

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Calling Party Pays Service)
Offering in the Commercial Mobile)
Radio Service)

WT Docket No. 97-207

**OPPOSITION OF THE
CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION
TO THE PETITION FOR PARTIAL RECONSIDERATION OF
THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL**

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The Cellular Telecommunications & Internet Association ("CTIA"),¹ pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, hereby submits its Opposition to the Petition for Partial Reconsideration filed by the American Public Communications Council ("APCC") on June 4, 2001,² with regard to the above captioned proceeding.³

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

² See Petitions for Reconsideration, Clarification of Action in Rulemaking Proceedings, Calling Party Pays Service Offering in the Commercial Mobile Radio Services, WT Docket No. 97-207, 66 Fed. Reg. 35628-35629 (July 6, 2001).

³ Calling Party Pays Service Offering in the Commercial Mobile Radio Service, WT Docket No. 97-207, *Memorandum Opinion and Order on Reconsideration and Order Terminating Proceeding*, FCC 01-125 (rel. April 13, 2001) ("Order").

I. INTRODUCTION

In the Order, the Commission determined that this proceeding should be terminated without adopting specific rules governing the provision of calling party pays (“CPP”) at this time.⁴ It made this decision in light of the substantial divergence in opinion reflected in the record as to the need for any such rules, and noted that its existing rules do not prevent a carrier that wishes to provide CPP from doing so.⁵ The Commission further observed that, to some extent, events in the CMRS marketplace had overtaken the proceeding. Specifically, the Commission acknowledged that the widespread availability of flat-rate pricing plans for large “buckets” of minutes and service plans for which the first minute of an incoming call is free offered many of the benefits identified as potential benefits of CPP.⁶

In light of these changes, the Commission also determined that it did not “need to adopt rules to govern the manner in which a carrier may offer a calling party pays service, but can deal in an enforcement context with any individual carrier offerings that result in charges that may violate the Communications Act.”⁷ The Commission specifically noted that call screening capabilities were available to carriers offering CPP as a means of avoiding unauthorized calls, and reminded carriers that charges for unauthorized calls “could raise significant questions under Sections 201 and 202 of the Communications Act.”⁸ APCC urges the Commission to reconsider its decision to terminate the proceeding without adopting CPP-specific rules and to rely on its

⁴ Id. ¶ 23.

⁵ Id. ¶¶ 23, 24.

⁶ Id. ¶ 24.

⁷ Id.

⁸ Id. ¶ 24, n.55.

enforcement procedures to address unauthorized charges that violate the Communications Act. Instead, APCC seeks the adoption of a prospective rule that would prohibit CMRS providers from billing payphone lines for CPP calls.⁹ APCC's petition should be denied. The Commission is entitled to "highly respectful"¹⁰ and "very substantial"¹¹ discretion when it determines to terminate a proceeding, and this is particularly true where, as here, the Commission has determined to proceed to address the concern raised by APCC through adjudication, not through the adoption of general rules. The Commission has adequately explained its basis for terminating this proceeding and has addressed the concerns raised by APCC.

II. THE COMMISSION HAS DETERMINED TO ADDRESS THE POSSIBILITY OF CARRIER BILLING FOR UNAUTHORIZED CPP CALLS THROUGH ADJUDICATION, AND APCC HAS OFFERED NO VALID BASIS TO ALTER THAT DECISION.

The gravamen of APCC's petition is that a payphone service provider ("PSP") could be billed for calls placed on its payphone without the PSP's authorization, that the Commission failed to address this concern in the Order, and that the Commission should rectify this "oversight" by prospectively prohibiting carriers from billing PSPs for CPP calls. APCC is simply incorrect that the Commission failed to address the possibility of carrier billing for unauthorized calls. Indeed, APCC acknowledges that the Commission addressed the possibility that subscribers to telephone lines could be billed for unauthorized calls.¹² Specifically, the Commission determined that call screening capabilities in existing line information database

⁹ Calling Party Pays Service Offering in the Commercial Mobile Radio Service, WT Docket No. 97-207, *Petition for Partial Reconsideration*, at 4-5 ("APCC Petition").

¹⁰ Consumer Fed'n of Am. v. CPSC, 990 F.2d 1298, 1305 (D.C. Cir. 1993).

¹¹ Id.

¹² APCC Petition at 4-5.

