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May 30, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation
WT Docket No. 99-263

Dear Ms. Salas:

On May 26, 2000, Douglas Brandon of AT&T Wireless Services, Inc., Ben Almond of BellSouth, L. Andrew Tollin of Wilkinson Barker Knauer, LLP, and the undersigned met with Ari Fitzgerald, Legal Advisor to Chairman Kennard regarding the above-captioned matter. We discussed the limitations on damage awards against wireless carriers imposed by Section 332(c)(3)(A) of the Communications Act, as set forth in more detail in the joint comments and reply comments of AT&T Corp, BellSouth Cellular Corp., and AB Cellular Holding, LLC in the above-referenced proceeding. We also discussed the relevance of the decision of the U.S. Court of Appeals for the Seventh Circuit in Bastien v. AT&T Wireless Services, Inc., as set forth in more detail in my March 13, 2000, letter to the Wireless Telecommunications Bureau in this proceeding. We provided Mr. Fitzgerald with a copy of that letter and a copy of the attached ex parte filing by the Cellular Telecommunications Industry Association, which describes numerous federal and state court decisions rejecting claims for damages where the award of damages would have constituted impermissible state rate regulation.

Pursuant to sections 1.1206(b)(1) and (b)(2) of the Commission's rules, an original and one copy of this letter are being filed with the Office of the Secretary. Copies of the letter are also being served on the Commission personnel who participated in the meeting.

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Any questions concerning this submission should be addressed to the undersigned.

Respectfully submitted,

Howard J. Symons

cc: Ari Fitzgerald

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FEDERAL COMMUNICATIONS COMMISSION
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**Before the**
# Federal Communications Commission
**Washington, DC 20554**

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|---|---|---|
| In the Matter of | ) | |
| | ) | |
| **Wireless Consumers Alliance, Inc.** | ) | WT Docket No. 99-263 |
| | ) | |
| Petition For a Declaratory Ruling Concerning Preemption of State Court Awards of Monetary Relief Against Commercial Mobile Radio Service Providers | ) | |

## *Ex Parte* PRESENTATION OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The U.S. Supreme Court has made clear that a state court order awarding a remedy of a rate rebate is the same for purposes of federal preemption analysis as is a state legislative act of rate regulation. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959) ("regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."). Numerous federal and state courts have rejected state court claims for damages against carriers where the award of damages would effectively constitute impermissible state rate regulation.

- **Bastien v. AT&T Wireless Services, Inc.**, 205 F.3d 983 (7th Cir. 2000). Claim against AT&T based on allegations that the carrier had allegedly failed to construct a wireless infrastructure necessary for reliable service but nonetheless continued to market and sell service to consumers sought, in effect, state regulation of rates and entry, which is barred by Section 332(c)(3).

- **Ball v. GTE Mobilenet of California Ltd.**, No. 98AS03811 (Cal. Super. Ct. (Sacramento County) Nov. 17, 1998). Incremental billing and related claims were dismissed under Section 332 because they challenged the method of calculating the length of and rate for wireless calls.

- **Powers v. AirTouch Cellular**, No. N71816 (Cal. Super. Ct. (San Diego County) Oct. 6, 1997). Plaintiff's claims (based on alleged inadequate disclosure) that it had been damaged by defendant's methods of determining or calculating the quantity of airtime usage were preempted because plaintiff's "allegations constitute direct challenges to the calculation of the rates charge[d] by defendant AirTouch for cellular telephone service."

- **In re Comcast Cellular Telecom. Litigation**, 949 F. Supp. 1193 (E.D. Pa. 1996). Claims of breach of the implied duty of good faith and fair dealing, unjust enrichment, and restitution, based on the carrier's practice regarding the measurement of call length, were preempted by Section 332(c)(3) because they were "a direct challenge to the calculation of the rates charged by Comcast" for cellular service. "It is undisputed that like legislative or administrative action, judicial action constitutes a form of state regulation. Thus, like legislative or regulatory action, state court adjudications threaten the uniformity of regulation envisioned by a congressional scheme."

- **Simons v. GTE Mobilnet, Inc.**, No. H-95-5169 (S.D. Tex. Apr. 11, 1996). "[A]ll state law claims related to the field of rate regulation are completely preempted by section 332(c)(3)(A)."

In a number of cases, the prohibition against judicial rate regulation stems from the "nonjusticiability" strands of the filed rate doctrine, which is aimed at preserving the exclusive role of federal agencies in approving rates for telecommunications services that are "reasonable" by keeping courts out of the rate-making process. The purpose of Section 332 is identical to the purpose of the nonjusticiability provision of the filed rate doctrine, and thus filed rate cases that define when a court ventures into the zone of impermissible rate-making are equally instructive in determining when a state court has engaged in prohibited regulation of CMRS rates.

- **AT&T Corp. v. Central Office Telephone, Inc.**, 524 U.S. 214, 118 S. Ct. 1956 (1998). Long distance resellers alleged that AT&T violated state contract and tort law by promising, but never providing, various service and billing options, but the U.S. Supreme Court found that both claims fell within the exclusive preserve of the FCC because they involved rate setting. The Court found that rates "do not exist in isolation. They have meaning only when one knows the services to which they are attached." "Any claim for excessive rates can be couched as a claim for inadequate services and vice versa." The concept of rates must be defined broadly to ensure that states do not engage in backdoor rate-making under the guise of regulating other terms and conditions.

- **Marcus v. AT&T Corp.**, 138 F.3d 46, 61 (2d Cir. 1998). Where customers alleged that a telephone company fraudulently concealed its billing practice of rounding calls up to the next full minute, the state law claim for monetary relief was barred because judicial rate setting and "any judicial action which undermines agency rate-making authority" was precluded.

- **Wegoland Ltd. v. NYNEX Corp.**, 806 F. Supp. 1112 (S.D.N.Y. 1992). Where telephone company allegedly gave misleading financial information to support the inflated rates they requested and subsidiaries allegedly sold products and services at inflated prices, the Court dismissed plaintiffs' action for common law fraud because court would have had to determine the reasonable rate absent the carrier's fraud, a function the court found is reserved exclusively to the FCC under the Communications Act.

- **Day v. AT&T Corp.**, 63 Cal. App. 4th 325 (Cal. App. 1998). In an action for disgorgement of profits and injunctive relief against providers of telephone services and prepaid telephone cards, alleging that defendants engaged in misleading and deceptive advertising in that they

failed to disclose that telephone calls made with the prepaid cards would be charged by rounding up to the next full minute, the court rejected the claim for relief because it would "enmesh the court in the rate-setting process."

- **Rogers v. Westel-Indianapolis Co.**, No 49D03-9602-CP-0295 (Marion Super. Ct. (Ind.) July 1, 1996) ("remedy requested by Plaintiff will in fact require a change of rates and therefore this Court does not have jurisdiction").