Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
South Seas Broadcasting	)	RM-11415
Petition for Rulemaking	)	

OPPOSITION OF AT&T TO PETITION FOR RULEMAKING

On July 23, 2007, South Seas Broadcasting Inc. (South Seas) filed a Petition for Rulemaking (Petition) asking the Commission to "expand the implementation of Section 254(g) of the Communications Act, 47 U.S.C.A. § 254(g), to include wireless (cellular telephone) calls from the mainland United States to the U.S. Territory of American Samoa."[1] On January 22, 2008 the Commission issued a Public Notice inviting interested persons to file statements opposing or supporting the Petition within 30 days.[2] For the reasons set forth below, AT&T opposes the Petition.

The debate over whether to require rate integration by Commercial Mobile Radio Service (CMRS) providers has a long history. Prior to the passage of the Telecommunications Act of 1996[3], the Commission required domestic interexchange carriers to integrate their rates.[4] The rate integration requirement, however, was never extended to CMRS providers. In the 1996 Act, Congress codified the Commission's rate integration rule as Section 254(g), which instructed the Commission to promulgate rules

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[1] South Seas Petition for Rulemaking at 1.

[2] Public Notice Report No. 2848 (January 22, 2008).

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act).

[4] The Commission in 1976 required AT&T to develop a tariff that would integrate the rates it charged for interstate long distance service to Alaska, Hawaii and Puerto Rico into the domestic rate patterns applicable in the contiguous 48 states. *See Integration of Rates*, 61 F.C.C.2d 380, 392 (1976).

to require that "a provider of interstate interexchange service shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other state." Section 254(g) does not mention CMRS providers.

In the rulemaking to implement Section 254, the Commission adopted a rule that codified the language of Section 254(g).[5] The *Rate Integration Order* stated that the rule incorporates the Commission's existing rate integration policy and applies to all providers of interstate interexchange services as defined in the Act. There was no discussion of applying the rate integration rule to CMRS providers.

The Commission subsequently issued the *Rate Integration Reconsideration Order* which, for the first time, applied the rate integration requirement to CMRS providers.[6] The wireless industry sought further reconsideration, and in December, 1998, the Commission issued the *Rate Integration Further Reconsideration and Forbearance Order* in which the Commission denied reconsideration, saying that the language of the statute is clear and unambiguous in its application to CMRS providers. The Commission also denied forbearance.[7]

The wireless industry appealed, and on July 14, 2000, the Court of Appeals for the District of Columbia reversed and vacated the Commission's order. The Court held that the statute did not unambiguously apply to CMRS providers. It cited the Conference Report, which said Congress intended new Section 254(g) to incorporate the

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[5] Policy and Rules Concerning the Interstate Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended, *Report and Order*, 11 FCC Rcd. 9564 (1996) (*Rate Integration Order*); *see* 47 C.F.R. § 64.1801.

[6] Policy and Rules Concerning the Interstate Interexchange Marketplace; Implementation of Section 254(g) of the Telecommunications Act of 1934, as Amended; Petition for Forbearance, *First Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 11812, 11821 (1997) (*Rate Integration Reconsideration Order*).

[7] *Rate Integration Further Reconsideration and Forbearance Order*, 14 FCC Rcd at 396 (1998).

Commission's preexisting rate integration policies. The Court reviewed the order under *Chevron* step one,[8] which asks "whether Congress has directly spoken to the precise question at issue." If so, the Courts "must give effect to the unambiguously expressed intent of Congress." If not, under *Chevron* step two the Court asks whether the agency has reasonably interpreted the statute "in light of the text, structure and purpose of the Act."[9] The Court held that the use of the term "interexchange" in the statute does not unambiguously apply Section 254(g) to CMRS providers, who do not use exchanges. It held that the Commission might decide to interpret the statute as extending to CMRS on remand under its delegated authority, but the Court could not uphold the Commission under Chevron step two because the Commission held that the statute unambiguously applied to CMRS providers. The fact that Congress did not expressly exempt CMRS providers was held to be unremarkable in light of the Conference Report because the Commission had never applied rate integration to CMRS providers prior to the 1996 Act.[10]

While the case was pending before the Court of Appeals, the Commission issued the *Rate Integration Stay Order*[11], which voluntarily stayed the CMRS rate integration requirement so that the Commission could conduct a further rulemaking proceeding to determine how CMRS carriers might integrate their rates for wide area calling plans,

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[8] *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 81 L.Ed.2d 694, 104 S.Ct. 2778 (1984).

[9] *Id.* 467 U.S. at 842-43.

