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

In the Matter of	)	
	)	
AirTouch Cellular,	)	
Complainant,	)	File No. E-97-46
	)	
v.	)	
	)	
Pacific Bell,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 27, 2001 **Released:** July 6, 2001

By the Commission: Commissioner Abernathy not participating.

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant in part and deny in part the complaint filed by AirTouch Cellular ("AirTouch") against Pacific Bell[1] pursuant to section 208 of the Communications Act of 1934, as amended ("Act").[2] In its complaint, AirTouch alleges that Pacific Bell violated section 20.11[3] of the Commission's rules because Pacific Bell did not pay mutual compensation to AirTouch, nor did the Interconnection Agreement between AirTouch and Pacific Bell contain any provisions for mutual compensation.[4] We find that Pacific Bell violated section 20.11 of the rules when it failed to pay mutual compensation to AirTouch in connection with terminating traffic that originated on Pacific Bell's facilities. We dismiss, however, AirTouch's claim that the Interconnection Agreement violated rule section 20.11 because the statute of limitations has run on that claim.

II. BACKGROUND

2. During the period relevant to this complaint, AirTouch controlled several cellular telephone providers in California. Pacific Bell was an incumbent local exchange carrier ("LEC") that provided local exchange and exchange access services in California.[5] In 1993, Pacific Bell began negotiations with the cellular industry in California, leading to interconnection agreements in 1994 between

[1] Subsequent to the filing of this complaint, SBC Communications acquired Pacific Bell.

[2] 47 U.S.C. § 208 (1991 & West Supp. 1999).

[3] 47 C.F.R. § 20.11.

[4] AirTouch Complaint, filed September 19, 1997, at ¶¶ 4, 5 ("Complaint").

[5] Joint Stipulations of Disputed and Undisputed Facts, filed February 25, 1998, Undisputed Fact No. 2 ("Joint Stipulations").

Pacific Bell and individual cellular carriers.[6] On April 28, 1994, AirTouch and Pacific Bell entered into an Interconnection Agreement governing the terms and conditions associated with the exchange of traffic between AirTouch and Pacific Bell.[7] The Interconnection Agreement did not provide "cash compensation" to AirTouch for the termination of calls that originated on Pacific Bell's network.[8]

3. On March 7, 1994, prior to the signing of the Interconnection Agreement, the Commission adopted rule section 20.11, which requires that "local exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation."[9] Section 20.11 became effective on July 18, 1994, approximately three months after the parties signed the Interconnection Agreement.[10] During the time period in which the Interconnection Agreement was effective, Pacific Bell did not pay "cash compensation" to AirTouch for terminating traffic that originated on Pacific Bell's network.[11] Almost three years later, AirTouch and Pacific Bell entered into a new contract for interconnection, effective March 25, 1997, that did provide for reciprocal compensation.[12] On September 19, 1997, AirTouch filed this formal complaint, reserving the right to file a supplemental complaint for damages after the issuance of a Commission decision on the merits of the instant complaint.[13]

III. DISCUSSION

4. In its Complaint, AirTouch appears to make several different arguments. First, AirTouch alleges that Pacific Bell's failure to "provide for mutual compensation in its then-existing interconnection agreements with AirTouch [] resulted in Pacific Bell violating Section 20.11(b) of the Commission's Rules … ."[14] AirTouch also alleges that, regardless of the terms of the Interconnection Agreement, Pacific Bell

[6] Opening Brief of Pacific Bell, filed April 27, 1998 at 13 ("Pacific Bell Brief"); Joint Stipulations, Undisputed Fact Nos. 9, 12, 13, 20.

[7] AirTouch Cellular's Opening Brief, filed April 27, 1998 ("AirTouch Brief") at Exhibit A (Interconnection Agreement).

[8] Joint Stipulations, Undisputed Fact No. 8.

[9] *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1498 at ¶ 232 (1994).

[10] *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 59 FR 18493 (April 19, 1994).

[11] *See* Joint Stipulations, Undisputed Fact No. 9.

[12] Complaint at ¶ 6. The Commission stated in 1996 that "[w]e use the term 'reciprocal compensation' and 'mutual compensation' synonymously." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Report and Order, 11 FCC Rcd 15499, 16045 at ¶ 1095, n. 2634 (1996) ("*Local Competition First Report and Order*") (subseq. history omitted).

