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December 21, 2004

Via Federal Express

Mr. Dale H. Roberts
Executive Secretary
MISSOURI PUBLIC SERVICE COMMISSION
200 Madison Street, Suite 100
Jefferson City, Missouri 65101

FILED
DEC 23 2004
Missouri Public
Service Commission

RE: Case No. TC-2002-1077

Dear Mr. Roberts:

Please find enclosed for filing with the Commission the original and nine copies of a letter in reference to the adoption of interconnection agreements pursuant to 47 U.S.C. § 252(i) in Case No. TC-2002-1077. Please return one "filed" copy of the letter to me in the enclosed return envelope.

Very truly yours,

Mark Johnson/rgr

Mark P. Johnson

MPJ/rgr
Enclosures

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December 21, 2004

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Mr. Dale H. Roberts
Executive Secretary
Missouri Public Service Commission
200 Madison Street
Jefferson city, Missouri 64102-0360

Re: Docket No. TC-2002-1077
T-Mobile USA, Inc.
Adoption of Interconnection Agreements Pursuant to 47 U.S.C.§252(i)

Dear Mr. Roberts:

T-Mobile USA, Inc. ("T-Mobile") asks the Commission to reject the argument made by eight rural local exchange carriers ("RLECs") that they can excuse themselves from complying with their obligations under Section 252(i) of the Telecommunications Act of 1996 (the "Act"), unless T-Mobile executes a settlement agreement with each of them on terms that the RLECs would establish unilaterally. If, however, the Commission accepts this RLEC argument, then T-Mobile alternatively requests that the Commission order each of the eight RLECs to share with T-Mobile their settlement agreements with all other wireless carriers. T-Mobile obviously cannot intelligently exercise its "opt-in" rights if it does not have access to the documents containing the terms and conditions that it would need to accept before exercising its rights.

Background and Summary

Section 252(i) of the Act provides that a LEC "shall make available any . . . agreement . . . to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions to those provided in the agreement."[1] The FCC has held that a primary purpose of this

[1] 47 U.S.C.§252(i)(emphasis added). *See also* 47 C.F.R.§51.809(a).

statute is to prevent LECs from discriminating among interconnecting carriers.[2] The FCC has further ruled that this statute permits interconnecting carriers like T-Mobile to obtain their "statutory rights on an expedited basis":

> We conclude that the nondiscriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251 before being able to utilize the terms of a previously approved agreement.[3]

On December 10, 2004, T-Mobile advised the Commission that it wanted to exercise its Section 252(i) "opt-in" rights with respect to certain agreements already executed by eight RLECs: Cass County; Citizens (Higginsville); Craw-Kan; Fidelity; Grand River; Green Hills; IAMO; and Kingdom ("Eight RLECs").[4] The Eight RLECs responded four days later by claiming that T-Mobile is not eligible to opt into the referenced agreements because T-Mobile has "not settled all claims related to traffic exchanged between it and the above listed ILECs":

> Accordingly, T-Mobile is not in a position to adopt all of the rates, terms and conditions of the referenced agreements and its proposed adoption is neither appropriate nor effective.[5]

In other words, the Eight RLECs take the position that for purposes of Section 252(i), the word "agreement" includes two different documents: the interconnection agreement governing terms and conditions on a going forward basis, and an unavailable settlement agreement that resolved disputes over past traffic which the Eight RLECs have not filed with the Commission nor produced to T-Mobile.

T-Mobile urges the Commission to reject the position taken by the Eight RLECs. As demonstrated below, there is no basis in law and policy that would justify this position, and the RLEC position is blatantly discriminatory, in violation of the very non-discrimination standard

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2 *See Second ILEC Unbundling Order*, CC Docket No. 01-338, FCC 04-164, 19 FCC Rcd 13494, at¶18 and 28 (July 13, 2004); *Local Competition Order*, 11 FCC Rcd 15499, 16139¶1315 (1996).

3 *Local Competition Order*, 11 FCC Rcd at 16141¶1321.

4 *See* Letter from Mr. Mark P. Johnson, T-Mobile attorney, to Mr. Dale H. Roberts, MoPSC Executive Secretary (Dec. 10, 2004). This letter was filed with the Commission on December 14, 2004.

5 Letter from Mr. W.R. England, Eight RLEC attorney, to Mr. Dale H. Roberts, MoPSC Executive Secretary, at 2 (Dec. 14, 2004)("Eight RLEC December 14 Response").

of Section 252(e)(2) under which this Commission approved these agreements in the first place.[6] If, however, the Commission accepts the RLECs' "expanded agreement" position, then it should order the RLECs to share their settlement agreements with all other wireless carriers so T-Mobile can choose which, if any, of the "expanded agreements" it may want to use in exercising its Section 252(i) rights.

