D.P.U. 94-73

Investigation by the Department of Public Utilities upon its own motion on Regulation of Commercial Mobile Radio Services.

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## I. INTRODUCTION

On April 22, 1994, the Department of Public Utilities ("Department") voted to open an investigation on its own motion into the regulation of commercial mobile radio services ("CMRS"), also known as radio common carrier ("RCC") services. The investigation was docketed as D.P.U. 94-73.

On August 10, 1993, the Omnibus Budget Reconciliation Act ("Budget Act") was signed into law by the President. [1] The Budget Act amends the Communications Act of 1934 by preempting state and local entry and rate regulation of both commercial and private mobile radio services as of August 10, 1994. [2] However, states may regulate other terms and conditions of CMRS. Also, the Federal Communications Commission ("FCC") shall allow states to continue CMRS rate regulation if the state can demonstrate that:

> (1) market forces in the state are inadequate to protect the public from unjust and unreasonable wireless service rates or from rates that are unjustly or unreasonably

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[1] Omnibus Budget Reconciliation Act of 1993, Public Law No. 103-66, Title VI, §§ 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993).

[2] G.L. c. 159, §§ 12, 12A-12D, provides the Department jurisdiction over RCC service in Massachusetts. The statute requires that RCCs obtain a certificate of public convenience and necessity from the Department prior to offering service in Massachusetts and grants the Department jurisdiction over RCC rates. G.L. c. 159, §§ 12B, 12C. Specifically, G.L. c. 159 §§ 12B-12D will be preempted by Section 332 of the Communications Act, as revised by the Budget Act, which governs the regulation of all "mobile services," as defined by Section 3(a) of the Communications Act.

discriminatory; or

(2) such market conditions exist and such service is a replacement for land-line telephone exchange service for a substantial portion of the telephone land-line exchange service within such state.

The Department opened this investigation to determine whether to petition the FCC for authority to continue rate regulation of RCCs after August 10, 1994. The Department also sought comments on the regulation of other terms and conditions of RCC service in Massachusetts, such as liability of the company, use of service, and consumer protection issues, and the repeal of 220 C.M.R. §§ 35.00 et. seq., which provides procedural rules for the Department's regulation of radio common carrier service.

The Department allowed interested parties to submit written comments on these issues by May 12, 1994. The Department also held a public hearing at the Department's offices on May 17, 1994. The Department allowed until June 30, 1994, for the filing of any additional written comments, and until July 20, 1994, for the filing of reply comments.

Pursuant to the Department's request for written comments, MCI Telecommunications Corporation ("MCI"), Southwestern Bell Mobile Systems, Inc. d/b/a Cellular One ("Cellular One"), NYNEX Mobile Communications Company ("NYNEX Mobile"), Bell Atlantic Mobile Systems ("BAMS"), SNET Mobility, Inc. ("SNET Mobility"), MobileMedia Communications, Inc. ("MobileMedia"), GTE Mobilnet

Incorporated ("GTE Mobilnet"), Tri-State Radio Co. ("Tri-State"), Arch Connecticut Valley, Inc. ("Arch"), Paging Network Inc. ("PageNet"), Berkshire Communicators ("Berkshire"); QuickCall Corporation ("QuickCall"), and MobileComm of the Northeast, Inc. ("MobileComm") filed comments. On June 15, 1994, and June 30, 1994, Cellular One and NYNEX Mobile, respectively, filed additional comments in reply to MCI's initial comments.

## II. POSITIONS OF THE PARTIES

### a. MCI

MCI argues that the Department should petition the FCC for authority to continue rate regulation of CMRS in Massachusetts in order to maintain the status quo and to protect subscribers in a market characterized by very limited competition (MCI Comments at 4). MCI argues that the Department should use this docket to establish the general dominant/nondominant regulatory structure for the CMRS industry in Massachusetts ( id. at 2-3).

MCI also maintains that regulatory oversight of "other terms and conditions" of CMRS providers is "extremely important" in order to create MCI's proposed new regulatory structure for the CMRS industry ( id. at 5). MCI argues that the Department should require that terms and conditions of the intrastate interconnection and access offerings of dominant CMRS providers be fair and reasonable, and do not unreasonably discriminate against any customer, including competing providers of CMRS ( id.

at 6).

MCI argues that the Department should extend "co-carrier" status to CMRS providers and should adopt principles of "mutual compensation" ( id. at 7).[3]

b. Cellular One

Cellular One asserts that "fierce" competition in the telecommunications market protects the public from unjust and unreasonable wireless service rates and from rates that are unjustly or unreasonably discriminatory (Cellular One Comments at 1). Cellular One argues that with new wireless technology and the introduction of competitors in the marketplace on a regular basis, existing cellular providers are prevented from allowing their prices to become unjust, unreasonable or unduly discriminatory ( id. at 2).

