commission clarify or simplify the application of rate integration to CMRS where appropriate.

By contrast, most of the CMRS commenters have approached this proceeding with the apparent goal of resisting the Commission's efforts to faithfully implement the universal service mandates found in Section 254(g). These parties recycle discredited and unfounded allegations about the inapplicability of Section 254(g) to CMRS and the appropriateness of forbearing from the statutory rate integration provision. Without responding to the Commission's requests for information, these parties also ask the Commission to adopt rules expressly intended to permit them to circumvent their obligations under Section 254(g).

The CMRS commenters' resistance to rate integration at this time is probably not surprising. Although the Commission has repeatedly held that Section 254(g) applies to CMRS, members of the industry have repeatedly attacked the statute's rate integration requirement. Until the U.S. Court of Appeals for the D.C. Circuit affirms the Commission's December 31, 1998 order finding – once again – that CMRS providers are subject to rate integration,³ the CMRS industry will probably continue to resist the agency's efforts to implement Section 254(g). In the interim, the Commission should maintain its commitment to ensuring that affordable and non-discriminatory rates for interstate, interexchange CMRS services are made available to all consumers.

³ See *Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, FCC 98-347, CC Docket No. 96-61, at ¶ 34 (rel. Dec. 31, 1998) (“*CMRS Order*”).

I. THE CMRS PARTIES HAVE UNDERSTATED CERTAIN MATTERS AND OVERSTATED OTHER MATTERS

In their comments, the CMRS parties make a number of broad claims about the nature of the CMRS market and Section 254(g) of the Communications Act. As explained below, the CMRS parties have seriously understated the risk of rate discrimination and the importance of the universal service mandates found in Section 254(g). At the same time, many of the commenters also have overstated: the impact of wide area calling plans; the extent to which CMRS is local in nature; the differences between CMRS and wireline interstate, interexchange services; and the state of competition in the CMRS long distance market.

The Risk of Rate Discrimination. In their comments, several of the CMRS parties claim that “the harm that rate integration was designed to cure simply does not exist in the wireless arena. Nor could it exist.”⁴ Unfortunately, this does not appear to be the case.

Ameritech currently offers a “Long Distance for Cellular” service plan that provides customers with a “flat per minute” rate “for all U.S. calls.” According to Ameritech’s Website, this service plan is available for all “*calls originating from an Ameritech Cellular service area, excluding Kauai, Hawaii.*”⁵ In other words, Ameritech makes a “flat” rate structure for domestic long distance calls available in its Mainland calling areas, but does not make this same rate structure available for calls originating in Hawaii. This is precisely the type of discrimination that Congress sought to prevent through Section 254(g).

⁴ Primeco Comments at 15; *see* GTE Comments at 12.

⁵ A description of Ameritech’s “Long Distance for Cellular” offering can be found at the following address: www.ameritech.com/products/wireless/cellular/longdistance.htm.

Rate discrimination is just as much of a concern in the wireless context as it is in the wireline context, especially given the number of cellular providers, the increasing number of service plans, and the fact that very little information is available concerning the long distance offerings of CMRS providers. Further, even if CMRS providers have made some rate integrated plans available, “nothing in the record suggests that the existence of the rate integration requirement is not a significant cause of that condition.”⁶

Section 254(g)’s Universal Service Mandates. The CMRS commenters also understate the importance of Section 254(g) to the overall commitment to universal service made by Congress in the 1996 Act. This provision reflects Congress’ determination that, even in markets where competition is increasing, there is an ongoing need to ensure that “the benefits of growing competition for interstate, interexchange telecommunications services . . . are available throughout our nation.”⁷ Accordingly, Section 254(g) does not simply prohibit discrimination against consumers in remote points. Rather, Section 254(g) imposes *affirmative* universal service mandates on all providers of interstate, interexchange services. The Commission should require CMRS providers to fulfill these mandates.⁸

⁶ *CMRS Order* at ¶ 30.

⁷ *See Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, 11 FCC Rcd 9564, 9588 (1996) (“*First Report & Order*”). The legislative history accompanying the Senate bill’s rate integration provision explains that “maintaining affordable long distance service in high cost remote as well as lower cost metropolitan areas benefits society as a whole by fostering a nationwide economic marketplace.” *See* S. Rep. No. 23, 1404th Cong., 2d Sess., § 253(h) at 30 (1995).

⁸ The Commission should reject Bell Atlantic Mobile and BellSouth’s suggestion that CMRS providers can rely on wireline carriers to fulfill their rate integration obligations. *See* Bell Atlantic Mobile Comments at 10; BellSouth Comments and Petition for Forbearance at 15. Section 254(g) requires every provider of interstate, interexchange telecommunications services to rate integrate its own services.

