

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

_____)
In the Matter of)
ASAP Paging, Inc.)
Petition for Preemption of)
Public Utility Commission of Texas)
Concerning Retail Rating of Local Calls)
to CMRS Carriers)

WC Docket 04-6

COMMENTS OF F. CARY FITCH d/b/a FITCH AFFORDABLE TELECOM

Introduction.

F. Cary Fitch d/b/a Fitch Affordable Telecom (“Affordable Telecom”) submits these comments in support of the Petition for Preemption filed by ASAP Paging, Inc. Affordable Telecom is a sole proprietorship operated by F. Cary Fitch.¹ Affordable Telecom has a series of Radio Station Authorizations (“RSAs”) issued by the FCC to use wireless spectrum on a common carrier basis in order to provide Commercial Mobile Radio Service in several parts of Texas. Fitch Affordable has had its own issues with CenturyTel of San Marcos, Inc. and one of its other Texas ILEC affiliates. It is likely that the decision in this case will directly impact – or at least serve as precedent applicable to – Affordable Telecom’s future relationship with CenturyTel ILECs in Texas.

Discussion.

The Texas Public Utilities Commission (TPUC) has erred in its decisions to assign the retail rating point for all paging service calls to the location of the CMRS switch and to deny CMRS carriers “local calling” under Texas mandatory ELCS rules for the following reasons.

¹ Fitch has nearly 50 years (since mid 1950s) of respectful involvement with the FCC, on his personal behalf and on behalf of various mass media licensees. Fitch particularly respects the candor that the FCC expects from those it oversees, which candor is notably absent in some sectors of the current matter.

1. TPUC incorrectly asserts that since no one can tell where a pager is, ILECs may retail rate the calls originated by ILEC subscribers that are addressed to CMRS providers based on the physical location of the “paging terminal” or “switch” that processes the call. TPUC denies the CMRS paging carrier the retail rating that should prevail based on current industry practice of using the rate centers associated with the calling and called NXXs.

This TPUC approach to retail rating ignores the CMRS network of FCC licensed transmitters and the coverage area² for them. More egregiously, it wrongly equates wireless service with the legacy wireline network. Mobile customers are not “location based.” Instead they are “presence based.” If their mobile station is turned on and tuned in to an available transmitter, they are “on” the network, and their physical location is simply irrelevant to the retail rating that should apply to a wireline-wireless call.³ TPUC is so wireline-centric that it felt compelled to “locate the called customer” in order to establish the proper retail rating for a wireline-wireless call. Since “locating” ASAP’s paging customers with reference to a rate center is obviously impossible, TPUC then chose to “deem” the called wireless customer to somehow be “physically located” within the hardware/software of ASAP’s switch/paging terminal.”

This “deeming” is purely the result of TPUC’s irrational attempt to force the square peg of wireless service into the round hole of traditional legacy ILEC wireline networks. TPUC should have simply accepted the prevailing industry practice of retail rating calls based on the NXX rate center assignments⁴ of the calling and called numbers. TPUC limited its decision to

² A CMRS carrier’s “‘coverage area’ is the area in which wireless service can be received from the wireless carrier.” Memorandum Opinion and Order, *In the Matter of Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, CC Docket 95-115, FCC 03-284 ¶ 22 (Nov. 10, 2003) (“*Wireline-Wireless Portability Order*”). CMRS coverage areas do not slavishly hew to legacy ILEC rate center boundaries. They comprise much wider areas and often cross LATA lines or even state lines.

³ “[T]he services provided by LECs and CMRS carriers have an essential difference: the wireline phone is tied to a single physical location, whereas the wireless phone can travel at will.” Opposition of the Federal Communications Commission to Emergency Motion for Stay, *USTA v. FCC*, No. 03-1414 Before D.C. Circuit Court of Appeals, filed Nov. 26, 2003, p. 15.

⁴ “A ‘rate center’ is a geographic area established by state regulators that is used to determine whether a given call is a local call or a toll call.” Opposition of the Federal Communications Commission to Emergency Motion for Stay, *USTA v. FCC*, No. 03-1414 Before D.C. Circuit Court of Appeals, filed Nov. 26, 2003, p. 3. *See*

“paging carriers”. They somehow assume that all other CMRS carriers do know where their subscriber is, and that the subscriber is in a defined rate center. That is not true. While a carrier may be able to locate a mobile unit for emergency (911) purposes within a limited area, for everyday calling, a CMRS carrier can not determine the called customer’s physical location with reference to the wireline rate center and then tell the originating ILEC what to charge its customer. Thus the TPUC logic is flawed, faulty, lacking in scientific or practical basis, and discriminatory. It is a conclusion supported by data gathered to support the conclusion, rather than a conclusion reached after examining current practice and available data. If the TPUC decisions is allowed to stand it must be applied across the board to every CMRS carrier that can not peg every operating unit to a specific rate center. Since coverage areas are interstate, it would have to apply to all 50 states as well. That would wreck havoc on the CMRS carrier industry. Such practice is patently contrary to FCC intentions, absent any change in FCC intent, policy and rules.

