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 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

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[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).

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.

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[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).