[10] *GTE Services Corporation, et al., v. Federal Communications Commission, et al.*, 224 F.3d 768 (D.C. Cir. 2000)

[11] Policy and Rules Concerning the Interstate. Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, *Order*, 12 FCC Rcd 15,739 1997) (*Rate Integration Stay Order*).

plans that include local airtime or roaming charges in addition to separate long-distance charges for interstate interexchange services, and whether cellular and PCS services should be integrated.[12] Certain parties filed Petitions for Forbearance from the application of Section 254(g).[13] On August 23, 2000 the FCC dismissed BellSouth petition for forbearance as moot in light of the Court of Appeals decision.[14] On May 9, 2007 the Commission issued an Order dismissing as moot petitions for reconsideration filed by Nextel and Rand McNally. The Commission also terminated the *Further Notice of Proposed Rulemaking* proceeding. Both were dismissed because there was no extant rate integration rule that currently applied to CMRS carriers.[15]

AT&T sets out this history to demonstrate that the Commission has had numerous opportunities to consider whether to mandate rate integration by CMRS carriers. When the Commission mandated rate integration for wireless carriers in 1998, it did so because it thought that Section 254(g) mandated such action. The Court of Appeals vacated that action and held that the statute was ambiguous and remanded the case for the Commission to exercise its discretion. In the decade since, the Commission has not seen fit to mandate rate integration by wireless carriers, which AT&T believes represents sound public policy.

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[12] Policy and Rules Concerning the Interstate Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act, as Amended, *Further Notice of Proposed Rulemaking,* 14 FCC Rcd 6994, 6998 (1999).

[13] Policy and Rules Concerning the Interstate Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act, as Amended, CC Docket No. 96-61, Comments and Petition for Forbearance filed by BellSouth Corporation, (May 27, 1999).

[14] Policy and Rules Concerning the Interstate Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act, as Amended, CC Docket No. 96-61, *Memorandum Opinion and Order*, 15 FCC Rcd 21066 (2000).

[15] Policy and Rules Concerning the Interstate Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act, as Amended, CC Docket No. 96-61, *Memorandum Opinion and Order*, 22 FCC Rcd.8967 (May 11, 2007).

The CMRS industry is vibrantly competitive, and the imposition of rate regulation in the form of a rate integration requirement should be approached with utmost caution. CMRS carriers design rate plans to meet the needs of their subscribers. Wireless rate plans vary from plans covering a discrete metropolitan area to plans that permit nationwide calling for a single price. Wireless carriers offer competitive rate plans that are designed to attract customers that have a variety of needs, including rate plans tailored to customers with disabilities, prepaid and pay-as-you-go plans for customers unwilling to enter into a term contract or to submit to a credit check, plans that allow parents to limit the amount of calling by their children, and a myriad of other plans designed to meet the need of a segment of the carrier's customers. Specifically with regard to the instant petition, carriers offer a variety of international calling plans that allow frequent international callers to make international calls for a reduced per-minute price or no incremental per-minute charge at all.[16] The Commission should be loathe to place any form of rate regulation on wireless providers in the absence of a clear showing of market failure. South Seas has presented no evidence that would suggest a market failure.

South Seas justifies its Petition by pointing out that American Samoa is now part of the North American Numbering Plan (NANP) and has been assigned an area code permitting 10 digit dialing to American Samoa. However, inclusion of American Samoa into the NANP did not automatically require wireline interexchange carriers to integrate American Samoa into their domestic rate schedules. Rate integration was required by a

[16] The Petitioner objects to the $1.49 per minute rate charged by Spring PCS for calls to American Samoa, but acknowledges that Sprint PCS offers an international rate plan that prices calls to American Samoa at a reduced rate of $.37 per minute. Petition at 2. This rate is comparable to the integrated rates charged by wireline interexchange carriers for calls to American Samoa, and demonstrates that competition is working in the international marketplace.

separate Commission order.[17] As South Seas acknowledges in its petition, since May 25, 2007, wireline interexchange carriers have integrated American Samoa into their domestic long distance rates. South Seas can get the benefit of integrated rates by simply using the services of a domestic wireline interexchange carrier when making calls to American Samoa. Wireline interexchange carriers offer a variety of rate plans, some of which contain no separate per-minute charge for calls to American Samoa. There is no need to order rate integration by wireless carriers for South Seas to get the benefit of integrated rates.

For the reasons set forth above, the Petition for Rulemaking filed by South Seas should be denied.

Respectfully submitted,

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[17] Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended, *Order*, 21 FCC Rcd 5971 (2006).