CMRS carriers obtain NXXs specifically at the insistence of ILECs to designate local calling areas so they can collect wireline-wireless calls that will be retail rated “non toll” to the calling party.⁵ The discrete rate center based NXX serves no other purpose in all CMRS services, and particularly when the CMRS carrier provides one-way messaging service.

CO Code Guidelines, p. 5. The Commission has noted that the calling and called NXXs are the determinant for **retail rating** of calls on several occasions. Memorandum Opinion and Order in *Starpower Communications v. Verizon South, Inc.*, File No. EB-00-MD-19, FCC 03-278 ¶ 17 (Nov. 7, 2003) (“*Starpower Liability Order*”); Memorandum Opinion and Order in *In the Matter of Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, CC Docket 95-115, FCC 03-284 (Nov. 10, 2003) (“*Wireline-Wireless Portability Order*”) ¶¶ 11, 16, 28. Memorandum Opinion and Order in *In the Matter of Telephone Number Portability, Carrier Requests for Clarification of Wireless-Wireless Porting Issues*, CC Docket 95-115, FCC 03-237, ¶ 22 (Oct. 7, 2003) (“*Wireless-Wireless Portability Order*”). As ASAP points out on pages 31-40 of its Petition, this is not new law. CMRS carriers have always been entitled to numbers, and it has always been clear that getting local numbers is necessary for the sole purpose of securing locally retail rated calls from wireline customers.

⁵ See ASAP Petition, pp. 34-40, notes 37, 38, 67 and 71.

TPUC uses an outmoded concept that every paging site will have a collocated “paging terminal,” so that the paging terminal is a proper point to retail rate calls.

It may be true that at some time in the past, every CMRS “paging” site had a discrete “paging terminal” at each transmitter site on the end of an ILEC local phone line. But in the modern world it is better and more efficient to have a central site with more sophisticated processing, centralized voice mail and other features, with distribution to individual transmitter sites via other means such as private lines, radio links, satellite links or IP links. It is inappropriate and obsolete to slavishly relate to “paging terminals” as the point of rating for a “Paging” call since the “paging terminal” may be a significant distance away; it could be in another LATA, another MTA or even another state. The ILECs want to turn local calls into toll calls merely because a CMRS provider is using more modern and efficient equipment that may no longer be physically located in the local calling area where the call originates. This is the equivalent of designating for retail rating purposes that all “cellular” calls terminate at a Mobile Telephone Switching Office (“MTSO”), and that all calls to a cell phone are really calls to that MTSO even if the MTSO is in another rate center or even another LATA.

2. TPUC overlooks the fact that even if every site had a paging terminal, that site might still provide service to multiple rate centers. The FCC should not require a CMRS carrier to build a paging transmitter in every nearby rate center just so the CMRS carrier could guarantee that every call was “local”. Even if there were such transmitters, there would be no way to confine the signals so that some paging receiver didn’t receive a message from a site in an adjacent rate center.

Wireless signals do not hit a wall and fall to the ground when they come up to an arbitrary state designated local calling area boundary that exists on paper. Wireless networks are different than wireline networks and they should be. TPUC is attempting to usurp FCC judgment and authority by defining where a CMRS carrier must have switches, transmitters and other facilities, and the areas that may be served by them. It is not doing so to make wireless service

more affordable or efficient; instead its clear goal is to protect legacy wireline incumbents from wireless competition.

The clear result of TPUC's decision is that if ILECs have mandatory ELCS between three adjacent rate centers, a CMRS carrier must then build three separate transmitter sites with three "paging terminals" to obtain retail rated local calling even if a person standing at one tower could see the other two towers on a foggy day and receive signals from all of them. Under the TPUC decision, a CMRS transmitter/paging terminal could not serve any area outside of a single ILEC rate center unless calling parties pay a toll. This is clearly ILEC-centric thinking and demonstrates regulatory capture of TPUC by ILECs, and TPUC's disregard of FCC rules.

3. TPUC wrongly attempts to make CMRS carriers conform to wireline concepts and duplicate the wireline network topology.

CMRS carriers are not required to slavishly duplicate the wireline network. They are explicitly authorized to build their networks in the most efficient manner possible in order to provide the best service to the public, at a competitive price, and for the public good.⁶ TPUC has overruled FCC policy by denying CMRS carriers the benefits of centralized processing, inexpensive inter area transport facilities, and the right to build their network for the best service and value to their customers. TPUC's decision wrongly punishes wireless carriers for not being wireline carriers and for not duplicating the legacy ILEC wireline network topology.

