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

In the Matter of	)	
	)	
	)	RM-11415
South Seas Broadcasting, Inc.	)	
	)	

ORDER

Adopted: March 15, 2011 **Released: March 16, 2011**

By the Commission: Commissioners Copps and Clyburn concurring and issuing a statement.

I. INTRODUCTION

1. In this Order, we deny a Petition for Rulemaking filed by South Seas Broadcasting, Inc. (South Seas), in which South Seas asks that we "expand the implementation of Section 254(g) of the Communications Act of 1934, as amended, to include wireless (cellular telephone) calls from the mainland United States to the U.S. Territory of American Samoa."[1] We find that the statutory rate integration requirement of Section 254(g) does not apply to providers of commercial mobile radio services (CMRS), such as wireless carriers, and accordingly deny the Petition.

II. BACKGROUND

2. Section 254(g) of the Communications Act (Act) provides in relevant part that "a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State."[2] Prior to enactment of Section 254(g) as part of the Telecommunications Act of 1996, the Commission had limited the application of its similar, administrative "rate integration" requirement to wireline providers. However, in 1997, the Commission extended the new, statutory requirement to CMRS providers.[3] (In a separate decision released on the same day, the Common Carrier Bureau temporarily suspended the

[1] South Seas Broadcasting, Inc., Petition for Rulemaking (filed July 23, 2007) at 1 (Petition).

[2] 47 U.S.C. § 254(g). According to the Act, the term "State" includes the territories of the United States; American Samoa is such a territory. *See* 47 U.S.C. § 154(40) (defining "State"); 48 U.S.C. § 1661(a) (codifying tribal cession and federal acceptance of Samoan Islands). *See also U.S. v. Standard Oil Co. of Calif.*, 404 U.S. 558, 560 (1972) (American Samoa is a territory of the United States within the meaning of the Sherman Act).

[3] *See Policy and Rules Concerning the Interstate, Interexchange Marketplace*, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 11812, 11821 ¶ 18 (1997) ("[T]he rate integration provision applies to all interstate interexchange telecommunications services and therefore requires CMRS providers to provide the interstate interexchange CMRS service on an integrated basis in all their states."); 47 C.F.R. § 64.1801(b) (1996) ("A provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each U.S. state at rates no higher than the rates charged to its subscribers in any other state.").

overall rate integration requirement as applied to American Samoa because that government had yet to take certain steps – such as participation in the North American Numbering Plan – that would enable carriers to submit rate integration plans to the Commission.[4])

3. Following the Commission's decision to apply the rate integration requirement to CMRS providers, several CMRS providers and industry representatives petitioned for reconsideration of or, in the alternative, for forbearance from application of the requirement.[5] The Commission denied these requests, determining that Section 254(g) by its terms – specifically, the phrase "provider of interstate interexchange telecommunications services" – allowed no exception for CMRS.[6] It concluded that the section "unambiguously applies to the interstate, interexchange services . . . offered by CMRS providers. If Congress had intended to exempt CMRS providers, it presumably would have done so expressly as it did in other sections of the Act."[7] Petitions for judicial review followed.

4. On review, the D.C. Circuit vacated the Commission's determination that Section 254(g) "unambiguously" applied to CMRS providers.[8] The court first emphasized that the statute did not define the term "interexchange telecommunications service"; as CMRS does not use wireline exchanges, the court said, "it is by no means obvious that the Congress, when it used a phrase in which the word 'interexchange' [a]s an essential term, was referring to CMRS."[9] Second, the court concluded that in enacting Section 254(g), Congress intended merely to incorporate the Commission's pre-existing rate integration requirements (which did not apply to CMRS providers).[10] Because Section 254(g) was unclear with respect to its application to CMRS providers, and because the Commission had not purported to exercise its discretion when interpreting the statute more expansively than the earlier Commission rule, the court vacated the rate integration requirement for CMRS and remanded.[11]

5. Following remand, the Commission in 2007 dismissed petitions filed by Nextel and Rand McNally seeking reconsideration of the 1998 Order, finding the reconsideration petitions moot in light of the court's vacatur of the underlying Commission order.[12] The Commission also terminated a proceeding that had been initiated in 1999 (prior to the D.C. Circuit's decision) in which it was considering various

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[4] *See Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Memorandum Opinion and Order, 12 FCC Rcd 11548, 11557-58 ¶¶ 21-22 (CCB 1997).