The Impact of Wide Area Plans. Due in large part to the high rates traditionally charged for interstate, interexchange CMRS services, some wireless users have migrated recently to so-called wide area calling plans. While the popularity of these plans has increased, they are not sufficient to achieve the goals of rate integration, as suggested by some of the commenters.⁹

First, these plans are targeted primarily at users who travel frequently, spend between \$90 and \$150 per month on mobile service, and use between 600 and 1500 minutes of airtime per month. As a result, these plans are beyond both the means and needs of most CMRS users. Second, the flat rates advertised by some CMRS providers are only available to customers that have a digital phone and that are enrolled in a digital service plan. Because such services are not available in all areas, many consumers do not have access to the rate structure and rates made available under certain wide area plans. Third, CMRS providers do not make certain regional wide area calling plans available to all customers in their service area. In light of the exclusion of lower volume users and users in certain geographic areas, the Commission should reject the notion advanced by some of the CMRS commenters that wide area calling plans meet the universal service principles found in Section 254(g).

Local v. National. Several of the commenters suggest that CMRS should not be subject to rate integration because these services are local in nature.¹⁰ Although the origins of CMRS may be local, the clear trend in the industry is towards national offerings. Indeed, as

⁹ See Bell Atlantic Mobile Comments at 14 n.14; Nextel Comments at 11.

¹⁰ See BellSouth Comments and Petition for Forbearance at 13; Primeco Comments at 15.

many as thirteen CMRS providers, now offer service plans with a national orientation.¹¹ The universal service mandates found in Section 254(g) are entirely consistent with this trend.

The CMRS commenters also suggest that they should not be required to integrate their CMRS rates because “unlike traditional long distance” service the costs of providing CMRS vary from market to market.¹² In the wireline context, however, the Commission has previously determined that regional cost variances do not provide a basis for a competitive exception to Section 254(g).¹³ Like the wireline carriers that originally called for such an exception, the CMRS commenters here have “provided only conclusory allegations of harm and have not demonstrated that they would be unable to compete . . . in a rate-integrated environment.”¹⁴

Wireless v. Wireline. Several of the CMRS parties also have argued that rate integration should not apply to CMRS long distance because it is “fundamentally different” from wireline long distance service.¹⁵ This overstates the case. As the State explained in its initial comments, like wireline interexchange calls, most long distance CMRS calls are completed predominantly through the use of wireline plant, which can readily be classified as interexchange

¹¹ These providers include AirTouch, AT&T Wireless, Bell Atlantic Mobile, BellSouth Mobility, Cellular One, Cincinnati Bell Wireless, Comcast Cellular Corp., GTE Wireless, Houston Cellular, Omnipoint, Powertel, Sprint PCS, and SunCom. These plans, however, are not necessarily available in all markets. See David Whelan, *The Flat Rate Revolution*, Point.com, <http://www.point.com>.

¹² BellSouth Comments and Petition for Forbearance at 13.

¹³ See *First Report & Order*, 11 FCC Rcd at 9580-83; *AT&T Corp.'s Petition for Waiver and Request for Expedited Consideration*, 12 FCC Rcd 934 (1997).

¹⁴ *First Report & Order*, 11 FCC Rcd at 9589. In any event, experience in the CMRS market suggests it is possible for CMRS providers to integrate rates interstate, interexchange services offered in a number of areas. For example, Primeco offers a rate of \$0.19 per minute for domestic long distance calls. In light of this fact, Primeco's claims regarding the difficulty of complying with Section 254(g) due to cost variances are entirely unpersuasive. See Primeco Comments at 15.

¹⁵ See Sprint PCS Comments at 6, 7; CTIA Comments at 2,3; GTE Comments at 7.

or local in nature.¹⁶ Further, the Commission has recognized that CMRS providers, like their wireline counterparts, have the ability to distinguish between local and interexchange calls.¹⁷ Finally, many CMRS plans distinguish between local and long distance services for purposes of rates charged to consumers.

The State of CMRS Competition. Without question, competition has increased in the market for CMRS services. However, some of the CMRS parties' broad claims about CMRS competition are of limited relevance for purposes of Section 254(g). For example, in its comments, CTIA points out that CMRS competition has taken root in "ninety-four of the top one hundred markets."¹⁸ While this may be true, consumers in remote areas, rather than consumers in the "top" markets, are the intended beneficiaries of Section 254(g)'s universal service mandates. Several of the CMRS commenters also note that CMRS rates have declined in the United States.¹⁹ According to a recent study, however, the benefits of declining rates in the United States have accrued disproportionately to higher volume users.²⁰

¹⁶ See *Comments of the State of Hawaii*, CC Docket No. 96-61 (filed May 27, 1999).

¹⁷ See *CMRS Order* at ¶ 23; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16017 (1996).

¹⁸ CTIA Comments at 5; see PCIA Comments at 5 ("competition in the mobile telephony sector is growing tremendously, with 87 percent of the nation's POPs having three or more operators providing mobile wireless services and over 68 percent of the nation's POPs having four to six providers."); SBC Comments at 2 ("approximately 60 percent of the population can choose from 5 or more providers").

¹⁹ As the Commission has explained, "most rural BTAs are the least likely to be experiencing competition from new entrants." *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, at 20 (rel. June 24, 1999).

²⁰ See Peter J. Howe, *Cell Phones in Hub Seen Falling; But Survey Finds Tab Lower in Europe, Canada*, The Boston Globe, D1 (June 22, 1999). Similarly, the FCC has recently found that "the most aggressive price competition has been occurring at the higher levels of usage . . . For example, . . . as of the third quarter of 1998, users at the 60 MOU level were paying two or three more times per minute than users at the 500 MOU level." *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis*

Moreover, while progress has been made in the United States, experience in many foreign markets suggests that CMRS market still has a long way to go. First, CMRS rates in the U.S. are much higher than in many developed countries. For example, consumers in the United States pay an average per minute price of (\$.32), while consumers in Canada pay (\$.16) and consumers in Finland pay (\$.17).²¹ Second, due to lower rates, penetration rates in some foreign markets are markedly higher than in the United States. For example, according to the Yankee Group, Norway has a penetration rate of approximately 60, which is approximately twice that of the U.S.²² A number of other countries, including Italy, Sweden, Finland, and Portugal, also have higher penetration rates than the United States.²³ Thus, while the competitive situation in the United States may be improving, it is not as rosy as the picture painted by the CMRS parties.

of Competitive Market Conditions With Respect to Commercial Mobile Services, Fourth Report, at 22 (rel. June 24, 1999).

²¹ See *Canada's Wireless Rates Are the Most Affordable in the World; U.S. Ranks 9th*, The Yankee Group, Press Release (June 16, 1999); see also Peter J. Howe, *Cell Phones in Hub Seen Falling; But Survey Finds Tab Lower in Europe, Canada*, The Boston Globe, D1 (June 22, 1999) (Consumers in U.S. cities pay the following average rates per minute of use: Boston (\$.36), Chicago (\$.32), Los Angeles (\$.33), and New York (\$.40). By contrast, users in many foreign cities pay much lower average rates: Toronto (\$.08), Seoul (\$.12), Tel Aviv (\$.15), Hong Kong (\$.20), and Copenhagen (\$.20)).

²² See *North America, Europe Lead in Potential for Landline Displacement by Wireless*, The Yankee Group, Press Release (June 21, 1999); T.R. Reid, *Letter From Finland; A Cell Phone in Every Pocket*, The Washington Post, C1 (May 26, 1999).

²³ See Qualcomm, Inc., *Wireless Industry Overview*, at 6 (June 10, 1999) (citing Dataquest information indicating that the U.S. has a penetration rate of 26%, which is lower than that of Italy (36%), Japan (37%), Sweden (46%), Norway (49%), and Finland (58%)).

II. **THE COMMISSION SHOULD REJECT THE CMRS PARTIES' ATTEMPTS TO CIRCUMVENT SECTION 254(g)**

In their comments, several of the CMRS parties recycle discredited claims about the applicability of Section 254(g) to CMRS and the appropriateness of forbearing from this provision's universal service mandates. As it has done before, the Commission should reject these claims.

Section 254(g) Applies to CMRS. Several of the CMRS parties argue that Congress did not intend Section 254(g) to apply to CMRS.²⁴ These parties must be confused. Just six months ago, the Commission rejected the arguments that these parties have put before the agency in this proceeding. As the Commission has found, "on its face Section 254(g) *unambiguously* applies to all providers of interstate, interexchange services."²⁵ Consistent with this finding and the plain language of Section 254(g), the Commission should once again affirm that the statutory rate integration requirement applies to *all* providers of interexchange services – including CMRS providers – "with no exceptions."²⁶

There is Not a Presumption Against CMRS Rate Integration. The CMRS parties next assert that there is a presumption against rate integration for CMRS.²⁷ Bell Atlantic

²⁴ See Primeco Comments at 15; PCIA Comments at 3. The State has specifically addressed many of the arguments raised by these parties in its Opposition to Nextel's Petition for Reconsideration of the Commission's December 31, 1998 CMRS rate integration order. Rather than repeat the arguments made in its opposition, the State will simply incorporate them by reference. See Opposition of the State of Hawaii, CC Docket No. 96-61 (April 16, 1999).

²⁵ CMRS Order at ¶ 10 (emphasis added).

