

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

In the Matter of:)
)
Calling Party Pays Service Option) WT Docket No. 97-207
in the Commercial Mobile Radio Services)
)

Comments of AirTouch Communications, Inc.

Pamela J. Riley
AirTouch Communications
1818 N Street, Suite 800
Washington, D.C. 20036
(202) 293-3800

Charles D. Cosson
AirTouch Communications
One California Street, 29th Fl.
San Francisco, CA 94111
(415) 658-2434

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Table of Contents

Executive Summary	4
INTRODUCTION AND BACKGROUND.....	6
<i>Calling Party Pays Serves Consumer Interests.....</i>	<i>6</i>
DISCUSSION	10
I. Reasonable ILEC Billing Arrangements Are Required for Calling Party Pays	10
A. ILECs Possess Market Power In the Market for Billing and Collection Services for Purposes of Calling Party Pays And Abuse of This Market Power Has Foreclosed the Availability of CPP Services for Consumers	11
<i>Why ILEC Billing and Collection is Essential to Calling Party Pays</i>	<i>11</i>
<i>There are No Good Alternatives to ILEC Billing and Collection Service</i>	<i>13</i>
<i>ILEC Refusals to Provide Billing and Collection Have Deprived Consumers of CPP</i>	<i>17</i>
B. The Commission Should Adopt a Rule Requiring LECs to Offer Billing and Collection for CPP Purposes Similar to the Rule Requiring Non-Common Carrier Cable Operators to Offer Billing and Collection for Leased Access Providers.....	21
<i>Adoption of the Proposed Rule is Consistent With Commission Precedent.....</i>	<i>22</i>
<i>The Commission Has Legal Authority To Adopt Rules Requiring ILEC Billing and Collection for CPP</i>	<i>25</i>
<i>The Commission Should Preempt State Rules Prohibiting LECs from Billing for CPP.....</i>	<i>31</i>
<i>California’s Prohibition on CPP Billing Should Be Overturned</i>	<i>32</i>
C. Calling Party Pays Cannot Be Implemented Effectively Through Interconnection Arrangements	36
II. Minimum Guidelines for A Notification to Originating Callers for New Calling Party Pays Services Are Needed.....	39
<i>The Commission Has Jurisdictional Authority to Adopt Rules Governing the Content of a Uniform National Notification Method</i>	<i>40</i>

<i>The Notification Rules Should Allow for Variety Between Competing CMRS Carriers</i>	42
<i>The Minimum Content Required for a Calling Party Pays Notification Should Include Sufficient Information to Permit Consumers to Make Informed Decisions Without Burdening Consumers Or Stifling the Growth of CPP</i>	44
B. The Commission Has Authority to Preempt Additional or Inconsistent State Regulation of CPP Notification Methods And Should Do So If Necessary	51
III. Both Competition and Carrier Interest in Growing CPP Provide Ample Incentives For CPP Airtime Charges to Be Set at Competitive Levels	56
<i>Ample Market Incentives Will Ensure that The Price of A CPP Call is Reasonable....</i>	57
<i>European Experience With Calling Party Pays Demonstrates that Rate Regulation is Not Necessary to Protect CPP Consumers in the United States</i>	59
CONCLUSION	63

Executive Summary

Wireless consumers deserve no less than wireline consumers with respect to receiving the maximum value from the telecommunications services they buy. Calling Party Pays (“CPP”) allows subscribers of commercial mobile radio services (“CMRS”) to better control their spending for telecommunications services, increases the economic efficiency of network usage, opens up wireless services to low-income and other new segments of the markets, and has the potential to encourage competitive substitution of CMRS services for traditional local wireline services. Steps to remove obstacles to CPP and allow consumers to take advantage of this wireless innovation are in the public interest.

The primary regulatory obstacle to CPP deployment exists in markets where incumbent LECs (“ILECs”) have refused to bill CPP charges to originating callers on their customary home telephone bill. Absent these billing services, it is simply uneconomic for CMRS carriers to offer CPP. The vast majority of calls to CMRS CPP subscribers will originate from ILEC-provided landline telephones. And billing the CPP airtime charges through other methods is simply not feasible.

Self-provision of the billing by CMRS carriers is economically unworkable due to the significant expense, including the cost of LEC billing name and address (“BNA”) information, and the high rate of uncollectibles associated with separate bills for casual calling services, particularly bills that are likely to be in small amounts. Other utilities such as electric utilities and cable companies are not equipped to bill telecommunications services. And requiring calling parties to enter a credit card or calling card number, or to mark the call collect, defeats the purposes and benefits of CPP.

AirTouch proposes that the Commission address this barrier with a simple rule that does not require the Commission to re-regulate LEC billing and collection services as common carriage. The Commission should utilize its authority under Section 332 and 7(a) of the Act, as well as its ancillary jurisdiction under Title I and Title III, to adopt a rule requiring ILECs to offer billing and collection services for CPP. This rule is directly analogous to that imposed on cable television operators - who are also not common carriers - with respect to billing and collection services provided to leased access customers.

A uniform set of national guidelines covering a method for notifying calling parties about CPP would be a helpful step. Many CMRS carriers operate in multi-state areas on a multi-state basis. A single notification method within a given CMRS carrier’s service area would both reduce customer confusion and provide greater economic efficiency. The Commission should not, however, do more than adopt basic guidelines. As with its recent steps to address consumer issues with respect to telephone bills, the Commission should adopt no more regulations than necessary, and allow competing carriers flexibility to design methods of thorough, truthful and accurate CPP notifications. To this end, the Commission should preempt state regulations that seek to add additional guidelines or requirements. Such preemption will not diminish consumer protection nor need it completely restrict states’ authority over the “other terms and conditions” of CMRS.

Finally, the Commission should recognize that there are significant incentives for CMRS carriers to set terminating airtime prices at competitive levels. There are a number of facts that demonstrate that market conditions will exert competitive pressure on CPP rates, and additional incentives for CMRS carriers to charge incoming airtime rates on CPP calls that are at competitive levels. At a minimum, the Commission should wait until there is clear evidence in the market that action is needed to resolve CPP rate issues.

For example, the notification process described above will help ensure that, if charges are above competitive levels, consumers will reduce the number of calls they make to CPP subscribers, frustrating both parties and diminishing the value of the product. Because of the ubiquity of landline services, as well as e-mail, paging, and other methods of reaching a desired party, excessive levels for calls to mobile phones will result in reduced volume of inbound calls. CMRS customers will demand CPP rates that are low enough to encourage incoming calls and do not result in missing calls from those they want to hear from. And, from a carrier's perspective, unless CPP results in an increase in incoming airtime, CMRS carriers will not find CPP to be a useful investment.

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AirTouch Communications, Inc. (“AirTouch”)¹, hereby submits its comments in response to the Notice of Proposed Rulemaking concerning a “Calling Party Pays” (“CPP”) service option offered by Commercial Mobile Radio Service (“CMRS”) providers.² AirTouch strongly supports the Commission’s interests in facilitating competition and increasing consumer options. AirTouch agrees with the Commission that CPP is one of the innovative services that will accelerate the continuing transformation of mobile telephony into a service appealing to a broader cross-section of consumers and into a competitive substitute for landline local services.

INTRODUCTION AND BACKGROUND

Calling Party Pays Serves Consumer Interests

AirTouch has already placed on the record evidence that wider availability of CPP would serve the public interest. CPP allows consumers to better control their spending for

¹ AirTouch is a CMRS provider with interests in cellular, paging, PCS and mobile satellite services, both domestic and international. AirTouch is a corporate affiliate of Vodafone AirTouch, Plc.

²“In the Matter of Calling Party Pays Service Option in the Commercial Mobile Radio Services,” WT Docket No. 97-207, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 99-137, (released July 7, 1999)(“Notice”); see, e.g., Notice of Inquiry, FCC 97-341 (October 23, 1997)(“Notice of Inquiry”).

wireless services and make fuller use of the value of mobility.³ CPP, particularly in conjunction with pre-paid service arrangements, also makes wireless services more affordable to low-income or credit-challenged individuals.⁴

In response to statements from its own CMRS customers, AirTouch has made significant investments in attempting to develop a CPP product that consumers find useful; the response among CMRS consumers has been overwhelmingly positive. Consumer concerns often heard by AirTouch are focused on the product's limitations: the fact that not all incoming calls can be billed to the calling party. AirTouch agrees that, both for technical and regulatory reasons, CPP service arrangements have yet to reach their full potential. AirTouch intends to continue its efforts to devise technical and service solutions that will make CPP more attractive to consumers and supports the type of actions contemplated in the Notice.

³See, e.g., Comments of AirTouch Communications on Notice of Inquiry, WT Docket 97-207 (December 16, 1997); Reply Comments of AirTouch Communications on Notice of Inquiry (January 16, 1998); Comments of AirTouch Communications on CTIA Petition, WT Docket 97-201 (May 8, 1998); Reply Comments on CTIA Petition (June 8, 1998); see also Public Notice, "Commission Seeks Comment on Petition for Expedited Consideration of the Cellular Telecommunications Industry Association in the Matter of Calling Party Pays Service Option in the Commercial Mobile Radio Service," DA 98-468, March 9, 1998 ("Public Notice"); "Petition for Expedited Consideration," filed February 23, 1998, ("CTIA Petition") (materials identifying CPP public policy and legal issues).

⁴A new Yankee Group study, "Prepaid Wireless Service Becomes More Affordable," shows that pre-paid services are rapidly becoming more affordable. Yankee expects also pre-paid users to grow from 3.5% of all wireless subscribers in 1998 to 22% in 2003. The Yankee Group compared pre-paid and post-paid plans from the leading carriers, finding that pre-paid plans for the price leaders were only a 20% premium to post-paid plans. The study finds that PrimeCo PCS, Omnipoint and AirTouch have plans that are closest to "parity" with post-paid plans, while GTE, Sprint PCS and SBC are the most expensive. AirTouch has recently modified its pre-paid plans to make them even more affordable: pre-paid subscribers can now use their airtime minutes over an extended six-month period and pay no extra charges for long-distance calls.

Calling Party Pays Promotes Economic Efficiency

Wireless consumers deserve no less than wireline consumers with respect to receiving the maximum value from the telecommunications services they buy. Wireline local exchange carriers, in other proceedings, recognize that associating the charges for the call with the calling party, i.e., the cost-causer, promotes economic efficiency. In the access charge proceedings, one ILEC coalition wrote:

“perhaps most damaging to the efficient network use pursued by the legislation and Commission policies would be a requirement to recover terminating access charges from the called party, as wireless carriers have done in the past. The Commission rightly calls attention to the concern that charging a party for receiving calls would result in unanswered calls. It is familiar information that many cellular telephone subscribers do not make their wireless telephone numbers known widely to avoid having to pay for receiving unwanted telephone calls. The same result would be likely, but on a larger scale, if answering the wireline telephone exposed the passive recipient of the call to terminating access charges. Creating incentives not to accept telephone calls could, in turn, discourage full and efficient use of the public switched network that would maximize the value obtained for the resources involved in providing service.⁵

These observations suggest that the Commission is indeed correct that a CPP option would promote economic efficiency, thereby enhancing consumer welfare and increasing the ability of CMRS to compete with wireline local exchange services.

In these comments, AirTouch will focus on the regulatory or legal obstacles identified in the Notice. AirTouch wholeheartedly agrees with the Commission that the success or failure of CPP offerings should depend on the commercial judgments of service

⁵Comments of the Rural Telephone Coalition, “In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, and Transport Rate Structure and Pricing,” CC Docket Nos. 96-262, 94-1, and 91-213 (January 29, 1997), at 25-26 (footnotes omitted).

providers and the informed choices of consumers.⁶ Indeed, AirTouch believes that, with one key exception - ILEC billing and collection - the primary factors affecting the success of CPP are within the control of CMRS carriers and are not regulatory issues. CMRS carriers have the primary and ultimate responsibility to design their product in a manner that customers - including “casual” CMRS customers placing CPP calls - find convenient to use, a fair value for their money, and simple to understand.

This approach to CPP is in keeping with the premise that carriers in a competitive market bear primary responsibility for the success of new innovative services. CPP, like other new innovations in the broadband CMRS market, is indicative of an evolution driven by competition and supported by the Commission’s pro-competitive, de-regulatory policies regarding CMRS.⁷ Accordingly, overly prescriptive regulations should not be adopted absent clear record evidence demonstrating market power abuses or other bases for regulatory intervention.⁸ As the Commission has recognized previously, Congress intended CMRS services to be subject to only as much regulation for which there could be demonstrated a clear-cut need.⁹

⁶Notice, para. 1.

⁷See, e.g., “Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services,” Fourth Report, FCC 99-136 (June 24, 1999), at 11-17 (describing new innovations driven by competition, such as “digital one- rate” plans, bulk usage plans and pre-paid billing plans).

