

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

99-263

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In the Matter of)
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SOUTHWESTERN BELL MOBILE)
SYSTEMS, INC.)
)
)
Petition for a Declaratory Ruling)
Regarding the Just and Reasonable)
Nature of, and State Law Challenges to,)
Rates Charged by CMRS Providers)
When Charging for Incoming Calls and)
Charging for Calls in Whole-Minute)
Increments)
_____)

File No. 97-31

**COMMENTS OF AT&T WIRELESS SERVICES, INC. IN SUPPORT OF PETITION
FOR DECLARATORY RULING**

AT&T Wireless Services, Inc. ("AT&T"), by its attorneys, submits these comments in support of the above-captioned petition by Southwestern Bell Mobile Systems ("SBMS") for a declaratory ruling that CMRS providers' practices of charging for incoming calls and charging for calls in whole-minute increments are just and reasonable.^{1/} The SBMS Petition arises out of a recent federal district court order in a purported class action brought against Southwestern Bell Mobile Systems. The plaintiff there claims, among other things, that SBMS violated section 201

^{1/} Petition of Southwestern Bell Mobile Systems, Inc. for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments (filed November 12, 1997) ("SBMS Petition").

of the Communications Act by charging for incoming calls and charging in full-minute increments for cellular service, allegedly in breach of its subscriber contract. Smilow v. Southwestern Bell Mobile Systems, Inc., No. 97-10307-REK, 1997 U.S. Dist. LEXIS 19453 (D. Mass. July 11, 1997). The federal district court hearing the case deferred the resolution of certain issues until after this Commission had been afforded an opportunity to provide guidance on certain matters of communications policy arising under the Communications Act. The court observed that "it is at least a reasonable hypothesis, and perhaps a probability, on the basis of the limited record now before the court, that some aspects of this dispute could be resolved on grounds of national communications policy and practice within the areas in which the FCC has special competence."^{2/}

In light of the court's ruling, AT&T believes that the Commission should issue a declaratory ruling that charging for incoming calls and charging for calls in whole-minute increments are not unjust or unreasonable practices under section 201 of the Communications Act.

INTRODUCTION AND SUMMARY

AT&T supports SBMS' request for a declaratory ruling that longstanding CMRS provider practices of charging for incoming calls and billing in whole-minute increments are just and reasonable under section 201 of the Communications Act. Such a ruling is fully consistent with the Commission's past interpretations of section 201 and its historic reliance on market forces rather than regulation to ensure just and reasonable rates in a competitive marketplace such as CMRS. Where there is competition, the Commission has properly refused to second

^{2/} Id. at *9-10.

guess under section 201 the economic decisions of individual competitors to offer particular rates, services, or billing practices.

This conclusion is bolstered by section 332(c) of the Communications Act, which reflects a strong Congressional preference to let the marketplace govern the rates and practices of CMRS providers. In light of vigorous and increasing competition in the CMRS marketplace, the Commission has ample basis for concluding that carrier rate structures and practices, such as billing for incoming calls and billing in full-minute increments, are not unjust or unreasonable practices. The Commission can and should provide a clear declaration under section 201 for the guidance of the court in the Smilow case

I. CONGRESSIONAL AND COMMISSION POLICY CONTEMPLATE THAT MARKET FORCES RATHER THAN REGULATION BEST ENSURE JUST AND REASONABLE CMRS RATES AND PRACTICES

market forces vs regulation

The statutory requirement embodied in section 201 of the Communications Act that carrier rates and practices be “just and reasonable” is longstanding, dating back to the days of end-to-end telephone monopolies. With the growth of competition in various segments of the communications industry in more recent years, the Commission has recognized that market forces are more effective than regulation in assuring compliance with the just and reasonable requirement. Where competition is present, the Commission has correctly found, there is little ground for concern that carrier rates and practices will be unjust and unreasonable. In one of its first decisions to deregulate “non-dominant” common carriers, the Commission observed that:

the economic underpinning of our proposal to streamline the regulatory procedures for non-dominant carriers flows from the fact that firms lacking market power simply cannot rationally price their services in ways which, or impose terms and conditions which, would contravene Sections 201(b) and 202(a) of the Act . . . a non-dominant competitive firm, for example, will be incapable of violating the just and reasonable standard of 201(b). If it charges unreasonably high rates or imposes unreasonable terms or conditions in conjunction with the

offering, it would lose its market share as its customers sought out competitors whose prices and terms are more reasonable.^{3/}

