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Decision 98-02-014 February 4, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of AirTouch Cellular and its Affiliates for an Exemption from the Reporting Requirements of General Order 104-A, Section 1, and General Order 77-K.

Application 97-02-035
(Filed February 27, 1997)

ORIGINAL

O P I N I O N

I. Summary

This decision grants the request by AirTouch Cellular and its affiliates¹ for an exemption from General Orders (GOs) 77-K and 104-A. This decision also instructs Commission staff to prepare for the Commission's consideration a draft order instituting rulemaking (OIR) to examine whether all Commercial Mobile Radio Service (CMRS) providers should be exempt from GOs 77-K and 104-A.

II. Procedural Background

AirTouch Cellular and its affiliates (referred to collectively as AirTouch) filed Application 97-02-035 on February 27, 1997, for an exemption from GO 77-K and GO 104-A, Section 1 (GO 104-A). These general orders require AirTouch to submit the following information to the Commission on an annual basis:

- GO 77-K: (1) The identity of AirTouch employees paid \$75,000 or more during the preceding calendar year and the amount of compensation received by each such person, including any expense reimbursements; (2) payments to attorneys employed by AirTouch or an affiliate; and (3) dues, donations, subscriptions, and contributions paid by AirTouch.

¹ AirTouch Cellular (U-3001-C) is the managing general partner of the Los Angeles SMSA Limited Partnership (U-3003-C), the Sacramento Valley Limited Partnership (U-3004-C), and the Modoc RSA Limited Partnership (U-3032-C). AirTouch Cellular operates in its own interest in the San Diego market.

GO 104-A: (1) income statement; (2) balance sheet ; (3) separate schedules for income, expenses, assets, long-term debt, retained earnings and partnership capital; (4) a list of directors, owners, principal officers, and business partners; and (5) a list of significant changes during the preceding year, including the issuance of capital stock or long-term debt, changes in franchise rights, significant changes in plant, and rate changes.

A protest to AirTouch's application was filed by the Cellular Resellers Association, Inc. (CRA) on April 2, 1997. A prehearing conference (PHC) was subsequently held before Administrative Law Judge (ALJ) Kenney on May 8, 1997. At the PHC, AirTouch and CRA agreed that an evidentiary hearing was unnecessary. Concurrent opening briefs were filed on May 29, 1997, and reply briefs were filed by CRA and AirTouch on June 6 and June 9, 1997, respectively.

On October 27, 1997, a proposed decision drafted by the ALJ was mailed to parties along with a letter inviting parties to submit comments on the ALJ's draft decision. In general, the ALJ's draft decision granted AirTouch's request for an exemption from GO 77-K, but denied AirTouch's request for an exemption from GO 104-A. On November 17, 1997, CRA submitted brief comments in support of the ALJ's proposed decision, while AirTouch submitted extensive comments detailing why it was no longer necessary to require AirTouch to comply with GO 104-A.

III. Position of the Parties

AirTouch states that compliance with GO 77-K and GO 104-A is costly and burdensome. To illustrate its point, AirTouch asserts that its is forced by GO 77-K to spend a considerable amount of effort to track and report transactions as small as \$5.95 paid to reimburse an employee for a work-related newspaper subscription. By the same token, AirTouch says it is required by GO 104-A to spend more than 500 hours each year preparing the information prescribed by the general order.

According to AirTouch, the sole purpose of GO 77-K and GO 104-A is to assist the Commission in regulating the rates charged by public utilities. AirTouch argues that because the Commission's ability to regulate the rates of CMRS providers has been

preempted by federal law,² there is no longer any point in requiring AirTouch to comply with these general orders.

AirTouch believes there is Commission precedent for exempting utilities from GO 77-K and GO 104-A. A case in point is Decision (D.) 96-07-052 wherein the Commission granted an exemption from GO 77-K to Class I railroads. Likewise, in D.89-11-010 and D.88-09-066 the Commission granted exemptions to individual companies from General Order 123-G which directs transportation carriers to file annual financial reports similar to those required by GO 77-K.

AirTouch also maintains that the Commission has previously relieved CMRS providers from complying with "unnecessary regulations" such as GO 77-K and GO 104-A. For example, in D.96-12-071 the Commission eliminated the requirement for CMRS providers to file tariffs; and in D.95-10-032 the Commission eliminated the requirement for CMRS providers to obtain Commission authority to issue securities or transfer assets.

CRA agrees that AirTouch should be exempted from GO 77-K. CRA believes, however, that AirTouch should continue to submit the information required by GO 104-A. According to CRA, GO 104-A currently applies to all telecommunications carriers, and there is no justification for granting AirTouch a preferential exemption from the general order. CRA also observes that AirTouch and the other duopoly cellular carriers have been classified as "dominant" carriers by the Commission,³ and CRA believes that collection of the data required by GO 104-A will provide a basis for determining if their dominance erodes in the future.

CRA does not believe that federal preemption of the Commission's rate regulation of CMRS providers is a sufficient reason to exempt AirTouch from GO 104-A. CRA notes that the Commission still retains authority over nonrate terms and

² 47 U.S.C. § 332(c)(3).

³ D.91-08-022 defined a dominant cellular carrier as one that controls important bottlenecks facilities that are essential in providing CMRS to some or all of the public, i.e., it possesses significant market power. (D.91-08-022, mimeo, p. 22.)

conditions of CMRS, and CRA argues that requiring adherence to GO-104 by the dominant cellular carriers would be consistent with the Commission's authority.