[5] The petitioners included AirTouch Communications; Bell Atlantic Mobile, Inc.; BellSouth Corp.; Cellular Telecommunications Industry Association; PrimeCo Personal Communications, L.P.; Personal Communications Industry Association; and Telephone and Data Systems, Inc. *See In the Matter of Policy and Rules Concerning the Interstate Interexchange Marketplace*, Memorandum Opinion and Order, 14 FCC Rcd 391, 409 at Appendix A (1998) (*1998 Order*).

[6] *See id*. at 396 ¶ 10 (denying reconsideration); *see also id*. at 407 ¶¶ 36-37 (denying forbearance).

[7] *Id*. at 396 ¶ 10.

[8] *See GTE Service Corp. v. FCC*, 224 F.3d 768 (D.C. Cir. 2000).

[9] *Id*. at 774-75.

[10] *See id*. at 774 (citing Conference Report to Telecommunications Act of 1996, H.R. Conf. Rep. No. 104-458 at 132 (1996) (Conference Report), and Dissenting Statement of Commissioner Michael K. Powell, 1999 WL 38420 (Jan. 28, 1999) ("[W]hen it is undisputed that CMRS providers were not subject to the Commission's pre-1996 Act rate integration policy, and where Congress seems to say it is merely incorporating that policy, why would we expect to find an explicit and unambiguous indication to exclude them?")).

[11] *See* 224 F.3d at 775-76.

[12] *See In the Matter of Policies and Rules Concerning the Interstate Interexchange Marketplace,* Memorandum Opinion and Order, 22 FCC Rcd 8967, 8969 ¶ 8 (2007).

issues concerning the scope of the rate integration requirement as applied to CMRS.[13] One year earlier, in 2006, the Wireline Competition Bureau had lifted the suspension of the overall rate integration requirement as applied to American Samoa, finding that authorities there "have implemented the measures necessary to facilitate the ability of interexchange carriers to integrate their service offerings to American Samoa."[14]

6. South Seas filed a petition for rulemaking on July 23, 2007, requesting that the Commission extend the rate integration requirements of Section 254(g) to wireless carriers. In the petition, South Seas asserts that the Wireline Competition Bureau's 2006 reinstatement of the overall rate integration requirement for American Samoa caused confusion, inasmuch as the order did not explicitly extend the reinstated requirement to wireless carriers, "a fact that was omitted in news stories about the integrated rate rule and in the customer newsletter circulated by the American Samoa Telecommunications Authority (ASTCA)."[15] Moreover, South Seas contends that most cellular telephone carriers offered at that time various calling plans that included "domestic long distance," but none of them notified customers that callers to American Samoa (who would be dialing what was considered a domestic telephone number under the plans) would not be eligible for the favorable domestic long distance rate. These omissions caused some residents of American Samoa mistakenly to inform friends and family on the U.S. mainland that the calling rate effectively had been lowered as a result of rate integration. These relations placed calls on their wireless phones to American Samoa and later "were shocked when they received their telephone bills."[16] For these reasons, South Seas argues that rate integration should apply to CMRS carriers.

7. Several parties oppose South Seas' petition. AT&T Inc. argues that the CMRS industry is competitive and that the Commission "should be loathe to place any form of rate regulation on wireless providers in the absence of evidence of a clear showing of market failure."[17] Sprint Nextel maintains that the Commission historically has tended not to regulate the price of wireless communications and should not do so now; it also argues that any confusion that might have occurred after the 2007 reinstatement of the overall rate integration requirement to American Samoa does not justify extension of that requirement to all wireless carriers.[18] Finally, CTIA – The Wireless Association® (CTIA) maintains that Congress intended Section 254(g) to apply only to wireline carriers; that wireless carriers more generally have not been subject to regulation; and that there are practical reasons why wireless carriers should not be considered "interexchange" carriers for purposes of the statute.[19]