The Commission Should Reject the RLEC Attempt to Tie Resolution of Past Disputes to Resolution of Future Interconnection Terms and Conditions

The Eight RLECs contend that T-Mobile is not eligible to opt into the interconnection agreements they signed with other wireless carriers because (a) these other agreements reference a "settlement agreement," (b) T-Mobile has "not settled all claims" for past traffic, and as a result, (c) T-Mobile is "not in a position to adopt all of the rates, terms and conditions of the referenced agreements."[7] This RLEC assertion lacks all merit.

Section 252(i) requires the RLECs to provide to T-Mobile on the same terms "any interconnection, service, or network element provided under an agreement" with another carrier.[8] It is apparent that the word "agreement" in Section 252(i) refers to an interconnection agreement that this Commission approves under Section 252(e) governing the terms and conditions of interconnection on a prospective basis. To T-Mobile's knowledge, this Commission does not approve under Section 252(e) settlement agreements involving disputes over past traffic before an interconnection agreement takes effect. Thus, the RLEC assertion that the word "agreement" in Section 252(i) encompasses both interconnection agreements and separate settlement agreements is inconsistent with the plain commands of Section 252.

In addition, the FCC has held that the only settlement agreements that are interconnection agreements under Section 252 are those settlement agreements that "create an ongoing obligation pertaining to . . . interconnection."[9] T-Mobile suspects it is highly unlikely that the settlement agreements that the Eight RLECs executed with other carriers create an "ongoing [interconnection] obligation" independent of their pre-existing statutory interconnection

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6 *See, e.g., Application of Cass County Telephone Company for Approval of a Traffic Termination Agreement under the Telecommunications Act of 1996*, Case No. TK-2003-0572, Order Approving Interconnection Agreement (August 27, 2003); *Application of Citizens Telephone Company of Higginsville, Missouri, for Approval of a Traffic Termination Agreement under the Telecommunications Act of 1996*, Case No. IK-2003-0254 Order Approving Interconnection Agreement (March 20, 2003).

7 Eight RLEC December 14 Response at 2 (emphasis added).

8 *See* 47 U.S.C.§252(i)

9 *Qwest Declaratory Ruling*, 17 FCC Rcd 19337, 19341¶8 (2002)(emphasis in original).

obligations.[10] If this is the case, then under the FCC's interpretation of the Act, to which this Commission must give deference, the RLECs' settlement agreements are not "agreements" as that term is used in Section 252.

The RLEC assertion is also inconsistent with one of the primary purposes of Section 252(i). As noted above, Congress enacted this statute in part so as to permit competitive carriers to achieve an interconnection agreement on "an expedited basis," without have to undergo "a lengthy negotiation and approval process . . . before being able to utilize the terms of a previously approved agreement."[11] Yet, according to the RLECs, T-Mobile cannot exercise its Section 252(i) "opt-in" rights until it negotiates a settlement of past disputes that the RLECs are willing to accept. In other words, according to the RLECs, they can demand the very protracted negotiations that Section 252(i) was designed to avoid.

The RLECs counter that T-Mobile's exercise of its "opt-in" rights is conditioned upon its settlement of past claims because T-Mobile must "adopt those agreements in their entirety."[12] The FCC has ruled that a carrier must accept another agreement "in its entirety" in order to take advantage of its Section 252(i) "opt-in" rights.[13] But the FCC has further ruled (in a point the RLECs neglect to mention) that "[m]erely inserting the term 'settlement agreement' in a document does not excuse carriers" from complying with their obligations under the Act.[14] In other words, an incumbent carrier cannot circumvent its Section 252(i) non-discrimination interconnection obligations requirements by simply inserting the phase, "settlement agreement" in an interconnection agreement, or referencing any collateral legal agreement it might choose to insert in an interconnection agreement to offer preferential interconnection terms to one set of carriers but not others.[15]

In addition, the Act under Section 252(e) expressly bars the RLECs from the very discriminatory behavior that is being exhibited here. Section 252(e)(2) provides:

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[10] Obviously, T-Mobile cannot state this with complete confidence since it has not seen these settlement agreements.

[11] *Local Competition Order*, 11 FCC Rcd at 16141 at¶1321. *See also Qwest Forfeiture Order*, File No. EB-03-IH-0263, FCC 04-57, 19 FCC Rcd 5160, at¶20 (March 12, 2004).

[12] Eight RLEC December 14 Response at 2 (bold in original).

[13] *See Second ILEC Unbundling Order*, CC Docket No. 01-338, FCC 04-164, 19 FCC Rcd 13494 (July 13, 2004), *revising* 47 C.F.R.§51.809.