[13] Complaint at ¶ 12.

[14] Complaint at ¶ 9.

violated section 20.11(b) when it failed to pay mutual compensation to AirTouch for terminating traffic that originated on Pacific Bell's network.[15]

A. Claim that Terms of Interconnection Agreement Violated Section 20.11(b)

5. AirTouch claims that Pacific Bell violated section 20.11(b) when it failed to provide for mutual compensation in the 1994 Interconnection Agreement.[16] Pacific Bell asserts that AirTouch's claim is barred by the statute of limitations set forth in section 415 of the Act. AirTouch responds that Pacific Bell's failure to comply with section 20.11(b) was a continuing violation and that the statute of limitations began with each day that the rule was violated. For this claim, however, we agree with Pacific Bell that the statute of limitations bars AirTouch's claim.

6. Under section 415(b) of the Act, "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues."[17] A cause of action accrues for purposes of section 415(b) when the carrier does the unlawful act or fails to do what the law requires.[18] We find that this cause of action, which is based on the allegation that the Interconnection Agreement violated section 20.11(b) of the Commission's rules, accrued on July 18, 1994, the date that section 20.11 became effective.[19] AirTouch knew when it entered into the Interconnection Agreement that it lacked mutual compensation provisions.[20] If section 20.11 required Pacific Bell to take some action to amend the preexisting Interconnection Agreement, then that obligation came into being on July 18, 1994.[21] Accordingly, AirTouch should have filed this claim in a complaint on or before July 18, 1996 in order to comply with the requirements of section 415(b). Because this complaint was not filed until September 19, 1997, AirTouch's claim is time barred.

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[15] Complaint at ¶ 6; Reply of AirTouch Cellular, filed November 19, 1997, at ¶ 28.

[16] Complaint at ¶ 9.

[17] 47 U.S.C. § 415(b).

[18] *AT&T Corp. v. Bell Atlantic – Pennsylvania*, Memorandum Opinion and Order, 14 FCC Rcd 556, ¶ 12 (1998).

[19] *See Former Frigidaire Employees Association v. International Union of Electrical Radio and Machine Workers, Local 801*, 573 F.Supp. 59 (S.D. Ohio 1983). In *Frigidaire*, the plaintiff employees alleged that the defendant union violated § 301 of the Labor-Management Relations Act and the duty of fair representation when the union ratified an agreement that failed to include an extension of recall rights. The Court found that the cause of action accrued when the agreement was ratified, and that "once the original damage is lodged, the mere fact that the Defendants are 'continuing' to implement allegedly improper collective bargaining agreements does not convert Plaintiffs' loss of jobs into a 'continuing violation.'" *Frigidaire*, 573 F.Supp. at 62, citing *Adkins v. General Motors Corp.*, 573 F.Supp. 1188, 1193 (S.D. Ohio 1982).

[20] AirTouch Brief at 11, n.30.

[21] We note that Pacific Bell argues that this cause of action accrued on April 28, 1994, the date the parties entered into the Interconnection Agreement. *See, e.g.*, Pacific Bell Brief at 8. We disagree that the cause of action accrued on this date. AirTouch's claim is that the Interconnection Agreement was not in compliance with section 20.11 of the Commission's rules, which did not become effective until July 18, 1994, after the Interconnection Agreement was signed.

B. Claim that Pacific Bell Violated Section 20.11(b) by Failing to Pay Mutual Compensation to AirTouch

1. Section 20.11(b) Applies to Intrastate Traffic

7. AirTouch next argues that regardless of the absence of mutual compensation provisions in the Interconnection Agreement, Pacific Bell violated section 20.11(b) of the Commission's rules when it failed to pay AirTouch mutual compensation for terminating calls that originated on Pacific Bell's network.[22] Pacific Bell contends that, prior to the enactment of the 1996 Act, the obligation to pay mutual compensation under section 20.11 only applied to interstate traffic.[23] We disagree for the reasons set forth below.[24]

8. The Commission adopted the *CMRS Second Report and Order* in 1994 to implement sections 3(n) and 332 of the Act, as amended by Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993.[25] The Budget Act changed the regulatory regime with respect to mobile service providers, by, among other things, (1) bringing all mobile service providers under a comprehensive, consistent regulatory framework; (2) giving the Commission flexibility to establish appropriate levels of regulation for mobile radio services providers; (3) mandating that commercial mobile radio service ("CMRS") providers would be treated as common carriers; and (4) preempting state regulation of entry and rates for CMRS providers, but permitting states to petition the Commission for authority to regulate CMRS rates under some circumstances.[26]

9. In the *CMRS Second Report and Order* the Commission adopted rule section 20.11, which states in relevant part:

> (b) Local exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation.

[22] AirTouch Brief at 7.

[23] Pacific Bell Brief at 22.

[24] This claim is not barred by the statute of limitations in section 415(b). We agree with AirTouch that Pacific Bell's failure to pay mutual compensation should be considered a continuing violation of rule section 20.11, such that the statute of limitations would begin with each day that the rule was violated. We also agree with AirTouch that, although it cannot recover damages dating back to the 1994 inception of the Interconnection Agreement, it can recover damages for alleged violations during the two year period from September 20, 1995 (two years back from the filing date of the complaint) to March 25, 1997 (the effective date of the new interconnection agreement that included reciprocal compensation provisions). Complaint at ¶ 6; AirTouch Brief at 6-7.

[25] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993) ("Budget Act").

[26] *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1417 at ¶¶ 11-12 (1994) ("*CMRS Second Report and Order*").

> (1) A local exchange carrier shall pay reasonable compensation to a commercial mobile service provider in connection with terminating traffic that originates on facilities of the local exchange carrier.[27]

10. In the text of the *CMRS Second Report and Order*, the Commission stated that the mutual compensation requirement is "in keeping with actions we already have taken with regard to Part 22 providers."[28] The Commission then cited to a 1987 proceeding that affirmed principles of mutual compensation for interstate switching costs between telephone companies and cellular carriers.[29] Pacific Bell argues that because the *CMRS Second Report and Order* cited to a proceeding that explicitly limited the scope of mutual compensation to interstate traffic, the scope of section 20.11 must be similarly limited to interstate traffic. Pacific Bell states that the Commission did not preempt the authority of the states to regulate mutual compensation or other aspects of interconnection rates.[30]

11. We find Pacific Bell's arguments unpersuasive and conclude that the Commission intended the principles of mutual compensation to apply to intrastate interconnection between LECs and CMRS carriers. First, nothing in the text of rule section 20.11 limits its coverage to interstate services. Section 20.11 states that a LEC "*shall* pay reasonable compensation to a commercial mobile service provider in connection with terminating traffic that originates on facilities of the local exchange carrier."[31] The text of the rule contains no limitations on its applicability to intrastate traffic. In fact, to limit section 20.11 to only interstate services would be nonsensical given that the rule pertains to CMRS-bound traffic that originates on the local exchange carrier which, because of the Bell Operating Companies' prohibition on the provision of interLATA services at the time, would almost entirely be intrastate traffic.

12. Second, in the text of the *CMRS Second Report and Order*, the Commission said that "[t]he principle of mutual compensation shall apply, under which LECs shall compensate CMRS providers for the reasonable costs incurred by such providers in terminating traffic that originates on LEC facilities."[32] The text does not impose any limitation on the scope of the mutual compensation requirement. This is in stark contrast to the very next paragraph, in which the Commission specifically limits a pricing requirement to interstate traffic only: "[w]e require that LECs shall establish reasonable charges for *interstate* interconnection provided to commercial mobile radio service licensees."[33] We conclude that had the Commission intended to limit the applicability of the mutual compensation requirement to interstate traffic, it would have clearly specified such a limitation.

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[27] 47 C.F.R. § 20.11(b).

[28] *CMRS Second Report and Order*, 9 FCC Rcd at 1498, ¶ 22.

[29] *Id.* (citing *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Declaratory Ruling, 2 FCC Rcd 2910, 2915 at ¶¶ 44-45 (1987) ("*Declaratory Ruling*")).

[30] Pacific Bell Brief at 21-22.

[31] 47 C.F.R. § 20.11(b)(1) (emphasis added).

[32] *CMRS Second Report and Order*, 9 FCC Rcd at 1498, ¶ 232.

[33] *Id.* at ¶ 233 (emphasis added).

13. Third, we find support for our conclusion in the Commission's 1996 *Local Competition First Report and Order*.[34] In that order, the Commission stated that

> [I]n many cases, incumbent LECs appear to have imposed arrangements that provide little or no compensation for calls terminated on wireless networks, and in some cases imposed charges for traffic originated on CMRS providers' networks, both in violation of section 20.11 of our rules.[35]

Based on this conclusion, the Commission ordered that CMRS carriers be given the option to renegotiate existing interconnection agreements to include reciprocal compensation provisions. Once again, the Commission made no mention of any intrastate restriction on the scope of section 20.11, or on the scope of mutual or reciprocal compensation in general.

14. We note that the *CMRS Second Report and Order* does state that the Commission "will not preempt state regulation of LEC intrastate interconnection rates applicable to cellular carriers at this time."[36] This must be read in conjunction with the nonrestrictive mutual compensation language in that order. Accordingly, we conclude that the Commission's intent was to mandate mutual compensation for the termination of traffic that originates on the LEC's network, but to not preempt state regulation of the actual rate paid by CMRS carriers for intrastate interconnection. Therefore, although LECs were required to pay mutual compensation to CMRS carriers for intrastate traffic pursuant to Commission rules, the determination of the actual rates charged for intrastate interconnection would be left to the states. Based on the reasoning above, we conclude that when the Commission adopted the *CMRS Second Report and Order*, it intended to apply the mutual compensation provisions of rule section 20.11 to intrastate traffic.

2. The Provision of Cost Data Is Not a Prerequisite for Mutual Compensation

15. Pacific Bell argues that the Commission's mutual compensation requirement "required that each carrier to record and segregate traffic by originating carrier and provide cost data."[37] Pacific Bell contends that this requirement stems from the Commission's 1989 statement that "a mutual compensation policy … allows each cellular and landline carrier to recover its actual costs of switching traffic for the other party."[38] We agree with AirTouch that section 20.11 does not require CMRS carriers to provide such cost data to be eligible for mutual compensation.[39] The text of the 1994 *CMRS Second Report and Order* states merely that "the principle of mutual compensation shall apply, under which LECs shall compensate CMRS providers for the reasonable costs incurred by such providers in terminating traffic that originates

[34] *Local Competition First Report and Order*, 11 FCC Rcd 15499 (1996).

[35] *Id.* at ¶ 1094.

[36] *CMRS Second Report and Order*, 9 FCC Rcd at 1498, ¶ 231.

[37] Pacific Bell Brief at 19.

[38] Pacific Bell Brief at 19, citing *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services (Cellular Interconnection Proceeding)*, Memorandum Opinion and Order and Order on Reconsideration, 4 FCC Rcd 2369, 2372 at ¶ 20 (1989).

[39] *See* AirTouch Brief at 15.

on LEC facilities."[40] Nor does the text of section 20.11 of the rules impose any requirement for the provision of cost data to the originating carrier in order to be eligible for mutual compensation. The Commission's statement that mutual compensation allows carriers to recover their "actual costs" does not itself reflect any substantive requirement, but rather describes one possible outcome if the Commission were to adopt a mutual compensation regime. Accordingly, we find that section 20.11 does not require CMRS carriers to provide cost data to the originating carrier as a prerequisite to eligibility for mutual compensation.

3. AirTouch Did Not Waive Its Statutory Right to Mutual Compensation

16. We conclude above that Pacific Bell should have paid mutual compensation to AirTouch for terminating traffic, pursuant to section 20.11, regardless of the fact that the Interconnection Agreement was silent regarding mutual compensation. Pacific Bell contends, however, that AirTouch voluntarily traded mutual compensation in exchange for other favorable terms, such as an option for reverse toll billing at a special rate.[41] We acknowledge that parties may modify some statutory obligations under certain circumstances, such as through an express waiver of statutory rights.[42] Based upon our examination of the record, however, we find that the parties did not modify the section 20.11 obligation to pay mutual compensation. The Interconnection Agreement does not contain any provisions negating the mutual compensation obligation.[43] Pacific Bell failed to offer any evidence that AirTouch expressly waived its right to mutual compensation. Moreover, AirTouch states repeatedly that it "did *not* waive any right to receive mutual compensation."[44] Accordingly, we conclude that AirTouch and Pacific Bell did not agree to modify or negate the obligation to pay mutual compensation for the termination of traffic that originated on each other's networks.

C. Equitable Defenses of Estoppel, Laches, Waiver

17. Pacific Bell argues that the equitable defenses of estoppel, laches, and waiver bar AirTouch's complaint.[45] We find that these equitable defenses do not operate to bar AirTouch's complaint. We agree with AirTouch that Pacific Bell has failed to provide specific authority for the availability of equitable defenses in a section 208 complaint.[46] In any event, we reject Pacific Bell's defenses. Pacific Bell failed to pay mutual compensation to AirTouch as expressly required under section 20.11 of our rules

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[40] *CMRS Second Report and Order*, 9 FCC Rcd at 1498, ¶ 232.

[41] Pacific Bell Brief at 5, 12. Reverse Toll Billing permitted Pacific Bell's subscribers to call CMRS providers' mobile subscribers throughout the LATA without incurring toll charges. *Id*. at 12-13.

[42] *See, e.g., Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998) (stating that waiver of a statutorily protected right must be clear and unmistakable). *See also Evans v. Jeff. D.*, 475 U.S. 717 (1986) (stating that statutory rights are not waivable if the waiver contravenes public policy).

[43] *See, e.g.*, Joint Stipulations, Undisputed Fact No. 8; AirTouch Brief at 8.

[44] *See, e.g.*, AirTouch Brief at 19 (emphasis in original); AirTouch Reply Brief at 5; Proffitt Declaration at 2.

[45] Pacific Bell Brief at 7.

[46] Letter from David A. Gross, attorney for AirTouch to Magalie Roman Salas, Secretary of the Federal Communications Commission, dated Jan. 19, 1999, at 1.

and, therefore, we decline to accept Pacific's Bell's invocation of equity to avoid paying such compensation. Accordingly, we reject Pacific Bell's argument that AirTouch's complaint is barred by the equitable defenses of estoppel, laches, and waiver.

IV. CONCLUSION

18. Based on our analysis above, we find that Pacific Bell violated section 20.11 of the Commission's rules when it failed to pay mutual compensation to AirTouch for terminating traffic that originated on Pacific Bell's network. We dismiss AirTouch's claim, however, that Pacific Bell violated section 20.11 when it failed to include mutual compensation provisions in the Interconnection Agreement, because such claim is barred by the statute of limitations contained in section 415(b) of the Act.[47]

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to §§ 1, 4(i), 4(j), 207, 208, and 209 of the Act, 47 U.S.C. §§ 151, 154(i), 154(j), 207, 208, and 209, and section 20.11 of the Commission's rules, 47 C.F.R. § 20.11, that the formal complaint filed by AirTouch Cellular against Pacific Bell is GRANTED to the extent indicated herein.

20. IT IS FURTHER ORDERED that AirTouch Cellular, pursuant to section 1.722 of the Commission's rules, 47 C.F.R. § 1.722, MAY FILE a supplemental complaint concerning damages relating to our findings in this Order within 60 days of the date of this decision.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

[47] We note that the parties dispute the validity of the unsigned Declaration of Peter Geiler, which was Exhibit I to AirTouch's Reply Brief. *See* Letter from David A. Gross, attorney for AirTouch to Magalie Roman Salas, Secretary of the Federal Communications Commission, dated May 29, 1998; Letter from Jeffrey B. Thomas, Senior Counsel for Pacific Bell to Magalie Roman Salas, Secretary of the Federal Communications Commission, dated June 3, 1998; Letter from David A. Gross, attorney for AirTouch to Magalie Roman Salas, Secretary of the Federal Communications Commission, dated June 24, 1998. We need not address these disputes because the substantive issues in this complaint were decided without reference to this particular document.

We also note that the Reply Brief of Pacific Bell contained two requests to strike certain assertions made in AirTouch's Brief. *See* Reply Brief of Pacific Bell, filed May 18, 1998, at n.1, n.13. We need not address these motions to strike because the substantive issues in this complaint were decided without reference to those particular assertions.