²⁶ *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, FCC 97-357, at ¶ 19 (rel. Oct. 3, 1997) ("*Stay Order*"); see *First Report & Order*, 11 FCC Rcd at 9589; *Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, 12 FCC Rcd 11812, 11821 (rel. July 30, 1997) ("*Reconsideration Order*").

²⁷ See Bell Atlantic Mobile Comments at 8; Sprint PCS Comments at 3.

Mobile, for example, asserts that the Commission “must develop a compelling record” sufficient to satisfy the “particularly high” burden of applying Section 254(g) to CMRS. Remarkably, Bell Atlantic also asserts that “CMRS providers” should not be required “to prove that the three forbearance prongs” found Section 10 of the Communications Act “are met” *before* the Commission forbears from Section 254(g) for CMRS.²⁸

These assertions are inaccurate. The Commission has expressly rejected Bell Atlantic Mobile’s “argument that applying section 254(g) to CMRS provider is inconsistent with section 332 of the Act.”²⁹ As explained by the Commission, “Section 332(c) cannot be read to bar every form of oversight over CMRS rates.”³⁰ To the contrary, Section 332(c) expressly requires the Commission to regulate CMRS providers pursuant to Sections 201 (just and reasonable rates, interconnection obligations), 202 (unreasonable rate discrimination prohibited), and 208 (enforcement of violations through the complaint process) of the Communications Act. Section 254(g) of the Act shares with Sections 201 and 202 the common goal of ensuring that consumers do not pay unreasonably high or discriminatory rates.

Further, Section 10 of the Communications Act does not require the Commission to establish a “compelling record” before applying the Communications Act. Rather, it merely requires the Commission to forbear when certain specific statutory criteria are satisfied. Despite extensive efforts, the CMRS industry has failed in its efforts to satisfy these criteria with regard

²⁸ Bell Atlantic Mobile Comments at 8.

²⁹ *CMRS Order* at ¶ 15.

³⁰ *Id.*

to CMRS rate integration. Accordingly, the Commission's decision to move forward with the application of rate integration to CMRS was quite appropriate and, indeed, required by the Act.

Finally, Section 254(g) does not establish a different standard for applying rate integration to CMRS providers than for other providers of interstate, interexchange services.³¹ Rather, as the Commission has repeatedly explained, Section 254(g) simply and clearly applies to *all* providers of interstate, interexchange services. The Commission, therefore, should reject the claim that there is a presumption against CMRS rate integration.

Competitive Conditions do Not Warrant Forbearance. Recognizing that Section 254(g) applies to CMRS, many of the commenters – once again – request forbearance from this provision. However, the arguments made by the CMRS commenters in support of this request are no more persuasive today than they were just six months ago when they were thoroughly considered and flatly rejected by the Commission.

In their comments, the CMRS parties note the decline in CMRS rates, provide anecdotal evidence concerning the impact of wide area calling plans, point out that the Commission has found that competitive forces exist in the CMRS market, and assert that rate integration would impede competition. In addressing these arguments six months ago, the Commission stated:

We are concerned that, without rate integration, CMRS providers would, when consistent with their economic interests, discriminate against the offshore points. Our concerns are not eliminated by the CMRS providers' claims that CMRS rates are falling or that PCS rates are lower than cellular rates. Similarly, CMRS providers' few cited anecdotal instances of the offering of rates that comply

³¹ As the Commission has recognized "[e]lsewhere in the Act, . . . when Congress wanted to exempt CMRS providers from a requirement of the Act, it did so expressly." *Id.* at ¶ 18.

with the rate integration requirement of Section 254(g) do not ensure that such rates will be offered by all CMRS providers in the future. Moreover, although CMRS providers contend generally that rate integration would interfere with competition, resulting in less consumer choice, we find no specific persuasive arguments to support those contentions.³²

These matters are also addressed above.

Second, in light of the affirmative universal service mandates found in Section 254(g), “forbearance from rate integration cannot be justified on competitive conditions alone”, as the CMRS commenters have tried to do here.³³ In this regard, the Commission has explained:

We are not persuaded that we must forbear from requiring carriers to comply with rate integration, either generally or in *competitive conditions*, for the same reasons discussed with respect to geographic rate averaging. Our rate integration policy has integrated offshore points into the domestic interstate, interexchange rate structure so that the benefits of growing competition for interstate interexchange telecommunications services . . . are available *throughout our nation*.³⁴

Third, the history of Section 254(g) suggests that Congress intended rate integration to apply to competitive markets. Indeed, when Section 254(g) was enacted, AT&T had already been declared a non-dominant provider of interstate, interexchange services and the Commission generally considered the wireline interexchange market to be competitive. Further, the same trend towards lower prices and high churn rates cited here by the CMRS commenters were present in the wireline market. Nonetheless, Congress determined that, even in competitive

³² *Id.* at ¶ 29.

