

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
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)

DA 97-2464

To: The Commission

COMMENTS OF OMNIPPOINT COMMUNICATIONS, INC.

Omnipoint Communications, Inc. ("Omnipoint"), by its attorneys, files these comments on the issues raised in the Petition for Declaratory Ruling filed by Southwestern Bell Mobile Systems ("SBMS") on November 12, 1997 (the "SBMS Petition").¹ Omnipoint supports the SBMS Petition, and provides these comments to expand on the ideas presented for clarification therein. Omnipoint is a significant new entrant in broadband Personal Communications Services ("PCS"). Omnipoint, through its affiliates, holds the New York MTA Block A license, 18 Block C licenses for which it bid a net price of \$509 million, and 108 Block D, E, and F licenses for which it bid a net price of \$181 million (including 50 Block F licenses at a net price of \$74 million). Omnipoint currently operates PCS systems in a number of markets, including New

¹ Public Notice, DA 97-2464 (rel. Nov. 24, 1997).

York City and Philadelphia, and will soon be launching service in Boston and Miami. Omnipoint's PCS licenses cover over 96.5 million people in the United States.

I. Market Forces, Not Extensive Governmental Regulation, Should Determine Which Service Offerings are Provided by CMRS Carriers.

As stated in the SBMS Petition, both Congress and the Commission have expressed their intentions to allow market forces, rather than governmental regulation, to shape the Commercial Mobile Radio Services ("CMRS") industry.² In revising Section 332(c) of the Communications Act of 1934, as amended (the "Act"), Congress precluded state and local governmental regulation of the entry of or rates charged by CMRS providers, with limited exceptions.³ The legislative history for Section 332(c)(3) amplifies the intent of the legislature to leave as much control as possible to market forces, by stating that "the Commission . . . should be mindful of the Committee's desire to give the policies embodied in Section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee."⁴ In addition to Section 332(c), Congress amended Section 2(b) of the Act to preclude the States from having jurisdiction to regulate the rates charged by CMRS providers.

Since 1992, with its allotment of 220 MHz of spectrum available for communications services, including broadband PCS offerings, the Commission has strongly encouraged the development of new technologies that foster efficient use of the spectrum. The Commission provided that "it is important that the emerging technology bands be able to meet the requirements of a significant number of new services and to support the operation of mobile, as

² SBMS Petition at 4-6.

³ 47 U.S.C. § 332(c)(3)(A).

⁴ Petition of Arizona Corporation Commission, To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services, Report and Order and Order on Reconsideration, 10 FCC Rcd. 7824, 7828 (1995) (citing H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261-62).

well as fixed, operations."⁵ In order to develop and provide new and innovative service offerings to consumers, CMRS providers require sufficient regulatory flexibility. The Commission has since reaffirmed its commitment to regulatory flexibility for the promotion of a multitude of diverse services in the CMRS Flexibility Order.⁶ In the Order, the Commission determined that "the public interest would be served by giving licensees maximum flexibility in the uses of CMRS spectrum,"⁷ and minimizing the regulation of service offerings "will allow CMRS providers to better respond to market demand and increase competition in the provision of telecommunications services."⁸

In order to enable CMRS offerings to flourish as a viable competitor to traditional landline services, the Commission should continue to allow market forces, not extraneous state regulation, to govern the service offerings that CMRS providers choose to market. Consumer demand should be allowed to dictate the particular offerings made available by CMRS providers to the public. It is in this context that Omnipoint supports the SBMS Petition's request that the Commission declare that charging in whole-minute increments does not violate Section 201(b) of the Act.⁹ Charging in whole minute increments is just one possible service offering by a CMRS provider. Just as some interexchange carriers choose to bill in whole minutes, six-second increments, or by the second, CMRS carriers should be granted that same flexibility. Some carriers even offer customers different rate plans based on the timing increment that the customer

⁵ Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, First Report and Order and Third Notice of Proposed Rulemaking, 7 FCC Rcd. 6886, 6888 (1992).

⁶ In the Matter of Amendment of the Commission's Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Service, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 8965 (1996) ("CMRS Flexibility Order").

⁷ Id. at 8966.

⁸ Id.

