BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the matter of: Calling Party Pay Service Offering in the Commercial Mobile Radio Services.	WT Docket No. 97-207

COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION AND OF THE PEOPLE OF THE STATE OF CALIFORNIA

The California Public Utilities Commission and the People of the State of California (CPUC or California) submit to the Federal Communications Commission (FCC or Commission) these Comments on the Declaratory Ruling and Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding, released July 7, 1999.

In this proceeding, the FCC intends to remove regulatory obstacles to the offering to consumers of Calling Party Pays (CPP) services by Commercial Mobile Radio Service (CMRS) providers. The Commission has concluded that CPP offerings will benefit the development of competition in the local exchange market, and will provide new CMRS alternatives to consumers. The FCC's stated goal in this proceeding is "to help ensure that the success or failure of CPP offerings to reach this potential reflects the commercial judgments of service providers and the informed choices of consumers, both wireless and wireline, rather than unnecessary regulatory or legal obstacles and uncertainties".

(NPRM, ¶ 1.) The FCC seeks comments on various issues related to CPP. In particular, the Commission asks about the means to inform and to protect consumers as CPP is implemented.

I. STATUS OF CCP AS A SERVICE

In the Declaratory Ruling, the FCC concludes that CPP is a service and not a billing practice. (Ruling, ¶ 15.) Calling Party Pays requires the party placing a call to a wireless device to pay the per-minute terminating charges to the carrier providing service to the customer with the wireless device. By virtue of placing the call, the calling party has no other independent business relationship with carrier providing service to customer with the wireless device. Thus, the "service" in question is being provided to a third party, the calling party, who is not a customer of the wireless carrier.

The CPUC reached a different conclusion in our Decision 98-12-086, issued in December, 1998.[1] In D.98-12-086, the CPUC concluded that CPP was not a "wireless service" as the term was used in Pacific Bell's Tariff Cal P.U.C. Schedule 175-T. We reached this conclusion because the relevant tariff required that the service in question, in that case, billing and collection services, must be provided to end users of the carrier offering the service, and

[1] The CPUC's different conclusion is the subject of a request for comments in the NPRM, and we will address that issue later in these Comments. (See NPRM, ¶ 68.)

not to a third party who is not a customer of the carrier offering the service. For the same reason, we question the FCC's conclusion that CPP is, in fact, a service. We note that it is a "service" which can be compared to a customer using a telephone in a hotel room to place local or toll calls. In that situation, the customer cannot choose the provider of toll service, but must pay charges associated with each toll call. Yet, the customer is not paying for "hotel calling service". Rather, the customer is paying for toll service, but must access that service through the hotel's chosen provider.

Consequently, we do not quite see how CPP can truly be a "service" in that the CPP customer does not choose the carrier on whose network the CCP call terminates, yet the customer must pay that carrier termination charges. In contrast, when a customer places an (800) call, the customer also does not choose the carrier which terminates the call, but the customer is not paying termination (or any other) charges for the call. Alternatively, when a customer places an intraLATA or interLATA toll call, whether by presubscription, or by using an access code, the customer chooses the carrier terminating the call.

At the same time, the CPUC is sympathetic to the Commission's desire to have uniform rules for provision of CPP, especially given that many wireless providers offer service in multiple states, if not nationwide. It would be more efficient and effective from a consumer standpoint, to have a uniform notice for CPP calls. In this way, customers in every state will easily recognize the notice and understand what it portends.[2]

[2] We will offer more detailed thoughts on the uniform notice later in these Comments.

The CPUC recommends, however, that the FCC establish minimum notification rules which state commissions may augment if they believe it to be in the public interest to do so. For example, the FCC's proposed notice would include rate information, but the Commission suggests that it might consider eliminating inclusion of rate information in the notice after a period of eighteen months to two years. (NPRM, ¶ 44.) A state commission may determine that consumers are better protected by continued inclusion of rate information in the customer notice.[3] Other state commissions may choose instead to rely on the FCC's rules establishing minimum requirements for a uniform notice.

We note that the Public Utilities Commission of Ohio has filed a Petition for Reconsideration and Clarification and Further Comments on Jurisdictional Issues (PFR) pertaining to the FCC's Declaratory Ruling on CPP. Ohio raises some of the same concerns the CPUC set forth here. California intends to respond in support of the Ohio PFR and will further discuss jurisdictional issues in that response.

Finally, we concur with the Public Service Commission of Wisconsin that the FCC's "initial analysis provided in the NPRM provides inconclusive evidence" to support the Commission's conclusion that CCP may expand wireless market penetration and in

[3] Customer liability for CPP charges if rate information is not included in the uniform notice would be in doubt, as an implied contract between the calling party and the CMRS provider would not be created if the calling party does not receive notice of the charges to be imposed. (See discussion in § III.A.1 of these Comments.)

doing so, create a "near-term competitive alternative" ILEC residential service. (Comm. of Wisconsin PSC, p. 2, citing NPRM, ¶ 20.) While we do not disagree with the FCC that greater wireless market penetration may provide real competition for wireline service, we agree with Wisconsin that the Commission has not adequately supported its conclusion.[4] The CPUC believes the Commission must more fully explore this question in order to justify any conclusion about the competitive potential of CPP and wireless services.

II. CCP CREATES CAPTIVE CONSUMERS

A. California Recommends That CPP Should Not Be Mandatory

The CPUC is concerned about how the FCC's various CPP proposals could affect consumers. The FCC proposes two types of CCP: 1) Optional CCP, which would allow CMRS providers to offer CPP if the CMRS customer chooses that option, and 2) Mandatory CPP, which would require incumbent local exchange carriers (ILECs) to assess their customers terminating airtime charges associated with CPP.[5] Most European countries employ Mandatory CPP, which means that a customer must pay his/her LEC the costs associated with terminating CCP calls. Under this model, CCP is mandatory because the wireless customer cannot choose to pay or not pay the per-minute charges associated with incoming calls. In contrast, Optional CPP allows CMRS providers to continue to offer plans for which the calling party is responsible only for toll charges

[4] Rather, the FCC concludes that the availability of prepaid wireless service would effectively encourage expansion of wireless market penetration.

[5] Mandatory CPP would result when CMRS providers charge LECs for termination costs associated with airtime facilities. These costs exceed the costs recovered normally through symmetrical interconnection agreements.

incurred in accessing a wireless customer, and the costs associated with incoming wireless calls are borne by the wireless subscriber.

Today, symmetrical interconnection compensates each carrier's transport costs from the carrier's facilities to the switch. Each network provider, whether wireline or wireless, is responsible for recovering termination costs through its access and toll or airtime rates. The CPUC believes that the market, not the FCC, should determine how each carrier recovers wireless and wireline termination costs for CPP calls.

In either the optional or mandatory model, CPP creates a category of calling ratepayers captive either to the service plan of the CMRS subscriber, or in the case of mandatory CPP, captive to the LEC. Consumers are captive because, as noted previously, they have no choice as to which carrier will terminate the call to the wireless customer. Further, under a mandatory CPP model requiring LEC billing of the calling party, the market would likely be insufficient to control excessive pricing of wireless termination because the market will be so new. In England, regulators have not relied on market forces to set termination rates because of the absence of competition for such charges, and instead, have intervened to establish termination rates. (See OFTEL's submission to the Monopolies and Mergers Commission, May, 1998.) The CPUC believes it best for the FCC to avoid creating a market structure that would require it later to engage in rate regulation when better alternatives exist.

One result of CCP could be a shifting of costs from the CMRS end user to the CCP captive customer. This could be effected by the CMRS provider charging more per

minute for its customer's incoming calls versus the same customer's outgoing calls. This could easily occur under a mandatory CPP scheme which includes LEC billing for CPP termination charges. Because competition for CPP termination charges is nonexistent, regulatory intervention would likely be necessary to ensure that termination rates are not excessive.

In addition, both mandatory and optional CPP would increase the cost of basic exchange service to all consumers who are now able to avoid pay-per-call charges for terminating to wireless customers. Shifting termination costs from the wireless subscriber to the calling party will result in an increased revenue stream to CMRS providers from captive consumers rather than from their own customers. This, in turn, poses the possibility that CMRS providers could shift a greater percentage of their costs from their own end users to calling parties, who would be able to choose only <u>whether</u> <u>to</u> terminate but not <u>who</u> <u>would</u> terminate the call.

California prefers to promote competition and consumer choice, not regulatory intervention or mandatory rate increases. Thus, the CPUC supports a solution that would allow optional CPP with appropriate consumer protection rules, thereby allowing market participants to judge the efficacy of CPP. This approach also requires the FCC to balance the dual policy goals of promoting competition but ensuring that consumers are protected from potential market excesses.

California believes that symmetrical compensation will spur reasonable termination rates, and accommodate optional CPP, whereas asymmetrical compensation

will have produce effects harmful to consumers. The FCC appears to lend credence to CMRS provider claims that consumers will leave their telephones "on" if CPP were available. California believes common sense dictates that most customers of any CMRS service will shut off their devices at appropriate times – to conserve battery life, to avoid distraction while driving, or not to disturb others in public places, such as meetings or theatres – regardless of whether the customer subscribes to CPP.

Competition within CMRS markets has resulted in providers offering flat rate plans, which include blocks of "anytime" airtime minutes. Plans are tailored to consumer usage needs and budgets. In addition, the entry of PCS in the wireless market and their offering of flat rate plans has spurred increased CMRS subscribership. This growth has occurred without CPP, which suggests that greater wireless market penetration and usage can be achieved simply by promoting plans responsive to consumer needs.[6]

Industry response to consumer needs has included plans offering "the first incoming minute free" as a means to encourage end users to keep their wireless devices activated. While this first free minute is a benefit to consumers, the application of CPP could simply increase revenue for the CMRS provider at the expense of the calling party. The FCC can best assist CMRS providers to penetrate the local telephone market by promoting more competition in the wireless industry, which will result in lower rates and more consumer choice. Nonetheless, if the FCC determines that CPP is responsive to

[6] At the same time, the CPUC recognizes that some CMRS customers may be demanding CPP, and the industry's desire to provide the service may be responsive to that demand

consumer demand and a reasonable means of encouraging usage, then the FCC should ensure that adequate consumer protections are put in place.

III. CONSUMER PROTECTIONS

The CPUC is most concerned about three key consumer protection issues which must be resolved before CPP can be made available. First is the form of notice which the calling customer receives when placing the call. Subsumed in the notice issue is the more specific question the Commission poses regarding whether the proposed customer notice would create an implied contract between the calling party and CMRS provider.

Second is what charges are assessed against the calling party, i.e., how the "termination" charges and/or "airtime" charges assessed against the calling party are defined. And, third is the issue of whether it is appropriate to set a cap on the charges assessed against the calling party.

A. Customer Notice

The CPUC concurs with the FCC that 'some effective form of calling party notification is critically important to avoid consumer confusion with widescale CMRS provider introduction of CPP offerings.[7] (NPRM, ¶ 30.) The Commission proposes to include the following four elements in a standard CPP customer notices:

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.

[7] We disagree with the Commission's apparent conclusion that only the FCC can establish the requirements for the CPP customer notice. California believes the FCC's customer notice mandate should constitute minimum requirements, and that states should be free to augment the notice requirements consistent with overall FCC CPP policies.

3) The per-minute rate, and other charges, that the calling party will be charged by the CMRS provider.

4) Notice that the calling party will have an opportunity to terminate the call prior to incurring any charges. (NPRM, ¶ 42.)

In our own decision authorizing CPP and adopting a requirement for an "intercept message" we declined to include mandatory notice of the per-minute rate and/or other charges that might be imposed on the calling party. Nonetheless, we do not object to inclusion of this element in the FCC's proposed customer notice. Indeed, the FCC has identified a very specific reason for considering inclusion of rate information in the customer notice – the creation of an "implied-in-fact", or implied, contract.

1. Implied-in-Fact Contract

The CPUC believes that, for the transaction between the calling party and the CMRS provider to create an implied contract, the calling party must be informed of the charges associated with the call, and must agree to continue the call based on that knowledge. Without adequate information concerning the charges to be assessed for the call, the calling party later could be charged very high rates, which, had the caller been aware of those changes when placing the call, might have dissuaded him or her from completing the call. It is an axiom of contract law that customers must be of like mind when making a deal. If the calling party is to be held legally responsible for the charges associated with the CPP call, that caller must know what rates will be imposed. Without that information, the caller will not be knowingly entering into a binding contract, and the CMRS provider will have a more difficult time collecting owed amounts.

Further, the CPUC envisions that failure to include rate information in the customer notice will result in untold numbers of complaints both the FCC and to state commissions once the customer receives the bill and sees that charges assessed. These complaints would be diminished in number if the calling party is informed in advance what the per-minute charges will be, and provided adequate time to accept or reject the termination charge(s).

California has a very specific concern regarding another element contained in the Commission's proposed notice. We observe that in our own decision authorizing a CPP trial, we required notice that the calling party would have an opportunity to terminate the call prior to incurring any charges. And, the CPUC is generally aware that 900/976 services afford a similar opportunity for early call termination.