³³ *Id.* at ¶ 34.

³⁴ *First Report & Order*, 11 FCC Rcd at 9588 (emphasis added). In the past, the Commission has explained that a request for forbearance based “entirely on generalized assertions of the alleged need for a competitive exception to geographic averaging requirements” is insufficient to “justify the exception under Section 10.” *Id.* at 9583.

markets, there is an ongoing need to ensure that “the benefits of growing competition for interstate, interexchange telecommunications services . . . are available throughout our nation.”³⁵

Notably, the legislative history accompanying Section 254(g) speaks of limited forbearance in connection with geographic rate averaging, but does not mention forbearance with regard to rate integration.³⁶ This suggests that Congress did not intend the statutory rate integration provision to be forborne.

III. THE COMMISSION SHOULD ADOPT A CONSISTENT APPROACH IN DISTINGUISHING EXCHANGE AND INTEREXCHANGE CMRS CALLS

In order to ensure that the benefits of nascent competition in the market for interstate, interexchange CMRS services are made available to *all* consumers, the State believes that the Commission should apply Section 254(g) to *all* CMRS calls in a consistent manner.

A. The Commission Should Continue to Use MTAs to Define CMRS Exchange Areas

By its terms, Section 254(g)’s rate integration requirement applies to interstate, interexchange services, but not to intraexchange services.³⁷ This statutory framework requires the Commission to distinguish “interexchange” CMRS calls from “exchange” calls. In making this distinction, the Commission has not previously turned to the definition of the term

³⁵ *Id.* at 9583. With regard to geographic rate averaging, the Commission has explained that “Congress knew at the time the 1996 act was passed that all IXC’s were nondominant and we find that Congress would not have required us to adopt rules to implement geographic rate averaging if it had intended us to abandon this policy with respect to all IXC’s so soon after enactment.” *Id.*; see also *CMRS Order* at ¶ 34 (“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 the nationwide policy of rate integration.”).

³⁶ See H.R. Conf. Rep. No. 104-458, 104th Cong., 1st Sess. 132 (1996).

³⁷ See 47 U.S.C. § 254(g).

“telephone toll service.”³⁸ Rather, in the past, the Commission has turned to the Act’s definition of the term “telephone exchange service” to distinguish between exchange and interexchange CMRS calls.³⁹ The Commission should do the same here.

The Communications Act defines the term “exchange service” as “telephone exchange service” or “comparable services.”⁴⁰ The Commission has previously determined that cellular, broadband PCS, and other CMRS providers offer local services that are “comparable” to “telephone exchange service.”⁴¹ For purposes of reciprocal compensation and identifying local CMRS calls, the Commission has further determined that, given the mobile nature of these services, MTAs are comparable to telephone exchange areas.⁴² The State has supported the Commission’s use of MTAs to distinguish between local and long distance CMRS calls and believes that the Commission should apply this standard consistently to CMRS offerings.⁴³

³⁸ See, e.g., Bell Atlantic Mobile Comments at 13. In their comments, many of the CMRS parties argue that Section 254(g) only applies to interstate, interexchange CMRS services with a separately stated toll charge. There is no basis for this limitation in either the text or legislative history of Section 254(g). Indeed, allowing CMRS providers to remove interstate, interexchange calls from the scope of Section 254(g) by simply electing to bundle rates would strike at the very heart of the rate integration requirement adopted by Congress.

³⁹ See *CMRS Order* at ¶ 23; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15999 (1996) (“*Local Competition Order*”) (subsequent history omitted).

⁴⁰ See 47 U.S.C. § 153(47).

⁴¹ *Notice* at ¶ 14; see *Local Competition Order*, 11 FCC Rcd at 15999.

⁴² See *Local Competition Order*, 11 FCC Rcd at 15999; *CMRS Order* at ¶ 22.

⁴³ Notably, MTAs may be used in other contexts to make distinctions among CMRS calls. For example, in certain situations, even CTIA “supports designation of the Major Trading Area (“MTA”), rather than State lines, as the dividing perimeter for interstate and intrastate traffic of cellular and PCS carriers.” See Comments of the Cellular Telecommunications Industry Association, CC Docket No. 96-45 (Jan. 11, 1999).

B. The Commission Should Not Permit CMRS Providers to Define Their Own Exchange Areas

In their comments, the CMRS parties assert that all calls placed under plans with bundled local and long distance rates should be classified as “local” and, therefore, should not be subject to the requirements of Section 254(g).⁴⁴ As explained below, this approach would: be inconsistent with the plain language of the Communications Act; lead to the inconsistent regulatory treatment of CMRS calls; undermine the universal service goals of Section 254(g); place limitations on the Commission’s jurisdiction over wide area calling plans; and trigger the Act’s forbearance requirements.

