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Dear Sirs:

In a letter of February 6, 2003, Cingular Wireless LLC (Cingular) and Vodafone Americas, Inc., (Vodafone) asked that the Wireless Telecommunications Bureau (Bureau) clarify whether the Federal Communications Commission (Commission) has ruled on whether a state's investigation of rate discrimination by providers of commercial mobile radio services (CMRS) violates the prohibition in Section 332(c)(3)(A) of the Communications Act of 1934, as amended, on state regulation of CMRS rates, or is permitted state regulation of "other terms and conditions" under that subsection.[1] The letter from Cingular and Vodafone states that this issue has arisen in the context of litigation in the state of Ohio involving a complaint proceeding alleging rate discrimination brought before the Public Utilities Commission of Ohio (Ohio or PUCO) by Westside Cellular, Inc. (Cellnet) against subsidiaries of

[1] 47 U.S.C. § 332(c)(3)(A).

Cingular and Vodafone.[2] On February 10 and February 19, 2003, respectively, counsel for Cellnet and the PUCO filed letters raising concerns about the request from Cingular and Vodafone.[3]

In response to these letters, we note as an initial matter that the Bureau takes no position with respect to the merits of the Ohio litigation, or on the issue of whether a state determination of a rate discrimination complaint is or is not preempted under Section 332(c)(3)(A). Nevertheless, the Bureau believes it is appropriate to articulate for the benefit of the parties and the public its view on the scope of the Commission's prior decisions with respect to Section 332(c)(3)(A).[4] We further note that the views stated in this letter are those of the Bureau and are not in any way binding on the Commission.

Based on its review of prior Commission decisions, the Bureau believes that the Commission has to date declined to decide whether state determination of claims that CMRS providers have engaged in rate discrimination would constitute prohibited rate regulation, or would instead constitute permitted regulation of other terms and conditions under Section 332(c)(3)(A). Instead, the effect of the Commission's orders on this issue to date has been to leave such questions for potential future consideration on a case-by-case basis.

The Commission was most directly presented with the issue raised by the above-referenced letters in the context of the petition filed by Ohio in 1994, pursuant to Section 332(c)(3), seeking to retain state regulatory authority over the rates for intrastate CMRS services.[5] The petition was filed in accordance with Section 332(c)(3)(B), which provided that if a state had in effect on June 1, 1993, any regulation concerning the rates for any CMRS offering, it could petition the Commission to grant authority to the state to continue exercising authority over such rates.[6] Section 332(c)(3)(B) further required the Commission to grant the petition if the state demonstrated that "(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or (ii) 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."[7] As part of its petition, Ohio noted that it was currently using its complaint authority

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[2] Letter from J. R. Carbonell, General Counsel, Cingular Wireless LLC, and Dennis A. Daugherty, Vice President and General Counsel, Vodafone Americas, Inc., to John B. Muleta, Chief, Wireless Telecommunications Bureau, FCC (February 6, 2003), citing *New Par. V. Pub. Util. Comm'n of Ohio*, 98 Ohio St. 3d 277, 781 N.E.2d 1008, 2002-Ohio-7245 (Dec. 30, 2002).

[3] Letter from Randy J. Hart, Hahn Loeser & Parks LLP, to John B. Muleta, Chief, Wireless Telecommunications Bureau, FCC (February 10, 2003), and Letter from Duane W. Luckey, Senior Deputy Attorney General, Public Utilities Section, and Steven T. Nourse, Assistant Attorney General, Public Utilities Section, State of Ohio Office of the Attorney General, to John B. Muleta, Chief, Wireless Telecommunications Bureau, FCC (February 19, 2003).

[4] 47 C.F.R. § 0.331.

[5] Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services, PR Docket No. 94-109, Report and Order, 10 FCC Rcd 7842 (1995) (*Ohio Petition Order*); Order on Reconsideration, 10 FCC Rcd 12427 (1995) (*Ohio Petition Reconsideration Order*).

[6] 47 U.S.C. § 332(c)(3)(B).

[7] *Id*., incorporating by reference 47 U.S.C. § 332(c)(3)(A)(i)-(ii).

to adjudicate individual claims of rate discrimination against CMRS providers, but stated that it did not regard this as rate regulation.[8]

In the *Ohio Petition Order*, the Commission denied the Ohio petition, finding that the state had not demonstrated the existence of the above-referenced market conditions that, under Section 332(c)(3), are a prerequisite to retention of state authority over CMRS rates.[9] In the summary of its decision, the Commission also stated that Ohio had not demonstrated that, as of June 1, 1993, it was using state authority to regulate 'the rates charged' by CMRS providers.[10] With respect to Ohio's authority to adjudicate complaints against CMRS providers, the Commission commented "in a preliminary manner" that such adjudication could fall within the scope of permissible regulation of "other terms and conditions," but it declined to reach a definitive conclusion on this issue.[11] Instead, the Commission found that it required "a more fully developed record" to establish "with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions."[12] In conclusion, it indicated that "to the extent that an interested party seeks reconsideration on this issue, it will specify with particularity the provisions of the Ohio regulatory practice at issue."[13]

Following the *Ohio Petition Order*, the PUCO filed a petition for reconsideration, in which it sought the ability to supplement its filing at a later date with the results of the then-pending Cellnet complaint proceeding, so that the Commission could provide a definitive determination between retained and lost state regulatory jurisdiction under Section 332.[14] In response, GTE Mobilnet and New Par, two of the carriers that were the subject of Cellnet's complaint, requested that the Commission clarify that certain of the issues being considered in the Cellnet proceeding, including the discriminatory rate issue, were not within the state's retained jurisdiction.[15]

In the *Ohio Petition Reconsideration Order*, the Commission denied Ohio's request, saying that the state could provide the Commission with additional information gathered in the course of the Cellnet proceeding at a later date if it desired "a definitive ruling from this Commission."[16] The Commission also did not grant the carriers' alternative request that further consideration by the state of the discriminatory rate issue be preempted.[17] Rather than decide the issue, the Commission found that "the record of this proceeding is not sufficiently detailed to permit us to comment meaningfully on the regulatory activities

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[8] *Ohio Petition Order*, 10 FCC Rcd at 7850 (para. 28).

[9] *Id.,* at 7851-52 (paras. 37-39).

[10] *Id.*, at 7850 (para. 31); *Ohio Petition Reconsideration Order*, 10 FCC Rcd at 12430-31 (para. 6).

[11] *Ohio Petition Order*, 10 FCC Rcd at 7852 (para. 40).

[12] *Id*., at 7852 (para. 42).

[13] *Id*., at 7853 (para. 44).

[14] *Ohio Petition Reconsideration Order*, 10 FCC Rcd at 12433-34 (paras. 11-13).

[15] *Id*., at 12436-37 (paras. 17-18).

[16] *Id*., at 12438-39 (para. 23).

[17] *Id.,* at 12436-37 (paras. 17-18), 12438-39 (para. 23).

contemplated by the PUCO in the Cellnet proceeding."[18] The United States Court of Appeals for the Sixth Circuit, in reversing a federal district court injunction that would have prohibited the PUCO under Section 332(c)(3) from continuing its consideration of the Cellnet complaint, also concluded that the Commission had not decided the issue. The court stated that "the FCC did not rule on the preemption question, since the FCC stated that the record was not sufficiently detailed to allow it to 'comment meaningfully' on the regulatory activities contemplated by Ohio…"[19]

Since the *Ohio Petition Reconsideration Order*, no party has provided the Commission with additional information regarding the Cellnet matter, nor has any party requested the Commission in the context of the Cellnet matter or in any other context to further address the potential preemptive effect of Section 332(c)(3)(A) on a state investigation or adjudication of a rate discrimination complaint. The Bureau is also unaware of any other Commission decision that addresses this issue other than the orders referenced above. Accordingly, the Bureau regards the issue raised in the letters submitted by Cingular and Vodafone, Cellnet, and the PUCO, respectively, as one that the Commission has not decided, and that would require presentation of a specific case and a full record as a predicate to any potential Commission decision.

Sincerely,

John B. Muleta
Chief, Wireless Telecommunications Bureau

[18] *Id*., at 12439 (para. 24).

[19] *GTE Mobilnet v. Johnson*, 111 F.3d 469, 484 (6th Cir. 1997).