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June 21, 2002

EX PARTE

By Courier And Electronic Filing

Marlene H. Dortch,
Secretary
Federal Communications Commission
445 Twelfth Street, S.W. -- Room TWB-204
Washington, D.C. 20554

ORIGINAL

Re: Sprint PCS and AT&T Petitions For Declaratory Ruling On CMRS
Access Charge Issues, WT Docket No. 01-316

Dear Ms. Dortch:

I am writing to respond to arguments made by certain wireless carriers in this proceeding that the FCC has the authority to issue an order providing that wireless carriers may assert state law claims against interexchange carriers ("IXCs") for payment of charges for traffic originated on and terminated to the wireless carrier's network. Under this theory, the wireless carriers would be entitled to assert state law unjust enrichment or implied-in-fact contract claims to recover damages against IXCs.

In the circumstances presented in these proceedings, permitting a wireless carrier to obtain recovery under implied-in-fact contract or unjust enrichment theories pursuant to state law would require a court to determine a wireless carrier's rates, and such claims are thus pre-empted by the Communications Act. In particular, Section 332(c)(3)(A) provides that "no state or local government shall have any authority to regulate the entry of *or the rates charged* by any commercial mobile service." 47 U.S.C. § 332(c)(3)(A) (emphasis added). On the facts presented in these proceedings, wireless carriers would assert such claims as a method to receive compensation from IXCs for the origination or termination of traffic carried on the wireless carriers' networks. Because such claims do not depend on the existence of an express agreement between the parties as to the price, in order to determine the proper amount of damages under an implied contract or unjust enrichment theory, a state court necessarily would be determining the effective rate that the wireless carrier could have charged an IXC - precisely the conduct that the Communications Act pre-empts.

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In a prior order, the Commission has determined that, as a matter of law, Section 332 does not pre-empt all state law actions for damages against wireless carriers, because such actions would not “per se” constitute the rate regulation that state courts are pre-empted from conducting. *In the Matter of Wireless Consumers Alliance, Inc.*, WT Docket No. 99-263 (Aug. 14, 2000). However, the Commission made clear that “whether a specific damage award or 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.” *Id.* ¶ 36. In particular, the Commission concluded that state contract claims are pre-empted where the “request for monetary damages requires a court to retroactively establish new rates in determining damages, thus constituting state ratemaking explicitly prohibited by Section 332.” *Id.* (citing *Tenore v. AT&T Wireless Serv.*, 136 Wash.2d 322, 962 P.2d 104, 113 (1998)). In the absence of an express agreement between an IXC and a CMRS carrier as to price, any damages award in favor of a wireless carrier under an unjust enrichment or implied-in-fact contract claim would result directly in the state court establishing the rates for the CMRS carrier’s services. Such implied contract or quasi-contract claims are therefore pre-empted, and a Commission decision in this docket permitting such actions to be brought would be an arbitrary departure from prior Commission precedent.

Sincerely,



Daniel Meron