The Communications Act. The regulatory approach proposed by the CMRS commenters is directly at odds with plain language of the Communications Act. As noted above, the Act defines the term “telephone exchange service” as “service provided within a telephone exchange . . . or *comparable* service.”⁴⁵ Plainly, services that permit users to place calls between disparate points in Maine and South Carolina are not “comparable” to telephone exchange service. Nor are wide areas that encompass multiple states “comparable” to telephone exchanges. The statutory definition of the term “telephone exchange service” simply cannot bear the geographic burden that the CMRS commenters seek to place on it.

Moreover, the jurisdictional approach advocated by the CMRS parties would elevate form over substance. In order to classify a particular call as exchange or interexchange, the CMRS commenters would have the Commission ignore a call’s points of origination and termination and, instead, look to the manner in which the call is billed (*i.e.*, whether the rate for

⁴⁴ See Bell Atlantic Mobile Comments at 12; CTIA Comments at 10; Primeco Comments at 17.

the local and long distance components are bundled). This manipulatable standard is inconsistent with the Commission's established practices. Indeed, as the agency recently explained, the "Commission traditionally has determined the jurisdictional nature of communications by the end points of the communication."⁴⁶

Inconsistent Treatment of CMRS Calls. The classification of CMRS calls based on the manner in which they are billed also would lead to the inconsistent treatment of CMRS calls. Perhaps the best way to illustrate this result is to consider the treatment of an inter-MTA call to a distant city under two service plans offered by the *same* CMRS provider. Under a "traditional" plan, the call would be considered interexchange and the Commission's rules would require the CMRS provider to integrate the rate for the call.⁴⁷

If the same call were placed under a wide area plan, the only difference would be the manner in which the user would be billed for the call. The call would travel the same distance, to the same point, and over the same facilities. Nonetheless, under the schizophrenic approach advocated by the CMRS commenters, the manner of billing would render the call "local" and the rate for the call would not have to be integrated. There is no logic, statutory or otherwise, for classifying calls as exchange or interexchange based on the rate plan that a user selects or the billing method a CMRS provider elects to use.

Rate Integration. As the State explained in its initial comments, allowing CMRS providers to define their own exchange areas would, as a practical matter, allow these providers

⁴⁵ 47 U.S.C. § 153(47).

⁴⁶ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, ¶ 10 (rel. Feb. 26, 1999).

⁴⁷ See *CMRS Order* at ¶ 2.

to manipulate what services are subject to rate integration. For example, CMRS providers would have the ability to exclude offshore points from large Mainland calling areas where more favorable rate structures are offered or to use different rate structures for plans encompassing offshore points. This, in turn, would effectively eviscerate Section 254(g)'s rate integration requirements for interstate, interexchange services and undermine the universal service objectives that Congress sought to achieve in enacting that provision.

Geographic Rate Averaging. The regulatory approach advocated by the CMRS parties also appears to be inconsistent with the Communications Act's geographic rate averaging requirements. Section 254(g) states that "the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas."⁴⁸ As the Commission has explained, this policy "furthers our goal of providing a universal nationwide telecommunications network . . . [and] ensures that ratepayers share in the benefits of nationwide interexchange competition."⁴⁹

Section 254(g)'s geographic averaging requirements prohibit providers of interstate, interexchange services from limiting discounted rates for interexchange services to selected low cost areas.⁵⁰ Permitting CMRS providers to define their own exchange areas,

⁴⁸ 47 U.S.C. § 254(g). A geographically averaged rate structure requires carriers to offer the same services, at the same rates, for the same distance, regardless of the location of the terminal points.

⁴⁹ *First Report & Order*, 11 FCC Rcd at 9567. The Commission has further explained that, "[i]f prices are falling due to competition in urban corridors where more traffic is carried," then prices should also "fall for rural Americans." *Id.*

⁵⁰ The Commission has specifically determined that, pursuant to Section 254(g), "the only 'geographically specific' discounts that carriers may offer are temporary promotions." *Id.* at 9576; *see id.* at 9577 ("we have not in the past

however, would enable these providers to define low cost regions as an exchange area and offer discounted rates for calls within these urban corridors.⁵¹ The protections afforded by Section 254(g)'s geographic averaging requirement – which would otherwise prohibit this practice – would not apply to these “exchange” calls.⁵² This, of course, would be directly at odds with the universal service goals of Section 254(g).⁵³

The Commission should require the CMRS parties to explain how granting them a license to limit discounted rates to selected areas would further the universal service goals served by Section 254(g)'s geographic averaging mandate, advance consumer protection, or ensure the reasonableness and nondiscriminatory nature of carriers' rates. The Commission further should require these providers to disclose the extent to which they make special rate packages available to customers throughout their service areas.⁵⁴

exempted from our geographic rate averaging policy entire groups of services . . . where carriers offer discounted rates on a permanent or long-term basis.”).