⁸See, e.g., “In the Matter of Truth-in-Billing and Billing Format,” First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-170, FCC 99-72 (May 11, 1999), para.16 (declining to apply certain billing and customer notification requirements to CMRS carriers due to the low volume of complaints in the CMRS context)(“*Truth-in-Billing Order*”).

⁹“Petition of Arizona Comm’n to Extend State Authority over Rate and Entry Regulation of All Commercial Mobile Radio Services,” Report and Order, 10 FCC Rcd 7824, para. 11 (1995) (“*Arizona Decision*”).

DISCUSSION

I. Reasonable ILEC Billing Arrangements Are Required for Calling Party Pays

Absent a billing arrangement with the incumbent LEC in a given market, CPP will not be available to consumers. This basic fact is unavoidable; addressing this issue will do more to advance CPP than any other regulatory action. Below, and in the attached economic study by Dr. Michael Katz and David Majerus, AirTouch explains why there are no good alternatives to ILEC billing and collection, how LECs possess market power over essential billing services, how ILECs can abuse this market power to foreclose CPP services from becoming available in the CMRS market, and how the Commission can adopt an appropriate rule to address this fact.

The rule proposed by AirTouch would not require the Commission to re-visit its decision that ILEC billing and collection is not a common carrier service. The proposed rule is very similar to the rule adopted by the Commission concerning billing and collection services provided by cable operators - also non-common carriers - for programming offered by the cable operator's leased access customers. In that situation, the Commission stated that "we will require cable operators to provide billing and collection services for leased access cable programmers, unless operators can demonstrate the existence of third party billing and collection services which in terms of cost and accessibility, offer leased access programmers an alternative substantially equivalent to that offered comparable non-leased programming."¹⁰

¹⁰ "Implementation of Sections of the Cable Television and Consumer Protection Act," 8 FCC Rcd 5631, at 5943-5945 (1993).

The Commission did not undertake to regulate the rates of cable operators's billing and collection services and, absent further evidence, it need not do so here. AirTouch's proposal would not require the Commission to declare billing and collection services provided to third parties to be common carriage, or become involved in "re-regulating" billing and collections services or rates. But the Commission has found that cable operators have market power over billing, may have incentives to refuse reasonable billing and collection services to leased access programmers, who may compete with the cable operator, and acted accordingly. This approach is also appropriate for CPP.

A. *ILECs Possess Market Power In the Market for Billing and Collection Services for Purposes of Calling Party Pays And Abuse of This Market Power Has Foreclosed the Availability of CPP Services for Consumers*

In the section below, AirTouch explains why ILEC billing and collection is essential to CPP, and why there are no good alternatives to those arrangements that would permit CPP to be introduced. Also, attached to these comments is an economic analysis prepared by Michael Katz and David Majerus of Charles River Associates. This study examines ILEC market power in the market for CPP billing services and shows how abuse of that market power could stifle CPP services.¹¹

Why ILEC Billing and Collection is Essential to Calling Party Pays

As the Commission has noted, incumbent LECs still serve the vast majority of telecommunications customers and originate or terminate the vast majority of telephone

¹¹Attachment A, "Declaration of Dr. Michael L. Katz and David W. Majerus: ILEC Market Power in Billing and Collection," 17 September 1999 ("*Katz and Majerus Study*").

calls.¹² While some calls to CPP subscribers will be originated from aggregator locations such as airports and hotels, or originate on the same or other wireless networks, or originate on a CLEC network, such calls will represent a very small percentage of incoming calls. AirTouch estimates that calls originated from a pre-subscribed ILEC business or residential line will constitute approximately 80% of all incoming CPP calls.

The ability of these callers to be billed for the CPP charges associated with the CMRS services involved on their local telephone bill is critical to the success of CPP. Absent this simple and convenient billing method, CMRS carriers will face uneconomic levels of billing expense, substantial levels of uncollectible revenue, generate increased consumer inconvenience and confusion and, simply, will not offer a CPP product. It makes no difference, whether the CMRS carrier utilizes a clearinghouse service provider to provide its CPP product, as the clearinghouse, then, must negotiate a billing and collection arrangement with the ILEC serving a given area.

AirTouch, for example, offers CPP presently only in markets where it has negotiated arrangements with the predominant ILECs; to wit, in markets controlled by US West, Ameritech and Cincinnati Bell. Where, for example, SBC owns the dominant ILEC, such as in California, they have refused to negotiate any billing arrangements with AirTouch or its designated clearinghouse, and in fact declined a request from AirTouch to purchase tariffed wireless billing services. Accordingly, there are no CPP services in

¹²“In the Matter of Promotion of Competitive Networks,” WT Docket No. 99-217, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 99-141 (July 7, 1999), para. 21.

California. AirTouch is unaware of any CMRS carrier in the United States that provides CPP whereby all originating callers are billed through a means other than the incumbent LEC for the CPP airtime charges.

There are No Good Alternatives to ILEC Billing and Collection Service

ILECs and their representatives have generally proffered three alternatives to billing and collection services. First, some LECs contend that a CMRS carrier can obtain billing name and address information (“BNA”) which it (or a clearinghouse) can then use to provide the originating caller with a separate bill.¹³ Second, the Notice suggests that credit card companies represent a billing alternative.¹⁴ Finally, the Notice requests comment on using carrier-to-carrier interconnection arrangements, rather than end-user billing, to achieve the effects of CPP, although not introduce a CPP CMRS service option.¹⁵ As the attached study explains, none of these is economically viable as the sole method of billing originating callers for CPP airtime charges.

The Notice asks whether technological developments in intelligent network platforms and new billing software make it more cost-effective for CMRS providers to

¹³See, e.g., Notice, para. 58, n. 146, citing Comments of CTIA. In response to concerns raised by some interexchange carriers regarding LEC’s discriminatory refusal to provide billing and collection services, the Commission has required ILECs to offer BNA services on a tariffed basis. See Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Second Report and Order, 8 FCC Rcd 4478 (1993) (“BNA Order”); Order, 8 FCC Rcd 6393 (1993) (“*First BNA Reconsideration Order*”); Second Order on Reconsideration, 8 FCC Rcd 8798 (1993) (“*Second BNA Reconsideration Order*”). The definition of “unbundled network element” for purposes of Section 251 also references billing information. See, e.g., 47 U.S.C. § 153(29); Notice, para. 66.

¹⁴Notice, para. 61.

¹⁵Notice, para. 72, n. 184, citing Comments of Sprint Spectrum.

perform their own billing.¹⁶ Reductions in the costs of other functions do not change the economics of separate billing. Separate billing is uneconomic for two reasons unrelated to the efficiency of the rating, recording and billing equipment used. First, the costs of billing are too high relative to the small amounts of revenue each bill represents. Second, the small amount of the bill encourages consumers to not pay CPP bills and thus, uncollectibles are high.

In the Notice, the Commission correctly analogizes CPP CMRS services to “casual calling” services offered by IXCs, often through dialing 10 and then the Carrier Identification Code (or “CIC code”), e.g., 10-10-123.¹⁷ In a separate proceeding, MCI has submitted to the Commission public information detailing the basis for its conclusion that there are no feasible alternatives to LEC-provided billing and collection for such “casual calling” services.¹⁸ Testimony at public forum held by the Commission provides evidence and testimony to the same effect.¹⁹ A coalition of clearinghouse providers has also provided evidence on this point.²⁰

¹⁶Notice, para. 61.

¹⁷Notice, para. 51.

¹⁸“See In the Matter of MCI Telecommunications Corporation, Billing and Collection Services Provided by Local Exchange Carriers for Non-Subscribed Interexchange Services,” Petition for Rulemaking, RM 9108 (May 19, 1997) (“*MCI Petition for Rulemaking*”), at 8 (competitive billing market for non-subscribed services does not exist).

¹⁹Public Forum on Local Exchange Carrier Billing for Other Businesses,” Transcript of Proceedings, (June 24, 1997), <http://www.fcc.gov/Bureaus/Common_Carrier/Other/lec62497.html> (John Muleta and Robert Spangler, Co-Moderators), (“*LEC Billing Forum*”). See, e.g., Testimony of Ronald F. Evans, Vice President-Operations, OAN Services, Inc. There, Mr. Evans explains that where a LEC does not bill for casual calling long-distance services, consumers soon learn that they can essentially get long-distance service for free because long-distance carriers are unable to bill for usage. (“either they need to have billing arrangements in place, or [long-distance carriers] start shutting down optional services, especially casual services such as 10 XXX, dialing which allows end users to have a choice, and test new long distance services. It shuts down collect calling, bill to

Among other things, MCI states that current BNA rates range from 4.5 cents per query (SNET) to 80 cents per query (Pacific Bell, for queries that result in no BNA match), and that many LECs charge per-query rates of 20 cents or more. Already, many of the BNA query rates constitute 40-60% of a typical per-call charge for a CPP CMRS call. Since BNA may not be sold on a bulk basis for CPP purposes, a CMRS carrier - or its clearinghouse provider must pay the per-query charge each time a calling party places a call.²¹ This aspect of BNA multiplies the costs, making it further uneconomic. There are also postage, billing materials, customer service, and internal processing costs. Including an allowance for bad debt, MCI estimates that the cost of sending an invoice to a non-subscribed customer averages \$3.47 per invoice. At that price, as few as 20% of invoices sent to CPP purchasers of CMRS service would be profitable.²²

third calling, simply because there is no guarantee that it is going to be cost effective to ever get it billed, if it can be billed”).

²⁰Earlier this year, a coalition of clearinghouse providers presented the Commission with evidence that ILECs have “the incentive and the ability to exercise virtually unfettered control over billing and collection functions,” for casual calling services, that there are no viable alternative billing arrangements, and that LECs have anti-competitive incentives to leverage this market power in order to discriminate against competitors. See “Ex Parte Comments of The Coalition to Ensure Responsible Billing,” RM 9108 (January 21, 1999). The coalition members are: Billing Concepts, OAN Services, Federal TransTel, HBS Billing Services, ILD Teleservices, Integretel, and USP&C. Id., at 1, n.1.

²¹Bulk” BNA disclosure is disclosure of the BNA information for all the local exchange service subscribers of a local exchange carrier. See 47 CFR §64.1201(a)(4). “Bulk” BNA may only be used for verification of service orders of new customers; identification of customers who have moved to a new address; fraud prevention; and purposes related to the MFJ “equal access” requirement. See “Local Exchange Carrier Validation and Billing Information,” Third Order on Reconsideration, 11 FCC Rcd 6835, aff’d AT&T et. al. v. FCC, 8 CR 222 (D.C. Cir., May 16, 1997)(“Third BNA Reconsideration Order”), para. 6; Second BNA Reconsideration Order, 8 FCC Rcd at 8805, paras. 37-42. Also, BNA services regulated by the FCC are available only to providers of interstate communications. See 47 C.F.R. § 64.1201(a)(2). In many cases, this might not include a CMRS carrier providing CMRS services to a calling party making a local call to a CPP subscriber.

²²Also, ILECs are only required to offer BNA services through tariff for calling card, third number or collect calls, and it is unclear at this point whether access to BNA is required under the Commission’s interconnection rules. Thus, there is no guarantee that CMRS carriers would be afforded a tariffed price for BNA, if they were to attempt to provide CPP on that basis. See Third BNA Reconsideration Order, 11 FCC Rcd 6835, para. 38 (limiting scope of required BNA to calling card, third number and collect calls); 47 C.F.R. § 51.319(f)(1)(access to BNA databases required as part of ILECs obligations to offer unbundled network

Second, the level of uncollectible charges is simply too high to make billing CPP charges separately an economically viable foundation for providing CPP service. Evidence before the Commission establishes that uncollectible accounts are, at best, nearly 50% when separate bills are issued by third parties using LEC-provided BNA, in sharp contrast to a usual uncollectibles rate of 10% for charges billed on the LEC bill.²³ The problems with high uncollectible rates associated with BNA-based separate billing of CPP charges were also noted by an independent Wall Street analyst examining the wireless industry.²⁴ And there is substantial evidence before the Commission that consumers vastly prefer to receive a single bill for telecommunications services.²⁵ Separate bills will harm the value of CPP.

As the Katz and Majerus study explains in further detail, billing through alternative firms such as credit card companies and electric utilities is also unsuitable. AirTouch has, in fact, already discussed this possibility with several utilities and learned that such an arrangement is not viable. AirTouch has also fully explored, and rejected, introducing a

elements), vacated, *Iowa Utilities Board*, 119 S.Ct. 721; see also Public Notice, “Commission Adopts Rules on Unbundling of Network Elements,” September 15, 1999 (announcing that the Commission adopts new rules regarding unbundled network elements).

