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Decision 98-07-037 July 2, 1998

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| Investigation on the commission's Own Motion Into Mobile Telephone Service and Wireless Communications. | I.93-12-007 (Filed December 7, 1993) |

# ORDER GRANTING LIMITED REHEARING, MODIFYING D.95-10-032, AND DENYING REHEARING IN ALL OTHER RESPECTS

In Decision (D.) 95-10-032, the Commission considered the effect of federal law preempting state regulation of "entry" on the Commission's regulation of commercial mobile radio service (CMRS) providers.[1] The Cellular Carriers Association of California (CCAC) and Air Touch Cellular together with several of its affiliates[2] (collectively AirTouch) filed applications for rehearing of D.95-10-032 (the Decision). The Cellular Resellers Association, Inc. filed a response in opposition. The applications for rehearing challenge the Decision on several grounds.

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[1] More specifically, section 332(c)(3)(A) of the Federal Communications Act, as amended by the 1993 Budget Act, states, in pertinent part, that:

> no State or local government shall have any authority to regulate the entry of . . . any commercial mobile service . . . , except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile service.

[2] These affiliates are: Los Angeles SMSA Limited Partnership, Sacramento-Valley Limited Partnership, and the Modoc RSA Limited Partnership.

First, they challenge the Decision's authorization for CMRS providers to obtain a ministerial Certificate of Public Convenience and Necessity (CPCN) for market entry. Ordering Paragraph No. 2 of the Decision states:

> Any CMRS provider that does not have a Commission-issued CPCN for market entry may obtain one by filing with this Commission a wireless Identification Registration, and in the case of a facilities-based provider, a copy of its FCC license. The Executive Director, or the Director's delegee, promptly upon receiving these items shall issue a CPCN to the CMRS provider, when so requested by the provider.

The Decision included this provision in an attempt to reconcile several different provisions of law. Public Utilities (PU) Code section 1001 requires a telephone corporation (including a CMRS provider) to obtain a CPCN from this Commission before establishing a new or expanded service territory (subject to certain exceptions). The Federal Communications Act (the Act) as amended, on the other hand, prohibits states from regulating the entry of commercial mobile radio service. (See footnote 1, above.) Finally, article III, section 3.5 of the California Constitution states that:

> An administrative agency, including an administrative agency created by the Constitution . . . has no power . . . [t]o declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law . . . prohibit[s] the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law . . . .

In light of these various provisions we crafted Ordering Paragraph No. 2 in an attempt to harmonize our enforcement of section 1001 with the federal regulatory framework, consistent with the requirements of the state Constitution. (See D.95-10-032 at 11-13.)

After we issued the Decision, and after the applications for rehearing were filed, the Legislature and the Governor approved Chapter 574, Statutes of 1996 (AB 1121, Conroy). This statute enacted section 247 of the Public Utilities Code, which provides in pertinent part that:

> Any provision of th[e Public Utilities A]ct that is in conflict with the Communications Act of 1934, as amended, (47 U.S.C. Sec. 332(c)(3)) shall not apply to commercial mobile radio service to the extent of that conflict.

The purpose of section 247 was to extricate the Commission from the situation previously described, which had led the Commission to attempt to harmonize the apparently conflicting statutory and constitutional provisions by means of Ordering Paragraph No. 2. Accordingly, we are now in a position to conclude that the federal Act's preemption of state regulation of entry conflicts with PU Code section 1001's requirement to obtain a CPCN before market entry. Therefore, pursuant to legislative direction, section 1001's requirement for a market entry CPCN does not apply to CMRS providers. The California Constitution does not prohibit us from reaching this conclusion, as we are not refusing to carry out a legislative directive; rather, we are limiting the implementation of section 1001 as directed by the Legislature. (See Reese v. Kizer (1988) 46 Cal. 3d 996, 999, 1002.)

Because section 1001's requirement for a market entry CPCN does not apply to CMRS providers pursuant to PU Code section 247 (due to the conflict with federal law), we should eliminate Ordering Paragraph No. 2 of the Decision, which authorized the issuance of ministerial, market-entry CPCNs to CMRS providers. Accordingly, we will grant a limited rehearing to delete Ordering Paragraph No. 2. Ordering Paragraph No. 1 of the Decision will still require CMRS carriers to comply with the Wireless Identification Registration procedures

established in D.94-10-031. Those identification procedures should be sufficient for us to keep track of wireless providers and their owners.

In concluding its argument that federal law preempts Commission regulation of entry, AirTouch also contends that Ordering Paragraphs 6(c) and 9 contain legal error, but does not explain this contention. (AirTouch Application for Rehearing at 13.) We find no legal error in those provisions, and in any event the additional provisions to which AirTouch objects have been superseded.

Ordering Paragraph No. 6 dealt with siting requirements for CMRS facilities. We find no legal error in this ordering paragraph, because, while Section 332(c)(3)(A) of the federal Act preempts state regulation of the entry of, or rates charged by, commercial mobile service, it expressly permits state regulation of "other terms and conditions" of commercial mobile service.

Although the federal Act does not define the terms "entry" or "other terms and conditions," the legislative history spells out in some detail how those terms are used in the Act.

> By 'terms and conditions' the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; [and] facilities siting issues (e.g. zoning) . . . (House Report No. 103-111, at 261 (emphasis added) reprinted in 1993 U.S.C.C.& A.N. at 588.)

Thus, as used in the Act, "entry" does not include "facilities siting" and therefore state and local regulation of the facilities siting of CMRS providers is not federally preempted. Indeed, Section 332(c)(7) of the Act, added in 1996, specifically preserves state and local zoning authority over the siting of CMRS facilities.

Moreover, the particular provisions to which AirTouch objects have since been superseded. Ordering Paragraph No. 6 of D.95-10-032 states that its requirements for siting apply "[u]ntil the issuance of a decision in Rulemaking (R.) 90-01-012." A decision has been issued in R.90-01-012. Decision 96-05-035 in

that proceeding adopted General Order (GO) 159-A, which now governs the siting and environmental review of facilities constructed by cellular carriers and other CMRS carriers that are subject to this Commission's jurisdiction.[3] Therefore, Ordering Paragraph 6(c) of the Decision is no longer in effect. Ordering Paragraph No. 9 of the Decision only dealt with the processing of then pending applications for siting CPCNs, requiring some of those applications to be processed under Ordering Paragraph 6(c). Due to the passage of time, the provisions of Ordering Paragraph No. 9 no longer have any effect either.

The application for rehearing filed by CCAC also alleges that Ordering Paragraph No. 3 of the Decision impermissibly regulates entry by regulating transfer of CMRS ownership. CCAC relies on the "plain meaning" of the word "entry" and argues that the transfer of ownership is a vehicle through which market entry is executed.

We cannot agree with CCAC's view as to the "plain meaning" of "entry". It appears to us that a transfer of ownership (or "transfer of control") over an existing firm, by definition, occurs after entry, after there is an already established right to provide service. Therefore, limitations on transfers of control are not intended to limit the number of market entrants.

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[3] More specifically, Ordering Paragraph No. 8 of D.96-05-035 provides:

> As stated in D.95-10-032, pps. 22-25 and ordering paragraph 6, . . . the Commission's cell siting notification requirements for noncellular providers were interim until the Commission issued its decision in this proceeding. Accordingly, the cell notification requirements promulgated in this decision for cellular providers shall be applicable to noncellular providers to achieve uniformity of cell site notification requirements for cellular and noncellular providers alike.

The legislative history fully supports our view that the Act, in prohibiting state regulation of the entry of any commercial mobile service, does not prohibit state regulation of transfers of control: The Act specifically reserves to the States the authority to regulate "the other terms and conditions of commercial mobile service". (49 U.S.C. section 332(c)(3)(A).) As noted above, the Act does not define either the term "entry" or "other terms and conditions". However, the committee report specifically states that "terms and conditions" is intended to include such matters as "transfers of control". (House Report No. 103-111 at 261, reprinted in 1993 U.S.C.C.& A.N. at 588.) Accordingly, we find no error in any regulation of transfers of control contained in Ordering Paragraph No. 3 of the Decision.

In summary, we will grant a limited rehearing to reconsider whether ministerial CPCNs for market entry should be issued. In light of the enactment of section 247 of the PU Code and the provisions of federal law discussed above, we conclude that such CPCNs should not be issued. There is no need for any further hearings or briefing on this issue, and therefore we will now rescind Ordering Paragraph No. 2 of D.95-10-032. Because applicants have not shown that any other revisions to D.95-10-032 are necessary, we will deny rehearing in all other respects. Accordingly,

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**IT IS ORDERED that:**

1. A limited rehearing is granted in order to modify Decision 95-10-032 on the issue of whether ministerial certificates of public convenience and necessity for CMRS market entry should be issued by this Commission.

2. Decision 95-10-032 is modified by deleting Ordering Paragraph No. 2.

3. Rehearing of Decision 95-10-032 is denied in all other respects.

This order is effective today.

Dated July 2, 1998, at San Francisco, California.

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