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

In the Matter of	)	
	)	
Calling Party Pays Service Offering	)	WT Docket No. 97-207
In the Commercial Mobile Radio Services	)	

SECOND MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: January 11, 2002 **Released: January 31, 2002**

By the Commission:

I. INTRODUCTION

1. In this *Second Memorandum Opinion and Order on Reconsideration*, we deny the American Public Communications Council's (APCC) Petition for Reconsideration[1] of the order terminating the calling party pays docket (*Termination Order*).[2] APCC argues that it is necessary for the Commission to promulgate a rule to prevent commercial mobile radio service carriers that offer a calling party pays service option from charging payphone operators for calls placed from their phones to wireless subscribers. For the reasons discussed below, we find that adequate safeguards exist to protect the interests of payphone service providers without imposing additional regulations on commercial mobile radio service carriers.

II. BACKGROUND

2. In a Notice of Inquiry (*Inquiry*) issued in 1997, the Commission sought information about calling party pays and whether regulatory action was necessary to facilitate more widespread implementation of calling party pays service in the United States.[3] Under a calling party pays system, wireless subscribers pay only for the calls they place to others; the calling party is responsible for any charges associated with calls placed to a wireless subscriber. Under the predominant system currently in place in the U.S. for commercial mobile radio service calls, however, wireless subscribers pay both for calls they place as well as for calls they receive.

3. On June 10, 1999, the Commission adopted a *Declaratory Ruling and Notice of*

[1] Petition for Partial Reconsideration submitted by the American Public Communications Council, filed June 4, 2001 (APCC Petition).

[2] Calling Party Pays Service Offering in the Commercial Mobile Services, WT Docket No. 97-207, *Memorandum Opinion and Order on Reconsideration and Order Terminating Proceeding*, 16 FCC Rcd 8297 (2001) (*Termination Order*).

[3] Calling Party Pays Service Offering in the Commercial Mobile Services, WT Docket No. 97-207, *Notice of Inquiry*, 12 FCC Rcd 17693 (1997) (*Inquiry*).

Proposed Rulemaking in this proceeding.[4] The *Notice of Proposed Rulemaking* sought comment on several key issues identified in the *Inquiry*, including how to notify wireline callers that they will incur charges when placing a call to a wireless phone, and how to bill callers for calling party pays calls. In the *Declaratory Ruling*, the Commission addressed the regulatory status of calling party pays and determined that calling party pays should be classified as a commercial mobile radio service.[5] As a commercial mobile radio service, calling party pays thus would fall under the regulatory structure set out in Section 332(c)(3) of the Act.[6] On August 16, 1999, the Public Utilities Commission of Ohio filed a petition requesting reconsideration or clarification of the *Declaratory Ruling*.[7]

4. On April 9, 2001, the Commission terminated the calling party pays proceeding, and denied the Ohio Petition. In the *Termination Order*, the Commission stated that regulations were not necessary to govern calling party pays services and that lower prices and new pricing plans offered many of the same benefits that calling party pays services would.[8] The Commission also stated that if the need arose, it could initiate a new proceeding and gather a fresh record to consider rules to govern the offering of calling party pays services.[9] The Commission explained in the *Termination Order* that its existing rules do not prevent a carrier from offering a calling party pays service to its subscribers and that the mobile telephone market had changed substantially since the proceeding was started in 1997. As a result, the Commission stated that it was in the public interest to close the proceeding and eliminate the regulatory uncertainty created by the pendency of the proposals.[10] Further, the Commission noted that it was confident it could use existing enforcement mechanisms to deal with any carrier offerings that violate the Communications Act.[11]

5. On June 4, 2001, APCC submitted a Petition for Partial Reconsideration of the Termination Order. APCC argues that the Commission ignored the concerns expressed by APCC in its comments in this proceeding. APCC claims that contrary to our claim of reducing regulatory uncertainty, such uncertainty remains for payphone service providers because there is no rule that specifically prohibits commercial mobile radio service providers from billing payphone service providers for calling party pays calls placed from their facilities. Specifically, APCC asks the Commission to prohibit carriers from billing payphone lines for calling party pays calls,[12] and to require carriers that offer calling party pays service to screen all calls for flexible

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[4] Calling Party Pays Service Offering in the Commercial Mobile Services, WT Docket No. 97-207, *Declaratory Ruling and Notice of Proposed Rulemaking*, 14 FCC Rcd 10861 (1999) (*Notice*).

