

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

**REPLY 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 Reply Comments on the Declaratory Ruling and Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding, released July 7, 1999.

In the NPRM, the FCC stated its intention to remove regulatory obstacles to the offering to consumers of Calling Party Pays (CPP) services by Commercial Mobile Radio Service (CMRS) providers. Close to fifty parties submitted Comments in this proceeding on September 17, 1999. The CPUC has reviewed some of those comments and responds here on a few key issues.

I. UNIFORM NOTIFICATION

A. States Retain Jurisdiction Over CMRS “Other Terms and Conditions”

In our September 17th Comments, the CPUC stated its support for a uniform national notification announcement, so long as the FCC’s rules pertaining to the notice are minimum rules. As discussed in our Comments, pursuant to § 332 of the Communications Act, while states no longer have authority over CMRS entry or rates, states still retain jurisdiction over “other terms and conditions”. On July 16, 1999, the Public Utilities Commission of Ohio (PUCO) filed a Petition for Reconsideration and Clarification (PFR) of the FCC’s July 7th Order. On October 4, 1999, the CPUC filed Comments in support of the Ohio PFR. Ohio and California agree that the Commission’s Declaratory Ruling incorrectly concluded that CPP is a service, and then, based on that conclusion, inappropriately assumed full FCC jurisdiction over the terms and conditions of CPP “service”. The CPUC and the PUCO agree that, even if the FCC prevails in its conclusion that CCP is a “service”, the Commission cannot pre-empt authority which Congress has explicitly granted the states.

Consequently, while the CPUC welcomes a national standard for customer notification regarding CCP, we disagree with those commenting parties who unequivocally concur with “the FCC’s conclusion that it has the authority to implement uniform nationwide notification and other standards”. (United States Cellular Corporation [USCC] Comm., p. 6; see also AT&T Comm., pp. 5-6, GTE Comm., pp. 15-17, Qwest Communications Comm., pp. 6-7.) A plain reading of § 332 prohibits the

FCC from asserting exclusive jurisdiction over CPP terms and conditions. We are not persuaded that “[s]tate regulation of CPP . . . creates insoluble practical problems which have prevented and will continue to prevent the large scale implementation of CPP”.

(Id.) Rather, a perusal of the trade press indicates that CPP has been unsuccessful to date for reasons other than a patchwork of state regulation. In Minneapolis, AT&T abandoned its offering of CPP and did not roll it out anywhere else, citing lack of profitability. (See Attachment 1.) In addition, CMRS providers have encountered difficulties in establishing cost-effective billing arrangements. (See CPUC’s September 17th Comm., pp. 17-18.)

None of these problems arise from inconsistent state regulation. Rather, they stem from inherent complications in the offering of CPP because of its very nature as a billing arrangement between the CMRS provider and a third party who is not a subscriber to the CMRS provider’s service. No amount of state regulation or lack thereof can or will overcome those inherent complications. What FCC pre-emption of state regulation will do, however, is prevent states from ensuring that their citizens are protected from potential billing abuses by CMRS providers. Therefore, California urges the FCC to clarify that, pursuant to § 332, a state commission may impose additional notification requirements if the state commission believes the public interest would be better served by doing so.

B. Notice Requirements Do Not Constitute Rate Regulation

Some commenting parties assert that the FCC should pre-empt state regulation of CPP terms and conditions, and specifically of state jurisdiction over CPP notice requirements, because regulation of terms and conditions constitutes rate regulation.

The Commission also could classify CPP as a CMRS rate, putting it beyond the reach of state and local regulators and within the scope of the Commission's plenary authority over the "rates . . . for commercial mobile services". This authority plainly covers the nature and type of charges imposed for CMRS, and it is broad enough to include the manner in which these charges are collected. (AT&T Comm., p. 3, original emphasis.)

