

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
Wireless Consumers Alliance, Inc.)
)
Petition for a Declaratory Ruling Concerning)
Preemption of State Court Awards of Monetary)
Relief Against Commercial Mobile Radio)
Service Providers.)
)

WT Docket No. 99-263

RECEIVED

ORDER ON RECONSIDERATION

Adopted: January 31, 2001

Released: February 5, 2001

By the Commission:

I. INTRODUCTION

1. This Order on Reconsideration responds to a Petition for Reconsideration filed on September 13, 2000 by the Cellular Telecommunications Industry Association ("CTIA Petition").¹ This petition challenges our Memorandum Opinion and Order² deciding matters raised by the Wireless Consumers Alliance, Inc.³ in a petition for declaratory ruling on whether the provisions of the Communications Act serve to preempt state courts from awarding monetary relief against Commercial Mobile Radio Service ("CMRS") providers for violations of state contract, tort or

¹ No oppositions or replies were received in response to the CTIA Petition.

² Wireless Consumers Alliance, Inc. Petition For a Declaratory Ruling Concerning Preemption of State Court Awards of Monetary Relief Against Commercial Mobile Radio Service Providers, WT Docket No. 99-263. *Memorandum Opinion and Order*, FCC 00-292 (rel. August 14, 2000) (*WCA Order*).

³ Wireless Consumers Alliance, Inc. Petition for a Declaratory Ruling Concerning Whether the Provisions of the Communications Act of 1934, as Amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve to Preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers (a) for Violating State Consumer Protection Laws Prohibiting False Advertising and Other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws, filed July 15, 1999 (WCA Petition).

consumer protection law.⁴

2. In this order, we deny CTIA's petition for reconsideration because CTIA has not presented any new arguments that were not considered at the time we adopted the *WCA Order*. We reaffirm our earlier holding that Section 332 does not generally preempt the award of monetary damages by state courts and again note that whether a specific damage calculation is prohibited by Section 332 will depend on the specific details of the award and the facts and circumstances of a particular case.⁵

II. BACKGROUND

3. CTIA admits in its petition that it agrees with the Commission's holding that Section 332 does not *per se* preempt damage awards in state actions based on contract, tort or consumer protection law and that the question of whether Section 332 preempts a specific damage calculation must be made by on a case-by-case basis with reference to the details of the damage award and the facts of the particular controversy.⁶ CTIA, however, maintains that in reaching this conclusion, the Commission improperly centered its analysis on the question of whether awarding monetary damages for consumer protection, breach of contract or tort claims constitutes state regulation of rates.⁷ CTIA argues that the Commission should have provided more guidance to the courts in its decision by focusing on interpreting the statutory language of Section 332 regarding the terms "regulate" and "rates charged by."⁸ CTIA also argues that the Commission should have found that previous filed rate cases were relevant to the issue of whether the award of monetary damages is equivalent to rate regulation under Section 332 and thus are preempted by Section 332.⁹

III. DISCUSSION

4. The arguments that CTIA presents in its petition for reconsideration are not new and provide no basis for us to reconsider our determinations in the *WCA Order*. We address these arguments in turn.

5. First, we believe we have properly framed the issues presented to us in our analysis in

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⁴ In addition, the *WCA Order* incorporated a remaining issue from a Petition for a Declaratory Ruling filed by Southwestern Bell Mobile Systems. Southwestern Bell Mobile Systems Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, FCC 99-356, *Memorandum Opinion and Order*, 14 FCC Rcd 19898, 19908-09 (para 24) (1999). This outstanding issue, whether the Communications Act preempts the award of damages by state courts against CMRS providers, was so closely linked to the more specific issue of monetary damages raised by WCA, that the Commission chose to address them in the same order.

⁵ *WCA Order* at para. 2.

⁶ CTIA Petition at 4, 5, summary (unpaginated).

⁷ CTIA Petition at 2-3.

⁸ CTIA Petition at 3, 5.

⁹ CTIA Petition at 10-13.

the *WCA Order*. As CTIA asserts, and as we recognized in the *WCA Order*, Section 332 preempts state regulation of CMRS rates.¹⁰ Section 332 does, however, permit states to regulate the terms and conditions of CMRS service, which according to legislative history includes consumer protection matters.¹¹ Because all parties were in agreement that state regulation of CMRS rates is forbidden by Section 332, the issue presented to us was whether the award of damages was equivalent to rate regulation and thus prohibited or whether awarding damages generally fell under allowable state action on terms and conditions.¹² We do not agree that our framing and analysis of the issue in this manner were incorrect. The *WCA Order* appropriately addressed the questions presented in the WCA Petition and should provide sufficient guidance to courts regarding the meaning of the statutory language of Section 332.