More recently, the Commission has clearly reaffirmed that “the measure of reasonableness” under section 201 should be found in “rates that reflect or emulate competitive market operations.”^{4/}

That competition best ensures that the reasonableness of a carrier’s rates and practices is also the premise of section 332 of the Communications Act. Section 332(c) of the Communications Act embodies a fundamental preference for reliance upon market forces, rather than regulation, in the exercise of regulatory power over commercial mobile radio services. For instance, section 332(c)(3) expressly preempts state or local authority to regulate the rates charged by CMRS providers, except in particular circumstances when a state regulatory body could demonstrate that an existing regulation was necessitated by the fact that “market conditions with respect to such services failed to protect subscribers adequately from unjust and

^{3/} First Report and Order, Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore, 85 FCC 2d 1, 31 (1980).

^{4/} Report and Order, Petition of New York State Public Service Commission to Extend Rate Regulation, 10 FCC Rcd. 8187, 8190, ¶ 17 (1995). See also Second Report and Order, Policy and Rules Concerning the Interstate Interexchange Marketplace: Implementation of Section 254(g) of the Communications Act of 1934, 11 FCC Rcd 20730, 20752-53, ¶ 42 (1996) (“Just as we believe that competition is sufficient to ensure that nondominant interexchange carriers’ charges for interstate, domestic, interexchange services are just and reasonable, and not unreasonably discriminatory, and to protect consumers, we believe that competitive forces will ensure that nondominant carriers’ non-price terms and conditions are reasonable.”), stayed on other grounds, MCI Telecommunications Corp. v. FCC, No. 96-1459 (D.C. Cir. Feb. 13, 1997); Second Further Notice of Proposed Rulemaking in CC Docket No. 94-1, Further Notice of Proposed Rulemaking in CC Docket No. 93-124, and Second Further Notice of Proposed Rulemaking in CC Docket No. 93-197, Price Cap Performance Review for Local Exchange Carriers, 11 FCC Rcd 858, 868-69, ¶18 (1995) (reaffirming in dicta the Commission’s belief that competitive markets should result in just and reasonable rates).

unreasonable rates”⁵¹ Likewise, section 332(c)(1) authorizes the Commission to forbear from various forms of regulation of commercial mobile radio services if the Commission found that such regulation was not necessary to ensure that the charges and practices of carriers providing such services are just and reasonable.⁶¹

In interpreting section 332(c)(3), the Commission has recognized that reliance on market forces in lieu of regulation is central to the statutory scheme, observing that this section expresses an unambiguous Congressional intent to foreclose state regulation in the first instance. Moreover, OBRA reflects a general preference in favor of reliance on market forces rather than regulation. Section 332(c), for example, empowers the Commission to reduce CMRS regulation, and it places on us the burden of demonstrating that continued regulation will promote competitive market conditions.⁷

In first applying this statutory mandate in 1994, the Commission found that the level of competition in the CMRS marketplace was sufficient to support forbearance from regulation of CMRS at the federal level.⁸ Subsequently, the Commission rejected a series of state petitions seeking to preserve existing regulatory schemes, again finding that market conditions were sufficient to protect against unjust and unreasonable CMRS rates and practices.⁹ Since that time,

⁵¹ 47 U.S.C. § 332(c)(3)(A)(i).

⁶¹ 47 U.S.C. § 332(c)(1)(A). These amendments were part of the Omnibus Budget Reconciliation Act of 1993 (“OBRA”), Pub. L. No. 103-66, § 6002, 107 Stat. 312 (1993).