4. TPUC has denied CMRS carriers and the ILEC customer's non-discriminatory ability to be dialed locally using NXX assignments based on unsupportable and illegal discriminatory practices.

TPUC effectively held there is a class of mandatory extended local calls, which must be paid for by all ILEC customers, but that ILEC customers can not be allowed to call customers of

⁶ *In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, & 12, FCC 86-85 LEXSEE 59 Rad. Reg. 2d (P&F) 1275 (Rel. Mar. 5, 1986) ("FCC Policy Statement") Policy Statement at ¶ 2.

non-ILECs with locally rated numbers in the same extended area. TPUC has thus created a favored class of carrier (ILECs) which all customers must pay the mandatory, monthly, Expanded Local Calling Surcharge, but which TPUC claims only allows them to call other ILEC customers. CLECs and CMRS carrier's subscribers in the mandatory expanded local calling area may need to be dialed with 1+ dialing and the ILEC may charge its customers "toll," on top of the monthly ELCS fee. This makes it much more likely that persons in the ELCS area will select an ILEC as their carrier rather than a CLEC or CMRS carrier since calls to them would be non-toll by other ILEC customers but toll if they had a CMRS or CLEC number. A person, business or government agency would choose a number that can be dialed at no additional charge over one that requires toll dialing.

5. Most Texas ILECs have long recognized the parity required, expected and extended in local dialing parity to CMRS carriers based on the NXX rating of the called party, both on locally rated calls and on ELCS calls.

Every other ILEC in Texas has honored CMRS carriers' NXX rate center assignments; every other ILEC has customarily retail rated calls from their customers to CMRS providers, in local rate centers and even in ELCS areas. CenturyTel is a rogue ILEC on a mission to prevent citizens in CenturyTel ILEC areas from having any kind of competitive choice; it has even decided to punish its own ratepayers for having the temerity to call a customer of a competitor by imposing toll charges on them when they do so.

For unclear reasons, TPUC rejected the current prevailing ILEC practice of respecting NXX rate center assignments, even when it comes to ELCS, at the request of a so called "small rural ILEC" that is really the largest "independent" ILEC in the country. CenturyTel is a holding company that operates "rural" ILECs, intercity fiber carriers, and other subsidiaries on a nationwide basis. CenturyTel's ILEC specialty is to buy and/or operate ILECS in rural areas, and

try to maintain the “walled garden” mentality, keeping out all competition possible, maintaining rate center boundaries, with high LD costs, and even claiming to have its own tandem in a single end-office rate center so that it can double dip the IXC traffic with both end office and tandem charges.⁷

CenturyTel pretends to be a “Mom and Pop” rural phone company, when it is in fact a three billion dollar a year national business. This case is an outgrowth of CenturyTel’s “I’m rural so I do not have to truck with competition” strategy. CenturyTel did not want to deliver traffic to a CMRS Carrier, even though it did not pay termination fees and even though it incurred no additional cost as compared to the way it delivered traffic to another ILEC in an adjoining rate center covered by the Mandatory State Expanded Local Calling Service, which its subscribers were paying CenturyTel for, on each monthly bill.

6. TPUC ruled that the only place that calls to ASAP could be retail rated was at its switch, which was outside the mandatory local calling area, even though calls did in fact both originate and terminate within the mandatory local calling area.

TPUC ruled that any call made to one of ASAP’s customer numbers was really a call “to ASAP” and that since ASAP’s switch was located in Austin, it is not ELCS because there is no ELCS between San Marcos and Austin. The calls were being made to an NXX rated to Lockhart Texas to customers that are physically located in or have a legitimate connection to Lockhart. Lockhart is ELCS from San Marcos. ASAP has CMRS coverage in both Lockhart and San Marcos, along with other areas in Central Texas. The TPUC ruling totally ignored ASAP’s existence as a common carrier and relegated ASAP to the status of an ILEC end user of some unexplained CenturyTel service. This cannot be allowed. The FCC made it clear long ago that CMRS carriers are not end users, but are instead co-carriers and peers.

⁷ CenturyTel’s San Marcos tandem is not a true tandem. It connects to only one end office. It is not a stand alone switch connected at the trunk side to any other end office switches. It is a sham tandem designed only to artificially increase access charge revenues.

7. TPUC's decision is a prime example of "Regulatory Capture."

It is not uncommon for the industry that is regulated to gain so much influence at the regulating agency that the agency's effective role changes from protecting consumers from the regulated provider to preventing its own consumers' desire to access and use competitive services. Any competition and any practice that is not consistent with the regulated provider's economic benefit becomes the enemy of the regulator. In this case the ILEC industry has reasons, even if some of them are based in legacy rather than current environment, to maintain a rate center based system, to define the bounds of various ILECs, and to establish a system of inter-ILEC inter rate center traffic exchange. TPUC administers this system and has evidently been "captured" by it.