[5] *Id.*

[6] Communications Act of 1934, as amended, 47 U.S.C. § 332(c)(3).

[7] Petition for Reconsideration and Clarification and Further Comments on Jurisdictional Issues Submitted by the Public Utilities Commission of Ohio, filed Aug. 16, 1999 (Ohio Petition).

[8] *Termination Order*, 16 FCC Rcd at 8304-5, para. 24.

[9] *Id.*

[10] *Id.* at 8297-8, para. 2.

[11] *Id.* at 8304-5, para. 24.

[12] APCC Petition at 4.

automatic number identification (Flex ANI) coding digits to identify payphone-originated calls.[13]

6. The Cellular Telecommunications and Internet Association (CTIA) and the Rural Cellular Association (RCA) filed oppositions to the APCC Petition on July 23, 2001.[14] CTIA and RCA argue that the *Termination Order* did address the concerns raised by APCC and provided adequate safeguards for payphone operators. CTIA points out that no data have been placed in the record to demonstrate that payphone operators have been billed by commercial mobile radio service providers for calling party pays calls.[15] RCA notes in its opposition that wireless carriers have every incentive to determine if the caller to a calling party pays subscriber can be billed prior to completing the call.[16] APCC responded to the oppositions on August 6, 2001.[17]

III. DISCUSSION

7. **Background.** APCC specifically suggests that the Commission failed in its obligation to consider the comments it received and to provide a reasoned explanation for its decision not to adopt APCC's proposed rules regarding calling party pays calls from payphones.[18] In its opposition, CTIA contends that in the *Williams* case, on which APCC bases its Petition, the court noted that the issuance of a notice of proposed rulemaking does not bind an "agency to promulgate a final rule if further reflection, or changed circumstances, convince [the agency] that no regulatory change was warranted."[19] CTIA further argues that the Commission considered the issue raised by APCC and articulated a reasoned explanation for not adopting calling party pays rules.[20]

8. **Discussion**. We affirm that rules specific to calling party pays services, including those requested by APCC, are unnecessary. To the extent problems arise, as stated in the *Termination Order*, APCC's concerns can be efficiently addressed through the Commission's enforcement mechanisms.[21] Consequently, we deny APCC's Petition.

9. The Commission's evaluation of the entire record in this proceeding informed the determination not to adopt specific rules relating to calling party pays offerings. The *Termination Order* listed the topic areas the proceeding addressed and noted the range of issues, including

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[13] *Id.*

[14] Public Notice of the APCC Petition appeared in the Federal Register on July 6, 2001.

[15] CTIA Opposition at 6.

[16] RCA Opposition at 2.

[17] The APCC response was due 10 days after the filing of oppositions on July 23, 2001, or August 2, 2001. It is not clear why APCC filed its response several days later than the due date. Although the APCC Reply was untimely filed, we consider the arguments made in the interest of drawing on a complete record.

[18] APCC Petition at 2 (citing *Williams Natural Gas Company v. Federal Energy Regulatory Commission*, 872 F. 2d 438, 450 (D.C. Cir. 1989) (*Williams*)).

[19] CTIA Opposition at 4-5.

[20] CTIA Opposition at 5.

[21] *Termination Order*, 16 FCC Rcd at 8304-5, para. 24.

several specific matters as examples.[22] The Commission noted in the *Termination Order* that commercial mobile radio service providers have developed pricing options and service offerings that appeared to provide the same benefits that the *Notice* tentatively found that calling party pays services could provide.[23] Further, the *Termination Order* specifically noted that the Commission's enforcement mechanisms can be used to protect callers from charges for unauthorized calling party pays calls.[24] Thus, the Commission's action terminating the calling party pays proceeding is consistent with precedent that states an agency is accorded deference when it satisfactorily explains its action, including a rational connection to the facts found in the record.[25]

10. The APCC Petition fails to consider the full impact of these market developments on the need to regulate calling party pays implementation. These developments, which have involved the use of alternative means to stimulate the use of wireless systems, appear to have dramatically reduced the demand for a calling party pays service offering. This reduced market demand for calling party pays offerings was substantially demonstrated in the record and was a key factor in determining the best way to resolve this proceeding.[26] Although calling party pays services were offered by several carriers for a number of years in certain geographic areas, APCC has failed to provide any evidence of payphone operators being billed by wireless carriers for calling party pays calls. An agency must "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'"[27] Given the current apparent lack of wireless carrier interest in offering calling party pays services, it is difficult to justify promulgating a new rule specifically designed to protect payphone operators from hypothetical damages resulting from the use of calling party pays services for calls made from payphones.