[13] *See id*. at 8969 ¶ 9. In that proceeding, the Commission was considering, among other things, "how section 254(g) should be applied to [CMRS providers'] wide-area calling plans, services offered by affiliates, plans that assess local airtime or roaming charges in addition to separate long-distance charges for interstate, interexchange services, and whether cellular and PCS service rates should be integrated." *In the Matter of Policy and Rules Concerning the Interstate Interexchange Marketplace*, Further Notice of Proposed Rulemaking, 14 FCC Rcd 6994, 6998 ¶ 8 (1999).

[14] *See In the Matter of Policies and Rules Concerning the Interstate Interexchange Marketplace,* Order, 21 FCC Rcd 5971, 5971 ¶ 1 (WCB 2006).

[15] Petition at 3.

[16] *Id*. The record also contains several similar comments from individual customers supporting South Seas' assertion that customers were surprised by unexpectedly high charges for their wireless calls to American Samoa.

[17] Opposition of AT&T to Petition for Rulemaking at 5 (filed Feb. 22, 2008).

[18] Opposition of Sprint Nextel to Petition for Rulemaking at 1-3 (filed Feb. 21, 2008).

[19] Opposition of CTIA – The Wireless Association® to Petition for Rulemaking at 4-5, 9-10 (filed Feb. 21, 2008).

III. DISCUSSION

8. Although the arguments submitted in favor of and in opposition to the petition for rulemaking focus primarily upon the competitive conditions in the wireless industry today, we find other grounds for decision both sufficient and dispositive. The D.C. Circuit determined that "in light of the text and legislative history of Section 254(g), . . . it is unclear whether CMRS is included in the phrase 'interexchange telecommunications service.'"[20] Exercising our authority to interpret this ambiguous provision,[21] we find that the approach more faithful to the spirit of the statutory rate integration requirement is that, consistent with the prior agency rule, the requirement does not apply to CMRS providers. Careful consideration of the regulatory history of rate integration, the legislative history of Section 254(g), and practical features of CMRS illuminates why.

9. Before 1972, rates for interstate long distance telecommunications service to and from non-contiguous domestic locations such as Alaska, Hawaii, and Puerto Rico greatly exceeded the rates for similar services within the contiguous 48 states. The Commission was concerned that this disparity was "inhibit[ing] the free flow of communications between the contiguous states and [non-contiguous domestic] points to the disadvantage of all of our citizens."[22] The Commission also observed that technological developments – namely, the use of satellite-based telecommunications transmission, for which carriers did not incur costs commensurate with distance – made it economically feasible to serve non-contiguous domestic locations at rates comparable to those offered in the contiguous 48 states.[23] As a result, in 1972, the Commission adopted a policy of rate integration, under which telecommunications carriers serving Alaska, Hawaii, and Puerto Rico, as a condition of their licenses to use new domestic satellites, would be required to develop a tariff that applied "maximum effect to the elimination of overall distance as a major cost factor" and to integrate the rates charged for non-contiguous locations with those applicable to the contiguous 48 states.[24] For over two decades thereafter, the Commission did not apply this policy to CMRS, although it did apply it to myriad wireline services such as message toll telephone service, private line voice, and wide-area telephone service.[25]

10. Congress demonstrated a keen sensitivity to the Commission's existing regulatory framework in enacting Section 254(g) as part of the Telecommunications Act of 1996. The legislative history of this section indicates that Congress intended "to incorporate the policies contained in the Commission's proceeding entitled 'Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the United States Mainland and the Offshore Points of Hawaii, Alaska and Puerto Rico/Virgin Islands[,]61 FCC2d 380 (1976).'"[26] Congress thus ratified the Commission's limited policy of rate integration. As the D.C. Circuit explained: "[T]he

[20] *GTE Service Corp*., 224 F.3d at 775.

[21] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984); *National Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 980-81 (2005).