“LIDB”) systems could offer protection from unauthorized calls, and, while declining to address unauthorized calls with a prospective rule, reminded carriers that billing for unauthorized calls could raise significant questions under Sections 201 and 202 of the Communications Act and indicated that it would deal with charges that violate the Act in an enforcement context.¹³

While the Commission’s discussion of the issue identifies the “PBX community” as the proponent of the unauthorized call billing concern, the Commission’s discussion of the issue applies with equal force to PSPs.¹⁴ This is evident from APCC’s petition, which acknowledges that carriers could use LIDB to prevent billing a CPP call to a PSP.¹⁵ Indeed, APCC points out that carriers also could use flexible automatic number identification (“Flex ANI”) service to accomplish the same result.¹⁶ However, APCC would prefer that the Commission prospectively require that carriers use some means to ensure that PSPs are never billed for CPP calls, rather than “rely[] on unnecessary and wasteful enforcement proceedings.”¹⁷

Thus, APCC ultimately cannot dispute that the Commission met its obligation to “consider the comments it received and to articulate a reasoned explanation for its decision”¹⁸ in deciding to terminate this proceeding without adopting CPP-specific rules. While not

¹³ See Order ¶ 24, n.55.

¹⁴ APCC attempts to argue that PSPs are *sui generis*, but its argument does not withstand scrutiny. See APCC Petition at 3. PSPs are not unique in having no relationship with the CPP provider. That is likely to be true for any person placing a call to a mobile phone user. Nor are PSPs unique in not being associated with the party to whom the call should be billed, as PBX owners, hotels, etc. are in the same position.

¹⁵ See id. at 5.

¹⁶ See id. at 4-5.

¹⁷ Id. at 5.

¹⁸ Williams Natural Gas Co. v. FERC, 872 F.2d 438, 450 (D.C. Cir. 1989).

announcing a standard of review, the court in Williams pointed out that “an agency’s discretion is surely at its height when it chooses not to act,”¹⁹ and noted that issuing an NPRM does not bind an “agency to promulgate a final rule if further reflection, or changed circumstances, convinced the Commission that no regulatory change was warranted.”²⁰ Quite plainly, the Commission considered the issue raised by APCC and articulated a reasoned explanation for not adopting rules at this time. The Commission determined that circumstances in the CMRS business have changed such that many of the benefits of CPP have been made available to subscribers through other means, that CPP can be provided by carriers without a change in the rules, that carriers have readily available means of avoiding billing for unauthorized calls, and that the Commission’s enforcement procedures are sufficient to address any unauthorized call billing that does occur.²¹

Thus, as tacitly acknowledged by APCC in its petition’s penultimate paragraph, APCC’s dispute devolves to a preference that the Commission address the potential for billing for unauthorized calls with a prospective rule, rather than through after-the-fact enforcement procedures. This preference must fail; it is black-letter law that the Commission has broad discretion in deciding whether to proceed via rulemaking or adjudication in meeting its statutory obligations.²² The Commission has articulated that it will proceed here using its enforcement

¹⁹ Id. (emphasis in original); cf Consumer Fed’n of Am., 990 F.2d at 1304-1305 (holding that an agency is entitled to “highly respectful or “very substantial” deference when terminating a proceeding).

²⁰ Williams, 872 F.2d at 450.

²¹ See Order ¶ 24, n.55.

²² SEC v. Chenery Corp., 322 U.S. 194, 203 (1947) (“the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the

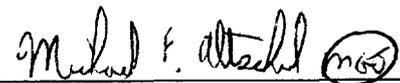
procedures and it has articulated why it will do so, and, in any event, APCC has not provided any facts suggesting that there is in fact any unauthorized call billing problem at all to date, much less a problem so widespread and endemic to CPP as to justify considering a change in course.

III. CONCLUSION

For the foregoing reasons, CTIA respectfully requests that the Commission deny APCC's Petition for Partial Reconsideration.

Respectfully submitted,

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informed discretion of the administrative agency”) citing Columbia Broad. Sys. v. U.S.,
316 U.S. 407, 421 (1942).

CERTIFICATE OF SERVICE

I, Dennette Manson, do hereby certify that on this 23rd day of July, 2001 copies of the foregoing "Opposition to Petition for Partial Reconsideration of The Cellular Telecommunications & Internet Association" were delivered by postage pre-paid first class mail, or otherwise indicated to the following parties:

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