²³*LEC Billing Forum*, Statement of Mr. E.E. “Stub” Estey, Government Affairs - Vice President, AT & T Corporation. (“When we worked with some of the B and A (sic) providers, there are actually one or two clearinghouses out there who specialize in this, and talk to the carriers and see the results they’ve gotten. A 50% collection rate is considered very good, and that’s obviously not something that could keep any carrier in business”).

²⁴Merrill Lynch, “The Next Generation II: Wireless in the U.S.,” (March 10, 1998) at 28.

²⁵For example, a 1996 Yankee group study indicated that 80 percent of consumers prefer a single bill for telecommunications. *LEC Billing Forum*, Statement of Mr Estey.

CPP product that would require all calling parties to enter a credit card or calling card number to complete the call and have the charges billed to the calling party.

CPP is designed, in part, to assist low-income individuals and parties likely to be calling them may not have access to a credit card. This approach would eliminate many of the public interest benefits from the introduction of CPP. It would also be inconvenient even for consumers who do have a credit card. Where an individual calls from an area where the ILEC does not offer billing, AirTouch does offer calling parties the option to bill the call to a credit card or LEC calling card. But AirTouch has also calculated the likely number of hang-ups, the costs involved - including the costs of bill adjustments, and concluded that it is simply uneconomic to offer the product where all originating calls must be billed to a credit card or calling card. Thus, absent LEC billing and collection, CPP will not be offered in the marketplace.

ILEC Refusals to Provide Billing and Collection Have Deprived Consumers of CPP

AirTouch has sought to introduce CPP services in one of its largest markets, California, since at least 1990. Up until the time of SBC's purchase of Pacific Bell, AirTouch worked with Pacific Bell to design a workable way in which the costs of terminating airtime could be billed to the calling party. Pacific Bell and AirTouch jointly petitioned the California Public Utilities Commission ("CPUC") for permission to conduct such a market trial, notwithstanding the CPUC's prohibition on LEC provision of CPP billing.²⁶

²⁶See, e.g., Notice, para. 68.

After purchasing Pacific Bell, SBC stated that it would not support AirTouch's market trial, and that it would not offer any billing and collection services for CPP.²⁷ SBC also refused to honor AirTouch's request to purchase billing and collection services from Pacific Bell's third party billing tariff, notwithstanding the fact that the tariff provides that Pacific offers billing services to third party providers of "wireless services."²⁸ Conducting a market trial absent billing services from the incumbent LEC has proved to be economically unprofitable. As a result, AirTouch has tabled all plans to introduce CPP in California.

SBC's statements on the matter, moreover, evidence that SBC's motivations for doing so include anti-competitive interests. For example, SBC has stated that "our ability to market additional products and services would be negatively impacted if we were to bill CPP on Pacific Bell's telephone bill."²⁹ At worst, SBC views CPP as likely to enhance the ability of CMRS services to threaten to its core landline services and therefore seeks to curtail the development of CPP. At best, this statement indicates that SBC views CPP as likely to inhibit its ability to market vertical services to its own customers.³⁰ In either case,

²⁷See AirTouch Comments on Notice of Inquiry, Appendix B. (Letter from David D. Kerr, Executive Director - Access & Interconnection Mktg. to Scott Falconer, Vice President, AirTouch Cellular, dated November 19, 1997)(*"Kerr Letter"*).

²⁸See AirTouch Comments on Notice of Inquiry, Appendix C. (Schedule Cal. P.U.C. No. 175-T, Section 8.5.1, revised by Advice Letter No. 19005 (September 3, 1997)).

²⁹*Kerr Letter*.

³⁰See also Comments of USTA on Notice of Inquiry at 4 (CPP could deter wireline end users from purchasing more (presumably wireline) advanced services, contrary to Section 254(b)(2)'s principle promoting access to advanced services. Of course, Section 254(b)(2) does not limit advanced services to wireline services, nor does it suggest that the Commission should eschew measures intended to foster local competition.

SBC is foreclosing potential competition, through use of its market power over billing and collection services, to its own economic advantage.

ILECs already bill for a number of services, including interexchange services provided on a “casual calling” basis. The costs to an ILEC of billing CPP charges are merely incremental and do not represent a significant economic or administrative burden. A number of ILEC commenters in this proceeding, and elsewhere, have suggested that their opposition to billing for CPP charges stems from consumer concerns regarding “slamming,” “cramming” and other confusion regarding local telephone bills.³¹ Concerns regarding customer reaction to CPP should be directed toward formulating an effective notification and education process and are not a basis for excluding CPP from the market altogether. Moreover, CPP represents legitimate charges for services purchased and is therefore distinguishable from “slamming” and “cramming,” which involve unlawful activity. “Slamming” and related concerns do not justify a refusal to provide CPP billing.

In fact, the Commission has taken steps to address these billing concerns. CMRS charges incurred by calling parties will be subject to the same requirements regarding billing format as are IXC charges, e.g., that the name of the provider be clearly identified and that the bill provide a telephone number for the consumer to contact the CMRS

³¹ See, e.g., Reply Comments of SBC on CTIA Petition (June 8, 1998), at 8; see also Ex Parte Notice,” Letter from Zina Garrison, SBC to Magalie Salas, FCC (March 24, 1998)(SBC handout to FCC staff notes that “LEC billing is experiencing problems nation-wide with charges being included in monthly bills which the end user customer doesn’t recognize and/or understand (e.g., cramming)).”

provider directly to discuss CMRS charges.³² Where needed, accommodations will be made to ensure that CMRS consumers placing CPP calls through TTY or TRS service devices will receive accurate and understandable bills.³³ Consumers will be notified that CPP charges are “non-deniable” and that their local service may not be disconnected for non-payment of CPP charges.³⁴

Finally, AirTouch notes that ILECs have made repeated references to how CPP should develop in response to market forces, and how billing arrangements should be made through negotiations.³⁵ But for certain LECs, there is no room for negotiation. SBC, for example, has made its position is clear: such services are not available, its decision is final, and there is no room for discussion on that point. Absent regulatory intervention, there will be no CPP in markets where SBC is the ILEC. Whether CPP succeeds or fails with consumers in the market is a legitimate question to address. But consumers should be given the opportunity to experience a CPP service for themselves before discussion on that question is declared to be closed.³⁶

³²See, e.g., *Truth-in-Billing Order*; 47 C.F.R. §§ 64.2001(a),(d).

³³See *Notice*, para. 63. Although there are technical issues associated with capturing the billing data in those circumstances, AirTouch is not aware of any particular regulatory problems associated with billing calls placed through TRS facilities or between TTYs that would require action by the Commission.

³⁴See 47 C.F.R. § 64.2001(c); but see, e.g., “USTA Petition for Reconsideration,” CC Docket No. 98-170 (July 26, 1999)(requesting that the Commission reconsider its decision to adopt 47 C.F.R. §§ 64.2001(a)(2), the “new service provider rule,” and 64.2001(c), the “deniable/non-deniable charge rule”); “Ameritech Petition for Stay,” CC Docket No. 98-170 (July 26, 1999)(requesting that the Commission stay application of these two rules until April 1, 2000).

³⁵See, e.g., Comments of USTA on *Notice of Inquiry* at 2 (“the competitive market, not regulation, should determine CPP availability”); Comments of SBC on *Notice of Inquiry* at 11.

³⁶For example, SBC cites consumer opposition to CPP because CMRS subscribers would not want family and friends to pay for incoming calls. Reply Comments of SBC on CTIA Petition at 13. But AirTouch’s “Select

B. The Commission Should Adopt a Rule Requiring LECs to Offer Billing and Collection for CPP Purposes Similar to the Rule Requiring Non-Common Carrier Cable Operators to Offer Billing and Collection for Leased Access Providers

AirTouch believes that, for Calling Party Pays to grow as an effective CMRS service option, what is needed is a simple but enforceable rule that prohibits ILECs from refusing to offer billing and collection services for CPP purposes on just, reasonable, and non-discriminatory terms. This rule proposed by AirTouch would not interfere with established arrangements or impose new regulatory burdens. Carriers could negotiate appropriate terms and rates for billing services and ILECs could meet this obligation simply by making existing services available to CMRS carriers. And this rule can be adopted and enforced without revisiting the question of whether LEC billing and collection services should be re-regulated as common carrier services.³⁷

Pay” CPP option allows AirTouch CMRS subscribers to toggle between CPP and paying for incoming airtime and to designate a “VIP” list of telephone numbers for which the airtime will be billed to the called party.

³⁷At divestiture, the Commission declared that LEC billing and collection services provided to IXCs was common carriage, and should be provided under tariff. See MTS and WATS Market Structure, 97 FCC 2d 682, 741-42 (1983), aff’d in part and remanded in part on other grounds, Nat’l Assoc. of Regulatory Util. Comm’rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984). In 1986, the Commission declared that LEC billing and collection for pre-subscribed IXCs was not common carriage and, indeed, not even a communications service. In the Matter of Detariffing of Billing and Collection Services, Report and Order, 102 F.C.C. 2d 1150, 1168, n.47 (1986) (“Detariffing Order”). The Detariffing Order stated that the Commission lacks Title II jurisdiction over billing and collection by a LEC for an unaffiliated IXC because such financial and administrative services are not communication services for the purpose of Title II. Yet, the decision also held that the Commission could exercise Title I jurisdiction over such billing and collection based on its incidental connection to communication by wire. 102 FCC Rcd at 1168-69. The jurisdictional aspects of that decision were clarified in Public Service Commission of Maryland, 4 FCC Rcd 4000, 4004 (1989), aff’d on other grounds sub nom. Public Service Commission of Maryland v. FCC, 909 F.2d 1510, 1512 (D.C. Cir. 1990) (“PSC of Maryland”). In 1992, the Commission found that LEC billing for unaffiliated IXC services is, in fact a communications service because it was incidental to the transmission of wire communications and thus is properly considered a communications service under the Communications Act. See 47 U.S.C. § 153 (51) (“wire communication” includes all services “incidental” to the transmission). But, the Commission found that “[b]illing and collection, of course, remains outside the scope of Title II because it is not a common carrier service.” See “In the Matter of LEC Validation and Billing Information for Joint Use Cards,” Second Report and Order, 7 FCC Rcd 3528, 3533 (1992); 8 FCC Rcd at 4480-81, para. 13. In 1997, the Commission reiterated its view that the ILEC’s billing and collection service provided to other carriers is a non-common carrier service. See, e.g., “In the Matter of Access Charge

The Commission has observed that it has generally declined to regulate the provision of billing and collection services unless regulation is needed to protect competition.³⁸ This rule is necessary to protect competition. AirTouch's proposed rule would prohibit ILECs from abusing their market power, thereby removing additional consumer choices from the marketplace. It is an easily enforceable rule that will permit market forces to govern more fully competition between wireline and wireless services.

Adoption of the Proposed Rule is Consistent With Commission Precedent

There is Commission precedent for the imposition of a simple, unobtrusive rule with respect to non-common carrier billing and collection services. Cable television operators, although not common carriers, are required to offer leased access arrangements to unaffiliated programmers. In order for those programmers to obtain payment from end users, the Commission has required cable operators to provide billing and collection services, unless the cable operator can demonstrate to the Commission the existence of a viable, equal-cost alternative.³⁹ AirTouch recommends a similar approach here.

This situation is distinguishable from prior instances where the Commission has declined to exercise its jurisdiction over LEC billing and collection. In the Detariffing Order and the BNA proceedings, the Commission declined to require ILECs to offer billing and collection services to interexchange carriers and Operator Service Providers

Reform," CC Docket No. 96-262, Third Report and Order, FCC 97-401 (November 26, 1997) at 1, n.2. LEC billing for its own services - as opposed to billing for third parties - is, however, considered to be a common carrier communications service. See, e.g., Truth-in-Billing Order; "Federal-State Joint Board on Universal Service," Second Recommended Decision, 1998 FCC LEXIS 6027 (November 25, 1998), para. 70.

³⁸Notice, para. 59 (emphasis added).

³⁹See 8 FCC Rcd at 5943-5945; 47 C.F.R. § 76.971(f)(1).

(OSPs).⁴⁰ The Commission has also ruled that ILECs may refuse to offer billing services to information service providers (IPs),⁴¹ and enhanced service providers.⁴²

Unlike OSPs or IPs, however, CMRS carriers are potential competitors to LEC services.⁴³ Thus, the balance in favor of LEC flexibility to provide billing and collection services as they see fit is fundamentally shifted. A LEC denial of billing and collection services for CPP purposes directly impedes competition with the LEC's core services and therefore represents a more significant harm to the public interest.⁴⁴ LECs have significant incentives to deny billing and collection services for anti-competitive reasons. And, as AT&T noted in its Comments on the Notice of Inquiry, the Commission has frequently

⁴⁰See, e.g., 102 F.C.C. 2d at 1170; "Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards," Notice of Proposed Rulemaking, 6 FCC Rcd 3506, 3509 ("First BNA Notice").