⁵¹ The comments suggest that some CMRS providers may have embraced a “selective” approach to the deployment of more favorable rates and rate structures. *See* Bell Atlantic Mobile Comments at 13 (“Competition drives the determination of the geography in which wide area rate plans are available.”); BellSouth Comments at 14 (“BellSouth has developed wide area plans to address identified communities of interest . . . Under these plans, the per-minute price for calls between identified communities of interest is less than the rate set forth in basic plans offered company-wide.”); Nextel Comments at 8 (“Similar to other CMRS carriers, Nextel determines which calls will be treated as local or long distance not based on whether the calls are handled entirely on Nextel’s network or other similar factors, but based rather on Nextel’s judgment about the competitive conditions of the particular market.”); CTIA Comments at 10; Nextel Comments at 7.

⁵² *See AT&T Corp.’s Petition for Waiver and Request for Expedited Consideration*, 12 FCC Rcd 934 (1997) (rejecting AT&T’ request for relief to provide discounted rates in certain urban traffic corridors in and around New Jersey).

⁵³ *See First Report and Order*, 11 FCC Rcd at 9567.

⁵⁴ *See id.* at 9577 (“We will require carriers to offer the same basic service package to all customers in their service areas, and permit carriers to offer contract tariffs, Tariff 12 offerings, and optional calling plans provided they are available to all similarly situated customers, regardless of their geographic location.”)

Jurisdictional Issues. In addition to undermining the universal service goals of Section 254(g), allowing CMRS providers to define their own exchange areas also would raise important jurisdictional issues under Section 221(b) of the Communications Act. That section, which generally reserves to the States the ability to regulate exchange services that cross State boundaries, provides:

nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, *mobile* or radio point-to-point *telephone exchange service*, or any combination thereof *even though a portion of such exchange service constitutes interstate or foreign communication*, in any case where such matters are subject to regulation by a State Commission or by local government authority.⁵⁵

While the States have been preempted from regulating the “entry of and rates for” CMRS,⁵⁶ they have the right to regulate other matters.⁵⁷ To the extent that wide area calling services are classified as “telephone exchange services,” any matters subject to State regulation would arguably be beyond the jurisdictional reach of the Commission under Title II. The Commission must consider whether ceding Title II jurisdiction over certain CMRS matters in this manner would be consistent with the terms of Section 332(c) of the Communications Act, which prohibits the Commission from forbearing from regulation of CMRS under the core provisions of Title II of the Act.

⁵⁵ 47 U.S.C. § 221(b) (emphasis added).

⁵⁶ 47 U.S.C. § 332(c).

⁵⁷ These matters include: enforcing complaint procedures for consumer protection matters, such as customer billing; transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis. *See* H.R. Rep. No. 103-111, 103d Cong. 1st Sess. at 261.

Forbearance. In their comments, the CMRS parties have suggested that they should be able to change the boundaries of their “exchange” areas on a service by service basis. The sole purpose of this gerrymandering would be to permit CMRS providers to circumvent the rate integration and geographic averaging requirements imposed on them by Congress. As the Commission has recognized, the elimination of a statutory requirement through the large scale manipulation of regulatory boundaries is “functionally no different” than forbearance.⁵⁸ The Commission, therefore, should require any CMRS providers seeking to eliminate Section 254(g)’s rate integration requirements for regional wide area calling plans to satisfy the forbearance criteria set forth in Section 10 of the Communications Act.⁵⁹ As explained above, the CMRS commenters have not offered any evidence that would justify reversing the Commission’s recent determination that it would be entirely inappropriate to forbear from Section 254(g) for CMRS. And the legislative history of Section 254(g) suggests that forbearance does not extend to rate integration.

⁵⁸ See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 98-188, CC Docket No. 98-147, at ¶¶ 81, 82 (rel. Aug. 7, 1998) (rejecting the attempt made by several BOCs to avoid Section 271’s requirements by having the Commission make large scale changes to LATA boundaries).

⁵⁹ See 47 U.S.C. § 160(a).

C. The State Supports Truly National Wide Area Calling Plans

The State welcomes the development of national CMRS calling plans that are available in offshore points, use the same rate structure for *all* interexchange calls, and charge the same rate regardless of whether a call is placed to or from a remote area. While these plans are currently very expensive and geared towards high-volume business users who place an unusual number of long distance calls, they may one day provide a viable competitive alternative to consumers in remote areas.