In addition, Cellular One asserts that wireless technology is used by less than ten percent of the Massachusetts population, and, therefore, cellular service cannot be considered a substitute for landline exchange service ( id.).

Cellular One argues that MCI's proposals are beyond the

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[3] MCI indicates that "co-carrier" status is a classification used by the California Public Utilities Commission to represent certain requirements for interconnection and mutual compensation (MCI Comments, Attachment B, at 5-6). MCI defines mutual compensation as "recovery by CMRS providers of the reasonable cost of terminating calls originating on local exchange carrier networks, and vice versa" ( id. at 7).

scope of this proceeding and do not reflect existing conditions in the increasingly competitive wireless marketplace in Massachusetts (Cellular One Reply Comments at 1). Cellular One argues that the Department should deny MCI's proposals ( id. ).

Cellular One also argues that because MCI's proposals are beyond the scope of the legal notice for this proceeding, the Department cannot consider them without the publication of a new and expanded notice and the opportunity for all interested parties to comment ( id. at 2).

c. NYNEX Mobile

NYNEX Mobile asserts that the Department should not petition the FCC and should forbear from regulation of mobile services (NYNEX Mobile Comments at 20). NYNEX Mobile argues that the mobile marketplace is vigorously competitive and that mobile communications is not a replacement for telephone landline exchange service within the state ( id. at 3). Also, NYNEX Mobile contends that the Department should repeal 220 C.M.R. Section 35 (id. at 16).

NYNEX Mobile estimates that its service penetration rate in its region is 1.77 percent and that the penetration rate for landline telephone exchange service in the NYNEX region exceeds 94 percent ( id. ). Therefore, according to NYNEX Mobile, it cannot be argued that cellular services have replaced basic telephone service for a substantial portion of the Massachusetts

population ( id. at 4).

NYNEX Mobile argues that: (1) its terms and conditions are disclosed in full on each customer's service order forms; (2) service representatives and sales channels are trained to address customer issues; and (3) customers regularly see notices in customer newsletters and bill inserts ( id. at 17). NYNEX Mobile argues that customers who are dissatisfied with their current provider may take their business elsewhere, and customers are thus protected by a competitive marketplace, which is "the most powerful and effective mechanism controlling service terms and conditions" ( id. at 17-18).

NYNEX Mobile also argues that the Department should reject MCI's recommendation for the Department to file a petition with the FCC to continue the regulation of wireless service (NYNEX Mobile Reply Comments at 4). NYNEX Mobile points out that MCI was the only commenter to request the Department to petition the FCC for continued rate regulation of CMRS ( id. at 1).

NYNEX Mobile also asserts that MCI inappropriately seeks to convert this docket into a broad-ranging proceeding ( id. at 2). NYNEX Mobile notes that the interstate interconnection and compensation issues raised by MCI are under consideration in pending FCC proceedings, and that any intrastate interconnection and compensation issues would be more appropriately handled in another proceeding ( id. at 3).

d. BAMS

BAMS urges the Department not to petition the FCC to continue regulation of rates beyond August 10, 1994 (BAMS Comments at 18). BAMS states that the market conditions in Massachusetts do not support continued rate regulation and make it impossible to meet the statutory tests for continued regulation ( id. at 3). According to BAMS, market forces are adequate to protect the public and cellular service is not a replacement for landline telephone service ( id. at 15).

BAMS states that the cellular radio service penetration rate nationally is about four percent while the landline service penetration rate is about 95 percent ( id.). BAMS further asserts that neither the price nor the capacity of cellular radio service suggests that cellular will become a substitute for landline service for a substantial portion of the Commonwealth's population in the foreseeable future ( id.).

BAMS also argues that the existing level of competition at the wholesale and retail levels for cellular service in Massachusetts does not support rate regulation for consumer protection purposes ( id. at 16). BAMS further states it is not in the best interest of a cellular radio service operator to engage in unjust, unreasonable or discriminatory practices or to charge unjust or unreasonable rates in such a competitive environment ( id.).

e. SNET Mobility

SNET Mobility argues that its Springfield market for cellular services is competitive, and bases its argument on the existence of suitable substitutes including paging, specialized mobile radio services, and mobile data services (SNET Mobility Comments at 5). SNET Mobility argues that this competitiveness will increase in the next year as the FCC proceeds to license new forms of mobile services, such as Personal Communications Services and mobile satellite services ( id. at 9).

SNET Mobility maintains that the introduction of new sources of competition will intensify competitive forces in the mobile services market, forcing providers to provide additional network services and enhance price competition ( id. at 17). SNET Mobility argues, accordingly, that current market conditions are adequate in mobile services to protect subscribers and to protect end users from unjust and unreasonable rates ( id.).

f. MobileMedia

MobileMedia asserts there is no longer a need for the regulation of rates of paging service or "other terms and conditions" of paging services ( id. at 3). According to MobileMedia, competitive market forces created by the large number of providers ensures public protection from discriminatory or unreasonable rates or unreasonable conditions of service (id.). In view of these market conditions, MobileMedia urges the

Department to repeal its regulation of radio utilities and not petition the FCC to continue regulation of paging service rates (id. at 5-6).

MobileMedia argues that price competition in the paging industry should be distinguished from competition in the cellular industry, because while the FCC has allocated portions of radio spectrum to two cellular facilities-based carriers, no such limitation exists in the paging industry ( id. at 4). Consequently, according to MobileMedia, there are significantly more paging companies than cellular providers, and thus more price competition ( id.).

Regarding the regulation of "other terms and conditions" of paging services, MobileMedia asserts that competition makes regulation of services and billing practices unnecessary ( id. at 5).

MobileMedia also supports the repeal of regulations regarding certification of radio utilities set forth at 220 C.M.R. § 35.00 ( id.).

g. GTE Mobilnet

GTE Mobilnet argues that: (1) the cellular marketplace is currently competitive and competition will increase in the near future; and (2) cellular service is discretionary in the sense that it is not a necessity (GTE Mobilnet Comments at 1.) GTE Mobilnet argues that these two factors obviate the need for the

Department to petition the FCC to continue the regulation of rates of CMRS after August 10, 1994 ( id. ).

GTE Mobilnet argues that competition manifests in two ways: (1) direct competition provided at the wholesale and retail levels through other service providers; and (2) through alternative service providers such as paging, pay phones, and Specialized Mobile Radio Services ( id. at 3).

GTE Mobilnet asserts that market forces in Massachusetts adequately protect the public from unjust and unreasonable wireless service rates and from rates that are unjustly or unreasonably discriminatory ( id. at 9). Also, GTE Mobilnet states that the Department has no need to regulate other "terms and conditions" of cellular service because market forces act as a regulator ( id. ).

h. Tri-State

Tri-State argues that with respect to paging CMRS, the extremely competitive nature of the paging industry both nationwide and in Massachusetts makes unnecessary any regulation by the Department (Tri-State Comments at 5). Tri-State further asserts that regulation, whether consisting of regulation of rates or "terms and conditions," will inhibit competition between paging service providers and will deprive the public of substantial benefits that result from "aggressive competition" (id. at 4).

Tri-State maintains that the regulation of "other terms and conditions" of CMRS, including company liability, use of services and consumer protection issues, is not necessary given the extremely competitive state of the paging industry in Massachusetts ( id. at 8).

Tri-State emphasizes that its comments relate to the paging CMRS industry and not the two-way mobile CMRS industry ( id. at 9). Tri-State argues that this distinction is critical because conditions in the cellular market may warrant a petition by the Department for regulation of rates, the imposition of new regulations regarding company liability, the use of services, or consumer protection issues ( id. at 10). Tri-State asserts that findings regarding the two-way marketplace should not affect Tri-State's assertion that the competitive status of the paging CMRS market renders continued regulation by the Department "unnecessary and counterproductive" ( id.).

i. Arch

Arch asserts that market forces in Massachusetts provide fair and reasonable service rates to the public for commercial mobile radio services (Arch Comments at 1). Arch argues that the Department should repeal 220 C.M.R. § 35.00, because, after federal preemption of entry regulation, no legal basis remains for the regulation of the extension of mobile radio utility systems, or transfers of certificated facilities ( id. at 3).

j. PageNet

PageNet argues that the Department cannot meet the required burden of proof to establish the need for continued regulation of paging service in Massachusetts (PageNet Comments at 1).

PageNet maintains that the paging market in Massachusetts is highly competitive and that market conditions adequately protect the public from unjust and unreasonable discriminatory rates (id. at 4). PageNet also asserts that paging is not a replacement for landline telephone service, but rather an enhancement or complement ( id.).

k. Berkshire

Berkshire states that it does not see any advantage for the Department to continue regulation of RCCs after August 10, 1994, unless the Department can regulate other currently unregulated services as well (Berkshire Communicators Comments at 1).

l. QuickCall

QuickCall states that a competitive market without regulation provides "a lower cost of doing business, better service to our customers, and better flexibility in meeting customer needs in the market place" (QuickCall Comments at 1). Further, QuickCall asserts that its costs are significantly higher in regulated markets, such as Massachusetts and California (id.).

m. MobileComm

MobileComm asserts that the Massachusetts marketplace is strongly competitive for paging services and that market forces are extremely effective in keeping prices at a competitive level (id. at 1). Accordingly, MobileComm argues that rate regulation at the state level is no longer necessary ( id. at 2).