6. Second, in explaining its dissatisfaction with the Commission's original decision, CTIA refers to issues that were previously raised by commenters to the WCA Petition. For example, CTIA argues that state court damage awards require a court to evaluate the reasonableness of the rates charged by CMRS providers and thus constitute rate regulation preempted by Section 332.¹³ In the *WCA Order*, we specifically determined that a damages award or calculation is not necessarily a ruling on the reasonableness of the price charged for a CMRS service.¹⁴ CTIA also maintains that damages awards are in fact retroactive rate adjustments.¹⁵ However, we also rejected arguments that a damage award, including a refund or rebate, necessarily was equivalent to a retroactive rate adjustment.¹⁶ These issues were raised and fully discussed in the *WCA Order*.¹⁷

7. Third, CTIA argues that the Commission should have looked to filed rate cases in order to interpret Section 332.¹⁸ While CTIA admits that the filed rate doctrine itself does not apply in the CMRS context, it again argues that the logic or analysis of the filed rate cases should apply.¹⁹ As it did in its comments on the WCA Petition, CTIA cites non-CMRS cases premised on the filed rate doctrine, including *Central Office*,²⁰ *Day*,²¹ and *Marcus*,²² whereby monetary

¹⁰ 47 U.S.C. 332(c)(3)

¹¹ H.R. Rep. No. 111, 103rd Cong., 1st Sess. 550-551 (1993).

¹² *WCA Order* at para. 13.

¹³ CTIA Petition at 3, 6, 12-13.

¹⁴ *WCA Order* at paras. 25-27.

¹⁵ CTIA Petition at 8-10

¹⁶ *WCA Order* at para. 27.

¹⁷ See *WCA Order* at paras. 25-36.

¹⁸ CTIA Petition at 10-13.

¹⁹ Compare CTIA Petition at 10-13 with CTIA Comments on the WCA Petition at 15-19.

²⁰ *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998) (*Central Office*).

²¹ *Day v. AT&T Corp.* 74 Cal. Rptr. 2d 55, Cal. Dist. Ct. App. (1998) (*Day*).

damages are considered to be modifications to the lawful tariff rate and thus equivalent to ratemaking. CTIA again argues that in the CMRS context damages awards should be similarly barred by Section 332.²³ This question of the applicability of the filed rate doctrine in CMRS cases, however, was fully analyzed in the *WCA Order* and all of the cases cited by the parties were considered by the Commission in reaching its determinations.²⁴ In that order we found that since there are no filed rates for CMRS services, the filed rate doctrine does not apply.²⁵ We further determined that the logic and analysis of the filed rate cases do not apply to the specific statutory preemption established by Section 332, and found that it would not serve the public interest to apply a filed rate doctrine rationale in CMRS cases.²⁶

8. As stated above, the issues raised in the CTIA Petition were fully considered in the *WCA Order*. CTIA has provided us no new facts or legal analysis that would cause us to reach a different result. We therefore deny the CTIA Petition.

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²² *Marcus v. AT&T Corp.*, 938 F. Supp. 1158 (S.D.N.Y. 1996) *aff'd* 138 F3d 46 (2nd Cir. 1998) (*Marcus*).

²³ We note that the cases cited in the CTIA Petition were previously cited by CTIA and others in the underlying record. Compare CTIA Petition at 10-13 (and accompanying notes) with CTIA Comments on the WCA Petition at 15-19 (and accompanying notes). See also, for example, AT&T Comments on the WCA Petition at 11-13 citing *Marcus* and *Day* and at 15 citing *Central Office*; AT&T Reply Comments on the WCA Petition at 6 n.18 citing *Day* and *Marcus* and at 12 citing *Central Office*; BAM Comments on the WCA Petition at 12-15 citing *Central Office* *Day* and *Marcus*; SBC Reply Comments on the WCA Petition at 2 n.6 citing *Central Office* and *Day*; Sprint Comments on the WCA Petition at 6 citing *Day*.

²⁴ See *WCA Order* at paras. 15-22.

²⁵ *WCA Order* at paras. 15-18.

²⁶ *WCA Order* at paras. 19-22.

IV. ORDERING CLAUSE

9. Accordingly, pursuant to Sections 1, 2, 4(i) and (j), 201, 303(f) and (r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i) and (j), 201, 229, 303(f) and (r) and 332, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, IT IS ORDERED, that the Petition for Reconsideration of the WCA Memorandum Opinion and Order filed by the Cellular Telecommunications Industry Association IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary