

Decision 97-09-096 September 24, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Richard Kashdan,

Complainant,

vs.

AirTouch Communications,
GTE Mobilenet of California,
ComTech Mobile Telephone Company,

Defendants.

ORIGINAL

Case 97-06-008
(Filed June 5, 1997)

O P I N I O N

1. Summary

Complainant alleges that his cellular telephone carrier and others are levying unlawful "roamer" charges for his calls in Los Angeles. The Commission lacks jurisdiction to adjudge the lawfulness of rates charged by cellular telephone carriers. The complaint is dismissed.

2. Nature of Complaint

Complainant Richard Kashdan has been a subscriber since early this year to the cellular telephone service of GTE Mobilenet in San Francisco. Previously, he used the GTE Mobilenet service through a subscription with a reseller, Comtech Mobile Telephone Company (Comtech).

Kashdan states that he frequently travels to Los Angeles and makes many cellular telephone calls in that area through AirTouch Cellular on a "roamer" basis.¹ He states that, prior to 1995, Comtech's tariff specified a price per minute of roamer airtime usage, and half that price per minute for incomplete calls. Kashdan states that, early in 1995, GTE Mobilenet and Comtech changed their tariffs to a standardized price of 49 cents per minute of roamer airtime in California.

Kashdan states that, with the new tariffs in place, Comtech began charging him 49 cents per minute of roamer use in Los Angeles, but it also charged 49 cents per minute for incomplete calls. Kashdan states that, when he complained, Comtech agreed that he should have been billed for half the price for incomplete calls, and Kashdan was given a refund.

When he switched his subscription to GTE Mobilenet early this year, Kashdan states that GTE Mobilenet charged him 49 cents per minute for incomplete roamer calls in Los Angeles, explaining that it was merely passing on the charges that it was required to pay to AirTouch.

The complaint notes that Public Utilities (PU) Code § 2886 prohibits charging more than half price for incomplete cellular calls. Moreover, the complaint alleges that the standard practice of cellular carriers is to charge its subscribers nothing for incomplete calls, and that it is therefore discriminatory to charge "roaming" customers for incomplete calls. Accordingly, the complaint asks that the Commission direct Comtech and GTE Mobilenet to refund all charges for incomplete roamer calls in Los Angeles prior to the time that their standardized roamer rates became effective in early 1995, and that AirTouch be ordered to stop charging GTE Mobilenet and Comtech for incomplete roamer calls in Los Angeles and refund to other carriers all unauthorized charges for such calls.

¹ Under a "roamer" arrangement, a cellular subscriber may use the network facilities of another cellular carrier and be billed for such services by the subscriber's "home" carrier through an inter-carrier roaming agreement.

3. Motions to Dismiss

AirTouch and Comtech each has filed a motion to dismiss the complaint² on grounds that Section 332(c)(3)(A) of the Communications Act of 1934, 47 U.S.C. §§ 151 et seq., as amended, has expressly preempted any state action to adjudge the lawfulness of the rates charged by cellular telephone carriers, leaving such enforcement instead to the Federal Communications Commission (FCC) and to the federal courts. For the reasons set forth below, we agree that the Commission is without jurisdiction to address the rate practices alleged in this complaint. Accordingly, the motions to dismiss the complaint are granted.

4. Discussion

In recognition of the rapid growth of the wireless telecommunications services industry, Congress in 1993 amended the Communications Act to provide a uniform federal regulatory framework for all commercial mobile radio services.³ Pursuant to its stated goals of regulatory uniformity and deregulation of the industry, Congress amended Section 332 of the Act to provide:

"no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a state regulating the other terms and conditions of commercial mobile services." (47 U.S.C.A. § 332(c)(3)(A).)

On August 8, 1994, as authorized by the Act, the Commission filed a petition with the FCC to continue the Commission's jurisdiction over the rates of cellular

² Defendant AirTouch Communications is not a cellular carrier. Its subsidiary, AirTouch Cellular, is the general and managing partner of the Los Angeles SMSA Limited Partnership (U-3003-C), which operates one of the two cellular systems in the Los Angeles market. The allegations in the complaint refer to practices of AirTouch Cellular; AirTouch Communications states that its response and motion to dismiss are submitted on behalf of AirTouch Cellular.

³ See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 387-97 (1993).

carriers for an 18-month period. The filing of this petition preserved the Commission's authority to regulate cellular rates while the FCC considered the petition. On May 19, 1995, the FCC released its report and order denying the petition and, on June 8, 1995, the Commission announced that it would not appeal the FCC's denial.⁴

Despite the preemption, the Commission was still obligated by various provisions of the PU Code to enforce certain aspects of cellular rates, including the half price requirement for uncompleted calls set forth in PU Code § 2886.⁵ In response to this, Assembly Bill 1121 last year added Section 247 to the PU Code, stating, in relevant part:

"Any provision of this act that is in conflict with the Communications Act of 1934, as amended...shall not apply to commercial mobile radio service to the extent of that conflict."

Consequently, this Commission lacks jurisdiction to hear complaints regarding the lawfulness of the rates charged by cellular carriers. As the Commission itself has concluded with respect to cellular and other commercial mobile service carriers, "we will not entertain disputes regarding the level or reasonableness of any rate."⁶

⁴ On June 22, 1995, the Cellular Resellers Association sought reconsideration of the FCC's denial. The FCC denied the petition for reconsideration in an order on reconsideration issued on August 8, 1995.

⁵ Article 3, Section 3.5 of the California Constitution prohibits state administrative agencies from refusing to enforce a statute on the basis of federal preemption unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law.

⁶ Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications, D.96-12-071, at 23 (December 20, 1996). A number of judicial authorities support this view. See In re Comcast Cellular Telecom Litigation (E.D.Pa. 1996) 949 F.Supp. 1193 ("any state regulation of [a cellular carrier's rate practices] is explicitly preempted under the terms of the Act."); Lee, et al. v. Contel Cellular of the South (S.D.Ala. 1996) 1996 U.S. Dist. LEXIS 19636 (state court action preempted as to "rounding" practice in calculating cellular charges.)

It appears that the complaint alleges that the rates charged by cellular telephone companies must be authorized by a tariff filed with the Commission. This is incorrect. The effect of Section 332 of the Communications Act is to eliminate the requirement that commercial mobile service carriers obtain authorization for rates from a state commission. The Commission has determined that Commission preapproval of tariff filings is no longer required.⁷

The complaint also alleges that AirTouch bills carriers with which it has an intercarrier roaming agreement for the entire cost of incomplete calls, and that this violates PU Code § 2886 as well as intercarrier roaming agreements. Again, the essence of this allegation is that a particular rate charged by a cellular carrier is unreasonable, and that the Commission should prescribe a different rate, something which it is preempted from doing. Moreover, under the express provisions of PU Code § 247, which invalidates PU Code provisions that conflict with the Communications Act, PU Code § 2886 is preempted to the extent that it prescribes or restricts the rates to be charged by cellular telephone carriers for incomplete calls.⁸

5. Conclusion

Simply put, the Commission cannot grant the relief requested.⁹ The complaint asks that the Commission: (a) prescribe a rate of zero for incomplete roamer calls made by Comtech and GTE Mobilenet subscribers while in Los Angeles; (b) prescribe a rate

⁷ D.96-12-071, at 21-22.

⁸ The Commission is without jurisdiction to address this allegation even if it is alleged (as it is in Kashdan's response to the motions to dismiss) that AirTouch billed other carriers in this manner prior to the effective date of preemption. The question is not whether Section 2886 could have been enforced prior to the effective date of preemption, but whether the Commission can presently engage in adjudicatory regulation of cellular rates, something that it is preempted from doing. Consequently, the Commission lacks jurisdiction and cannot grant the relief requested.

⁹ Complainant alleges in a response to the motions to dismiss that the complaint can go forward as a simple billing dispute. The sole remedy sought, however, is an order requiring cellular carriers to adjust end user rates for roamer calls, a remedy which the Commission cannot grant.

refund to Comtech and GTE Mobilenet subscribers for incomplete roamer calls; (c) prescribe a rate of zero to be charged by AirTouch for incomplete roamer calls made by Comtech and GTE Mobilenet subscribers; and (d) prescribe a rate refund by AirTouch to Comtech and GTE Mobilenet. Any and all of these actions would involve the Commission in ratemaking for cellular telephone services, an activity in which the Commission has been preempted. Consequently, the complaint must be dismissed for lack of jurisdiction and for failure to state a cause of action for which relief can be granted.

Findings of Fact

1. Complainant alleges that defendants levy unlawful roamer charges for his cellular telephone calls in Los Angeles.
2. Defendants have moved to dismiss the complaint for lack of jurisdiction.

Conclusions of Law

1. Congress in 1993 amended the Communications Act of 1934 to preempt state and local rate regulation of cellular telephone carriers.
2. The PU Code was amended by Section 247 to make unenforceable any provision of the Code that conflicts with the Communications Act of 1934.
3. Because of the preemption, the Commission has concluded that it will not entertain disputes regarding the level or reasonableness of any rate of cellular and other commercial mobile service carriers.
4. The gravamen of the complaint is that rates for incomplete roamer calls of three cellular telephone carriers are unlawful.
5. The complaint should be dismissed for lack of jurisdiction and failure to state a claim upon which relief can be granted.

O R D E R

IT IS ORDERED that:

1. The motions to dismiss the complaint of Richard Kashdan against AirTouch Communications, GTE Mobilenet of California, and Comtech Mobile Telephone Company are granted.

2. The complaint is dismissed.

3. Case 97-06-008 is closed.

This order is effective today.

Dated September 24, 1997, at San Francisco, California.

JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
/ Commissioners

President P. Gregory Conlon, being
necessarily absent, did not participate.