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April 18, 2000

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VIA EXPRESS MAIL

The Honorable Magalie R. Salas, Esq.
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Cellco Partnership
d/b/a Bell Atlantic Mobile Petition
for Designation as an Eligible
Telecommunications Carrier
CC Docket No. 96-45 /
FCC 97-419

Dear Ms. Salas:

Enclosed for filing are an original and eleven copies of the Ex Parte Comments of the Maryland Public Service Commission. Please distribute a copy to each of the Commissioners.

Sincerely,

Susan Stevens Miller
General Counsel

SSM:sf

Enclosures

cc: Sheryl Todd, Accounting Division
S. Mark Tuller – Bell Atlantic Mobile, Inc.
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EX PARTE OR LATE FILED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

CELLCO PARTNERSHIP)	CC Docket No. 96-45
d/b/a BELL ATLANTIC MOBILE)	FCC 97-419
)	
Petition for Designation as an)	
Eligible Telecommunications Carrier)	

EX PARTE COMMENTS

OF THE

MARYLAND PUBLIC SERVICE COMMISSION

Susan Stevens Miller
General Counsel
Maryland Public Service
Commission
6 Saint Paul Street
Baltimore, Maryland 21202
(410) 767-8039

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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EX PARTE COMMENTS

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Introduction

On September 8, 1999, Cellco Partnership d/b/a Bell Atlantic Mobile (“Cellco”) filed a “Petition for Designation as an Eligible Telecommunications Carrier” (“Petition”) with the Federal Communications Commission (“FCC”) seeking eligible telecommunications carrier (“ETC”) status in Delaware and parts of Maryland. With regard to Maryland, Cellco requests ETC status for the Baltimore MSA; Maryland 2RSA – Kent (the Maryland portion of the Delmarva peninsula) and Maryland 3RSA – Frederick (central Maryland). Cellco claims that the Maryland Public Service Commission (“MDPSC”) lacks the jurisdiction necessary to rule on Cellco’s ETC Petition. As will be explained more fully below, the MDPSC possesses sufficient jurisdiction to rule upon the ETC Petition. The MDPSC respectfully requests that the

FCC dismiss Cellco's Petition and instruct the Company to file its petition for ETC designation with the MDPSC. Furthermore, the MDPSC requests that the FCC direct **all** CMRS providers to initially file their ETC petitions with the respective State commission. Only after a State commission finds that it lacks the jurisdiction necessary should the CMRS provider file with the FCC. The State commission, not the FCC, should be responsible for determining its jurisdiction under State law.

Argument

The designation of a carrier as an ETC is governed by § 214 of the Telecommunications Act of 1996 ("1996 Act"). Section 214(e)(2) governs the designation of eligible carriers by State commissions and § 214(e)(5) provides that the State commission may establish the service area for the purpose of determining universal service obligations and support mechanisms. Finally, in interpreting this section, the Fifth Circuit Court of Appeals found that States may impose additional requirements, such as service quality standards or consumer protection regulations, when designating carriers as ETCs.

Thus, Congress clearly stated its preference for having the States determine when a carrier should be granted ETC status. Furthermore, a State's ability to place additional requirements on ETCs would be severely undermined if a certain subset of carriers obtain ETC designation from an entity other than the State commission. Given the importance of this issue and Congress' express preference that the States render these determinations, the FCC should be very hesitant to find that a State commission lacks the jurisdiction to rule on the ETC petition of a CMRS carrier. The FCC should require that the petitioning CMRS provider seek a State commission ruling regarding that commission's jurisdiction

before the carrier files a petition with the FCC. A State commission knows the extent of its own authority and should not be unnecessarily burdened with defending its jurisdiction.

Unlike the enabling statutes of some other states, nothing in the MDPSC's statutory authority prohibits the Maryland Commission from regulating cellular carriers. The *Public Utility Companies Article* of the Maryland Annotated Code ("*The PSC Law*") simply states that the term "Telephone Company" does not include a cellular telephone company. *The PSC Law* at § 1-101(bb). The intent of this exception is to clearly establish that the provisions of *The PSC Law* governing telephone companies do not apply to cellular companies.¹ However, the MDPSC's authority to designate ETCs does not stem from state law, but from the 1996 Act. No provision of *The PSC Law* prohibits the MDPSC from exercising the federal authority granted to it by Congress. Thus, contrary to Cellco's assertion, the MDPSC does possess the requisite authority to render a decision on any CMRS petition to be an ETC.

In addition to its argument that the MDPSC lacks the necessary jurisdiction, Cellco also buries in a footnote its contention that § 332(c) would itself supply a basis for concluding that State commissions do not possess sufficient jurisdiction to rule upon an ETC request from a CMRS carrier. (Cellco Petition at pg. 8, fn. 14). Cellco's attempt to hide this argument is not surprising since the argument is contrary to law.

¹ See, e.g., *Public Utility Companies Article* §§ 8-201(b) (requiring each telephone company to offer lifeline service); 8-203 (prohibiting telephone company charges based on a measured time period); 4-301 (permitting the MDPSC to regulate a telephone company through alternative forms of regulation).

Several courts as well as the FCC have considered the interplay between the 1996 Act and § 332. The courts have found that while States in general cannot regulate rates or entry requirements for CMRS providers, the States are free to regulate all other terms and conditions of CMRS service. *See, eg., Sprint Spectrum v. State Corporation Commission of Kansas*, 149 F.3d 1058 (10th Cir. 1998); and *Cellular Telecommunications Industry Assoc. v. FCC*, 168 F.3d 1332 (DC Cir. 1999). Thus, precedent clearly establishes that § 332(c) only prohibits a state from regulating the rates or entry requirements of a CMRS carrier. Neither rates nor entry are at issue when a State considers an ETC petition. Entry is not at issue because the cellular carrier already operates in the service territory at issue. *See, Cellco Petition at pg. 5.* Rates also are not at issue because Cellco will receive universal service funding under the federal program as determined by the FCC rules.

Because § 214(e) is neither a rate nor entry regulation, this subsection neither applies to nor implicitly contradicts or modifies § 332(c). To interpret § 332(c) otherwise would be to contradict § 214(e) which permits States to designate ETCs. The language of § 214 supports the contention that Congress endorsed the concept that States should designate ETCs. The FCC should explicitly find that § 332 does not preclude a State commission from exercising jurisdiction over CMRS petitions for ETC status.²

Conclusion

Cellco's contention that the MDPSC lacks the jurisdictional authority necessary to

² Cellco also notes that the FCC requires the carrier to certify that it is not subject to the State commission's jurisdiction when filing an ETC petition. This requirement would be superfluous and unnecessary if no State commission has jurisdiction over the ETC petitions because of the effect of § 332(c). If this interpretation were correct, the FCC would have simply ordered all CMRS carriers to file their ETC petition with the FCC.

rule on its ETC petition is simply incorrect. Permitting Cellco to receive ETC status from the FCC rather than the MDPSC would result in CMRS providers circumventing the regulatory scheme envisioned by the 1996 Act. Congress clearly found that the States should be granted a vital role in the universal service program. The MDPSC respectfully requests that the FCC recognize this vital State role and dismiss Cellco's ETC Petition. Furthermore, the FCC should direct all CMRS providers to seek a ruling from the State commissions on the jurisdictional issue before filing an ETC Petition with the FCC.

Respectfully submitted,



Susan Stevens Miller
General Counsel
Maryland Public Service Commission
6 Saint Paul Street
Baltimore, Maryland 21202