⁴¹See "Audio Communication, Inc. Petition for a Declaratory Ruling that the 900 Service Guidelines of US Sprint Communications Co. Violate Sections 201(a) and 202(a) of the Communications Act," 8 FCC Rcd 8697, para. 13. (Comm. Car. Bureau 1993).

⁴²See, e.g., "Filing and Review of Open Network Architecture Plans," 5 FCC Rcd 3103 (1990), para. 32. As with presubscribed interexchange services, the Commission's decision that LECs need not provide billing to enhanced service providers is not relevant here to the extent that such services are provided on a subscription, as opposed to a "casual calling" basis.

⁴³See, e.g., "Amendment of the Commission's Rules to Establish Competitive Safeguards for LEC Provision of CMRS," Report and Order, 12 FCC Rcd 15668 (1997) ("*Competitive Safeguards Order*"), para. 1 ("We believe that incumbent LECs and broadband CMRS operators are increasingly likely to be direct competitors. [This] could increase the incentive for incumbent LECs to engage in anticompetitive practices, such as discriminatory interconnection, cost-shifting, and anticompetitive pricing practices").

⁴⁴Also, since the time of other Commission decisions on this question, policy emphasis in favor of competition has been fundamentally shifted by the 1996 Telecommunications Act. Prior to 1996, competition in local telecommunications markets was prohibited while now it is a stated purpose of the Communications Act. See H.R. Report No. 104-458 (1996) at 113 (noting that it is a legislative purpose to open all telecommunications markets to competition).

intervened to prevent LECs from using their control of local facilities to discriminate against competitors.⁴⁵

This instance should be no different and is entirely in keeping with the Commission's policy direction. CPP also does not involve either the unusually high per-minute rates and/or the objectionable content involved in the IP situations, or the objectionable long-distance rates involved in the OSP discussion. Particularly where a LEC offers billing and collection services to non-competing carriers, such as IXC's, but not to CMRS carriers for CPP, an ILEC's refusal to offer billing and collection services for CPP is highly suspect.

As noted above, the Commission's prior decisions with respect to competition in the market for billing and collection for presubscribed interexchange services are not relevant to the question at hand, since CPP involves CMRS charges for non-presubscribed services. As the attached Katz and Majerus economic analysis explains, there may well be more competitive alternatives in this market than there are for CPP billing because the economic characteristics of billing for presubscribed services are different than for billing for non-presubscribed or "casual calling" services.⁴⁶

This instance is also markedly different from the Capital Network Systems/Comptel petition, which also requested that the Commission initiate a rulemaking

⁴⁵Comments of AT&T on Notice of Inquiry at 5, n.10.

⁴⁶Other evidence before the Commission also suggests that competitive alternatives to ILEC billing for presubscribed IXC services have not developed to the extent expected and that, in fact, IXCs are heavily dependent on LEC billing and collection. See, e.g., LEC Billing Forum; MCI Petition.

to require all LECs to provide billing and collection services on a non-discriminatory basis, at just and reasonable rates, under the authority of Title I.⁴⁷ The D.C. Circuit upheld the Commission's refusal to grant CNS and Comptel's request on the basis that a new rulemaking on the basis that "[p]etitioners cite no instances in which IXC-provided billing and collection has been tried and found wanting. They point to no analyses measuring the cost disadvantages of IXC-provided billing and collection service as opposed to LEC-provided services."⁴⁸ Here, AirTouch has already explored alternatives to LEC billing and collection and found them unworkable. Independent Wall Street analysts have also posed the question: "Why doesn't the U.S. have calling party pays?" and have answered it simply "we really can't have a successful calling party pays system without the landline telephone companies doing the billing and collection for wireline to wireless calls."⁴⁹

The Commission Has Legal Authority To Adopt Rules Requiring ILEC Billing and Collection for CPP

The Commission has authority both to adopt such a rule and to preempt inconsistent state rules, i.e., state rules prohibiting LECs from offering billing and collection services for CPP. Such authority rests on two separate bases: 1) the Commission's authority and responsibility to promote increased availability of consumer options for federally-licensed wireless services, and 2) the Commission's ancillary jurisdiction under Sections 4(i) and 303(r) of the Communications Act.

⁴⁷"Petition to Mandate Availability of Essential Billing and Collection Services," Capital Network Systems, Inc. and Competitive Telecommunications Association (filed June 1, 1989)("CNS/Comptel Petition"); see Capital Network Systems v. FCC, 3 F3d 1526 (D.C. Cir. 1993)(upholding Commission denial of that petition).

⁴⁸Capital Network Systems, 3 F3d 1526 at 1532.

⁴⁹Merrill Lynch, "The Next Generation III: Wireless in the U.S.52-53 (Mar. 10, 1999).

As the Notice suggests, Section 332 (and other provisions of the Act) are an independent basis for a federal requirement regarding CPP-related LEC billing and collection services.⁵⁰ Section 332 establishes an independent basis of authority by virtue of the Communications Act’s consolidation of exclusively federal authority over the introduction of new wireless services. Section 301 of the Act states that it is a purpose of the Communications Act to vest exclusive federal control over channels of radio communications and to provide for their use.⁵¹ 332(c)(3)(A) preempts state regulation of the “entry of” any commercial mobile radio service, including CPP. Thus, regulatory issues related to the “entry” of CMRS, including the introduction of new CMRS services, are subject to federal jurisdiction.

The Commission similarly has statutory authority and responsibility to promote the introduction of new wireless services, and to take appropriate steps to make wireless services more affordable for all Americans. For example, Section 7(a) of the Communications Act states that it is the policy of the United States to encourage the provision of new technologies and services to the public.⁵² It is also a purpose of Section 332 to promote wider availability of CMRS service options for consumers.⁵³ Moreover, although the Commission’s “universal service” obligations are usually thought of in the

⁵⁰Notice, para. 65.

⁵¹47 U.S.C. § 301.

⁵²47 U.S.C. § 157(a).

⁵³See, e.g., Notice at para. 5 (“[p]ursuant to the mandates of the 1993 Budget Reconciliation Act and the 1996 Telecommunications Act, this Commission is committed to removing obstacles to the growth of competition of (sic) all telecommunications services, including CMRS.”)(footnotes omitted).

wireline context, the responsibility to promote the widespread availability of affordable CMRS services and innovative CMRS service options is no less.⁵⁴

The Commission can mandate LEC provision of billing services for CPP as part of its responsibility under these sections to promote wider availability of CMRS services and to regulate the “entry” of CMRS services into the marketplace. Based on record evidence demonstrating that consumers will not have a CPP option absent a rule prohibiting LECs from refusing to provide CPP-related billing, the Commission can adopt such a rule to remove obstacles to new CMRS services. Such a rule would demonstrably be in furtherance of the Commission’s authority to make CMRS services available, so far as possible, to “all the people of the United States.”⁵⁵

The Commission’s ancillary jurisdiction, also, is a source of “broad authority.”⁵⁶ When the Commission detariffed LEC billing and collection services for pre-subscribed interexchange carriers in 1986, the Commission noted that it retained “ancillary jurisdiction” under Title I of the Communications Act over LEC billing and collection

⁵⁴See, e.g., 47 U.S.C. § 151 (referring to “wire and radio communications service”).

⁵⁵See also “In the Matter of LEC Validation and Billing for Joint Use Cards,” 7 FCC Rcd 3528 (1992) (Ordering LECs to provide validation and screening data in order to ensure consumer availability of 0+ interstate service options)(“anything less than full access to LEC validation and screening data, will, as a practical matter, discourage the placement and completion of 0+ interstate calls, thus frustrating the central purpose of the Communications Act, i.e., “to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service”).

⁵⁶United States v. Southwestern Cable, 392 U.S. 157, 172 (1968).

services.⁵⁷ Title I, Section 4(i) of the Communications Act provides that, in addition to the specific authority and responsibilities set forth in the Act, the Commission may “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”⁵⁸

Additionally, Title III of the Act addresses the Commission’s responsibility over radio spectrum, and embodies Congress’ intent to maintain federal control over the channels of radio transmission and to provide for the use of such channels, including the use of such channels to provide CMRS. The Commission’s authority is not limited to carrying out the specific functions listed in Title III; the Commission has ancillary jurisdiction here as well. Section 303(r) of the Act provides that the Commission may issue “such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,” as “public convenience, interest, or necessity requires.”⁵⁹

Exercise of the Commission’s ancillary jurisdiction requires a record finding that such regulation would be directed at protecting or promoting a statutory purpose.⁶⁰ As AirTouch noted in earlier comments in this proceeding, prohibiting LECs from refusing to provide billing and collection service for CPP would serve a number of statutory

⁵⁷*Detariffing Order*, citing *NARUC v. FCC*, 525 F.2d 630, 641 n.58 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) (*NARUC I*).

⁵⁸47 U.S.C. § 154(i).

⁵⁹47 U. S. C. § 303 (r).

⁶⁰*See, e.g., Detariffing Order*, 102 F.C.C. 2d 1150, 1170, n.48; “Second Computer Inquiry,” 77 FCC 2d 284, 433 (1979).

purposes.⁶¹ For example, as noted above, it is a statutory purpose to make efficient CMRS services available “so far as possible, to all the people of the United States.”⁶² Additionally, as the Notice concludes, CPP would serve the statutory purpose of promoting competition in the market for local telecommunications services.⁶³ Additionally, Commission action would secure a more effective and efficient execution of the policies of the Communications Act.⁶⁴

The Commission has authority to adopt such a rule without interfering with State authority over intrastate local exchange services or the “other terms and conditions” of CMRS. Although the rule would require LECs to bill and collect for CMRS CPP charges, regardless of whether a given call is interstate or intrastate, the Commission’s authority over CMRS entry provides sufficient grounds to address LEC billing for intrastate CMRS services. The question is not whether states have authority over LEC billing services; they may very well have concurrent authority. The only question is whether the Commission also has authority under the Communications Act, and here it unquestionably does, by virtue of either Title III or Title I.

⁶¹AirTouch Comments on Notice of Inquiry, at 19.

⁶²47 U.S.C. § 151.

⁶³See Notice, para. 21. The Telecommunications Act of 1996 was passed to “accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans by opening all telecommunications markets to competition.” H.R. Rep. No. 104-458, 104th Cong., 2d Sess. (January 31, 1996)(“Conference Report”). The Notice of Inquiry also noted that the Commission is committed to taking necessary actions to increase consumer options for local telephone service. Notice of Inquiry, at para. 1. At a minimum, then, the Act authorizes the Commission to remove non-market obstacles to the introduction of new and innovative CMRS services.

Since the rule addresses LEC billing and collection services, such a rule will not contradict Section 152(b) of the Communications Act.⁶⁵ Section 2(b) is not relevant here because the LEC billing services at issue are not common carrier services. Section 2(b) withholds Commission jurisdiction over "charges, classifications, practices, services, facilities, or regulation for or in connection with intrastate communication service by wire or radio of any carrier" By its terms, Section 2(b) only applies to the intrastate communications services of common carriers, and does not apply to the LEC billing services here.⁶⁶

Finally, it is worth noting that there is precedent for the understanding that Commission and the states can share concurrent jurisdiction over LEC billing services for CPP. The 1986 *Detariffing Order*, for example, only addressed LEC billing and collection for interstate wireline services; it did not preempt state authority over LEC billing and collection services for intrastate services.⁶⁷ States are free to adopt rules requiring LECs to provide CPP billing services and can enforce existing state tariffs offering billing and collection services, to the extent States have authority over LECs and the "other terms and conditions" of CMRS. The only exception would be where a state

⁶⁴It is a purpose of the Communications Act to secure a more effective execution of this policy by vesting certain authority with the Commission. 47 U.S.C. § 151.

⁶⁵47 U.S.C. § 152(b).

⁶⁶See 47 U.S.C. § 152(b); see also "Norlight Request for Declaratory Ruling," *Declaratory Ruling*, 2 FCC Rcd 132, para. 31 (1987)(Commission can preempt state rules impeding the provision of new services and the Commission's mandate under Section 151 of the Act, notwithstanding Section 2(b)).

⁶⁷See, e.g., *Detariffing Order*; 4 FCC Rcd 4000 (1989), at para. 9; "Public Service Commission of Maryland Application for Review," *Memorandum Opinion and Order*, 4 FCC Rcd 4000 (1989), para. 9; see 2 FCC Rcd 1998 (1987), paras. 15-16.

effectively thwarts the federal objectives of Sections 332, 151, 7(a) and other provisions of the Act by affirmatively prohibiting LECs from providing CPP billing and collection.

The Commission Should Preempt State Rules Prohibiting LECs from Billing for CPP

State prohibitions on LEC provision of billing and collection for CPP services should be preempted as they constitute state regulation of CMRS services entry and a prohibited barrier to entry. Section 332 of the Act preempts state regulation of CMRS services entry;⁶⁸ Section 253(a) also prohibits any state or local rule that constitutes a barrier to entry.⁶⁹ Prohibitions on LEC billing for CPP violate both provisions.

Section 253 is one basis for preemption of state prohibitions on LEC provision of CPP billing. That section of the Act provides that no State law or regulation may prohibit or have the effect of prohibiting any entity to provide any interstate or intrastate communications service.⁷⁰ A prohibition on LEC provision of CPP billing is both a direct prohibition on LEC services, and has the effect of prohibiting CMRS carriers from offering CMRS services. Although Section 253(a) preserves state authority to “safeguard the rights of consumers,” that authority does not permit states to make decisions effectively favoring wireline calling parties over CMRS consumers, at the expense of

⁶⁸47 U.S.C. § 332(e)(3)(A)(prohibiting state regulation of CMRS rates and entry).

⁶⁹47 U.S.C. § 253(a).

⁷⁰Id.

competition.⁷¹ Preventing CMRS consumers from taking advantage of competitive CMRS options is not safeguarding their rights.

Section 253(b) also provides that this section does not affect the ability of states to impose requirements to preserve and advance universal service, on a competitively neutral basis.⁷² While states may attempt to justify prohibitions on CPP billing on the basis of “universal service,” *i.e.*, preserving low rates for landline local calls, including calls to wireless phones, that justification is not sufficient under Section 253(b). Hindering the growth of CMRS services and blocking CMRS from service options that have the potential to make CMRS more competitive with basic landline local exchange service, is not competitively neutral.

California’s Prohibition on CPP Billing Should Be Overturned

AirTouch hopes, however, that the Commission should have little cause to exercise this preemptive authority. AirTouch is aware of only one state- California - that presently prohibits LECs from offering billing for CPP services. The Notice observes that the California PUC (“CPUC”) has recently denied AirTouch’s petition requesting the CPUC to compel Pacific Bell to honor its state tariff for billing and collection of wireless services, based on a California PUC decision prohibiting a LEC from billing its wireline customers for CPP charges.⁷³ As a party to that proceeding, AirTouch provides here

⁷¹See, e.g., “Telecommunications Act of 1996,” *Conference Report*, H.R. Report No. 104-458 at 127 (explicit entry prohibitions are preempted under Section 253).

⁷²47 U.S.C. § 253(b).

⁷³Notice, para. 68; see Decision 90-06-025, 36 CPUC 464 (1990)(promulgating ban on CPP billing).

some more relevant facts regarding that decision, in order to respond to the Commission's request for comment on whether this decision raises jurisdictional issues it should address.⁷⁴ Based on the analysis of Section 253 provided above, California's prohibition on CPP billing should be overturned.

In 1997, AirTouch had secured a waiver of the prohibition on CPP billing to the extent necessary to conduct a market trial of CPP, which was to have been conducted in cooperation with Pacific Bell.⁷⁵ What has blocked deployment of CPP in California has been Pacific Bell's refusal to offer the necessary billing services, and the CPUC's misinterpretation of Pacific Bell's billing tariff, in addition to the ban on LEC provision of CPP billing.

After SBC announced that it was reversing Pacific Bell's earlier agreement to cooperate with a CPP market trial, AirTouch sought to require Pacific Bell to provide the necessary billing services under its tariff and conduct the CPP market trial on its own. Pacific Bell's billing tariff provides that Pacific Bell offers certain billing and collection services to third parties for the billing of charges associated with, inter alia, "wireless services."⁷⁶ AirTouch sought to purchase service under this tariff. The CPUC upheld

⁷⁴Id.

⁷⁵See Decision D.97-06-109 (California PUC June 26, 1997).

⁷⁶Pacific Bell, Schedule Cal. P.U.C. No. 175-T, Section 8.5.1. ("Billing and Collection Service for Telecommunications Related Services")("Services billed to end users under this Section include, but are not limited to,wireless services"). Of course, Pacific's election to offer these services to the public at large, under tariff, renders these services common carriage, notwithstanding the Commission's findings in the *Detariffing Order*. See, e.g., NARUC v. FCC, 525 F.2d 630, 642 (1976).

Pacific Bell's refusal to provide these services based on a misunderstanding regarding whether CPP services are CMRS; a misunderstanding that has been substantially addressed in the Declaratory Ruling in this proceeding.

In dismissing AirTouch's complaint regarding Pacific's refusal to honor its tariff, the CPUC adopted a decision that asked "is the term 'wireless services' in Pacific's tariff broad enough to include CPP services and if so, should this ambiguity be construed in AirTouch's favor despite the general prohibition on CPP service? The CPUC accepted the opinion of the ALJ who answered both of those in the negative, relying heavily on the CPUC's intent to prohibit CPP services except in the limited circumstances of the market trial it had authorized.⁷⁷ The ALJ in the case found that construing that ambiguity against the drafter of the tariff, according to the usual rule, would be inappropriate given the tariff language and the prohibition on CPP services.⁷⁸

The CPUC decision reflects a confused understanding of CPP services. Many of the confused statements in this opinion are directly addressed by the Commission's Declaratory Ruling, such as the question as to whether CPP involves CMRS services or whether the calling party in a CPP context is a "customer" of the LEC or of the CMRS carrier. For example, the California ALJ noted that the tariff provided for "bill rendering," i.e., mailing statements, to "the Customer's end users." The ALJ agreed with Pacific that

⁷⁷See, e.g., AirTouch Cellular v. Pacific Bell, Decision 98-12-086, Case No. 97-12-044 (Dec. 17, 1998) at 16-17. ("CPUC Tariff Decision"). The ALJ also rejected AirTouch's contention that the term "wireless" services was unambiguous and encompassed the CMRS services involved when a landline party calls a CPP subscriber.

⁷⁸Id.

the term “Customer’s end users” in the tariff refers to the end users of the party purchasing the billing service, in this case AirTouch customers. The ALJ also, unfortunately, accepted the argument that, in a CPP service, AirTouch is asking for bills to be sent to Pacific’s customers.⁷⁹ Therefore, the ALJ ruled that the tariff did not encompass CPP. The Commission’s Declaratory Ruling clarifies, however, that CPP involves a calling party’s purchase of CMRS services, effectively making them an “end user” of the CMRS provider.⁸⁰ Thus, the term “Customer’s end users” does include calling parties in a CPP environment and calling parties would be AirTouch customers.

Accordingly, AirTouch believes that Pacific’s tariff does obligate it to provide the needed billing services for CPP. But since the CPUC has both rendered this decision and declined to consider proceedings to permit a new market trial or to reconsider the existing prohibition on CPP services, AirTouch is reluctant to re-litigate this question at the CPUC. A simple federal rule obligating Pacific Bell to provide the appropriate billing services would be a more effective way of bringing this service to consumers. In addition, California’s prohibition on CPP billing should be overturned. California’s decision regarding CPP billing both constitutes a barrier to entry and regulates CMRS entry by

⁷⁹*CPUC Tariff Decision* at 13-14. The CPUC also declined to undertake an inquiry on its own motion to determine whether it should intervene to the degree necessary to let a CPP market trial continue. Id.; but see Statement of Commissioner Jessie J. Knight, Jr., Dissenting (“The Commission should on its own motion assess the need to intervention to ensure that the intended outcome of D.97-06-109 is achieved notwithstanding the roadblocks that the current monopoly provider has put in place to squelch competitive offerings”).

⁸⁰Notice, para. 16

depriving consumers of new CMRS services, and is therefore preempted under the Communications Act.⁸¹

C. Calling Party Pays Cannot Be Implemented Effectively Through Interconnection Arrangements

As described in the Notice, one possible way to obtain the benefits of CPP is an interconnection arrangement where “the calling party is billed by the LEC based on published LEC rates for landline-to-mobile calls. The LEC is solely entitled to the caller’s account...and ... pays the wireless carrier an interconnection charge to terminate traffic on the wireless network. The interconnection charges are determined either by regulators or negotiated bilaterally by the carriers involved.”⁸² Under this approach, the LEC need not offer billing and collection services to the CMRS carrier.

At the same time, however, this approach raises a number of other issues that are far more problematic. First, for ILEC originated calls, the price of calling a mobile phone would be set by the ILECs. There would be much less incentive to price these calls so as to encourage the use of wireless networks, or to take advantage of the competitive possibilities of wireless networks. ILECs have significant incentives to price calls to wireless phones at higher levels than necessary, in order to encourage callers to keep traffic on their wireline networks. At a minimum, this approach eviscerates the

⁸¹47 U.S.C. §§ 253(a), 332(c)(3)

⁸²Notice, para. 72.

Congressional goal of allowing the price of telecommunications services to be governed by competitive market forces.⁸³

Second, this approach would preclude originating callers as well as CMRS subscribers from taking advantage of the wide-area calling plans presently available, since the regulatory jurisdiction and price of a call would be determined by the LEC's operating area boundaries. CMRS carriers would lose many of the economies of regional or nationwide service arrangements. AirTouch, certainly, would not offer CPP through this type of arrangement, as it could eliminate the ability to offer a single airtime rate for all CPP calls across a wide area.

Third, ILEC pricing would eliminate the flexibility to offer CPP as an option and inhibit the type of flexible CPP service AirTouch has designed. AirTouch's CPP product, "Select Pay" service, permits CPP subscribers the flexibility to choose which calling parties pay for incoming airtime charges. By using advanced intelligent network ("AIN") features, an AirTouch CPP subscriber can identify a "VIP" list of numbers for whom the subscriber is willing to pay the incoming airtime charges.⁸⁴ But, as the Notice observes, under the ILEC-pricing approach there would have to be a single, higher rate for all calls

⁸³See 47 U.S.C. § 332(c)(3)(A).

⁸⁴These features, AirTouch believes, will effectively moot the question of whether CPP will in fact discourage additional wireless usage. See, e.g., Reply Comments of BellSouth on Notice of Inquiry at 3; SBC Comments on Notice of Inquiry at 3; USTA Comments on Notice of Inquiry at 2. Business subscribers, for example, who wish to encourage customers to call them by agreeing to pay the incoming call charges can do so with Select Pay; turning the CPP feature off whenever they deem appropriate. In short, AirTouch's approach to CPP makes CMRS services more like wireline services, where there is the option of 1-800 service, and allows consumers - not carriers or regulators - to decide what services to pay for.

to the customers of the CMRS provider or a more complex interconnect arrangement.⁸⁵

While it is perhaps technically possible for a LEC-based AIN solution to permit a “Select Pay” arrangement, the parameters of such an arrangement would be at the discretion of the LEC, not the terminating CMRS carrier. Thus, consumers would lose service options and a CMRS carrier would lose the ability to take advantage of its network capabilities.

Finally, regulatory oversight will be required to determine the amount of asymmetric compensation to be provided. Cost studies would be required to detail costs associated with airtime, transport and termination.⁸⁶ Separate analyses would be required for interstate and intrastate cost elements.⁸⁷ State commissions would be involved only in setting the price of a fixed-to-mobile intrastate call, while the Commission would have to address pricing for interstate CPP calls, including determining which calls constitute interexchange service.⁸⁸ The administrative burdens would likely be so enormous that the introduction of CPP services would be stifled. Such an intensively regulatory approach is

⁸⁵Notice, para. 73.

⁸⁶It is, of course, unclear whether this process of implementing CPP would involve new interconnection agreements, separate from the existing LEC-CMRS interconnect arrangements or modifications to the existing agreements for transport and termination functions. Since the retail airtime charges for CPP represent different cost elements than the transport and termination functions, see Notice at para. 71, but the revenue is being exchanged between the same parties, either outcome is possible.

⁸⁷Smith v. Illinois Bell Tel. Co., 282 U.S. 133, 148 (1930) (finding the "separation of intrastate and interstate property, revenues and expenses" to be "essential to the appropriate recognition of the competent governmental authority in each field of regulation").

⁸⁸These arrangements might, for example, include modifications to LEC access tariffs when an interexchange CPP call is handed off to an IXC.

entirely inappropriate not merely for CMRS, but for the competitive future of telecommunications in general.⁸⁹

II. Minimum Guidelines for A Notification to Originating Callers for New Calling Party Pays Services Are Needed

A uniform national policy regarding CPP notification will advance the benefits of CPP. As AirTouch has noted, notification messages have simply not been a major issue in AirTouch's experience with CPP offerings.⁹⁰ AirTouch continues to experience few consumer complaints, whether directly or referred from an originating/billing LEC, regarding confusion or surprise charges for CPP calls. This is so even though no notification other than 1+ dialing is used in many states where AirTouch provides a CPP offering. Nonetheless, ubiquitous nationwide roll-out of CPP will be facilitated with an efficient notification policy.

