

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298**DOCKET FILE COPY ORIGINAL**

October 4, 1999

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FCC

Magalie Roman Salas, Secretary  
Federal Communications Commission  
Office of the Secretary  
Portals  
445 Twelfth Street, S.W.  
Washington, D.C. 20024

**Re: WT DOCKET NO. 97-207**

Dear Ms. Salas:

Enclosed please find an original copy of the COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION AND OF THE PEOPLE OF THE STATE OF CALIFORNIA in the above-referenced docket. This document was also filed electronically on October 4, 1999.

Also enclosed is one additional copy of the document. Kindly file-stamp this copy and return it to me in the enclosed self-addressed envelope.

Thank you for your attention to this matter. If you have any questions, I can be reached at (415) 703-1319.

Sincerely,

A handwritten signature in cursive script that reads "Helen M. Mickiewicz".

Helen M. Mickiewicz  
Counsel for California

HMM:ngs

Encl.

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**ORIGINAL**

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

In the matter of:

Calling Party Pay Service Option in the  
Commercial Mobile Radio Services.

WT Docket No. 97-207

DEC 12 1999

FCC 1212110011

**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 these Comments on the Petition for Reconsideration and Clarification submitted by the Public Utilities Commission of Ohio (Ohio or Ohio PUC). Ohio requested reconsideration and clarification of the Declaratory Ruling issued by the Federal Communications Commission (FCC or Commission) in this docket on July 7, 1999.

California supports Ohio's Petition for Reconsideration (PFR) and agrees that, at a minimum, the FCC must clarify the scope of the jurisdiction it appears to be asserting over Calling Party Pays (CPP). Further, the CPUC concurs with Ohio that the FCC has incorrectly characterized CPP as a service rather than a billing practice.

**I. INTRODUCTION**

On July 7, 1999, the FCC issued its Declaratory Ruling and Notice of Proposed Rulemaking (FCC Order) on Calling Party Pays. In general, the Commission proposed to

remove regulatory obstacles to the offering to consumers of CPP by Commercial Mobile Radio Service (CMRS) providers. The FCC concluded that CPP offerings will benefit the development of competition in the local exchange market, and will provide new CMRS alternatives to consumers. Most importantly, the Commission concluded, based on comments previously received, that CPP is not a billing practice, as some parties had argued, but is a service. The Commission went on to propose rules that would govern provision of CPP as a service, and sought comment from parties on those proposed rules as well as on other issues related to CPP. On September 18, 1999, California filed Comments in response to the Notice of Proposed Rulemaking contained the FCC Order.

The Ohio PUC filed its Petition for Reconsideration and Clarification and Further Comments on Jurisdictional Issues in August. Ohio makes several arguments. First, Ohio asserts that the FCC Order on CPP “contains significant ambiguities regarding the jurisdictional issues” which Ohio urges the Commission to clarify. Ohio then argues that, in its Order, the FCC improperly concluded that CPP is a CMRS service. Assuming that CPP is properly classified as a CMRS service, Ohio goes on to note, that the FCC does not possess exclusive authority under Section (§) 332 of the Omnibus Budget Reconciliation Act of 1993 (OBRA) to impose mandatory national rules. Ohio points out that § 332 conferred on states concurrent jurisdiction over consumer issues addressed in the FCC Order.

California concurs with Ohio on all points. Like Ohio, the CPUC has no interest in regulating CPP with a heavy hand, preferring instead to allow market forces to dictate

the success or failure of the offering. Nonetheless, like the Ohio PUC, California wishes to ensure that consumers are adequately protected from potential abuses which could easily result if CPP is implemented without appropriate requirements for customer notice and billing practices. Indeed, like the Ohio PUC, the CPUC believes that CPP is a billing practice subject to state jurisdiction. The FCC's conclusion that CPP is a "service" appears to be little more than a sleight of hand to preclude states from exercising their lawful authority over a billing practice.

## **II. JURISDICTIONAL AMBIGUITIES**

The Ohio PUC explains in its PFR the inconsistencies in the FCC's CPP order pertaining to state jurisdiction. Ohio does not dispute, nor does California, that § 332 precludes state regulation of CMRS rates or entry. At the same time, § 332 reserves to the states authority over CMRS terms and conditions, a fact which the FCC's CPP Order gives scant attention. Specifically, as Ohio notes, while the FCC acknowledges the states' interest in terms and conditions of matters such as billing practices, the Commission appears to "incorporate a plan to preempt or severely limit the ability of State Commissions to directly address CPP consumer issues". (PFR, p. 6.) Ohio argues in particular that the FCC should state explicitly and without ambiguity how it envisions the relationship between the states and the Commission regarding CPP:

Either the FCC agrees that the consumer issues being addressed in this docket are within the "other terms and conditions" jurisdiction of the States or it believes that the CPP issues presented somehow require "rate regulation", and are pre-empted. If the FCC is going to attempt to pre-empt

State CPP regulations, it should “come clean” and state its intentions without ambiguity. (PFR, p. 6.)

The CPUC agrees with the Ohio PUC that the Commission should address squarely and plainly the jurisdictional issues raised by CPP.