This is a nonsensical argument, which offends several principles of statutory construction. AT&T proposes that the FCC read the language of § 332 so broadly that the Commission's authority over rates and entry swallows the express delegation to states of authority over "other terms and conditions". First, this would ignore the plain meaning of the words in the statute reserving state jurisdiction over "other terms and conditions". Second, interpreting FCC authority over rates and entry to include express state authority over other terms and conditions requires the FCC to read out of the statute the explicit grant of authority to the states, thus giving no meaning to that portion of § 332. Third, such an interpretation lends ambiguity to language which, in and of itself, is unambiguous: Congress gave the FCC jurisdiction over CMRS rates and entry, but reserved to the states jurisdiction over other terms and conditions for CMRS.

Simply put, had Congress intended the states to retain no jurisdiction over CMRS providers, Congress would have drafted § 332 accordingly and the FCC would possess exclusive authority. Such is not the case, and no amount of manipulation of the statutory language will produce a different result. The FCC should reject, as a threshold matter, the claim that jurisdiction over other terms and conditions is actually rate regulation.

II. CONSUMER PROTECTIONS

A. Inclusion of Rate Information in the Uniform Notice

GTE and other commenting parties propose that rate information need not be included in a uniform notification. This, they say, would make the notice too long. GTE goes so far as to assert that such a requirement would distinguish CPP from other services

Up-front, on-the-line point of long distance charges is not mandated in any other service and there is no reason for making CPP the progenitor of such a requirement. (GTE Comm., p. 19.)

In fact, the FCC has an excellent reason for mandating inclusion of rate information in a standard CPP intercept message: CPP is not like any other service. A typical service involves a contractual relationship between a customer and a service provider. The service provider provides service on a regular basis to the subscriber, bills the subscriber for the service, and (hopefully) the subscriber pays the provider. In the case of CPP, the calling party is not a subscriber to the CMRS provider's service. The calling party does not select the CMRS provider and has no independent relationship with the CMRS provider associated with the call being placed. The calling party is, in effect, a third party to the arrangement between the subscriber and the CMRS provider. Yet the calling party and not the subscriber pays the CMRS provider for completing the call. The CPUC is aware of no other service with such a construction.

Given the unique nature of the service structure, the notification to the customer must communicate sufficient information for the calling party to know what charges he may be liable to pay. Because the calling party has no independent relationship with the CMRS provider associated with that call, the calling party has no independent means of

determining what charges may be assessed. Prior to placing the call, the calling party likely will not know what CMRS provider serves the called party, and thus, cannot contact that provider for rate information. The only chance for that customer to be informed about her liability before proceeding with the call is the intercept message. Thus, the FCC has identified a valid function for inclusion of rate information in the uniform notice.

B. An Implied Contract Cannot Be Created Without Rate Information

GTE asserts that omitting rate information from the uniform notice will, nonetheless, create a binding contract between the calling party and the CMRS provider. GTE claims that “if contracting parties have not agreed on an essential term, such as price, a reasonable term will be supplied by the court”. (GTE Comm., p. 27.) This approach might make sense if the calling party had the opportunity to negotiate with the CMRS provider before placing the call. No party has proposed such an arrangement, and, indeed, it would make the offering of CPP logistically impossible. Thus, since the parties are not negotiating the terms of the “contract” and the calling party is captive to the CMRS provider if she wishes to complete the call, the calling party must rely on the service provider to provide the service at any price. The “contract” created between a calling party placing a CPP call and the CMRS provider completing the call would be analogous to an adhesion contract, since the calling party has no ability to negotiate, but

is bound by, the terms which the CMRS provider dictates.¹ The caller is faced with two options: complete the call at the terms set by the CMRS provider, or do not complete the call. But the caller has no alternative means to reach the called party, as the network of the CMRS provider serving the called party is the only route to the called party. In an emergency, the calling party may have no choice but to proceed with the call, regardless of the terms, conditions, or price for the call.