⁹ SBMS Petition at 6.

chooses. When a customer chooses to subscribe to a particular service plan, they are paying for the right to use the particular communications service for a period of time, whether that is calculated by the minute, by the second, or some increment in between. It is up to the customer to decide whether to use the entire period of time that has been purchased, or disconnect their call at some point before the unit purchased has expired. Charging in different increments of time is one way for a CMRS carrier to distinguish itself, which increases market competition, thereby promoting the public interest. Charging in whole-minute increments, therefore, is neither unjust nor unreasonable. Because the practice of charging in whole-minute increments complies with the "just and reasonable" requirements of Section 201(b) of the Act, the Commission should clarify that market forces should continue to govern this practice.¹⁰

II. The "Rates Charged" Language of Section 332(c)(3)(A) Should Be Construed Broadly.

As described above, Section 332(c)(3) of the Act provides that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . ."¹¹ The SBMS Petition requests that the Commission provide guidance on the meaning of the statutory term "rates charged," and requests that the Commission clarify that "rates charged" includes both the services a CMRS provider chooses to charge for, and the rate at which it decides to charge for those services.¹² Omnipoint supports SBMS' reading of "rates charged," and urges the Commission to fully explain that "rates charged" properly includes many aspects of CMRS services that are inextricably tied to CMRS rates.

¹⁰ Omnipoint further supports SBMS' request for clarification that state regulation over "rounding up" would violate Section 332(c)(3) of the Act.

¹¹ 47 U.S.C. § 332(c)(3)(A).

¹² SBMS Petition at 14.

Omnipoint believes that there are several service options provided by CMRS carriers that are encompassed by the definition of "rates charged," and requests that the Commission clarify this definition to include these charges. A specific rate charged by a CMRS provider includes several different components which, added together, comprise the ultimate rate charged to consumers. It is this total rate, and its components, that is exempt from state regulation under Section 332(c)(3) of the Act. For example, components such as end-user access charges, charges for incoming calls, charges for outgoing calls, and charges for special features such as facsimiles, email, and paging, are all services a CMRS provider chooses to charge for, and thus are properly exempt from state rate regulation. In acting on the SBMS Petition, Omnipoint respectfully requests that the Commission clarify that several components make up a CMRS provider's ultimate "rate charged" which is exempt from state regulation.

~~"Rates charged" also includes charges associated with calling party pays ("CPP") service offerings.~~¹³ ~~Calling party pays is a service option that CMRS providers may elect to offer whereby the party originating a call (the "Calling Party") pays the airtime charge and any applicable charges for the transport of the call.~~¹⁴ The CPP service subscriber (the "Called Party") incurs no charge to receive the incoming call, as is the case in a wireline-to-wireline call. The charge for calls placed to customers subscribing to a CPP service contains several fee components, including a fee charged by the CMRS operator.¹⁵ Thus, the CPP rate charged to the

¹³ While the Commission has a Notice of Inquiry pending to determine whether the wider availability of CPP would enable CMRS providers to more readily compete with wireline services provided by local exchange carriers, Omnipoint raises the issue of CPP in this docket to request clarification that CPP is a service that has a corresponding rate which is exempt from state regulation under Section 332(c)(3).

¹⁴ Calling Party Pays Service Option in the Commercial Mobile Radio Services, Notice of Inquiry, WT Dkt. No. 97-207, FCC 97-341, ¶ 3 (rel. Oct. 23, 1997).

¹⁵ The total charge paid by the Calling Party may include a charge paid to the local exchange carrier, the CMRS charge, and (depending on the distance between the Calling Party and the CMRS network's point of presence) a charge to an Interexchange Carrier.

calling party, and the method of charging and billing, is perhaps the most essential element of the CPP service offering. Inconsistent state regulation of the CPP charge, therefore, would inhibit the growth of the CPP service and subject multi-state CMRS operators to a patchwork of inconsistent state regulation. These results are completely at odds with the fundamental Congressional purpose of Section 332(c)(3) preemption. Omnipoint respectfully requests that the Commission declare that the CMRS CPP charge is a CMRS "rate charged," and that by Section 332(c)(3)(A) of the Act, states are preempted from regulating the CPP service offering.

III. The Definition of "Rates Charged" Should Include Interconnection Rates.

Omnipoint supports SBMS' request to clarify the definition of "rates charged," and requests that the Commission further clarify its definition to include interconnection as part of "rates charged." Interconnection rates negotiated by CMRS providers have an effect on "rates charged" to CMRS subscriber and thus, States should be precluded from regulating these rates.

Omnipoint notes that States are generally given authority to review and, if necessary, arbitrate interconnection rates between carriers.¹⁶ In Iowa Utilities Board, the court held that because Section 2(b) of the Act precludes state regulation of entry of and rates charged to a CMRS provider, and because Section 332(c)(1)(B) gives the Commission authority to order LECs to interconnect with CMRS providers, the Commission retains its authority to issue pricing rules with respect to CMRS interconnection.¹⁷ These pricing rules include reciprocal compensation for transport and termination of local traffic between the incumbent LEC and the CMRS operator, which includes CMRS traffic originating and terminating within the same Major Trading Area.¹⁸ In light of these decisions, Omnipoint requests that the Commission

¹⁶ 47 U.S.C. § 252(e).

¹⁷ Iowa Utilities Bd. v. F.C.C., 120 F3d. 753, 800, n. 21 (8th Cir. 1997).

¹⁸ 47 C.F.R. § 51.701. In addition, the Commission released a Public Notice clarifying that certain Part 51 rules, including Section 51.701, remain in full force and effect as they relate to CMRS providers. Summary of

(Footnote continued to next page)

clarify in this proceeding that CMRS interconnection rates are subject to Commission, rather than state, regulation.

IV. Impermissible State Regulation Over Components of CMRS Offerings Threatens the Uniform, Regulatory Structure For CMRS Providers As Envisioned by Congress and the Commission.

In its Petition, SBMS correctly notes that Congress, the Commission, and the courts have all found that disparate state regulation of CMRS charges frustrates the Congressional goal of creating a uniform regulatory structure for CMRS rates.¹⁹ Indeed, the legislative history of Section 332(c)(3) evinces that Congress enacted preemption of state law for the purpose of encouraging the development of mobile services, which operate without regard ~~to~~ state boundaries.²⁰

PCS providers today operate within geographic regions, known as Major Trading Areas ("MTAs") and Basic Trading Areas ("BTAs"), that cross multiple state borders.²¹ MTA and BTA regions were widely accepted by both the Commission and the telecommunications industry as logical territories for telecommunications service providers, and especially mobile providers. Such large geographic regions were adopted as license territories in order "to promote the rapid deployment and ubiquitous coverage . . . follow[ing] the natural flow of commerce,"²²

(Footnote continued from previous page)

Currently Effective Commission Rules for Interconnection Requests by Providers of Commercial Mobile Radio Services, Public Notice, 12 FCC Rcd. 15591 (1997).

19 SBMS Petition at 28.

20 H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 260.

21 For instance, Omnipoint's New York MTA covers portions of New York, New Jersey, Connecticut, and Vermont.

22 Memorandum Opinion and Order, GN Dkt. No. 90-314, 9 FCC Rcd. 4957, 4986 (1994).

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to "spur competition,"²³ to "facilitate regional and nationwide roaming; [and to] allow licensees to tailor their systems to the natural geographic dimensions of PCS markets."²⁴ Significantly, 41 of the 46 MTA license areas in the Continental U.S. include the territory of more than one state. In creating a uniform regulatory structure workable for all CMRS providers, the utmost diligence is required to ensure that state regulation does not unduly burden or impede the operation of many CMRS competitive providers' integrated multi-state systems. As noted in the SBMS Petition, inconsistent state regulation can significantly raise the costs a carrier must charge for services. Such inconsistencies are not only impractical and time-consuming to overcome, they can lead to increased prices and customer confusion over rates.

With the introduction of local competition by many CMRS operators, multi-state solutions to regulatory issues, which have traditionally been handled on a state-by-state basis, may now be most appropriate. For example, in response to the largely exhausted numbering plans, and the cumbersome state-by-state administrative number relief process, Omnipoint has suggested an Expanded NPA Overlay plan to be implemented by the Commission.²⁵ Under that plan, an Expanded NPA overlay could be implemented to cover regions defined by groups of BTAs and/or MTAs. Such a plan would ensure that all telecommunications carriers, including CMRS providers, are able to offer services across state boundaries without disparate state numbering decisions affecting those services.

23 Id. at 4987-88.

24 Second Report and Order, GN Dkt. No. 90-314, 8 FCC Rcd. 7700, 7732 (1993).

25 See, Carrier Liaison Committee ("CLC") Ad Hoc Committee on NXX Exhaust, Short-term Technical Alternatives to NXX Exhaust, (presented to NANC July 22, 1997; revised Sept. 2, 1997).

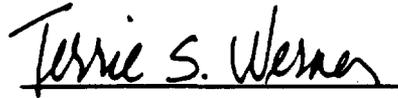
V. **Conclusion**

For the forgoing reasons, Omnipoint requests that the Commission continue to allow market forces, unimpeded by inconsistent state regulations, to dictate the service offerings presented to the public by CMRS providers, including the decision of whether to charge in whole minute increments, and further requests that the Commission construe the statutory term of "rates charged" broadly to preclude state regulation of many aspects that comprise the ultimate rate charged to CMRS subscribers.

Respectfully submitted,

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