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Decision 98-09-037 September 3, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Nova Cellular West, Inc. dba San Diego Wireless,

Complainant,

vs.

AirTouch Cellular of San Diego,

Defendant.

ORIGINAL

Case 98-02-036
(Filed February 13, 1998)

O P I N I O N

Summary

Nova Cellular West, Inc. (Nova), a cellular reseller operating in the San Diego area, complains that AirTouch Cellular (AirTouch) refuses to supply it with four promotional plans at lower rates that would reflect electronic billing efficiencies. AirTouch moves to dismiss on grounds that the Commission lacks jurisdiction to adjudge the lawfulness of rates charged by cellular telephone carriers. The motion is granted. The complaint is dismissed.

Nature of Complaint

On February 13, 1998, Nova filed this complaint against "AirTouch Cellular of San Diego,"[1] depositing $37,930.70 in disputed billing amounts with the Commission. Nova filed an amended complaint on March 12, 1998,

[1] Defendant's name is incorrectly stated in the complaint. AirTouch Cellular (U-3001-C) is the cellular operator in the San Diego market and has submitted an answer and a motion to dismiss.

depositing an additional $17,291.74 with the Commission. On June 12, 1998, Nova filed a second amended complaint that increased the amount of disputed funds deposited with the Commission to $95,689.39. Nova is a customer of AirTouch's cellular service; Nova purchases AirTouch cellular service in volume and resells that service to the public.

Nova alleges that AirTouch refuses to make four promotional access and airtime plans available to Nova at lower rates that would reflect an electronic billing format. While the service packages are available for resale, Nova alleges that the cost to it is higher because none of the packages includes the billing format that creates administrative cost savings. Nova asks the Commission to enjoin AirTouch from continuing to bill and collect from Nova for charges other than under the noted rate plan or such other more favorable plan, and to remove a total of $95,689.39 that Nova alleges was improperly assessed since November 1997.

AirTouch admits the facts of the complaint. It states that its billing system can, for certain rate plans, generate a billing tape in a format that allows a reseller to economically generate bills for the reseller's customers. AirTouch states that it also offers other rate plans, many of them with short-term promotional discounts, and that AirTouch is not able to develop billing tapes in that same format for these rate plans. AirTouch states that resellers may purchase service under these special rate plans, but that they must accept the terms, conditions and service limitations of these plans, including the number of options for the format of bills or billing tapes.

Procedural History

This case was filed on February 13, 1998. Notice of the filing appeared in the Commission's Daily Calendar on February 26, 1998. On March 2, 1998, defendant was instructed to answer the complaint within 30 days. The

instructions, a copy of which was served on complainant, assigned the matter to Administrative Law Judge Walker and categorized the case as an adjudicatory proceeding, as that term is defined in Rule 5(b) of the Rules of Practice and Procedure. Because we have decided to dismiss the complaint on the basis of defendant's motion to dismiss, no scoping memo is necessary, nor is a hearing required. As noted in the instructions to answer, a hearing is not required where the matter "is otherwise resolved by the parties," i.e., through pleadings addressing the motion to dismiss. The categorization of this matter as adjudicatory has not been contested by the parties.

Motion to Dismiss

AirTouch on April 15, 1998, filed a motion to dismiss the complaint. Nova responded to the motion on April 30, 1998. AirTouch moves for dismissal on grounds that (1) this Commission lacks subject matter jurisdiction because the complaint deals with rates charged to a reseller; (2) a similar complaint regarding another AirTouch rate plan was the subject of a 1997 settlement agreement between the parties that purportedly barred subsequent complaints of this nature;[2] and (3) the complaint fails to state a claim upon which relief can be granted. For the reasons set forth below, we agree that the Commission is without jurisdiction to address the rate practices alleged in this complaint, and that such enforcement must be left instead to the Federal Communications Commission (FCC) and to the federal courts. Accordingly, the motion to dismiss

[2] *See* Decision (D.) 97-05-100, dismissing with prejudice Nova's complaint in Case 96-12-027. A copy of the parties' settlement agreement in that case is attached to AirTouch's motion to dismiss.

for lack of jurisdiction is granted. Because of this decision, we do not reach the other grounds for dismissal.

Discussion

In recognition of the rapid growth of the wireless telecommunications services industry, Congress in 1993 amended the Communications Act of 1934, 47 U.S.C. §§ 151 et seq., as amended, 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 from 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 carriers for an 18-month period. 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]

Consequently, this Commission lacks jurisdiction to hear complaints regarding the lawfulness of rates charged by cellular carriers. As the Commission itself has concluded with respect to cellular and other commercial

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

[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 issued on August 8, 1995.

mobile service carriers, "we will not entertain disputes regarding the level or reasonableness of any rate."[5]

Nova argues that its complaint does not involve rate regulation, but is instead a dispute over a billing practice. It states that, based on an FCC interpretation, the Commission may continue to decide complaints relating to "customer billing information and practices and billing disputes and other consumer matters."[6]

While we agree that the Commission retains authority to handle consumer complaints in matters of cellular nonrate terms and conditions of service,[7] the Commission does not have authority to enjoin AirTouch from billing and collecting the rates at issue here, which is the remedy sought by Nova. Indeed, Nova asks the Commission to order AirTouch to adjust its rates to eliminate approximately $96,000 in charges to Nova. These requested actions would involve the Commission in ratemaking for cellular telephone services, an activity

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[5] *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).