The Notice correctly concludes that "without a uniform notification system, conflicting state notifications would increase consumer confusion about calls to CPP subscribers if CPP were implemented more widely."⁹¹ And, a uniform notification system will lower costs. Many wireless carriers, including AirTouch, serve multistate areas. Absent uniform requirements, such carriers could be required to develop and install a wide

⁸⁹See, e.g., "Jurisdictional Separations Reform and Referral to the Federal-State Joint Board," CC Docket No. 80-286, Notice of Proposed Rulemaking, FCC 97-534, 1997 FCC LEXIS 5554 (October 7, 1997), para. 19 (observing how the separations rules may inhibit competition).

⁹⁰Comments of AirTouch on Notice of Inquiry at 29.

⁹¹See, e.g., Notice, paras. 27 - 33.

variety of software in their switches to handle different state-mandated notification messages or methods, train and educate customer care representatives on the variety of notification messages, and therefore lose some of the efficiencies gained from a multi-state regional service structure, vastly increasing the costs of CPP.⁹² In competitive markets, increased costs must be passed on to consumers. And both increased costs and consumer confusion are likely to diminish the growth of CPP.

The Commission Has Jurisdictional Authority to Adopt Rules Governing the Content of a Uniform National Notification Method

AirTouch agrees with the Commission that the Commission has authority to implement a uniform nationwide notification policy under Sections 201(b) and 332 of the Act. As the Supreme Court recently held in Iowa Utilities Bd. v. FCC,⁹³ Section 201(b) of the Communications Act clearly gives the FCC authority to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”⁹⁴ Thus, if a provision of the Act applies, even to an intrastate service or to the intrastate aspects of that service, the Commission has authority to prescribe regulations as may be necessary in the public interest.

A number of provisions of the Act apply in this case. For example, Section 332(c)(1)(A) provides that “a person engaged in commercial mobile radio services shall,

⁹²See, e.g., Notice, para. 31.

⁹³AT&T v. Iowa Utils Bd., 119 S.Ct. 721 (1999)(“*Iowa Utilities Board*”); see Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted sub nom., AT&T v. Iowa Utils. Bd., 118 S. Ct. 879 (1998).

⁹⁴47 U.S.C. § 201(b).

insofar as such person is engaged, be treated as a common carrier for purposes of this Act.”⁹⁵ AirTouch believes that this provision establishes comprehensive federal authority to adopt whatever regulations the Commission deems necessary to ensure that CMRS services are provided on a just, reasonable and non-discriminatory basis.⁹⁶ Indeed, even the Eighth Circuit, whose jurisdictional holding was otherwise reversed by the Supreme Court, agreed that Section 332 established authority sufficient to establish rules to promote not merely interconnection, but the CMRS industry in general.⁹⁷

Section 7(a) of the Communications Act provides that it is the policy of the United States to encourage the provision of new services to the public.⁹⁸ In order to carry out this provision of the Act, the Commission can enact rules, pursuant to its authority under Section 201(b), that it reasonably deems necessary to encourage the provision of new services such as a CPP CMRS service option. Section 7(a) represents an additional source of authority for the Commission to adopt federal rules governing the notification of calling parties to CPP CMRS subscribers.

⁹⁵47 U.S.C. § 332(c)(1)(A).

⁹⁶See, e.g., 47 U.S.C. §§ 201, 202.

⁹⁷See, e.g., *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 800, n.21, *motion to vacate stay denied*, 117 S.Ct. 378 (1996); see also Motion to Lift Stay of AirTouch; *Iowa Utils. Bd.*, Nos. 96-3321 et. al. (8th Cir. Nov. 1, 1996) (Order Lifting Stay in Part), <http://ls.wustl.edu/8th.cir/FCC/Opinions/FCC?963221.019>>. That the Commission has authority to prescribe regulations over the intrastate and interstate provision of CMRS is supported by provisions of Section 332 in addition to those dealing with interconnection. For example, Section 332(c)(8) provides that the Commission may, if necessary, establish regulations concerning the provision of equal access to providers of telephone toll service by CMRS carriers. Telephone toll service, of course, can be intrastate or interstate in nature. See 47 U.S.C. § 332(c)(8). The Commission’s comprehensive authority over CMRS equal access is akin to the Commission’s comprehensive authority over CMRS provision of services on a common carrier basis.

⁹⁸47 U.S.C. § 157(a); see also 47 U.S.C. § 151 (it is a purpose of the Act to promote service availability).

The “other terms and conditions” provision in Section 332 is no bar to the Commission adopting rules in this area. Section 332 of the Act does not remove federal authority over the “other terms and conditions” of CMRS service. And, Section 332’s preservation of state authority over the “other terms and conditions” of CMRS service does not, of course, displace federal authority under Section 201(b) to adopt rules to carry out the provisions of the Act.⁹⁹

The Notification Rules Should Allow for Variety Between Competing CMRS Carriers

Regulation should provide a simple framework of minimum requirements, allowing CMRS carriers to compete and experiment with various forms of notification in order to identify which are best received by consumers. As the Commission has itself observed, “there are typically many ways to convey important information to consumers in a clear and accurate manner. For this reason, we disagree with commenters who assert that more prescriptive rules are necessary... rigid rules might prevent competing carriers from differentiating themselves on the basis of the clarity of their bills.”¹⁰⁰ And, as AirTouch has noted in other proceedings, government decisions that dictate the exact content of messages communicated by carriers ought to be avoided, in order to avoid disrupting the process of competition.¹⁰¹

⁹⁹See 47 U.S.C. § 332(c)(3)(A)(prohibiting state regulation of CMRS service “rates and entry,” while retaining state authority over the “other terms and conditions” of CMRS service).

¹⁰⁰*Truth-in-Billing Order*, para. 10.

¹⁰¹See Comments of AirTouch Communications on Truth-in-Billing and Billing Format, CC Docket No. 98-170 (November 13, 1998).

The ability of a CMRS carrier to successfully implement CPP will, to a significant degree, depend on its ability to provide notification to calling parties with sufficient clarity to encourage calling parties to proceed with the call. Unclear or confusing messages are likely to cause consumers to hang up and become dissatisfied with CPP arrangements. This will translate directly into lost incoming airtime and revenue for CMRS carriers. Additionally, CMRS carriers have incentives to avoid notification practices that are likely to result in consumer complaints, calls to customer service representatives, and possibly bill credits being issued, all of which are expensive for CMRS carriers. Thus, CMRS carriers have economic incentives to provide clear and concise CPP notification to calling parties. Because these are competitive incentives, moreover, CMRS consumers will benefit where CMRS carriers experiment with different methods in order to obtain a competitive advantage or differentiate their service by improving the notification's clarity.

As the Commission has recognized elsewhere repeatedly, allowing competitive incentives to drive the creation of solutions serves consumers better than government decision-making.¹⁰² There may, of course, be limits or ground rules that the Commission can establish, such as a minimum requirement that any notification identify the CMRS carrier assessing the charges. But refinements as to specific methods, language or content should be aspects that competing carriers can subject to experimentation. The Commission should allow for an approach to calling party notification that is at least as flexible as that provided for telephone bill information.

¹⁰²See, e.g., *Truth-in-Billing Order*; see also, "A New FCC for the 21st Century," found at <http://www.fcc.gov/21st_century>, page 14 (emphasizing the Commission's goal of substituting market-based methods for regulation wherever possible).

A flexible approach to CMRS provision of calling party notification is also appropriate given the concerns with respect to whether the proposed method of notification is accessible to people with disabilities, understandable to speakers of languages other than English, or meets other specialized needs in the market.¹⁰³ A detailed specification as to the required text or method might create an otherwise unnecessary administrative burden associated with the filing of a petition for waiver where a unique method is needed to meet unique needs. On the other hand, an overly comprehensive uniform text that attempts to anticipate all of these circumstances would burden and inconvenience consumers who are familiar with CPP services. Competitive flexibility for the content and method of CPP notification works best.

The Minimum Content Required for a Calling Party Pays Notification Should Include Sufficient Information to Permit Consumers to Make Informed Decisions Without Burdening Consumers Or Stifling the Growth of CPP

The Commission has similarly observed, with respect to telephone bills, that “[c]oncise bills are more likely, not less likely, to comport with our principles that bills be clear and understandable because excessively long bills may confuse consumers.”¹⁰⁴ AirTouch agrees; long or involved notifications are more likely to confuse consumers - as well as discourage the use of CPP services - than concise and simple notification methods. Whatever guidelines are adopted for CPP notification should follow this rule.

¹⁰³Notice, para. 44.

¹⁰⁴Truth-in-Billing Order, para. 10, n.24.

The Commission suggests that, initially, it is important that notification include the following elements: 1) notice that the calling party is making a call to a wireless phone subscriber that has chosen the CPP option, and that the calling party therefore will be responsible for payment of airtime charges; 2) identification of the CMRS provider; 3) the per-minute rate, and other charges, that the calling party will be charged; 4) notice that the calling party will be able to terminate the call prior to incurring any charges.¹⁰⁵

Of these elements, AirTouch believes that all of these, with one exception, can be implemented without undue costs or inconvenience to consumers, although such extensive notice may not be necessary in perpetuity. The one exception is the requirement to include both the per-minute rate and other charges associated with a given call. Depending on how this is defined, this requirement is likely to create consumer confusion, excessive costs, and unnecessarily weigh down CPP offerings.

A CPP call may well not simply include airtime charges, but other charges associated routinely with telecommunications services. These include any local charges, interexchange service charges, and a variety of local taxes and surcharges. Toll charges, for example, are likely to vary depending on the time of day of the call, a consumer's particular calling plan, pre-subscribed interexchange carrier, and whether the call originates from a landline phone, mobile phone, computer or other method. Moreover, not all of these charges will be set or controlled by the terminating wireless carrier. For

¹⁰⁵Notice, para. 42.

example, as the Notice observes, some toll charges formerly billed to the CMRS carrier are now also being billed to the calling party.¹⁰⁶

Thus, the price of a particular CPP call is likely to vary from situation to situation and from state to state. If extensive rate information is included, consumers are likely to encounter a variety of rates for CPP calls, and are likely to become confused as to which rate is for which service. Consumers may well attribute a particular rate element to the novelty of the CPP feature, when in fact, the price difference may stem from some other fact such as where a call is an intraLATA toll call. In order to preserve the benefits of a uniform CPP notification, the only rate information that should be in a CPP notification should be the per-minute rate for airtime associated with CPP. This will make the notification as neatly associated with the service changes associated with the advent of CPP as possible and therefore better educate the public about CPP services.

A comprehensive requirement to provide real-time notice of all applicable charges will also be inordinately expensive and unnecessary. Compiling information sufficient to match rate tables that account for all these possible variables, building those capabilities into the CPP platform, and including the proper information in each preamble message, is likely to be extraordinarily complex and costly. Additionally, a variety of taxes apply to telecommunications; it is not clear that this information would be excluded from the Commission's proposal. A requirement to calculate the individual taxes and provide real-

¹⁰⁶See Notice, para. 73, n.186. As the Notice explains, this process is a valid modification of traditional processes designed to bring wireline carriers in compliance with 47 C.F.R. § 51.703(b) which prohibits LECs from charging other carriers for LEC traffic that originates on the LEC's own network.

time information about the total price of the call would be burdensome and likely eliminate CPP as an economically viable option. It is also not at all clear that all CPP platforms and SS7 signaling systems will be able to provide this type of comprehensive notice. And in any event, this rule is likely to incur such expense unnecessarily, providing consumers with more information than they customarily deem necessary to complete a telephone call.¹⁰⁷

“Casual calling” wireline long-distance plans rely on general media advertising, toll-free customer care service lines and other methods to provide consumers with information regarding the charges they can expect for a particular service. The Commission has recently moved to clarify telephone bills - the primary source of consumers’ rate information.¹⁰⁸ And, as the record in the *Truth-in-Billing* proceeding shows, market competition in the CMRS industry provides strong encouragement for wireless carriers to communicate information clearly to the public. There have been few issues with respect to consumer bills in the CMRS industry.¹⁰⁹

For purposes of a CPP notification, the requirement that all customer bills identify the service provider associated with a charge, and provide a toll-free number to contact that carrier, should be sufficient to provide consumers with explanatory information regarding charges other than the per-minute airtime rate associated with calling a wireless

¹⁰⁷The Notice refers to the Commission’s “tentative agreement” with the Ohio PUC, the Washington Utilities Commission and others that a notification that does not include all applicable rate information would be ineffective. It is unclear, however, whether the Notice is referring to the filed comments of these parties, since no comments are referenced, or to some sort of other understanding or private agreement. Clarification of what the Ohio PUC, WUTC and the Commission have “tentatively agreed” upon would be helpful.