### **III. CPP IS NOT A CMRS SERVICE**

The CPUC read with great interest Ohio’s assessment of the FCC’s analysis of CPP as a “service”. Like the Ohio PUC, California found the FCC’s determination that CPP is a service to be fundamentally counter-intuitive. 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 using the wireless device. By virtue of placing the call, the calling party has no other independent business relationship with the carrier providing service to the 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. 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 at issue, billing and collections services, must be provided to end users of the carrier offering the service and not to a third party who is not a customer of the carrier offering the service.

For the same reason, in our September 18<sup>th</sup> comments in this docket, we questioned the FCC's conclusion that CPP is, in fact, a service. We noted there that CPP 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, and must pay the charges the hotel imposes. Thus, the hotel's assessment includes the billings for the call as well as for the hotel's charge for providing access. But the process of the hotel billing the customer for the call does not create a new service. Neither would a new service be created if someone other than the wireless service provider were to bill the calling party for a CPP call. That would simply be another billing arrangement.

Consequently, as noted in our September 18<sup>th</sup> comments, we do not understand how CPP can truly be a "service" in that the CPP customer does not choose the carrier on whose network the CPP call terminates, yet the customer must pay that carrier's airtime charges. Similarly, the hotel guest does not choose the carrier of his or her toll calls placed from the hotel room. 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. Similarly, when a customer places an intraLATA or interLATA toll call from a wireline phone, whether by

presubscription or by using an access code, the customer pays associated charges, but has chose the carrier terminating the call.<sup>1</sup>

The Ohio PUC offers additional arguments, with which California agrees, demonstrating why the FCC's categorization of CPP as a service is wrong. (PFR, pp. 8-11.) In addition, as Ohio explains at length, the Commission's attempt to distinguish CPP services and "CPP-like services" is confusing. The Ohio PUC correctly observes that "the distinction between CPP and CPP-like services is merely a different choice in billing options". (*Id.*) Thus, California agrees that the FCC's characterization of CPP services and CPP-like services adds up to little more than a distinction without a difference.

#### **IV. EVEN IF THE FCC PREVAILS IN ITS DETERMINATION OF CPP AS A SERVICE, THE COMMISSION DOES NOT RETAIN EXCLUSIVE JURISDICTION OVER CMRS**

Ohio argues extensively that in its Order, the FCC appears to have overstepped the scope of jurisdiction it possesses in regard to CMRS. (PFR, pp. 11-19.) Specifically, Ohio notes that § 332 reserves jurisdiction over "other terms and conditions", aside from rate or entry regulation, to the states. Further, citing the FCC's decision in Petition of Arizona Corp. Comm.<sup>2</sup>, the Ohio PUC argues persuasively that the FCC itself has

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<sup>1</sup> Even the hotel guest has the option to "dial around" the hotel's choice of carrier to access the guest's chosen service provider. This would not be true for the calling party placing a CPP call to a wireless customer.

<sup>2</sup> GN Docket 93-252, Report and Order on Reconsideration, 10 FCC Rcd. 7824 (1995).

determined that CPP “was properly subject to State regulation”. (PFR, p. 12.) While the FCC may reverse its conclusion in the Arizona case, Ohio correctly asserts that “the FCC cannot unilaterally amend Section 332 or alter the applicable Federal court decisions”. (PFR, p. 13.)

Specifically, the Ohio PUC discusses in detail the status of state authority over “other terms and conditions” as a “default reservation of authority ... over non-rate, non-entry CMRS regulation”. (PFR, p. 14.) Ohio cites in particular GTE Mobilnet of Ohio v. Johnson, 222 F.3d 469 (6<sup>th</sup> Cir. 1997), in which the Sixth Circuit Court of Appeals directly addressed the question of state regulation under § 332. In GTE Mobilnet, the Sixth Circuit did not find that the Ohio PUC’s consideration of a complaint against GTE Mobilnet constituted rate regulation. The FCC also addressed the Ohio complaint action, and concluded that “Ohio retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS providers in that state”. (PFR, citing In the Matter of Ohio Petition, PR Docket 94-109, Report and Order (May 19, 1995), 10 FCC Rcd. 7842 at ¶ 9.)

As Ohio points out, the type of regulation at issue here is not directly related to rates. Certainly, compliance by CMRS carriers with state-mandate customer notice requirements could require those providers to pass along to their customers the costs of providing the notice(s). This mere possibility does not constitute rate regulation, any more than does a requirement that carriers file tariffs with state commissions. There is a

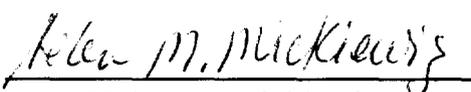
logical end to how far rate regulation can reasonably be extended; requiring customer notice is not a logical extension of rate regulation.

## V. CONCLUSION

The CPUC concurs with Ohio's PFR and urges the Commission to reconsider and revise its conclusion that CPP is a service rather than a billing practice. Further, if the FCC persists in its finding, at a minimum, the Commission should clarify the scope of jurisdiction over CPP it is asserting. As Ohio points out, "[t]his jurisdictional question is important because CPP directly affects the rates paid by landline customers for calls that are local in nature". (PFR, p. 19.) In addition, the CPUC believes the jurisdictional question is important because it affects the degree to which California and other states may act to protect their citizens from potential billing abuses.

Respectfully submitted,

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