11. We agree with RCA's comments that APCC fails to recognize the strong incentive of carriers who elect to provide calling party pays to ensure that the party placing a call to a mobile subscriber can be billed for the call. This incentive applies to all calling party pays calls—including those originated on payphones or PBXs. If a wireless carrier does not have a reasonable expectation of payment from the calling party, the calling party pays service offering

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[22] *Termination Order*, 16 FCC Rcd at 8303-4, paras. 20-21.

[23] *Id.* at 8304-5, para. 24.

[24] *Id.*

[25] *See Action for Children's Television v. FCC*, 564 F.2d 458, 479 (D.C. Cir. 1977). We also note that the calling party pays *Notice* involved tentative proposals only for new rules intended to facilitate the offering of calling party pays services on a widescale basis. No prior rules existed to prevent or regulate the offering of calling party pays. In this context, the Commission's decision not to proceed with regulations for calling party pays offerings did not alter the regulatory status quo. *See Williams*, 872 F.2d at 443. Moreover, in the instant proceeding, the Commission was not under a specific statutory duty to regulate. *Cf. Consumer Federation of America v. Consumer Product Safety Comm'n*, 990 F.2d 1298, 1304 (D.C. Cir. 1993) (citing *Professional Drivers' Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1221 (D.C. Cir. 1983)) (*Consumer Federation of America*). In such instances, a review of the agency's decision not to issue new regulations is judicially treated with somewhat more deference than a decision to promulgate, rescind, or amend regulation because non-promulgation does not "alter the regulatory status quo." *Consumer Federation of America*, 990 F.2d at 1304 (citing *Williams*, 872 F.2d at 442-43).

[26] *Termination Order*, 16 FCC Rcd at 8304-5, para. 24.

[27] *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

will not be economically viable. Therefore, one would expect that a wireless carrier providing a calling party pays service option would implement procedures to determine, prior to call completion, that a call will be paid for by the calling party. One such procedure referred to in the *Termination Order* is to check the Line Information Data Base to confirm that the originating phone will accept charges for calling party pays calls.[28] For originating phones that will not accept charges for calling party pays calls, we expect that a wireless carrier would request alternative billing information, such as a credit card number, before completing the call.

12. Finally, we reject APCC's allegation that enforcement proceedings are inefficient and wasteful.[29] The measures recognized by the *Termination Order* would provide the necessary safeguards to address and resolve the particular concerns of payphone providers should they choose to pursue any specific grievances with respect to violations of Sections 201 and 202 the Communications Act and the Commission's rules. The filing of a complaint allows a reasonable and timely means of seeking remedy. Although our chosen course here is not to impose a regulatory mandate, courts have recognized that enforcement options are a feasible alternative available to any agency.[30] For all the reasons discussed above, we deny the APCC Petition for Partial Reconsideration.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that the Petition for Partial Reconsideration submitted by the American Public Communications Council on June 4, 2001, **IS DENIED.**

14. This action is taken pursuant to Sections 1, 4(i), 4(j), 7, 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 157, 303(r), 332.

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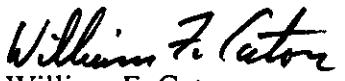

William F. Caton
Acting Secretary

[28] *Termination Order*, 16 FCC Rcd at 8305, n.55.

[29] APCC Petition at 5.

[30] Generally, an agency is accorded deference in its choice of remedies. *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413 (1958). Further, concentration on enforcement mechanisms may constitute a rational option for possible agency action. *See Consumer Federation of America*, 990 F. 2d at 1304 (according deference to agency's selection of means for pursuing policy goals; also citing *National Wildlife Fed'n v. Environmental Protection Agency*, 925 F.2d 470 474-75 (D.C. Cir. 1991)).