The CPUC supports the FCC's proposed comparable call termination opportunity. We note, however, that TTYs pose a special problem in this regard because they operate very slowly. We have been informed that in many instances TTY users were not able to terminate a call to a 900/976 service in time to avoid incurring charges.[8] We urge the FCC to ensure that the uniform notice minimum rules require CMRS providers to allow

[8] California understands that Sprint's 900 service to TTY users does allow enough time to reject a call before incurring charges.

sufficient time for TTY users to terminate calls before incurring charges. At the same time, if the uniform notice does not include sufficient time for call termination, the TTY user should not be required to pay for charges incurred when the call could not be terminated quickly enough.

B. Scope Of Charges To Be Assessed Against the Calling Party

In California's view, the FCC must address the question of what "termination" services or charges will be assessed against the calling party. Would these charges be assessed for incomplete or voice messaging ("voicemail") calls which do not actually use airtime facilities? If the Commission does not resolve these questions, state commissions will be deluged with questions and complaints arising from situations in which charges are imposed on these very types of calls which have no airtime associated termination costs borne by the CMRS provider.

The CPUC believes that the calling party should not be held liable for incomplete or voice messaging calls which do not use facilities. CPP provides the opportunity for CMRS providers to inappropriately charge the calling party for incomplete or otherwise unsuccessful calls. This would be in stark contrast to the practice in the wireline network, where carriers charge the caller only for completed calls. Certainly, wireline providers incur originating costs associated with placing a call that ultimately is not completed. Wireline carriers recover those costs from the charges assessed for completed calls. In the CPUC's view, customers should not be charged for calls when the CMRS phone is switched off or out of range, regardless of whether the call is answered by a

message-taking service. If the call is not completed to the wireless device, the calling party should not be liable for airtime charges.

Finally, there are questions regarding how to treat, for billing purposes, calls forwarded to a voice messaging service. If a CMRS customer pays for a CPP call forwarded to a voice messaging service, then the CMRS customer's billings could be influenced by a third party, i.e., the calling party, placing the incoming call. If the CPP customer pays for that incoming call to the CMRS customer, and the FCC does not limit the per-minute charges for CPP calls, then that CPP customer may pay much more for the call than the actual cost to reach the tandem serving the wireless customer. The FCC should resolve this issue before authorizing CPP service.

C. The FCC Should Ensure That CMRS Per-Minute Termination Rates Do Not Exceed Per-Minute Originating Rates

The FCC should require that termination rates assessed against the calling party do not exceed the charges the same CMRS provider assesses against the called party. In other words, the per-minute amount the calling party pays should be no more than the amount the called party pays to make a call. If the FCC does not impose this restriction, or some other restriction intended to ensure that the charges imposed on the calling party are reasonable, CMRS providers could take advantage of the very existence of CPP to shift costs from their own customers to calling parties. This possibility poses the potential to cause CPP users to become completely disenchanted with CPP and even with CMRS services more generally. The result would be counterproductive and would defeat the very purpose for which the Commission is proposing CPP.

IV. BILLING AND COLLECTION

In the NPRM, the FCC seeks comment on the general subject of LEC billing and collection for CPP services. (NPRM, ¶¶ 58-61.) The CPUC agrees with those commenters who oppose a Commission mandate that LECs provide billing and collection services for CMRS providers offering CPP to their customers. We note the FCC's observation that it generally has declined to regulate the provision of billing and collection services "unless regulation is needed to protect competition". (NPRM, ¶ 59.) In the case of CPP, regulation is not necessary to protect competition, as there is increasing competition in the wireless industry, particularly since introduction of PCS. Presumably, the purpose of FCC-mandated LEC billing and collection service would be to protect the ability of CMRS providers to offer the service more cost-effectively. This, in essence, would constitute Commission intervention in the marketplace to regulate the costs of providing a particular competitive service. As competition in various telecommunications markets develops, it seems less and less appropriate for regulators to intervene to protect the costs of any one group of providers. Further, billing and collection services are a matter of traditional state regulation. Consistent with our support for the Ohio PFR, we note that if a state commission wishes to require its intrastate LECs to provide billing and collection services for CMRS providers of CPP, then the state should be free to do so.

The Commission also seeks comment on whether it should mandate that "LECs provide to CMRS providers billing information sufficient for the CMRS provider or third parties to bill calling parties for CPP-related calls, or that LECS provide any CPP-related

billing and collection on a nondiscriminatory basis". (NPRM, ¶ 62.) While the CPUC believes it is unnecessary for the Commission to mandate LEC billing and collection for CMRS CPP services, we do recommend that, if the FCC adopts rules in this area, it should only mandate that LECs provide billing information to CMRS CPP providers. Plainly, LECs possess billing information the CMRS provider would need to bill the calling party for a CPP call to a CMRS customer. Ideally, the LECs and the CMRS providers should negotiate the transfer of billing information. In the event that LECs resist, for whatever reason, providing the necessary data to the CMRS provider(s), it is reasonable for FCC rules to compel provision of such information.

Finally, the CPUC urges the FCC to adopt non-discrimination rules regarding the provision of LEC billing and collection information to CMRS providers offering CPP. If a LEC provides CPP billing and collection information to its own affiliate(s) or to a particular carrier under contract, the LEC must also provide that information to other requesting CMRS providers offering CPP. The LECs should not be allowed to favor their affiliates, or carriers with whom they have special business relationships, to the exclusion and detriment of other CMRS providers of CPP. The FCC's minimum rules should prohibit discrimination in the provision of billing and collection data to CMRS providers.

V. MISCELLANEOUS ISSUES

The CPUC believes that introduction of CPP should be include the availability of blocking options. California notes that in its brief discussion of blocking options, the Commission addresses technical and cost concerns. (NPRM, ¶ 44.) The CPUC believes

that blocking options have a consumer protection component that should be a factor in the Commission's assessment of the viability and usefulness of blocking options.

Further, California recommends that the FCC authorize creation of area codes dedicated to wireless services as a form of customer notification. We are aware that the Commission is addressing the issue of establishing dedicated area codes in its Numbering Resources Optimization proceeding, CC Docket 99-200, and we have submitted comments in that docket. We noted there and we note here that area codes dedicated to wireless services would provide a form of consumer protection by informing customers automatically that a call to a wireless number may incur per-minute charges. Creating dedicated area codes would, however, necessitate a public information program to alert consumers to the new concept. Because of an FCC prohibition, no state has established an area code dedicated to a specific service or technology since 1996. At the same time, the CPUC is aware that the concept of dedicated area codes enjoys popular support.[9] We urge the Commission to reconsider its ban on service- or technology-specific area codes

[9] At public meetings the CPUC conducts in conjunction with our area code relief planning process, members of the public invariably recommend that we create area codes dedicated to particular services or technologies.

in light of its pending action on CPP.[10]

VI. JURISDICITIONAL QUESTION

In the NPRM, the FCC mentions a CPUC decision in response to a complaint against Pacific Bell regarding billing and collection for CPP. The commission asks if the CPUC decision raises any "jurisdictional issues" which need to be addressed. The answer is "no".

In 1997, the CPUC authorized a market trial of CPP. (See CPUC Decision 97-06-109.) Pursuant to that authorization, AirTouch and Pacific Bell (Pacific) entered into negotiations to establish a billing and collection agreement for CPP calls to AirTouch delivered by Pacific. The negotiations were unsuccessful, and AirTouch Cellular and its affiliates filed a complaint against Pacific with the CPUC. AirTouch alleged that Pacific was required by its tariffs to provide billing and collection services. In our opinion dismissing the complaint, Decision 97-12-044, the CPUC found that Pacific had not violated its tariffs, because the term "wireless services" in Pacific's tariffs was not broad enough to include CPP.

This CPUC decision raises no jurisdictional issues for the Commission to resolve. The decision was based on intrastate tariffs for a service proposed to be offered on an intrastate basis. If the FCC adopts binding rules regarding the entry of CMRS providers

[10] We note the suggestion that an area code could be dedicated just to CPP. In order for that arrangement not to deplete precious and dwindling numbering resources, the dedicated CPP area code should be an expanded overlay, covering many existing area codes. Even then, it may not be a particularly efficient use of numbering resources. The FCC should evaluate this option in light of the phenomenal industry demand for numbers.

into the CPP market, those rules would prevail over an intrastate tariff which does not include CPP as a wireless service.

VII. CONCLUSION

For the reasons stated, the CPUC urges the Commission to establish minimum national rules for a uniform customer notification for CPP. We also recommend that the FCC protect CPP consumers by establishing symmetrical compensation for incoming and outgoing CMRS traffic. California opposes mandatory LEC billing and collection for CPP, but believes that the LECs should be required to provide CMRS providers with adequate billing information. Finally, we propose that the Commission adopt blocking options and authorize creation of area codes dedicated to wireless services as a further form of consumer protection.

Respectfully submitted,

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