If there is a problem involving only the regulated industry, the regulator applies its rules to sort out the issues. But if there is an outsider, the Buggy Whip Commission jumps into action to protect the regulated buggy whip providers from insurgent alternative providers that threaten the buggy whip industry. TPUC looked at the issues only from the ILEC position, and decided that any carrier it does not regulate has no standing or any rights not granted by State Law or TPUC. Rights granted under Federal Law do not play any part of the regulator's reality.

TPUC is protecting the ILEC, but it is really protecting its own turf, because it is not to its advantage to recognize any rights that conflict with its own regulatory regime and it is certainly not in TPUC's interest to advance the rights of those it does not and cannot regulate. Since TPUC has very little oversight of CRMS carriers, the best thing for TPUC to do is preserve the strength and involvement of the industry it does regulate to the detriment of those it does not. TPUC has no reason to recognize the parity of ILECs and any other carrier such as CMRS or

CLECs since any such recognition is a diminishment of its primary power base, the regulation of ILECs.

8. TPUC is abetting Century Tel's policy of discrimination against certain classes of carriers.

CenturyTel at present enters much more freely into Interconnect agreements with two-way CMRS carriers, because there is a net traffic flow from the CMRS carrier to the ILEC, resulting in an income source for Century Tel. However CenturyTel is much less accommodating of one-way CMRS carriers because CenturyTel will only send traffic generated by Century Tel's subscribers to the CMRS carrier, and will therefore receive no traffic or revenue. Century Tel would therefore rather not have an Interconnection Agreement at all, and if they do enter into one they will insist on terms that ensure access payment or toll charges for outbound calls. TPUC's declaration that ASAP is really an "end user" with presence outside the San Marcos rate center wrongly protects CenturyTel against its own customers and against insurgent competitors.

9. TPUC is using its ASAP decision to deny intervention in Texas ELCS cases to CMRS carriers seeking to ensure proper retail rating.

The PUC recently ruled that Affordable Telecom could not intervene in an application to establish ELCS service in Texas by stating that CMRS carriers have no justiciable interest. According to TPUC, having an NXX in a rate center that will be ELCS to another rate center does not confer standing, even though there is a clear competitive impact. TPUC ruled that Affordable Telecom is not "really" in the ELCS area, despite the fact it has NXXs in that area. TPUC ruled that Affordable Telecom is the "called customer" rather than a co-carrier and a peer.⁸ TPUC will not let CMRS carriers intervene in ELCS creation cases to ensure proper retail

⁸ See, TPUC Docket 27802, Petition of City of Carrizo Springs for Expanded Local Calling (ELC) to the Exchanges of Batesville, Uvalde, Eagle Pass and LaPryor, Texas.

rating, and has also prevented proper retail rating in an after-the-fact complaint case. It is clear that TPUC is intent on protecting incumbent legacy wireline ILECs against insurgent wireless competition even if it must send CMRS providers into a black-hole of non-enforcement.

10. Local retail rating is an imperative for wireless service.

It should be clear to anybody (except, perhaps, a captured state regulator and a gatekeeper ILEC) that **retail rated** local calling from wireline calling parties is absolutely essential to any CMRS carrier and both wireline and wireless customers. TPUC's ASAP decision effectively ends local **retail rated** calls, except for calls originating from a local calling area that are routed to a CMRS switch that by happenstance is physically located in the same local calling area. All the other numbers, and all the other wireless customers, are consigned to toll calling only. This is not the law; this is not proper policy. It violates years of precedent; it is contrary to many FCC decisions. It is inconsistent with the way the industry actually operates today. King Kanute has regained control of the Texas PUC and is commanding the waves of technological progress and competitive service provision to move offshore. The Luddite inmates of the state asylum cannot prevail or chaos will reign. The USA cannot have 50 states with arbitrary rules as to how NXXs are rated and treated for CMRS carriers.

Conclusion.

Wireless service is not wireline service. CMRS carriers cannot be required to look, act like and design their networks like legacy wireline ILECs. Allowing ILECs to impose toll charges when their customers call a "local" number held by a CMRC carrier is anticompetitive, unjust, unreasonable, discriminatory, and violates federal law and precedent. TPUC's illegal and unreasonable ASAP decision must be preempted. If you want everybody to be like an ILEC, then outlaw all competition except by those who act like ancient, legacy, monopoly providers. The

FCC should encourage entry and operation by folks that are not merely interested in extracting supranormal profits and want to design, provide and deliver innovative and modern services to communications customers. If you wish to have anything other than a few telco look-a-likes, then grant ASAP's Petition.

Respectfully Submitted,

/s/

F. Cary Fitch d/b/a Fitch Affordable Telecom