CRA states that the Commission also has the option to regulate the rates of CMRS providers under Section 332(c)(3) of the Communications Act of 1996 by petitioning the Federal Communications Commission (FCC) for such authority. CRA suggests that CMRS will increasingly replace landline service, which in turn could cause the Commission to seek authority from the FCC to regulate the rates of CMRS providers. Given this scenario, CRA believes it is premature to exempt AirTouch from submitting the information required by GO 104-A.

IV. Discussion

GOs 77-K and 104-A were originally adopted by the Commission for the purpose of requiring utilities to provide the Commission with information useful in setting utilities' rates. In D.96-12-071 we recognized that our authority to regulate the rates of CMRS providers, including AirTouch, had been preempted by changes to federal law under the Omnibus Budget Reconciliation Act of 1993 (Budget Act).⁴ Given our lack of authority to regulate AirTouch's rates, we see no point in requiring AirTouch to comply with general orders whose primary purpose is to help us regulate rates. Accordingly, we shall grant AirTouch's request for an exemption from GOs 77-K and 104-A. However, we may reexamine our decision to exempt AirTouch from either or both of these general orders should there be a change in the scope of federal preemption or other changed circumstances that warrant such an action on our part.⁵

We anticipate that our granting AirTouch an exemption from GO 77-K and 104-A in this decision is likely to beget future requests by other CMRS providers for the

⁴ D.96-12-071, Findings of Fact Nos. 1, 3, 4, 5, 6, and 8; Conclusions of Law Nos. 1, 5, and 6. Section 332(c)(3)(A) of the Communications Act, as amended by the 1993 Budget Act, states that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile [radio] service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms of commercial mobile [radio] service."

⁵ In D.96-07-52, Ordering Paragraph No. 2, we likewise reserved our right to reexamine our policy of exempting Class I railroads from GO 77-K.

same exemption. Instead of considering these requests on a piecemeal basis, we shall open an OIR to examine whether all CMRS providers should be exempt from GOs 77-K and 104-A. To this end, we instruct the staff our Telecommunications Division to prepare a draft OIR for our consideration that would exempt other CMRS providers from these general orders.⁴ We provide notice herein that this OIR shall be strictly limited to CMRS providers, and that this proceeding shall not consider whether other telecommunications carriers should also be exempt from GOs 77-K and 104-A.

Findings of Fact

1. Application 97-02-035 was filed on February 27, 1997.
2. Notice of the application appeared in the Commission's Daily Calendar on March 3, 1997.
3. A protest to the application was filed by the CRA on April 2, 1997. CRA opposed granting AirTouch an exemption from GO 104-A, but CRA did not oppose granting AirTouch an exemption from GO 77-K.
4. A PHC was held on May 8, 1997. At the PHC the parties agreed there was no need to hold evidentiary hearings.
5. A hearing is not required.
6. AirTouch and CRA filed opening briefs on May 29, 1997. CRA filed a reply brief on June 6, 1997, and AirTouch filed a reply brief on June 9, 1997.
7. A draft decision prepared by the ALJ was submitted to the parties for comment on October 27, 1997. Parties comments on the draft decision were filed on November 19, 1997.
8. GOs 77-K and 104-A were adopted for the purpose of requiring utilities to provide the Commission with information useful in setting utilities' rates.

⁴ The rulemaking may addresses whether CMRS providers should continue to submit administrative information contained in their GO 104-A reports, such as the address, telephone number, and contact person for each CMRS provider. To the extent that such reporting requirements are retained, they should be applied to AirTouch as well.

9. The Commission's authority to regulate the rates of CMRS providers, including AirTouch, was preempted by changes to federal law under the Omnibus Budget Reconciliation Act of 1993.

10. Given the Commission's lack of authority to regulate the rates of CMRS providers, there is no reason to require AirTouch to comply with GOs 77-K and 104-A.

11. Granting AirTouch an exemption from GOs 77-K and 104-A is likely to cause other CMRS providers to submit applications for an exemption from these general orders.

12. Opening an OIR to consider whether all CMRS providers should be exempt from GOs 77-K and 104-A would be a more efficient use of Commission resources than addressing exemption requests by CMRS providers on a piecemeal basis.

Conclusions of Law

1. The Commission has no authority to regulate the rates charged by AirTouch.

2. AirTouch's request for an exemption from GOs 77-K and 104-A should be granted.

3. Commission staff should prepare for the Commission's consideration a draft OIR on the issue of whether all CMRS providers should be exempt from GOs 77-K and 104-A.

4. The following order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The application for an exemption from General Orders (GOs) 77-K and 104-A, Section 1, filed by AirTouch Cellular, the Los Angeles SMSA Limited Partnership, the Sacramento Valley Limited Partnership, and the Modoc RSA Limited Partnership is granted.

2. The staff of the Commission's Telecommunications Division shall prepare for the Commission's consideration an Order Instituting Rulemaking on the matter of

A.97-02-035 ALJ/TIM/rmn

whether all providers of Commercial Mobile Radio Service should be exempt from GOs 77-K and 104-A.

3. This proceeding is closed.

This order is effective today.

Dated February 4, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners