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June 28, 1999

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JUN 28 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S. W.
TW-A325
Washington, DC 20554

Re: In the Matter of Policy and Rules Concerning the Interstate
Interexchange Marketplace
CC Docket No. 96-61

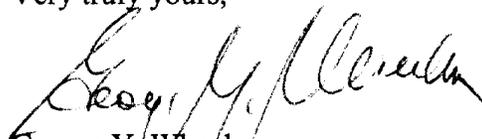
Dear Ms. Salas:

Transmitted herewith, on behalf of Aerial Communications, Inc. and United States Cellular Corporation, are an original and four copies of their joint reply comments in the above-referenced matter.

There is also a 3.5 inch diskette being submitted in accordance with Para. 40 of the Commission's Further Notice of Proposed Rulemaking, FCC 99-43.

In the event there are any comments or questions concerning this matter, please direct them to the undersigned.

Very truly yours,


George Y. Wheeler

cc(w/encl. by hand delivery):

James Schlicting (FCC, Room 3-C254)
Jeanine Poltronieri (FCC, Room 3-C224)

ORIGINAL

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

To: The Commission

JOINT REPLY COMMENTS OF AERIAL COMMUNICATIONS, INC.
AND UNITED STATES CELLULAR CORPORATION

Aerial Communications, Inc. ("Aerial") and United States Cellular Corporation ("USCC"), by their attorneys, hereby file their reply comments in response to the Commission's Further Notice of Proposed Rulemaking (FCC 99-43) released April 21, 1999 ("Further Notice") in the above-captioned proceeding.¹

Aerial and USCC agree with AirTouch, Bell Atlantic and others that before considering additional complex rules as proposed in the Commission's Further Notice, the Commission should defer further action in this proceeding to permit court action on the petitions for review before the United States Court of Appeals for the District of Columbia Circuit (Case No. 99-1045 and 99-1046). This is reasonable and administratively sound because, as several commentors have described, significant basic questions of statutory interpretation remain

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¹ Cross-references to the full names of the commentors who are referenced in these Joint Reply Comments are shown in the Certificate of Service attached hereto.

unresolved.² The partial stay initially granted in October, 1997 with respect to integration across affiliates and wide-area rate plans should also be maintained pending the outcome of that court action.

Aerial and USCC also agree with the numerous commentors requesting that the Commission use the expanded record in these proceedings on which to base further analysis of Section 254(g) of the Communications Act of 1934, as amended (“Communications Act”).³ The Commission has ample basis to decline to expand its rate integration policies to CMRS providers. As other commentors have described, the record in these proceedings does not contain any evidence that customers have been harmed in the absence of a CMRS rate integration requirement. The Commission’s records also document extensive public benefits from competition within the CMRS industry in terms of expanded services and features, competitive pricing and qualitative improvements in existing wireless services. Customers have clearly benefitted from a regulatory environment which fosters robust competition, a regulatory paradigm which is fundamentally at odds with the restrictions implicit in wireless rate integration. The regulatory concerns which rate integration was intended to address, if applicable

² Several commentors raise significant as yet unresolved basic questions of statutory interpretation involving the forced application of landline-based rate integration policies to the commercial mobile radio services (“CMRS”) industry. AirTouch argues that “the Commission has left unaddressed the basis for its views that CMRS offers “interexchange” services. AirTouch Comments, p. 2. GTE similarly argues that “. . . the term ‘interexchange’ has little, if any, meaning in the CMRS context, so Section 254(g) is inapplicable to CMRS providers.” GTE Comments, p. 2. Nextel describes how the Commission has yet to “. . . develop some material and cogent definition of CMRS ‘interstate interexchange’ service.” Nextel Comments. p. 3.

³ 47 USC § 254(g).

at all to the CMRS industry, involve only rates for services to non-contiguous states and offshore territories. These concerns can and should appropriately be protected as provided in Sections 201 and 202 of the Communications Act, and thereby avoid the need for intrusive, burdensome and counterproductive rate integration requirements.

Aerial and USCC also support the numerous commentors who have argued for complete forbearance from CMRS rate integration in the event the Commission continues to support the statutory interpretation of Section 254(g) in its Memorandum Opinion and Order adopted December 31, 1998.⁴ AT&T Wireless, BellSouth, CommNet, CTIA, GTE, Nextel, PCIA, PrimeCo, among others, present compelling arguments for complete forbearance from rate integration for the CMRS industry. In the event the Commission is not prepared to defer action in this proceeding as discussed above, the record contains ample justification for grant of complete forbearance or, at a minimum, forbearance from applying Section 254(g) to integration across affiliates and integration of airtime and roaming charges.

Discussion

1. Application of Rate Integration to Services Offered by Affiliates

Aerial and USCC proposed in their comments that at a minimum the Commission should revise its CMRS rate integration affiliation requirements to recognize that independently managed separate majority-owned subsidiaries of the same parent should not be compelled to charge identical rates for interstate toll services. As AT&T Wireless, CommNet and PrimeCo

⁴ Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, Petitions for Forbearance, Memorandum Opinion and Order, CC Docket No. 96-61, FCC 98-347 (released December 31, 1998).

describe, ownership structures involving affiliates have evolved in the CMRS industry for valid business reasons, none of which include the evasion of rate integration requirements.⁵ CTIA is correct in cautioning that the Commission should not assume CMRS providers will use separate affiliates to avoid rate integration obligations.⁶

As Bell Atlantic describes, “[t]he structure of shared ownership that characterizes much of the CMRS industry was...the result of the Commission’s own licensing rules, which promoted multi-party applicants for wireless licenses.”⁷ USCC and numerous other cellular operators have complex structures of ownership interests in individual cellular licenses, which clearly were not set up to evade rate integration.

The launch of PCS networks also resulted in the creation of separate co-owned subsidiaries to meet the unique financial and regulatory needs of this new technology. Aerial is a PCS operator that commercially launched its business in 1997 as the third or fourth wireless operator in each of its markets. USCC is an incumbent cellular operator that has been in business since 1985. Given the substantial cost of establishing a separate corporation and the huge Block A and B Band winning bid amounts paid by Aerial, it would be ludicrous to conclude that evasion of rate integration obligations was any factor in the decision of USCC’s parent to create Aerial.

If the Commission’s current requirement were implemented, the predictable

⁵ AT&T Wireless Comments, p. 12; CommNet Comments, p. 7; and PrimeCo Comments, pp. 21-23.

⁶ CTIA Comments, p. 12.

⁷ Bell Atlantic Comments, p. 17.

consequences would be diminished pricing flexibility, loss of price differentiation, restricted opportunities for service plans tailored to the needs of specific markets, counterproductive limitations on pro-competitive corporate consolidations and divestitures, dampened prospects for effective competitive entry in PCS by cellular-affiliated companies and potential antitrust and consumer class action litigation exposure implications. These consequences can be avoided if the independently managed PCS and cellular networks of CMRS affiliates are permitted to offer interstate interexchange services at rates which individually comply with Section 254(g) requirements.

2. Regulatory Treatment of Airtime and Roaming Charges

Numerous commentors, including Ameritech, Bell Atlantic, BellSouth, CommNet, CTIA, GTE, Omnipoint, PrimeCo, SBC and Sprint PCS, have described how airtime and roaming charges are not interexchange in character and generally do not vary with the local or interstate nature of the call. Aerial and USCC agree that such charges therefore should not be subject to rate integration. Competition in the marketplace is sufficient to ensure that just and reasonable rates are charged for all wireless services, including airtime and roaming charges.

Conclusion

The Commission has ample statutory authority as described above to address what AT&T Wireless aptly describes as the “. . . problems inherent in trying to fit new technologies and services into ‘traditional regulatory boxes.’”⁸ In this case the CMRS industry has evolved over more than two decades on a largely deregulated basis with the Commission’s primary reliance

⁸ AT&T Wireless Comments, p. 3.

being upon competitive market faces to foster cost-effective CMRS services throughout the U.S. The proposed revision from this paradigm to an intrusive, burdensome and potentially anticompetitive system of rate regulation inherent under Section 254(g) comes at a time when the Commission continues to document the public benefits from CMRS competition in annual reports to Congress. Grant of the relief requested here would support these well documented public benefits from competition. At a minimum, the Commission should revise its rate integration requirements so that the independently managed PCS and cellular systems of affiliates are not required to offer interstate interexchange services at the same rates. The Commission should also conclude that airtime and roaming charges are not subject to rate integration.

Respectfully submitted,

AERIAL COMMUNICATIONS, INC.

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June 28, 1999

CERTIFICATE OF SERVICE

I, Judy Norris, a legal secretary in the law firm of Koteen & Naftalin, L.L.P., hereby certify that on the 28th day of June, 1999, copies of the foregoing "Joint Reply Comments of Aerial Communications, Inc. and United States Cellular Corporation" were deposited in the U.S. mail, first-class, postage-prepaid, addressed to:

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