[14] *Qwest Declaratory Order*, 17 FCC Rcd 19337, 19342 at¶12 (2002).

[15] A major ILEC's attempt to engage in this very practice (hide agreements so other carriers could not opt-in) was unsuccessful. Indeed, the FCC fined this carrier $9 million, in addition to fines imposed by several state commissions. *See Qwest Forfeiture Order*, File No. EB-03-IH-0263, FCC 04-57, 19 FCC Rcd 5160 (March 12, 2004).

> The State commission may only reject--(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that-- the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement...

This Commission has strictly followed this standard in approving interconnection agreements. In seeking approval of its interconnection agreements by this Commission, the RLECs represented that their agreements meet the nondiscrimination standard of Section 252(e)(2).[16] Their supporting affidavits uniformly declare: *"[t]his Agreement does not discriminate against any telecommunications carrier. The terms of this agreement are available to any similarly situated provider in negotiating a similar agreement."*[17] This sworn declaration of nondiscrimination toward non-party telecommunications carriers rings hollow and insincere when contrasted with the RLECs' December 14 Commission letter refusing T-Mobile equivalent interconnection terms. The RLECs made this commitment to induce this Commission to approve its interconnection agreements, and this Commission relied on those representations in fulfilling its obligations to review and approve interconnection agreements that meet the standards of Section 252(e)(2). The Commission should not now allow the RLECs, after the fact, to evade their statutory obligation to provide interconnection on non-discriminatory terms and conditions through this artifice.

The RLECs cannot discriminate in their application of Section 252(i). The FCC has ruled, for instance, that an incumbent LEC may not limit the availability of "opt-in" rights based on the identity of the requesting carrier – that is, require that the requesting carrier be "similarly situated" to carriers that have executed agreements.[18] As a Texas federal district court has recently ruled in connection with the parties' opposition to file their terms publicly, the very reason Section 252(i) exists "is to discourage ILECs from offering more favorable terms only to certain preferred CLECs [or here wireless carriers]."[19] Here, the RLECs have announced their plan to discriminate against T-Mobile by limiting the availability of their "opt-in" obligation only to those carriers that execute settlement agreements with them. If this position were lawful, then, according to the RLECs, a new entrant could never exercise its "opt-in" rights to any of the subject Commission-approved agreements because there is no past traffic and thus no reason to execute any settlement agreement for past disputes. And, according to the RLECs, T-Mobile can be deprived of its statutory "opt-in" rights so long as it exercises its legal right to challenge the RLECs'

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16 *See, e.g., Application of Citizens Telephone Company of Higginsville* at 4 ("The affidavit of Brian Cornelius, President of Citizens, establishes that the Agreement satisfies these standards. (Affidavit, Attachment II)).

17 *See, e.g. id.*, Attachment II, Affidavit of Brian Cornelius at¶5. (Emphasis added).

18 *See Second ILEC Unbundling Order* at¶30; *Local Competition Order* at 16140¶1318.

19 *Sage Telecom, LP v. Public Utility Commission of Texas*, 2004 WL 2428672 (W.D. Tex) (Oct. 7, 2004).

terms and conditions in a complaint proceeding (as opposed to caving to whatever demands the RLECs may make in settlement discussions).

As the Supreme Court of Vermont recently held in affirming the Public Service Board of Vermont in upholding the adoption by a CLEC of an interconnection agreement: *"[a]s a matter of federal law, Verizon had to offer Telcove the same terms and conditions for interconnection and reciprocal compensation that the company offered to other carriers. See 47 U.S.C.A. § 252(i). The parties could agree to modify those terms, but Verizon could not do so unilaterally as the PSB pointed out."*[20] Thus, as in the case of many other interconnection agreement adoptions approved by this Commission, the RLECs and T-Mobile could easily agree to execute an interconnection agreement containing the same interconnection and reciprocal compensation terms that the RLECs have offered other carriers, and which the RLECs are indeed required to offer T-Mobile under Sections 252(e) and 252(i) of the Act. Any passing reference to unrelated, non-interconnection legal issues which were neither presented to nor considered by the Commission in approving the underlying agreements (such as the Cass County Telephone and Citizens Telephone Company of Higginsville agreements), could easily be removed by means of an adoption agreement. If the RLECs continue to refuse to comply, they should be required to conform their conduct as required by federal law and this Commission's standards of approval of the underlying agreements.

Significantly, the FCC has additionally held that an incumbent LEC would engage in discrimination if it included in a prior interconnection agreement a provision that has 'no reasonable relationship' to the ongoing interconnection between the two carriers.[21] The procedure used to resolve past disputes (e.g., settlement vs. litigation) has no reasonable relationship to the rates, terms and conditions that are applied to the parties' interconnection on a going forward basis.