[22] *See Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities*, Second Report and Order, 35 FCC2d 844, 856 ¶ 35 (1972).

[23] *See id*.

[24] *Id.* at 857 ¶ 37. The Commission adopted this policy pursuant to its authority under the Communications Act to regulate carriers for the public convenience and necessity. *See id.* at 856 ¶ 35; 47 U.S.C. § 214.

[25] *See generally In the Matter of Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the United States Mainland and the Offshore Points of Hawaii, Alaska, and Puerto Rico/Virgin Islands*, 61 FCC2d 380 (1976).

[26] *See* Conference Report, H.R. Conf. Rep. No. 104-458 at 132; *see also* Senate Commerce Committee Report, S. Rep. No. 23 at 30 (1995) (new section "is not intended to alter" Commission rate integration policies as of date of enactment, including previously imposed rate integration requirements).

Conference Report indicat[es] that the Congress meant § 254(g) to incorporate the Commission's pre-existing rate integration policy, which the Commission had never before applied to CMRS."[27] This regulatory and legislative context suggests that the best interpretation of the ambiguous text of Section 254(g) is that Congress did not contemplate that CMRS providers would be "provider[s] of interstate interexchange telecommunications services" and, accordingly, the rate integration requirement should not apply to CMRS.

11. Practical considerations support this interpretation. For instance, as CTIA explains, "CMRS service areas do not follow state lines and do not coincide with local exchange carrier ('LEC') 'exchanges.' Rather, CMRS licenses are issued by [Metropolitan Statistical Areas] and [Major Trading Areas], which frequently cover multistate areas within which some calls might be considered inter-LATA or interexchange calls in the wireline context."[28] This lack of congruence between CMRS service areas and those in which wireline services traditionally have been provided impedes the application of the rate integration requirement to CMRS, insofar as the rate integration requirement applies only to "interexchange telecommunications services." Similarly, even a single CMRS communication can defy categorization as "interexchange"; as CTIA points out, "[c]onsumers regularly drive across state lines and in and out of MTA boundaries while carrying on conversations on their wireless phones, such that a call that would have been considered an interexchange call if placed on a land line from the departure point would also be considered a local call if placed from the customer's final destination."[29] Finally, it is notable that most calling plans offered by the major U.S. wireless carriers offer nationwide "single rate" plans that do not distinguish among local, long distance, or other types of calls, suggesting that application of the rate integration requirement to CMRS would require carriers and/or the Commission to make painstaking determinations as to which calls or types of calls qualified as "interexchange" for purposes of Section 254(g).[30] These factors underscore the D.C. Circuit's observation that "[b]ecause CMRS does not use exchanges, it is by no means obvious that Congress, when it used a phrase in which the term 'interexchange' [a]s an essential term, was referring to CMRS,"[31] and also lend support to our decision to interpret Section 254(g)'s rate integration requirement not to apply to CMRS.

12. To be sure, we reached a different judgment in the 1998 Order, where we found that Section 254(g) applied to the interstate, interexchange services of CMRS providers.[32] However, the foundation of that decision was our belief that the plain language of the statute compelled this result.[33] The D.C. Circuit has now determined that the statute is in fact ambiguous. Taking that determination into

[27] *GTE Service Corp*., 224 F.3d at 774; *see also id*. at 772 ("Section 254(g) does not . . . announce a new policy; the legislative history makes clear that the Congress intended [that provision] to carry forward by regulation the Commission's preexisting policy requiring rate integration.").

[28] CTIA Opposition at 9.

[29] *Id*. at 10.

[30] *See id*. at 9 ("[T]he majority of plans offered by the major U.S. wireless carriers today are nationwide 'single rate' plans, with no distinction made between inter- or intra-MTA calls, interstate or interexchange calls, 'local' or 'long distance' calls, or any other such label. On its face, section 254(g) presumes that interstate service is being provided at a separately-identifiable 'interstate' rate, but as the Commission has again just recently recognized, many wireless plans do not include separate rates for local, intrastate, or interstate calls.") (citing *In the Matter of Universal Service Contribution Methodology*, Declaratory Order, 23 FCC Rcd 1411, 1415-17 ¶¶ 8-11 (2008).