⁷ Report and Order, Petition of the Connecticut Department Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, 10 FCC Rcd 7025, 7030, ¶8 (1995), *aff’d sub nom.*, 78 F.3d 842 (2d Cir. 1996) (“CT CMRS Rate Preemption Order”).

⁸ Second Report and Order, Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services 9 FCC Rcd 1411, ¶15 (1994); *recon granted in part*, 10 FCC Rcd 7824 (1995), *recon denied*, 11 FCC Rcd 19729 (1996).

⁹ Report And Order, Petition on Behalf of the Louisiana Public Service Commission for Authority To Retain Existing Jurisdiction over Commercial Mobile Radio Services Offered

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the Commission has consistently reaffirmed its commitment to permit market forces, rather than regulation, to determine the development of the CMRS marketplace.^{10/}

Competition is not only the touchstone for the Commission's CMRS regulatory policies, it is also the current reality faced by CMRS providers. The Commission's expectations that the CMRS market would become increasingly competitive over time has been borne out, as most recently reflected in the Commission's Second Annual Report on competitive conditions in the CMRS marketplace.^{11/} While CMRS providers remain subject to section 201,^{12/} the

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Within the State of Louisiana, 10 FCC Rcd 7898 (1995); Report And Order And Order On Reconsideration, Petition of Arizona Corporation Commission, To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services And Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, 10 FCC Rcd 7824 (1995); Report And Order, Petition Of New York State Public Service Commission To Extend Rate Regulation, 10 FCC Rcd 8187 (1995); Report And Order, Petition of the People of the State of California and the Public Utilities Commission of the State of California To Regulatory Authority over Intrastate Cellular Service Rates, 10 FCC Rcd 7486 (1995); Report And Order, CT CMRS Rate Preemption Order, 10 FCC Rcd 7025 (1995), *aff'd sub nom.*, 78 F.3d 842 (2d Cir. 1996); Report And Order, Petition on Behalf of the State of Hawaii, Public Utility Commission, for Authority To Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii, 10 FCC Rcd 7872 (1995); Report And Order, Petition of the State of Ohio for Authority To Continue To Regulate Commercial Mobile Radio Services, 10 FCC Rcd 7842 (May 19, 1995).

^{10/} See, e.g., Memorandum Opinion and Order on Reconsideration, In re Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, 12 FCC Rcd 9972, ¶ 22 (1997) (stating that market forces, not regulation, should shape the developing CMRS marketplace); Second Report And Order And Second Further Notice Of Proposed Rule Making, Amendment of the Commission's Rules Concerning Maritime Communications, PR Dkt. No. 92-257, 1997 FCC LEXIS 5857 at 13-14, ¶9 (1997) (“[W]e seek to enhance regulatory symmetry between maritime CMRS operations and other CMRS operations to ensure that economic forces, not regulatory forces, shape the development of the CMRS marketplace”).

^{11/} Second Annual Report, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, 12 FCC Rcd 11266 (1997).

^{12/} See 47 U.S.C. § 332(c)(1)(A) (precluding the Commission from specifying Section 201 as
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Commission's application of that provision to CMRS should reflect the reliance on market forces embodied in section 332(c).

II. THE BILLING PRACTICES AT ISSUE IN THIS CASE ARE JUST AND REASONABLE

The Commission's view that rates and practices adopted by carriers operating in competitive markets are necessarily just and reasonable is clearly appropriate when considering the two practices at issue in the SMBS Petition.^{13/} As the SBMS Petition correctly notes, billing in whole-minute increments is a long standing practice in the cellular and now CMRS industry. This practice also has long been used in the intensely competitive long distance business. In fact, in rejecting a petition for rulemaking seeking regulation of this practice in the long distance market, the Commission observed that "carriers compete in terms of their practices, and customers are free to select a carrier that offers the most desirable billing options. If the Commission were to mandate a particular billing procedure, it would eliminate this form of service competition."^{14/} As in the long distance industry, as CMRS competition has intensified,

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inapplicable to CMRS). The Telecommunications Act of 1996 added Section 10 the Communications Act, 47 U.S.C. § 160, which gave the Commission the authority to forbear from applying "any provision of [the Communications] Act to a telecommunications carrier or telecommunications service . . ." (emphasis added).

^{13/} Plaintiff in Smilow asserts that the challenged practices contravene section 201 strictly because they purportedly violate the terms of the plaintiff's contract with SBMS. The Commission, however, has rejected efforts by customers to categorize carrier actions as unjust or unreasonable under section 201 solely because such actions give rise to breach-of-contract claims. See America's Choice Communications, Inc. v. LCI Int'l Telecom Corp., 11 FCC Rcd 22494 (1996) (even if a carrier's delay in sending billing and traffic data to the customer constituted a breach of contract, this in and of itself would be insufficient to show a violation of section 201(b) of the Act); ACC Long Distance Corp. v. Yankee Microwave, Inc., 8 FCC Rcd 85, 88, n. 46 (1993), *aff'd*, 10 FCC Rcd 654 (1995).

^{14/} Letter from Kathleen B. Levitz, Acting Chief, Common Carrier Bureau to Donald L. Pevsner, (continued on next page)

an increasingly wide variety of billing options, including billing in various increments other than whole minutes, is being offered in the marketplace.^{15/}

Similarly, billing for incoming calls is a long accepted practice in the CMRS market. As the Commission recently observed:

the typical price structure for mobile telephone services is comprised of a flat monthly fee for connection with the CMRS network and permanent charges for air time. While the CMRS service plan may include some minutes of use, additional minutes of use are charged to the subscriber regardless of whether the subscriber places or receives the call.^{16/}

In fact, the CPP Notice contains extensive discussion of CMRS carriers' practice of billing for incoming calls and nowhere suggests that the practice is anything but legal under the Communications Act. Perhaps more importantly, the CPP Notice further highlights the fact that competitive marketplace conditions have caused carriers to experiment with calling party pays as an alternative to billing CMRS subscribers for incoming calls, and seeks comment on ways to increase the availability of this option. Finally, as the SBMS Petition points out, CMRS competition has produced a wide variety of competitive alternatives with respect to billing for incoming calls.^{17/}

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Esq. at 2 (dated December 2, 1993). A copy of this letter is attached to the SBMS Petition.

^{15/} See SBMS Petition at 5-6.

^{16/} Notice of Inquiry, Calling Party Pays Service Option in the Commercial Mobile Radio Services, WT Docket No. 97-207 ¶ 16 (released October 23, 1997) ("CPP Notice").

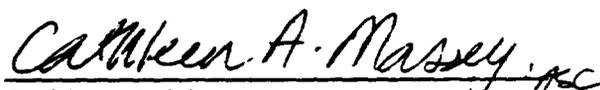
^{17/} SBMS Petition at 5-6.

CONCLUSION

AT&T, like other carriers, has been subjected to lawsuits under state and federal law challenging charging for incoming calls and billing in whole-minute increments. It is incumbent upon the Commission, as the expert agency entrusted by Congress with the authority to develop national policy for CMRS providers, to ensure that carriers are not subjected to a patchwork of regulatory or judicial decisions in this area. AT&T believes that the Commission should expeditiously issue a declaratory ruling that the practices of charging for incoming calls and billing in whole-minute increments by CMRS providers, even if in breach of a subscriber agreement, are not unjust or unreasonable under section 201 of the Communications Act. Such a ruling would serve to provide a measure of legal predictability and stability for CMRS providers as they compete in the marketplace.

Respectfully submitted,

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January 7, 1998

CERTIFICATE OF SERVICE

I, A. Sheba Chacko, hereby certify that on this 7th day of January 1998, I caused copies of the foregoing "Comments of AT&T Wireless Services, Inc. in support of Southwestern Bell Mobile Systems, Inc.'s Petition for Declaratory Ruling" to be sent to the following by hand delivery:

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In addition, I caused copies to be sent to the following by first-class U.S. mail:

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