In this context, the analogy to negotiating parties failing to mention an essential element which a court would later supply is misplaced. For that matter, the CMRS provider and not a court would initially supply the missing essential element. Or is GTE suggesting that in each and every instance where a calling party objects to the per-minute rate the CMRS provider charges, the customer must file a claim in civil court so that the court may supply the missing element?

Finally, GTE defeats its own argument by asserting earlier in its comments that the difficulty presented by including rate information in a standard notice is that it may not be possible “to provide up-front, on-the-line information concerning roaming charges at this time”. It would be “extremely complicated and costly” for GTE to obtain rate information from its Interactive Voice Response Unit in time to communicate that information to the calling party. Therefore, GTE seems to argue, the calling party should simply proceed with the call without a clue as to what it will cost and wait for the CMRS

¹ This is not to say that adhesion contracts are unenforceable. But the FCC must recognize that, under the scenario the Commission seems to envision, a CPP call is an arrangement between two parties of wildly unequal bargaining power. The rates assessed the calling party would accordingly be evaluated by a court in that context.

provider to “supply” the missing price element when billing the customer. This may be a practical arrangement for CMRS providers, but it will not create a binding implied contract, and it absolutely does not protect the calling party. The FCC should require inclusion of rate information in the minimum standard notice.²

C. Uniform Notice Issues Should Not Be Left to the Industry to Resolve

The United States Telephone Association (USTA) proposes that the FCC leave to the industry the details of how customers should be notified of the terms and conditions of CPP. USTA claims that “CMRS providers and incumbent LECs are motivated to make sure that notification and consent procedures are easy for consumers of all states to understand and execute, even if the content of such procedures varies slightly”. (USTA Comm., p. 11.)

This position is intriguing. First, USTA plainly considers inconsistent notice approaches to be perfectly acceptable, so long as the industry determines what those procedures are. In contrast, most other commenting parties who support uniform notice requirements assert that any inconsistencies would be “confusing” to customers, and would make it impractical for CMRS providers to offer CPP across state boundaries. So, which is it? If customers will be confused by state-mandated discrepancies in the CPP intercept message, then they will also be confused by inconsistent notice approaches developed by the industry. Conversely, if the FCC considers inconsistent notices

² Further, requiring inclusion of rate information in the intercept message may encourage the CMRS industry to develop a simplified rating scheme for CPP calls.

developed by the industry to be acceptable, it should be equally willing to tolerate such inconsistencies required by state commissions.

Further, the CPUC notes that if the industry develops notice protocols, the underlying motivation for doing so will be to ensure that CPP is a profitable service, and not to protect consumers from billing abuses. Since CPP would be a unique offering, as discussed elsewhere in this reply and in our September 17th comments, we urge the Commission to establish minimum notification rules and to make clear that states may augment those rules. To the extent the FCC's uniform notice requirements mandate inclusion of rates, the states may be less concerned about the need to augment the Commission's rules.

III. THE COMMISSION HAS NOT ADDRESSED KEY IMPLEMENTATION ISSUES

In its comments, MCI asserts correctly that the Commission has not raised, let alone addressed, key questions concerning how CPP would be implemented. For example, MCI notes that “[I]f resale is currently mandated by the ‘unrestricted resale’ rule and required by the [1996 Federal Telecommunications] Act, then the Commission needs to consider how CPP could be purchased for resale”. (MCI Comm., p. 3.)

Further, MCI observes that to offer CPP, carriers “must have access to traffic information, including the type of call detail that would allow a carrier to track traffic volumes, origination, destination, call duration, and other characteristics of the call”. (Id. at 4.) Finally, MCI points out that if the FCC selects CPP as a way to eliminate “usage-sensitive ‘airtime’ charges that wireless subscribers pay to CMRS carriers”, then “there

must be a mechanism under which the CMRS carrier can replace its airtime revenue stream with a revenue stream from the calling party”. (Id at 5.) “Existing compensation systems must be changed to accommodate CPP in some way”, MCI argues. (Id at 6; see also SBC Communications Comm., p. 12.)