[31] *GTE Service Corp*., 224 F.3d at 771.

[32] *See* 14 FCC Rcd at 396 ¶ 10 (concluding "that the rate integration language of section 254(g) applies to all providers of interstate, interexchange services, including CMRS providers"); *id*. at 402 ¶ 24 (finding that "traffic that originates and terminates *within* an MTA does not constitute interexchange service") (emphasis added).

[33] *See*, *e.g*., *id*. at 396 ¶ 11 ("Because the language of the statute is unambiguous and plainly applies to CMRS providers, we need not examine the legislative history of section 254(g).").

account, as well as the history of the Commission's rate integration policy, Congressional ratification of that policy, and certain features of CMRS, we believe the result reached in this order is consistent with the text, structure, and purpose of Section 254(g).[34]

IV. ORDERING CLAUSE

13. For the forgoing reasons, IT IS ORDERED that South Seas Broadcasting, Inc.'s Petition for Rulemaking is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[34] *See GTE Service Corp*., 224 F.3d at 772 (citing *Chevron*, 467 U.S. at 842-43).

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS
CONCURRING

Re: *In the Matter of South Seas Broadcasting, Inc.*, Order, RM-11415

U.S. citizens living in American Samoa have just as much right to expect reasonable rates when calling to and from other parts of the United States as the rest of us do. In that vein, South Seas Broadcasting petitioned the Commission to look at expanding the implementation of Section 254(g) of our enabling statute to cover wireless providers, including those providing "wireless calls from the mainland of the United States to the U.S. Territory of American Samoa." Section 254(g) protects consumers by requiring a "provider of interstate interexchange telecommunications services" to provide such services in each State at rates no higher than those in any other State. And, for purposes of the Act, it is indisputable that "State" includes U.S. territories. When we implemented this provision of the Telecommunications Act of 1996, we in fact did exactly what South Seas Broadcasting is asking us to do—apply this requirement to wireless providers. After much litigation, the sad fate of so many provisions of the pro-competitive law, the D.C. Circuit vacated in 2000 our finding that Section 254(g) "unambiguously" applied to wireless providers and remanded the matter back to the Commission. So, for more than a decade, the applicability of Section 254(g) has remained in limbo—a statutory tool possibly at our disposal should consumer protection demand it. The present case does not give us enough of a record to assess the rates being paid for wireless calls to and from the U.S. territories or the merits of whether we should move forward with a proceeding on Section 254(g). But, the majority goes too far, reaching an unnecessary and unsupported conclusion that Section 254(g) does not apply to wireless providers. Congress crafted this provision of the Act to ensure that citizens living outside the lower 48 states—Alaska, Hawaii and the U.S. territories—had access to affordable communications. As we go forward, we must not lose sight of that Congressional intent irrespective of the technology choice a consumer makes. In my ten years at the Commission, I have seen too many examples where we have abdicated our authority—our consumer protection responsibilities—without adequate foundation. I believe this is such a case, and therefore must respectfully concur.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN
CONCURRING

Re: *In the Matter of South Seas Broadcasting, Inc.,* Order, *RM-11415*

I agree with the Commission's decision to deny the Petition for a Rulemaking Proceeding filed by South Seas Broadcasting, Inc. South Seas argues that a rulemaking is necessary, as the Wireline Competition Bureau's 2006 reinstatement of the overall rate integration requirement created confusion because many American Samoa consumers assumed that rate integration would also extend to wireless carriers. However, there is nothing in that 2006 Bureau-level order that suggests Section 254(g) would apply to CMRS carriers. In fact, that Order explains that there "is currently no Commission rule requiring wireless carriers to provide services on an integrated basis."[1] In addition, South Seas does not present evidence to suggest that any confusion the Wireline Competition Bureau Order allegedly caused, in 2006, continues to harm American Samoa consumers today. In my view, the Order should have denied the Petition on the narrower ground that it does not demonstrate why the public interest would be served by the Commission initiating a rulemaking proceeding to apply Section 254(g) to Commercial Mobile Radio Service (CMRS).