¹⁰⁸See *Truth-in Billing Order*, para. 5.; see *In the Matter of Truth-in-Billing and Billing Format*, Notice of Proposed Rulemaking, CC Docket No. 98-170, FCC 98-232 (released Sept. 17, 1998).

¹⁰⁹*Truth-in-Billing Order*, para. 16.

CPP subscriber. In no other telecommunications service, save perhaps certain coin-sent-paid operator services calls, do consumers require or receive real-time, specific rate information regarding the services they are purchasing.

The Commission speculates that the provision of detailed rate information may facilitate CPP, because calling parties would be more inclined to complete CPP calls than they might be if they were left to guess what they would be billed for the call.¹¹⁰ But consumers are equally likely to terminate a CPP call if they are required to listen through a lengthy or complex notification prior to being able to complete the call.¹¹¹ AirTouch believes the Commission's prior observation regarding the benefits of concise information regarding rates and services in telephone bills is more likely to hold true here.

The Notice also seeks comment on the desirability of moving to a simpler and more streamlined notification system that would not include rate information, after consumers have become accustomed to CPP and are aware of the additional charges involved. AirTouch strongly supports this concept, and agrees with CTIA that a period of 18-24 months from the date CPP services are introduced to a particular market is an appropriate period.

¹¹⁰Notice, para. 43.

¹¹¹Although, as noted above, AirTouch has received very few complaints from consumers regarding calling party notification, it did receive one informal complaint (FCC reference #99-1483) from an AirTouch CPP customer that describes problems incurred when AirTouch moved from a simple 1+ dialing notification to a recorded preamble. Calling parties apparently found the recorded preamble annoying and simply hung up, leading the wireless subscriber to complain about missed calls and to write that she "had never experienced the problems I am currently experiencing with AirTouch" before the preamble was introduced.

To the extent that future forms of notification involve not a recorded preamble, but the use of a distinctive tone (or other distinctive signal to the extent needed to accommodate the hearing-impaired) to inform consumers they are calling a mobile phone, consumers would be less likely to consider calls to a CPP subscriber as inconvenient. AirTouch also believes that its experience with the use of 1+ dialing as a notification method demonstrates that the use of that dialing convention would provide sufficient notice to consumers that charges for the call will apply, particularly as consumers are used to making local calls for “free,” but paying separate per-minute charges for calls dialed with the 1+ convention.

The Notice also seeks comment on other options for notification, including distinctive service codes or NXX codes. For example, AT&T conducted a trial in Minnesota involving the use of special 500 numbers.¹¹² AT&T can, of course, speak more directly to its experiences with that arrangement, but AirTouch’s own market research indicates that wireless consumers find it inconvenient to have two separate wireless numbers. Additionally, use of the “500” service code does not support the Commission’s goal of moving towards a time where wireless services are a more robust competitor to wireline services. In order to encourage more and more consumers to consider wireless phones as a substitute for landline phones, the Commission should avoid measures that unnecessarily differentiate wireless service from traditional landline local service.¹¹³

¹¹²Notice, paras 45-48.

¹¹³AirTouch also agrees that number conservation concerns argue against a specific NPA or NPA/NXX codes for mobile services. See Notice, para. 48.

Finally, AirTouch agrees that the Commission's prior decisions regarding privity of contract in a "casual calling" situation are ample authority for the proposition that a consumer placing a CMRS call to a CPP subscriber is contractually liable for the associated charges.¹¹⁴ A tariff filing is not necessary to create a contractual obligation. Rather, the customer's informed choice to complete the call is sufficient to establish a binding obligation. At most, a wireless carrier might choose to file an informational tariff setting forth terms, conditions and limitations on liability for service. Rate information, however, should not be tarified.

AirTouch believes that the treatment of rate information in any CPP notification process should be consistent with Congress' intention to eliminate rate regulation and its associated administrative burdens such as tariffing. Section 332(c)(3)(A), as noted above, prohibited state regulation of CMRS rates and the Commission has wisely declined to re-introduce rate regulation into the CMRS marketplace, in order to ensure similar regulatory treatment among competitors and to reduce undue regulatory burdens.¹¹⁵ The Commission has also elected, correctly, to forbear from the tariffing requirements of Section 203 to the extent they would otherwise apply to CMRS carriers.¹¹⁶

¹¹⁴Notice, para. 51, citing "Policy and Rules Concerning the Interstate, Interexchange Marketplace," CC Docket No. 96-61, Order on Reconsideration, 12 FCC Rcd 15014, 15031-32 (para. 28).

¹¹⁵See 47 U.S.C. § 332 (c)(3)(A); "Implementation of Sections 3(n) and 332 of the Communications Act," Second Report and Order, 9 FCC Rcd 1411 (1994) ("*CMRS Second Report and Order*"), para. 250. (identifying the purposes of Section 332(c)(3)(A) as ensuring similar treatment among competitors and reducing undue regulatory burdens).

¹¹⁶*CMRS Second Report and Order*, paras. 174-181.

B. The Commission Has Authority to Preempt Additional or Inconsistent State Regulation of CPP Notification Methods And Should Do So If Necessary

The Commission tentatively agrees that a uniform nationwide notification system is necessary to facilitate the implementation of CPP.¹¹⁷ Regardless of whether this system includes minimum guidelines or detailed prescriptions, its goals will not be attained if additional requirements are imposed by state legislatures, courts or regulatory commissions. For example, the Commission recommends this approach partly on the basis that it would likely minimize the cost of providing such notifications, especially where CMRS carriers serve multistate areas.¹¹⁸ Although not all state actions regarding CPP notification will warrant preemption, preempting states who seek to impose additional elements or content requirements for a CPP customer notification, above and beyond the federal guidelines, would be in the public interest.

AirTouch service, for example, is provided in three multistate regions: Eastern, Western, and Sierra Pacific, with customer care and product development functions performed at central locations. In addition, AirTouch serves a number of urban areas, such as Cincinnati, OH, Omaha, NE, and Fargo, ND, where customer interstate travel is frequent. Thus, AirTouch customers would directly benefit from the reduced costs permitted where AirTouch can implement a single notification system. These cost savings

¹¹⁷Notice, para. 33.

¹¹⁸Id. The Notice also provides that evidence submitted by CTIA establishes that a large number of CMRS providers serve multistate areas, including 82% of MTA-based PCS license areas and 23% of BTA-based service areas. Notice, para. 31. As the Commission is aware, many of the BTA-based service areas have been consolidated, making the number of BTA-licensed carriers who serve multistate areas likely higher.

will not be realized if AirTouch's notification must comply not only with federal guidelines, but with a variety of additional requirements imposed at the state level.

AirTouch agrees with the Commission that the knowledge and concerns of the states should be incorporated into the development of the minimum guidelines, and believes that states should have ample opportunities to make their views known in this comment cycle. AirTouch fully supports the cooperative approach described in the Notice, and notes that a national approach is supported by some state commissions as well as the Commission and the CMRS industry.¹¹⁹ And some state actions, such as supplemental consumer education methods, might not obstruct this federal objective and need not be preempted.

AirTouch believes the Notice identifies ample jurisdictional authority for this approach. As explained above, Section 332 and 201(b) grant federal authority to adopt rules governing calling party notification. Where the Act grants authority, it also grants the authority to preempt state rules to the extent that such rules thwart the objectives of the Act. This approach is entirely in keeping with Congress' intent to respect state interests in consumer protection while at the same time providing for national, uniform treatment of CMRS through a federal regulatory framework.¹²⁰

¹¹⁹Notice, para. 39; Id., para. 33, citing Comments of WUTC.

¹²⁰See. e.g., H.R. Conf. Rep. No. 103-213 at 490 (1993) cited in Notice, para. 36.

Such preemption, if necessary, would further the Congressional goal of a “uniform national framework” for CMRS.¹²¹ It would not represent an instance such as in Louisiana Pub. Serv. Comm’n v. FCC,¹²² where the Commission’s action was precluded because the Commission was taking intrastate action solely because it furthered an interstate goal. The notification requirements pertain to increasing the availability and affordability of CMRS services and promoting local competition - which are general policy goals unrelated to any given jurisdiction. Also, as in Iowa Utilities Board, this instance is distinguishable from Louisiana PSC because the Commission has been given rulemaking authority over CMRS services in their entirety. As the Supreme Court explained, “that case [Louisiana PSC] involved the Commission’s attempt to regulate services over which it had not explicitly been given rulemaking authority; this one involves its attempt to regulate services over which it has explicitly been given rulemaking authority.”¹²³

Finally, under Louisiana PSC, the Commission may preempt state regulation of intrastate service when it is not possible to separate the interstate and intrastate components of the asserted Commission regulation.¹²⁴ In constructing this "inseparability doctrine" recognized by the Supreme Court in Louisiana PSC, Federal courts have held that where interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the states, state regulation of the intrastate service that

¹²¹H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.

¹²²Louisiana PSC v. FCC, 476 US 355 (1986).

¹²³Iowa Utilities Board, 119 S. Ct. 721 at n.7.

¹²⁴Under Louisiana PSC, the Commission may preempt state regulation of an intrastate matter only when the matter has interstate aspects as well and when it is "not possible to separate the interstate and the intrastate components of the asserted FCC regulation." 476 U.S. at 375 n.4.

affects interstate service may be preempted where the state regulation thwarts or impedes a valid Federal policy.¹²⁵

Here, providing separate notification messages for interstate and intrastate calls would be technically impossible. First, consumers do not purchase separate intrastate and interstate CMRS separately. Consumers, even casual end users such as the calling party in a CPP context, view wireless services “without regard to state boundaries,” in Congress’s words.¹²⁶ In many cases, the CMRS carriers’ licensed service area covers a multi-state area. And CMRS carriers do not, in every case, identify a particular call as interstate for rating or routing to a separate interexchange carrier.¹²⁷ Thus, unlike the appropriate depreciated costs of telephone plant involved in Louisiana PSC, CMRS service as it is purchased by consumers cannot be separated into its intrastate and interstate elements.

¹²⁵FCC preemption of state regulation is thus permissible when (1) the matter to be regulated has both interstate and intrastate aspects, see, e.g., Illinois Bell Tel. Co. v. FCC, 883 F.2d 104, 113 (D.C. Cir. 1989); (2) FCC preemption is necessary to protect a valid federal regulatory objective, see National Ass’n of Regulatory Util. Comm’rs v. FCC, 880 F.2d 422, 431 (D.C. Cir. 1989); and (3) state regulation would “negate[] the exercise by the FCC of its own lawful authority” because regulation of the interstate aspects of the matter cannot be “unbundled” from regulation of the intrastate aspects. Id. at 429, 430; see Public Util. Comm’n of Texas v. FCC, 886 F.2d 1325, 1331 (D.C. Cir. 1989); California v. FCC, 905 F.2d 1217 (9th Cir 1990). The burden of showing that the Commission’s conclusions as to inseparability is incorrect falls on a state commission or other challenger. See Texas PUC, 886 F.2d at 1334; Maryland PSC v. FCC, 909 F.2d 1510 (D.C. Cir. 1990).

¹²⁶H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.

¹²⁷See, e.g., “In the Matter of Federal-State Joint Board on Universal Service,” CC Docket No. 96-45, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 98-278, 1998 FCC LEXIS 5508 (October 26, 1998), para. 6. (describing difficulties faced by CMRS carriers in calculating overall interstate and intrastate usage). The Commission recognizes that identifying overall traffic averages is difficult enough, while here identifying the jurisdictional nature of a particular call is required, a process that is significantly more difficult, costly, and likely impossible. Moreover, wireless calls, as mobile services, can involve both intrastate and interstate transmission during the course of a single conversation. For example, as the Commission is well aware, a D.C. metro area traveler could easily begin a call in Virginia, pass through the District, and terminate the call while in Maryland.

It would be impossible for states who adopt additional notification requirements to avoid crimping the federal policy in favor of uniform CPP notification guidelines, regardless of what additional notification requirements are adopted and no matter how benign or unobtrusive. In the absence of preemption, CMRS carriers would effectively be required to default to the state's more involved notification on every call, thus destroying the value of a more streamlined federal notification requirement for interstate calls.¹²⁸

It also bears noting, however, that preemption could be narrowly tailored. AirTouch is simply suggesting that the Commission preempt states who seek to require specific notification requirements, *i.e.*, additional content in the message heard by calling parties, beyond the elements required in federal guidelines. Such an approach need not eliminate all state consumer protection activity with respect to CPP CMRS services, including activity with respect to the notification provided to calling parties.

For example, in its recent "Petition for Reconsideration," the Ohio Public Utilities Commission posits that, in addition to its concern that CPP will affect wireline local calling rates, it may want to extend the time period for which a recorded preamble is required.¹²⁹ Such an extension would not inherently cramp federal policy in favor of uniformity, since a CMRS carrier could continue to utilize the same notification message throughout a multi-state region that included Ohio without additional software modifications or other expense. Assuming the minimal federal guidelines are acceptable to

¹²⁸See, e.g., *Notice*, para. 31, *citing* Comments of CTIA and Bell Atlantic.

