Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)
Digital Cellular, Inc.,	)
Petition for Declaratory Ruling	)
Regarding a Primary Jurisdiction Referral	)
From the United States District Court for the	)
Central District of California	)

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 2005 **Released: May 3, 2005**

By the Deputy Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order ("Order"), we deny the petition for declaratory ruling filed by Digital Cellular, Inc. ("Digital") in connection with a primary jurisdiction referral from the United States District Court for the Central District of California ("Court").[1] The Court's referral concerns an allegation by Digital that AirTouch Cellular, Inc. ("AirTouch") violated the Federal Communication Commission's ("Commission") former commercial mobile radio services resale rule ("CMRS Resale Rule") and Sections 201 and 202(a) of the Communications Act of 1934, as amended ("Communications Act").[2] Digital purports that AirTouch failed to offer it cellular service for resale at the same price, terms, and conditions that AirTouch offered such service to Topp Telecom ("Topp"), a competing entity in the prepaid cellular phone service market.[3] Digital has asked the Commission to issue a declaratory ruling that Digital and Topp are similarly situated for purposes of Sections 201 and 202(a) of the Communications Act and the Commission's CMRS Resale Rule, and also that Topp's status as an agent of AirTouch, as identified in their contract, does not justify AirTouch's disparate treatment of Topp relative to Digital.[4] For the reasons discussed below, we decline to grant Digital's request for a declaratory ruling.

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[1] *See* Petition for Declaratory Ruling of Digital Cellular, Inc. (filed Feb. 27, 2004) ("Petition").

[2] *See Digital Cellular, Inc. v. AirTouch Cellular, Inc.*, No. CV-99-2205 SVW (MANx) (C.D. Ca.), "Order Staying Case and Referring Plaintiff's Discrimination Claim to the Federal Communications Commission" (filed Jan. 8. 2003) (*"Referral Order"*). 47 U.S.C. §§ 201, 202(a); 47 C.F.R. § 20.12(b) (1998). Since the alleged violation, the CMRS Resale Rule expired pursuant to the sunset provision of the rule. 47 C.F.R. § 20.12(b) (1998).

[3] Petition at 2.

[4] Petition at 15.

II. BACKGROUND

A. Material Facts

2. The *Referral Order* comes to the Commission after the Court has deemed that there is a "fully developed factual record and the material facts are now essentially undisputed."[5] In particular, the Court found that AirTouch, a licensed cellular carrier, entered into a contractual relationship with Topp for the purpose of offering prepaid cellular service to retail customers.[6] Digital was a reseller of cellular mobile radio services that sought to purchase airtime from AirTouch for resale on the same terms and conditions found in the contractual relationship between AirTouch and Topp.[7]

3. The contract between AirTouch and Topp provided, in pertinent part, that Topp would combine its proprietary hardware and redemption services with AirTouch's cellular airtime to sell prepaid services on the AirTouch network under Topp's name.[8] The contract denominated Topp as AirTouch's "agent" and the Court found that the arrangement resembled an agency relationship in that AirTouch prescribed the rates that Topp charged to customers, AirTouch retained a fee in the nature of a commission consisting of a preset portion of the retail price, and the contract provided that AirTouch "owned" the customers.[9] However, the arrangement differed from a conventional sales agency relationship in that the product was sold under Topp's name, retail customers interacted exclusively with Topp, and Topp did not simply sell AirTouch's product but combined the airtime with its own hardware and service to create a new product.[10]

4. The Court also ascertained the following facts that are material to the disposition of Digital's discrimination claim: (1) Topp possessed patented handsets, prepaid cards, and redemption services essential to the provision of prepaid cellular service;[11] (2) Topp alone was the patent holder who could give AirTouch access to its technology for providing prepaid cellular service;[12] (3) Topp bundled airtime from AirTouch with Topp's patented handset units and prepaid cards to facilitate AirTouch's provision of prepaid cellular service;[13] (4) AirTouch did not independently possess the technology to offer prepaid cellular service during the period of the alleged violation;[14] and (5) Digital did not independently possess the technology to offer

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[5] *Referral Order* at 8-9, 25.

[6] *Id.* at 1, 9.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 6-7, 12-15. The Court noted that Topp's payment of a fee to AirTouch to acquire the customers when the contract was terminated is consistent with the provision that the customers were owned by AirTouch. *Id.* at 15.

[10] *Id.* at 8-9.

[11] *Id.* at 17.

[12] *Id.*

[13] *Id.* at 16.

[14] *Id.*

prepaid cellular service during this period.[15]

B. Procedural History

5. On October 28, 1998, Digital brought an action against AirTouch alleging violation of Sections 201 and 202(a) of the Communications Act and the Commission's CMRS Resale Rule.[16] In its complaint, Digital alleged, in pertinent part, that AirTouch unreasonably discriminated against it in violation of these provisions by refusing to make its prepaid service plans available at the same rates and conditions it offered to Topp.[17]

6. On December 28, 1999, AirTouch filed a motion asking the Court to refer Digital's action to the Commission under the primary jurisdiction doctrine.[18] The Court granted this motion and stayed the case in its Order issued on January 26, 2000.[19] On February 4, 2000, the Court issued its Further Order in which it clarified the scope of the referral to the Commission.[20] Digital subsequently presented the referral to the Commission as part of a petition for a declaratory ruling.[21] AirTouch challenged the form of the referral by arguing that a formal complaint proceeding was required.[22] Digital then withdrew its petition without prejudice.[23] On May 23, 2002, the Court vacated its Order of January 26, 2000, and proceeded to set a trial date.[24] On October 4, 2002, AirTouch filed a Motion for Summary Adjudication of Digital's claim.[25] The Court responded on January 8, 2003, by adopting an Order staying Digital's case and referring Digital's discrimination claim to the Commission ("*Referral Order*").[26]

7. In the *Referral Order*, the Court stated, and explained at length why, it was "inclined to believe…that it could properly grant" summary judgment on Digital's discrimination claim.[27] First, the Court determined that while AirTouch's agreement with Topp

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[15] *Id.*

[16] *Id.* at 1. Petition at 3.

[17] Petition at 2. Digital also alleged that AirTouch unlawfully refused entirely to permit Digital to resell its services after termination of its agreement with Topp. The Court did not refer this claim to the Commission, and we express no opinion on its merits. *See Referral Order* at 2, 25.

[18] *Referral Order* at 2. The primary jurisdiction doctrine applies when the resolution of a claim initiated in the courts turns on a regulatory matter that is within the "special competence of an administrative body." When a court invokes primary jurisdiction, the judicial process is suspended pending review by the appropriate administrative body. *Id.* at 19-20 (citing *Nader v. Allegheny Airlines, Inc.* 426 U.S. 290, 303 (1976)).

[19] *Id.* at 2.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Referral Order.*

[27] *Id.* at 2.

resembled an agency relationship in some respects and not in others, the legal status of this relationship as "agency" or not was not dispositive. Rather, the important question was whether Digital was a "similarly situated customer" to Topp.[28] Turning to this question, the Court first opined that Topp, due to the nature of its relationship, did not appear to be a "customer" of AirTouch, and that it would therefore be justified in granting summary judgment in AirTouch's favor on this ground alone.[29] Moreover, even if Topp were Digital's customer, the Court believed summary judgment might be appropriate because Topp and Digital were not "similarly situated" under the Resale Rule or demanding like services under the Communications Act.[30] Finally, the Court indicated that summary judgment would be appropriate under Section 202(a) because AirTouch's discrimination was not unreasonable.[31]

8. Nonetheless, the Court did not render summary judgment in AirTouch's favor, but rather referred Digital's discrimination claim to the Commission. The Court determined that the Commission is "best suited" to resolve this claim because it "go[es] to the heart of the FCC's mandate and competencies."[32] In particular, the Court reasoned that the Commission should resolve Digital's claim because the Commission has not had the opportunity to apply the CMRS Resale Rule in the prepaid cellular phone service context due to the fact that the rule was adopted prior to the advent of this service.[33] The Court deemed that under the circumstances it is important to seek the Commission's expertise.[34] The Court explained that it is in the interest of the uniform application of both the CMRS Resale Rule and the Communications Act to refer Digital's claim to the Commission for resolution.[35]

9. On June 24, 2003, Digital forwarded the *Referral Order* to the Commission's Enforcement Bureau.[36] Digital and AirTouch subsequently agreed that Digital would effectuate the District Court's primary jurisdiction referral by submitting its claim to the Commission as a petition for declaratory ruling.[37] Both parties also agreed that AirTouch would file a response to

[28] *Id.* at 7-10.

[29] *Id.* at 12-15.

[30] *Id.* at 15-17.

[31] *Id.* at 18-19.

[32] *Id.* at 24.

[33] *Id.* at 23-24.

[34] *Id.* at 24.

[35] *Id.*

[36] Letter from Anthony J. DeLaurentis, Attorney, Market Disputes Resolution Division, Enforcement Bureau to Kenneth D. Patrich, Wilkinson Barker Knauer, LLP (counsel for AirTouch Cellular, Inc.), Allan D. Croll, Katten Muchin Zavis Rosenman, (counsel for AirTouch Cellular, Inc.) and John E. Andrews, Blecher & Collins (counsel for Digital Cellular, Inc.), dated Sept. 12, 2003 ("*Enforcement Bureau Letter*").

[37] *Id.*

Digital's petition.[38] Finally, the parties agreed that their respective arguments would be limited to the "four corners of the Referral Order."[39]

10. Digital filed the instant Petition on February 27, 2004. In its Petition, Digital contends that both it and Topp were customers and that both were similarly situated vis a vis AirTouch.[40] Furthermore, Digital asserts that AirTouch gave preferential treatment to Topp.[41] Therefore, Digital argues that AirTouch violated the CMRS Resale Rule and Sections 201 and 202(a) of the Communications Act.[42] AirTouch filed its response on March 26, 2004, and Digital filed a reply on April 2, 2004.[43]

III. DISCUSSION

11. The Commission's CMRS Resale Rule, as it existed at the time of the events pertinent to this referral, required carriers subject to the rule to "permit unrestricted resale of [their] service."[44] In adopting the rule, the Commission explained that due to the then-undeveloped state of competition in the CMRS market, a resale rule would, on balance, serve the public interest by promoting competitive pricing, discouraging unreasonably discriminatory practices, and fostering the development of new competitors.[45] The Commission further determined that competitive developments would obviate the need for a resale rule within five years after the initial broadband PCS licenses had been awarded.[46] Accordingly, the rule sunset on November 24, 2002.[47]

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[38] *Id.*

[39] *Id.*

[40] *Id.* at 7-12.

[41] *Id.*

[42] *Id.*

[43] Petition, *supra* note 1; AirTouch Cellular, Inc. Opposition to Petition for Declaratory Ruling (filed Mar. 26, 2004) ("*AirTouch Opposition Pleading*"); Reply in Support of Petition for Declaratory Ruling of Digital Cellular, Inc. (filed April 2, 2004).

[44] 47 C.F.R. § 20.12(b) (1998). At the time, the CMRS Resale Rule applied to providers of Broadband Personal Communications Services, Cellular Radio Telephone Service, and Specialized Mobile Radio Services in the 800 MHz and 900 MHz bands if such providers offered real-time, two-way, switched voice and data service that was interconnected with the public switched network and utilized an in-network switching facility that enabled the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls. 47 C.F.R. § 20.12(a) (1998). The rule was subsequently revised to exclude certain Broadband PCS licensees on the C, D, E, and F blocks as well as systems that lacked in-network switching capacity. *See* Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, *First Report and Order*, 11 FCC Rcd 18255 ("*CMRS Resale Order"), recon. granted in part and denied in part*, *Memorandum Opinion and Order On Reconsideration*, CC Docket No. 94-54, FCC 99-250, ¶¶ 31-52 (rel. Sept. 27, 1999) ("*CMRS Resale Recon. Order"), further recon. denied, Order on Reconsideration of Memorandum Opinion and Order on Reconsideration,* 15 FCC Rcd 16221, 16224, ¶¶ 5-6 (2000) ("*CMRS Resale Further Recon. Order*").

[45] *CMRS Resale Order*, 11 FCC Rcd 18255, 18461-63, ¶¶ 10-14.

[46] *Id.* at 18468-69, ¶ 24.

[47] *See* Public Notice, Commencement of Five-Year Period Preceding Termination of Resale Rule Applicable to Certain Covered Commercial Mobile Radio Service Providers, CC Docket No. 94-54, 13 FCC Rcd 17427 (1998);

(continued....)

12. In the *CMRS Resale Order*, the Commission explained that the rule had two relatively straightforward aspects. First, providers had to offer like communications services to "similarly situated" resellers on equal price, terms, and conditions unless there was a "reasonable justification" to vary these parameters.[48] Under the second aspect of the rule, which is not at issue in this referral, providers were prohibited from pursuing practices that unreasonably restricted resale either directly or indirectly.[49] However, the rule did not require providers to promote resale, adopt wholesale retail business structures, or guarantee resellers a profit.[50]

13. In the instant case, taking as given the undisputed facts found by the Court, we agree with the Court that Topp and Digital were not similarly situated.[51] As the Court ascertained, Topp held the patent for handsets, prepaid cards, and redemption services for providing prepaid cellular service.[52] Digital did not possess patents for these essential elements of a prepaid service business.[53] Thus, Topp alone was the patent holder who could, as the Court stated, bundle its patented handset units and prepaid cards with access to the AirTouch CMRS network to give AirTouch a "stake" in the prepaid cellular service market.[54] Topp provided material benefits to AirTouch related to resale of its service that Digital did not and could not provide. We find that these distinctions put Digital and Topp in materially dissimilar positions vis a vis AirTouch, rendering it reasonable for AirTouch to treat Topp and Digital differently. Therefore, AirTouch did not violate the CMRS Resale Rule.

14. In addition to its claim under the CMRS Resale Rule, Digital also alleges that AirTouch violated Sections 201(a), 201(b), and 202(a) of the Communications Act by not offering its communications services to Digital on the same price, terms, and conditions given to Topp.[55] Section 201(a) of the Communications Act provides, in pertinent part, that it is a duty of every common carrier engaged in interstate communication by radio "to furnish such communications service upon reasonable request therefore; and, in accordance with the orders of the Commission."[56] Digital argues that AirTouch violated Section 201(a) of the Communications Act because AirTouch denied Digital's request for access to AirTouch's

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see also CMRS Resale Recon. Order at ¶ 21 (declining to extend the sunset date of the CMRS Resale Rule); *CMRS Resale Further Recon. Order,* 15 FCC Rcd at 16224, ¶ 6 (again declining to extend sunset date).

[48] *CMRS Resale Order*, 11 FCC Rcd at 18462, ¶ 12. *See also CMRS Resale Recon. Order* at ¶¶ 53-54 (revising text of rule to clarify that only unreasonable practices were prohibited).

[49] *Id.* at 18462-463, ¶¶ 12-13.

[50] *Id.* at 18462, ¶ 12.

[51] We therefore need not address whether, as AirTouch argues and as the Court believed, Topp was not a "customer" of AirTouch. *AirTouch Opposition Pleading* at 8-10; *Referral Order* at 12-15. Rather, we assume *arguendo* that Topp was a "customer" within the meaning of the CMRS Resale Rule, and nonetheless find that that rule was not violated.

[52] *Referral Order* at 17.

[53] *Id.* at 16.

[54] *Id*.

[55] Petition at 2, 15.

[56] 47 U.S.C. § 201(a).

CMRS network on the same terms and conditions as AirTouch gave Topp.[57] Section 201(b) of the Communications Act provides, in pertinent part, that "charges, practices, classifications, and regulations for and in connection with [interstate] communications services shall be just and reasonable …."[58] Similarly, Section 202(a), provides, in pertinent part, that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications services."[59] Digital asserts that it was unreasonable for AirTouch to offer network access to Digital on terms less advantageous than the terms that AirTouch offered Topp.[60] Therefore, Digital alleges that AirTouch violated both Sections 201(b) and 202(a) of the Communications Act.[61]

15. For reasons similar to those discussed above with respect to the CMRS Resale Rule, we agree with the Court that AirTouch complied with Sections 201 and 202(a) of the Communications Act. Digital has failed to demonstrate that it made a "reasonable request" to AirTouch for airtime, pursuant to Section 201(a).[62] It was not reasonable for Digital to expect to receive the same price, terms, and conditions as Topp because only Topp owned the patents for the requisite technology and processes to offer prepaid cellular service.[63] Pursuant to Section 201(b) of the Communications Act, this material distinction between Topp and Digital rendered it "just and reasonable" for AirTouch to make available its network to Digital on different terms and conditions from those that AirTouch offered Topp.[64] Similarly, the material differences between Digital and Topp were a legitimate basis for AirTouch to offer CMRS network access to Digital and Topp on different terms. Therefore, AirTouch did not violate the Section 202(a) prohibition against unreasonable discrimination in charges and practices.[65]

IV. CONCLUSION

16. We conclude that Digital has failed to support its claim either that AirTouch violated Sections 201 or 202(a) of the Communications Act, as amended, or that AirTouch violated the Commission's CMRS Resale Rule. The separate terms and conditions offered to Digital and Topp were reasonable because these entities were not similarly situated.

V. ORDERING CLAUSE

17. Accordingly, pursuant to Sections 4(i), 4(j), 201, and 202(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j). 201, and 202(a), and

[57] Petition at 2, 6.

[58] 47 U.S.C. § 201(b).

[59] 47 U.S.C. § 202(a).

[60] Petition at 2, 6, 14.

[61] *Id.* at 2.

[62] 47 U.S.C. § 201(a).

[63] *Referral Order* at 17.

[64] 47 U.S.C. § 201(b).

[65] 47 U.S.C. § 202(a).

Sections 0.331 and 1.2 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.2, IT IS HEREBY ORDERED that the Petition for Declaratory Ruling filed by Digital Cellular, Inc. is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

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