I only concur with this Order, however, because I do not agree with the determination that Congress did not intend the language in Section 254(g) to extend to Commercial Mobile Radio Service (CMRS). I am not persuaded by the Order's reasoning that the FCC's history of not imposing rate integration on CMRS, together with the legislative history of 254(g), supports this statutory interpretation. In fact, the same rationale did not prevail before the U.S. Court of Appeals for the D.C. Circuit in *GTE Service Corp. and Micronesian Telecommunications Corp.* v. *FCC,*[2] – the case precedent upon which the Order relies. In that case, the Court concluded this argument "reads too much into both the Commission's policy and the legislative history." As the Court explained, "[t]he Commission had never either applied or declined to apply the policy to providers of CMRS. There is no reason to believe that prior to the 1996 Act, the Commission was in any way precluded from extending its policy to providers of CMRS, and the Congress, in stating that it was incorporating the Commission's preexisting policy into § 254(g), gave no indication that it meant to freeze rate integration as it then was and to prohibit any further development or extension of the policy. "[3]

The takeaway from the D.C. Circuit's ruling on this issue is that if the Commission wants to conclude that Congress did not intend to extend 254(g) to CMRS, then the agency must identify additional sources of support for that interpretation. This Order falls short of that mark. The Order's reliance on nationwide pricing plans in determining what Congress intended in 1996 when it enacted Section 254(g), is unconvincing, in that the first nationwide pricing plan for CMRS was not announced until 1998.[4]

Nor am I persuaded by the Order's argument that the fact that CMRS licenses are issued by Metropolitan Statistical Areas (MSAs) and Major Trading Areas (MTAs) prevents the application of Section 254(g) requirements to CMRS. In the 1996 Notice of Proposed Rulemaking that led to the *Policy*

[1] *See In the Matter of Policies and Rules Concerning the Interstate Interexchange Marketplace,* Order, 21 FCC Rcd 5971 n.2 (WCB 2006).

[2] *GTE Service Corp. and Micronesian Telecommunications Corp.* v. *FCC*, 224 F.3d 768 (D.C. Cir. 2000).

[3] *Id*. at 775.

[4] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Third Report*, 13 FCC Rcd 19746 n. 138 (1998).

and Rules Concerning the Interstate, Interexchange Marketplace, the Commission did not find that these service areas posed any impediment to the application of 254(g)'s requirements to CMRS. That Notice recognized that an interstate interexchange call would include CMRS such as "cellular, PCS, or other wireless interexchange services."[5] In its discussion about how best to define the relevant geographic market for the purposes of measuring competition in the market for interexchange services, the Notice specifically identified MSAs, MTAs, and Basic Trading Areas as potentially appropriate geographic areas.[6] Additionally, in a 1999 Further Notice of Proposed Rulemaking, although the Commission asked targeted questions about applying Section 254(g)'s requirements to these geographic areas, it did not find they would prevent these statutory provisions from extending to CMRS.[7] Therefore, this Order needed to explain why these geographic service areas currently pose a problem to the application of 254(g)'s requirements to CMRS, as the Commission did not find they were an impediment in 1996 or 1999.

For the foregoing reasons, I would have preferred the Order deny the South Seas Petition because Section 254(g) does not require the Commission to apply its requirements to CMRS and the Petition does not demonstrate why doing so would serve the public interest. This determination would have been more consistent with the statute, the D.C. Circuit opinion, and this agency's previous pronouncements about the applicability of Section 254(g) to CMRS.

[5] *In the Matter of Policy and Rules Concerning the Interstate Interexchange Marketplace*, Notice of Proposed Rulemaking, 11 FCC Rcd 7141, 7169 n.118 (1996).

[6] *Id*. at 7171 ¶ 54.

[7] *In the Matter of Policy and Rules Concerning the Interstate Interexchange Marketplace*, Further Notice of Proposed Rulemaking, 14 FCC Rcd 6994, 6998-99 ¶¶ 8-12 (1999).