IV. THE COMMISSION SHOULD ADOPT A CONTROL STANDARD FOR IDENTIFYING AFFILIATED CMRS PROVIDERS

Many of the CMRS parties renewed their opposition to the adoption of any standard for identifying affiliated CMRS providers.⁶⁰ AT&T, for example, claims that “because drawing the line in the wireless services market is so difficult” the Commission should “decline to adopt an affiliation standard.”⁶¹ While crafting a workable affiliation standard has been made more difficult by the CMRS industry’s refusal to offer information about ownership arrangements, the State is confident that the Commission is up to the task.

The State has previously suggested that the Commission adopt a “control” test to identify affiliated CMRS providers. Notably, one of the CMRS commenters also supported this approach. In its comments, BellSouth suggests that a carrier should be considered “affiliated with another entity if the carrier exercises management control over the entity even if it holds

⁶⁰ See Primeco Comments at 19; GTE Comments at 18.

⁶¹ AT&T Comments at 13.

less than a 50 percent equity interest in the entity.”⁶² As explained by BellSouth, this approach would eliminate the daisy-chain effect of the current rule, which could require competing CMRS providers to integrate their rates. At the same time, BellSouth noted, this practical approach would not give CMRS providers an incentive to create “innovative” ownership structures designed to circumvent rate integration.

By contrast, the approach suggested by Bell Atlantic Mobile would provide ample opportunity for CMRS providers to circumvent their rate integration obligations. Bell Atlantic suggests that the term affiliate “be defined for purposes of CMRS rate integration to mean entities that are wholly owned and jointly operated by a single provider.”⁶³ This approach would permit an entity to avoid rate integration by selling off as little as one percent of an affiliated provider under its control. The Commission should reject this approach.

V. THE COMMISSION NEED NOT REQUIRE THE INTEGRATION OF CERTAIN ROAMING CHARGES

Many of the CMRS commenters oppose the integration of roaming charges. The State believes that the Commission need not require the integration of such rates, with one caveat: the State does not necessarily support some of the rationales offered by the CMRS commenters. The reason these charges fall outside of Section 254(g) is not because they provide a basis for competition among CMRS providers.⁶⁴ Nor is it because roaming charges are unique to CMRS, or because they are the result of carrier to carrier negotiations, or because they vary

⁶² BellSouth Comments and Petition for Forbearance at 20.

⁶³ Bell Atlantic Mobile Comments at 17.

⁶⁴ See Bell Atlantic Mobile Comments at 21; Primeco Comments at 18; CTIA Comments at 9;

from region to region.⁶⁵ Rather, to the extent that discrete roaming charges do not vary depending on whether a call is local or interexchange, and do not contain a bundled interexchange rate, they need not be integrated.

VI. THE COMMISSION SHOULD CONSIDER SIMILARITIES BETWEEN PCS AND CELLULAR IN DETERMINING WHETHER TO REQUIRE THE INTEGRATION OF RATES FOR THESE SERVICES

In determining whether to require the integration of cellular and PCS services, the CMRS commenters have urged the Commission to consider the extent to which these services are priced differently, are marketed and sold separately, use different technology, and are perceived as separate services by customers.⁶⁶ In addition, the State believes that the Commission should consider: the extent to which these services are viewed as substitutes for each other, offer similar functions and features; compete on the basis of quality of service, compete on the basis of price, and are marketed towards the same consumers.

Notably, in this proceeding, the CMRS commenters have emphasized that PCS and cellular offerings compete on the basis of price.⁶⁷ Further, in support of their arguments that CMRS is competitive, these commenters also have cited to the number of providers present in

⁶⁵ See Sprint PCS Comments at 15; Primeco Comments at 18.

⁶⁶ See BellSouth Comments and Petition for Forbearance at 21; Primeco Comments at 22; GTE Comments at 23.

⁶⁷ See CTIA Comments at 14; PCIA Comments at 14.

particular markets, without distinguishing between cellular and PCS.⁶⁸ This suggests that even the CMRS parties view PCS and cellular as interchangeable services.⁶⁹

⁶⁸ See PCIA Comments at 5.

⁶⁹ The Commission has recently explained that, “while providers use different marketing techniques and different technologies, they are offering essentially the same product – mobile telephone services.” *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, at 8 (rel. June 24, 1999).

CONCLUSION

The Commission should reject the forbearance requests advanced by the CMRS parties and – once again – affirm that Section 254(g) applies to CMRS. Further, in order to achieve the universal service goals of rate integration and geographic averaging, the Commission should adopt a consistent definition of the term “exchange” for all CMRS calls. Finally, the Commission should adopt a control standard for purposes of applying Section 254(g) across affiliated companies.

Respectfully submitted,

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