The CPUC concurs with MCI’s assessment that the FCC has not adequately identified very important issues which must be resolved before CPP can be offered in any manner that will protect carriers and consumers. California further agrees with MCI that the Commission could better serve the process by identifying the appropriate issues and seeking public comment on them before rushing into CPP based on the inadequate record being developed here.

IV. NUMBERING QUESTIONS

MCI and some other commenting parties address the question of whether the FCC should require creation of separate area codes or other numbering identifiers for CPP calls. In our September 17th comments, the CPUC argued in favor of separate expanded area codes to be dedicated to specific services, including CPP. (CPUC Comm., p. 16.)

We concur here with MCI’s observation that the Commission needs assistance from the North American Numbering Council (NANC) in addressing numbering issues pertaining to CPP.

Specifically, the Commission would need to request information on the infrastructure of the administration system and the possible number assignment practice which would be feasible, who would administer the numbers and how this administrator would be paid, who would be in charge of the relief planning, what would be the impact on the numbering plan, and when NANC advises implementation. Additional questions which the

Commission should request NANC assistance on are: whether a system where NXXs within the NPA could be distributed in a manner that would allow carriers to determine the local calling area of the CPP subscriber, whether numbers within the NPA should be assigned by 10,000 number blocks, 1,000 number blocks or individual numbers. (MCI Comm., p. 9.)

While the CPUC supports use of dedicated area codes for specific services or technologies, we nonetheless agree with MCI that many aspects of dedicating one or more area codes to CPP must be fully explored. In particular, like MCI, California opposes any proposal that one NPA be given to each carrier offering CPP. This would be extremely wasteful of numbering resources.

V. BILLING AND COLLECTION

The CPUC agrees with the many commenting parties who oppose a mandate by the FCC that LECs must provide billing and collection services for CMRS providers offering CPP. (SBC Comm., p. 7-11; GTE Comm., pp. 31-32.) In addition, California agrees with SBC that LECs should not be prohibited from providing CPP billing and collection services if they are interested in doing so. This is an issue best left to carriers to negotiate.

VI. CONCLUSION

For the reasons stated, the CPUC urges the FCC to adopt minimum rules pertaining to notification requirements for CPP. California also recommends that the Commission further explore compensation and identification of traffic issues, and seek comment on those issues, before proceeding to authorize CPP. Finally, the CPUC urges the FCC to seek information from the NANC regarding numbering issues implicated by the offering of CPP.

Respectfully submitted,

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October 18, 1999

ATTACHMENT 1

September 22, 1999 Ramsay Report

*****Local/Toll - Wireless - Billing - Calling Party Pays - AT&T
WIRELESS DROPS CELL PHONE PLAN By JANET McCONNAUGHEY (AP) September 22
Want whoever calls your cellular phone to pay the bill? It's not likely here unless billing rules change dramatically. AT&T Wireless tested CCP in Minneapolis - charging 39 cents a minute and later 25 cents, but got so few takers that it quietly dropped plans for a national rollout. "We have not rolled it out anywhere else. You can draw your own conclusions from that about how profitable we think it would be." In Europe and Asia, the caller generally pays, and cell phones are almost extensions of home/office phones. Here, people often keep the phones off to avoid paying for calls they don't want. Intense competition is both the reason many companies want caller-pays and part of the reason it won't be easy to get. Most other countries either have telephone monopolies or a limited number of companies. US doesn't and solving the billing problems this presents is an extraordinary challenge. Customers won't use caller pays if it means they'll get a blizzard of bills, and companies cannot afford to do that kind of billing - It costs at least \$1.25 to create, send out and process a bill - not profitable if you are billing for a 15-cent, 20-cent, 25-cent call. In other countries, LECs work with cellular companies on the billing. Not here, e.g., Southwestern Bell will not bill for other companies, and other ILECs/CLECs seem likely to follow suit.