Regarding the regulation of "other terms and conditions," MobileComm argues that competitive market forces provide an adequate balance between customers and providers in reaching an agreement on terms of service ( id.).

## III. ANALYSIS AND FINDINGS

### a. Rate Regulation

In order to successfully petition the FCC for the authority to continue RCC rate regulation, the Department would have to demonstrate that:

> (1) market forces in the state are inadequate to protect the public from unjust and unreasonable wireless service rates or from rates that are unjustly or unreasonably discriminatory; or
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> (2) such market conditions exist and such service is a replacement for land-line telephone exchange service for a substantial portion of the telephone land-line exchange service within such state.

In 1984, the Department determined that the wireless service market in Massachusetts was competitive ( see Cellular Resellers, D.P.U. 84-250, at 6 (1984)). We note that most commenters cited an increase in the number of RCCs in Massachusetts and a corresponding reduction in rates as indications that competition

in the Massachusetts wireless market has increased since that time to the benefit of consumers. [4] Based on the comments received in this docket, the Department finds that the wireless market in Massachusetts remains competitive.

Accordingly, we find that market forces in the state are adequate to protect the public from unjust and unreasonable wireless service rates or from rates that are unjustly or unreasonably discriminatory. Also, we find that wireless service in Massachusetts is not a replacement for land-line telephone exchange service for a substantial portion of the telephone land-line exchange service within the Commonwealth. Therefore, the Department shall not petition the FCC for authority to continue rate regulation of RCCs in Massachusetts. [5]

b. Regulation of Other Terms and Conditions

As of August 10, 1994, the Department will no longer regulate the rates of RCCs in Massachusetts ( see section III.a,

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[4] MCI was the only commenter to recommend that the Department petition the FCC. MCI argued that the market is characterized by "very limited competition." MCI also recommended that the Department use this docket to establish a dominant/nondominant regulatory framework for wireless service in Massachusetts. We find that establishment of a regulatory framework for RCC regulation in Massachusetts is beyond the limited scope of this investigation, and, furthermore, that our findings herein render MCI's request moot.

[5] If the Department determines later that market conditions in Massachusetts are such that it desires to reinstate rate regulation, it will petition the FCC at that time, pursuant to Section 332(c)(3)(a) of the Budget Act.

above) and will no longer regulate the entry of RCCs into the market.[6] We have found that market forces in the state are adequate to protect the public from unjust and unreasonable wireless service rates; these market forces also make it unnecessary for the Department to regulate other terms and conditions of RCC service in Massachusetts. Therefore, as of August 10, 1994, the Department will not regulate other terms and conditions of RCC service in Massachusetts.

RCC tariffs that are currently on file with the Department primarily list rates and other terms and conditions. Because the Department will no longer regulate RCC rates and other terms and conditions, it is not necessary for the Department to maintain RCC tariffs, as of August 10, 1994.

c. Repeal of 220 C.M.R. §§ 35.00 et. seq.

220 C.M.R. §§ 35.00 et. seq., provides procedural rules for the Department's regulation of RCC rates and market entry. Given that the Department will no longer regulate RCC rates and market entry as of August 10, 1994, we find that 220 C.M.R. §§ 35.00 et.

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[6] The Department considers the requirement that a carrier obtain a certificate of public convenience and necessity ("certificate") to be a form of market entry regulation. Similarly, regulatory approval of a transfer of a certificate is a form of entry regulation. Therefore, because the Department is preempted from entry regulation as of August 10, 1994, RCCs need no longer file applications for a certificate or for approval of certificate transfers.

seq. should be repealed. [7]

IV. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That the Department will not petition the Federal Communications Commission for authority to continue rate regulation of radio common carriers in Massachusetts after August 10, 1994; and it is

FURTHER ORDERED: That the Department will not regulate other terms and conditions of radio common carrier service after August 10, 1994; and it is

FURTHER ORDERED: That the Department will not maintain tariffs for radio common carriers after August 10, 1994; and it is

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[7] 220 C.M.R. § 35.01, "Authority," provides "these rules are issued pursuant to M.G.L. c. 159, § 12B, authorizing the Department to issue rules and regulations governing the issuance of certificates for the construction, operation, and extension of mobile radio utility systems by radio utilities."

FURTHER ORDERED : That 220 C.M.R. §§ 35.00 et. seq. be and hereby is repealed.

By Order of the Department,

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Kenneth Gordon, Chairman

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Mary Clark Webster, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971)