[6] *In the Matter of the Petition of the People of the State of California and Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates*, FCC 95-195, PR Docket No. 94-105 (May 19, 1995), para. 145.

[7] *See* D.96-12-071, Conclusion of Law 10: "The Commission shall continue to monitor the structure, conduct and performance of CMRS carriers, and to handle CMRS consumer complaints, ensuring that facilities-based carriers not restrict in any manner, by way of nonrate terms and conditions, the ability of resellers to purchase or resell cellular or other telecommunications services to the public."

in which the Commission has been preempted. Consequently, the complaint must be dismissed.

Comments on Draft Decision

At the direction of Assigned Commissioner Neeper, parties were given the opportunity to comment on the draft decision in this matter. Both complainant and defendant filed comments on August 14, 1998.

Complainant argues that its complaint seeks to require AirTouch to provide it with electronic billing tapes for four promotional rate plans, and that this constitutes a billing dispute, over which this Commission has jurisdiction, rather than a dispute as to rates. It notes that the Commission, in discussing federal preemption in D.96-12-071, stated that preemption would not apply to "eligibility for rate plans" and "scope of service within each rate plan." (D.96-12-071, at 14.) Complainant asserts that those are the issues here. It cites the case of GTE Mobilnet v. New Par, et al. (6th Cir. 1997) 111 F.3d 469, as standing for the proposition that alleged discriminatory treatment against cellular resellers under state law is not unequivocally preempted by the FCC.

Defendant argues that the complaint asks the Commission to direct AirTouch to offer Nova particular rates, namely the price made available in certain promotional rate plans to which Nova does not subscribe. Further, defendant states, the complaint asks the Commission to return to Nova the amount Nova alleges was unlawfully assessed, in effect changing post hoc the rates AirTouch charged to Nova. Defendant asserts that this type of state commission involvement in cellular rate regulation is prohibited by Section 332(c)(3) of the Communications Act. As to Nova's claim that it seeks only mandatory provisioning of a billing format, defendant cites recent dicta of the United States Supreme Court stating that "[r]ates,...do not exist in isolation. They have meaning only when one knows the services to which they are

attached. Any claim for excessive rates [or for discriminatory rates] can be couched as a claim for inadequate services and vice versa."[5]

We agree with defendant that the relief requested by complainant requires ratesetting and that the Commission lacks jurisdiction to set cellular rates. The Commission, however, does retain authority over other terms and conditions of cellular service. In this case, mandating that AirTouch provide particular services at given rates is functionally identical to requiring AirTouch to provide its given services at particular rates. Both actions would constitute "rate regulation," and neither remedy is permitted under Section 332. The Sixth Circuit's decision in GTE Mobilnet is distinguishable, in that the issue there was whether a federal court should abstain from enjoining state commission action on the basis of preemption out of deference to the ability of the commission and state courts to deal with that question. The Sixth Circuit held that federal abstention was appropriate. As to D.96-12-071, the Commission in Conclusion of Law 10 states that it will continue to monitor restrictive practices of cellular carriers as to "nonrate terms and conditions." (D.96-12-071, at 32.) The undisputed facts of this case make clear that the relief is ratemaking, and therefore is preempted. Complainant should seek its relief before the FCC when its complaint involves AirTouch practices that would require a change in rates.

Findings of Fact

1. Complainant alleges that defendant assesses unlawful rates for at least four cellular service packages.

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[5] American Telephone and Telegraph Co. v. Central Office Telephone, Inc. (June 15, 1998) __ U.S. __, 118 S.Ct. 1956.

2. Defendant has 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 gravamen of the complaint is that rates for four AirTouch cellular plans available to complainant are unreasonable in that they do not include an electronic billing format.

3. The Commission has been preempted from prescribing rates for cellular telephone service.

4. The motion to dismiss the complaint for lack of subject matter jurisdiction should be granted.

5. Monies deposited by complainant pending resolution of this matter should be disbursed to defendant.

O R D E R

IT IS ORDERED that:

1. The motion of AirTouch Cellular (AirTouch) to dismiss the complaint of Nova Cellular West, Inc., dba San Diego Wireless (Nova), for lack of subject matter jurisdiction is granted.

2. The complaint is dismissed.

3. The money deposited with the Commission by Nova in connection with this complaint, together with interest earned thereon, is to be disbursed to defendant AirTouch.

4. Case 98-02-036 is closed.

This order is effective today.

Dated September 3, 1998, at San Francisco, California.

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