¹²⁹*Ohio Petition*, *supra* n.5, at 4. Ohio also suggests that it shares the FCC's view that CMRS should be subject to little regulation and "could generally endorse a similar approach to CPP as is being considered in the NPRM."

state regulators - as Ohio's position suggests they would be - the preemptive aspect of such guidelines should be non-controversial.

And preemption need not mean that states are restricted in handling consumer protection matters or a reduction in consumer protection regarding CPP notification. Between the significant competitive forces operating in the CMRS market, coupled with the availability of federal regulatory authority if necessary, there are ample resources for consumer protection. To the extent that consumers have concerns about both the notification and the rate charged for CMRS service, it is more efficient to handle those concerns in one proceeding, at the federal level, since states lack authority to address CMRS rate concerns.

Therefore, limiting state authority to adopt additional or inconsistent call notification requirements does not limit the degree of consumer protection involved. It would, however, preserve the federal objective of reducing the costs involved by permitting CMRS carriers who provide service over multi-state regions to use a single notification process throughout their service area. A narrow preemption, to the degree necessary to preserve this objective, is appropriate.

III. Both Competition and Carrier Interest in Growing CPP Provide Ample Incentives For CPP Airtime Charges to Be Set at Competitive Levels

The Notice urges commenters to discuss whether market conditions exist or are likely to develop that would exert competitive pressure on CPP rates to be charged a

calling party by a CMRS carrier.¹³⁰ The Commission proposed to defer regulatory intervention over rates until there is clear evidence that Commission action is necessary to resolve rate issues. AirTouch agrees that the Commission should defer regulatory action until there is clear evidence in the market that action is needed to resolve rate issues. Nonetheless, there are a number of facts that demonstrate that market conditions will exert competitive pressure on CPP rates, and additional incentives for CMRS carriers to charge incoming airtime rates on CPP calls that are at competitive levels.

Ample Market Incentives Will Ensure that The Price of A CPP Call is Reasonable

First, the notification process described above will help ensure that, if charges are above competitive levels, consumers will reduce the number of calls they make to CPP subscribers, frustrating both parties and diminishing the value of the product. Indeed, a number of ILECs commented in earlier rounds that CPP arrangements were likely to decrease the number of incoming calls and result in even more unbalanced traffic flows.¹³¹ This proposition only holds if there is some elasticity with respect to the price of a landline-to-mobile call.

While, as the Notice observes, the calling party does not necessarily have a subscription contract with the terminating CMRS carrier, those calling parties do have the ability to influence the called party's choice of the CMRS carrier to whom they subscribe. Most wireless calls are from an individual known to the called party, often a friend or

¹³⁰Notice, para. 54.

¹³¹See, e.g., Comments of SBC on Notice of Inquiry (December 27, 1997), at 11-13.

close family member. MCI's "Friends and Family" marketing of long-distance service works on just this principle, for example. These individuals can (and will) suggest to the called party that he or she change CMRS service providers if incoming call charges are unreasonably high.

Supra-competitive prices for calling to mobile phones will result in lower wireless usage, and concomitant revenue losses for CMRS carriers. Under CPP, airtime revenues from the called party are foregone and must be replaced by equal airtime revenues from calling parties. If calling parties find the prices excessive, they will choose to contact their party through other means, e.g., a landline phone, pager or Internet e-mail. Excessive prices will therefore directly lead to net revenue losses. Indeed, AirTouch has spent a substantial amount of time and effort attempting to ascertain the correct price that will both encourage CPP calling, yield sufficient revenues, and prevent call-back incentives or other distortions.¹³² These complex calculations would not have been performed if there were any sense that an excessive price - that is, a price that overshoot actual price elasticity and demand levels - would be tolerated in the market. Also, AirTouch's interest in developing a more robust CPP option is part of a long-term strategy to compete for minutes of use. There is no benefit from a high return on a single call if the byproduct of such a transaction is to lose that customer's future business, lower overall minutes of use, and undermine corporate goodwill.

¹³²As described in the economic literature, wireless networks are very different from wireline networks in that, while the up-front or "sunk" costs are lower, the wireless carrier must be much more attendant to managing capacity. Each cell, and each radio channel, has a limited engineered capacity and wireless carriers therefore must use price to manage peak/off-peak use and prevent call-back incentives. See, e.g., G. CALHOUN, DIGITAL CELLULAR RADIO 35 (1988).

European Experience With Calling Party Pays Demonstrates that Rate Regulation is Not Necessary to Protect CPP Consumers in the United States

AirTouch has extensive European experience with respect to fixed-to-mobile calls, including the investigation of the rates for those charges undertaken by regulators in the United Kingdom and at the European Community level.¹³³ In Europe, calling party pays is the rule, not the exception. The total charge for a fixed-to-mobile call is assessed by the originating landline carrier, often the incumbent or “PTT.” The originating carrier forwards a percentage to the mobile carrier to pay for termination, while keeping a percentage for itself as compensation for origination. In many cases, the amount of the charge paid by end-users is determined by the PTT, although in a few cases it is set by the mobile operator. These prices are often subject to regulatory oversight, based upon negotiated arrangements.

While practices vary widely across Europe, it is generally true that this arrangement means that mobile carriers are less able to adjust incoming call rates in order to encourage traffic migration to their networks, as such adjustments could only be made through re-negotiating interconnect agreements, rather than simply unilateral action. Thus, the full impact of competitive market forces operating in the mobile industry may not be brought to bear on fixed-to-mobile prices in Europe.

¹³³See, e.g., Notice, para. 54, n.135.

In Europe, also, a number of facts point out that the issues regarding fixed-to-mobile call prices were more complex than simply addressing an inherent “bottleneck” over call termination. At the European Community level, an investigation of high fixed-to-mobile prices revealed that, in fact, mobile operators’s termination rates warranted investigation in only two markets: Germany and Italy.¹³⁴ In many European countries, where CPP has long been the norm, regulatory intervention to address mobile termination charges was not necessary. European experience therefore shows that CPP does not automatically or inherently carry with it the need for regulatory oversight or regulation of mobile termination rates.

Indeed, in the United Kingdom, the U.K. Mergers and Monopolies Commission (“MMC”) rejected the view that permanent regulatory oversight of mobile termination rates would be necessary. Rather, it simply found that competitive pressures were, for the moment, insufficient. Any market power over call termination held by mobile operators in the U.K. was temporary. As the MMC observed, “mobile telecommunications is still a relatively immature service in the U.K. The client base is growing in size and experience and it is possible that charges for incoming calls will assume greater competitive significance in the future.”¹³⁵ The MMC rejected the view that call termination is a “bottleneck monopoly” and it also rejected the view that call origination and termination

¹³⁴ See, e.g., “Commission successfully closes investigation into mobile and fixed telephony prices following significant reductions throughout the EU,” IP/99/298 (Brussels, May 4, 1999) <<http://europa.eu.int/rapid/start/>>

¹³⁵ Monopolies and Mergers Commission, “Cellnet and Vodafone - A Report on a reference under section 13 of the Telecommunications Act 1984 on the charges made by Cellnet and Vodafone for terminating calls from fixed-line networks,” December 1998 (“MMC Report”).

are separate product markets. Rather, termination is but one segment of the overall market for mobile services, the primary focus of which is competition for subscribers.¹³⁶

Some parties argued before the MMC that mobile termination is a “bottleneck” monopoly. In this view, competitive pressures for mobile phone subscriptions would have no effect on the price of call termination and regulation would always be required to keep prices at competitive levels. But the MMC correctly recognized that the question of whether call termination is a “bottleneck monopoly,” is not a useful area of inquiry, because this theoretical presumption ignores the more practical question of whether there is actual evidence of competition.¹³⁷

Accordingly, the MMC focused instead on examining the emergence of competitive pressure on termination charges.¹³⁸ Granted, the MMC found that such competitive pressure was, for the moment, insufficient. But it first began with the premise that rigorous analysis should inform any regulatory action, rather than theoretical presumptions. So, too, the Commission must determine whether there is any actual evidence of market power abuses or supra-competitive pricing for calls to U.S. CPP subscribers before taking regulatory action.¹³⁹

¹³⁶See *Id.*, para. 4.63.

¹³⁷*Id.*, para. 2.68.

¹³⁸The MMC focused on three particular areas of inquiry: 1) the availability of competitive alternatives to a fixed-to-mobile call, 2) the proportion of subscribers to mobile phone networks concerned about incoming call costs, and 3) the level of importance subscribers attach to incoming call costs relative to other features. See MMC Report, para. 2.171. In the U.S. model for introducing CPP, the extent of competition for fixed-line call origination is less relevant, since it will be mobile operators, not the fixed operator, setting prices, *i.e.*, the Commission has concluded that CPP calls are CMRS, not wireline local service calls.

¹³⁹For purposes of this analysis, the Commission should also be certain to ensure that any benchmark price comparisons compare the price of CPP calls to other CMRS airtime rates, not to landline prices for local calls.

Rate regulation would be enormously burdensome in terms of data collection, cost analysis and involve taking difficult decisions out of the marketplace and back into government.¹⁴⁰ Such intervention, even on a generic level, would likely harm the complex dynamics of the robustly competitive CMRS market, with uncertain benefits for the public interest. In the U.K., for example, the regulator has attempted to save the administrative burdens of doing a carrier-by-carrier cost analysis by setting benchmark prices for fixed-to-mobile calling. Competition has thus been harmed because such benchmarks apply to four very different mobile operators who have made different decisions with respect to costs, levels of investment, business strategies, and who have different call volumes to manage.

This benchmarking practice inevitably will be unfair in one way or another. Such regulation may punish high-cost mobile carriers, who may either have invested in more advanced (and thus more expensive) technology and/or have lower call volumes due to their status as more recent entrants. Or, such regulation will punish the consumers of low-cost carriers who now have no competitive incentive to price below the regulated benchmark. Regardless of where it is set, the practice of regulating prices in a competitive

Landline prices for local calls represent a vastly different wireline cost structure and, moreover, are heavily subsidized by rates from other services and fees paid by other telecommunications carriers, including wireless.

¹⁴⁰These pricing decisions are yet more complex in the wireless context than in the wireline context with which the Commission is more familiar. For example, because wireless involves managing scarce capacity - the limitation in the number of radio channels available in any given area - mobile operators must use pricing to manage demand for both outbound and inbound calls. A mobile operator must be able to influence end-user prices in order to manage overall traffic volume. This means that any intervention or adjustments to incoming CPP prices will affect price-setting for outbound airtime, monthly service charges, pricing innovations such as pre-paid service or airtime bundles, handset subsidies and other aspects of the competitive CMRS business.

market harms consumers. And, even when prices are measured against a benchmark, price regulation involves an extraordinary and unnecessary level of regulatory involvement in CMRS rate setting. There are more than enough obstacles to widespread deployment of a CPP arrangement that the Commission need not create additional obstacles by adopting price regulations that inevitably distort competition.

CONCLUSION

Wireless consumers should enjoy the same advantages available to wireline consumers. CPP has the potential to give consumers more control over their wireless spending, and more robust use of their wireless services. CPP may make broadband CMRS telephony more affordable, particularly to low-income subscribers, and has the potential to make CMRS a more effective competitor with traditional wireline services. For these reasons, the Commission correctly concludes that whether CPP is attractive to consumers should be a decision made in the marketplace, and CPP's availability should not be foreclosed by regulators or by interference from monopoly LECs.

To this end, the Commission has already made one helpful step: the Declaratory Ruling correctly establishes that CPP services are CMRS services, provided on a "casual calling" basis. The next step should be to adopt a federal rule requiring LECs to offer billing services needed for CPP. Additionally, it would be helpful for the Commission to establish national guidelines prescribing the minimum elements that should be contained in

the process of notifying calling parties that they have called a CPP CMRS subscriber and about the rates that they will pay.

These two simple measures will remove the primary regulatory obstacles to more robust CPP deployment. For the most part, however, CPP's development remains the responsibility of CMRS carriers. The CMRS industry will be, as it should be, primarily responsible for designing a CPP product that is attractive to consumers - including calling parties. Allowing CMRS carriers to shoulder that responsibility in the market is the ultimate goal that AirTouch and the Commission share in these discussions concerning regulatory obstacles to CPP deployment.

Respectfully submitted,

By: s/ Pamela J. Riley
Pamela J. Riley
AirTouch Communications
1818 N Street, Suite 800
Washington, D.C. 20036
(202) 293-3800

Charles D. Cosson
AirTouch Communications
One California Street, 29th Fl.
San Francisco, CA 94111
(415) 658-2434

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