A specific case before the Tennessee Regulatory Authority is instructive. In that case, a CLEC attempted to exercise a contractual derivation of Section 252(i), or 'Most Favored Nations' provision to obtain approved terms of an interconnection agreement between BellSouth and another telecommunications carrier. BellSouth opposed the request, arguing that the telecommunications carrier's rights to adopt another interconnection agreement or portions of it were qualified, or dependent upon it first meeting a separate contractual condition in its existing agreement. The Authority observed:

> The Hearing Officer held that '[u]nder §252(i), Hyperion has an unfettered right to obtain the most favorable terms and conditions made available by BellSouth.' Further such a legal right 'is not

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[20] *In re Petition of Adelphia Business Solutions of Vermont, Inc.*, 2004 Vt. LEXIS 254 at 16 (Aug. 20, 2004)(Emphasis added)

[21] *See Second ILEC Unbundling Order* at¶29.

> generally deemed waived unless such waiver is made expressly and knowingly.' The Hearing Officer properly concluded that Section IV.C of the Agreement was not intended to operate as a limitation upon Section XIX of the Agreement with respect to the exchange of local traffic and, thus, BellSouth should have honored Hyperion's request under Section XIX. *To accept BellSouth's position would allow BellSouth to contract out of the requirements of §252(i) of the Act.*[22]

Similarly, the RLECs cannot evade their statutory obligation under Sections 252(i) and 252(e) to provide nondiscriminatory interconnection and reciprocal compensation conditions to other carriers under Section 252(i), by inserting a vague reference to a separate settlement agreement in an approved interconnection agreement as a contractual condition precedent to a proper exercise of Section 252(i) by T-Mobile.

This Commission should see the RLEC position for what it really is – namely, a 'poison pill' provision that the RLECs, through artifice and an insincere declaration of nondiscrimination to this Commission, included in the hope that they, rather than the competitive carrier, will determine when a competitive carrier can exercise its 'opt-in' rights. If there is one point that is clear in the Telecommunications Act of 1996, it is that the incumbent carrier does not have the right to determine the circumstances under which a competitive carrier can exercise its rights under the Act.

The FCC has charged states with ferreting out incumbent LEC attempts to discriminate and limit the availability of their Section 252(i) obligations. As the FCC stated earlier this year:

> To the extent that carriers attempt to engage in discrimination, such as including poison pills in agreements, we expect state commissions, in the first instance, will detect such discriminatory practices.[23]

T-Mobile urges the Commission to find that that the RLEC position is inconsistent with the Act, is discriminatory and is nothing less than an attempt to limit unlawfully the availability of competitive carrier exercise of their rights under Section 252(i) of the Communications Act. The Commission should rule that the word 'agreement' in Section 252(i) is limited to

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[22] *In re Complaint of AVR of Tennessee, LP d/b/a Hyperion of Tennessee, LP Against BellSouth Telecommunications, Inc. to Enforce Reciprocal Compensation and "Most Favored Nation" Provisions of the Parties' Interconnection Agreement*, 2000 Tenn. PUC LEXIS 99 (Tennessee Regulatory Utility Commission (denying BellSouth petition to appeal and affirming Hearing Officer's Initial Order)(emphasis added)(internal citations omitted)(emphasis added).

[23] *Second ILEC Unbundling Order* at¶29.

interconnection agreements and does not also encompass settlement agreements resolving past disputes.[24]

Alternatively, the Commission Should Order the RLECs to Produce their Settlement Agreements with Other Wireless Carriers

Ordinarily, LECs need not disclose the terms of their settlement agreements with other carriers. This is because while interconnection agreements customarily address terms and conditions governing interconnection in the future, most settlement agreements "simply provide for 'backward-looking consideration' (e.g., the settlement of a dispute in consideration for a chase payment or the cancellation of an unpaid bill)."[25]

Here, however, the Eight RLECs take the position that their settlement agreements with Cingular, Sprint, Verizon and others are part and parcel of the interconnection agreements that they executed with each of these wireless carriers. Specifically, the RLECs take the position that T-Mobile cannot exercise its Section 252(i) rights until it is willing to adopt "all the rates, terms and conditions of the referenced agreements," including the settlement agreements.[26] Of course, T-Mobile cannot possibly adopt "all the rates, terms and conditions of the referenced agreements" unless it has access to all of the underlying documents.

Section 252(i) gives a carrier like T-Mobile the right to opt-into any interconnection agreement that an incumbent carrier executes with another carrier. As the FCC has stated:

> [A]n incumbent LEC will not be able to reach a discriminatory agreement for interconnection, services, or network elements with a particular carrier without making that agreement in its entirely available to other requesting carriers. . . . Because these agreements will be available on the same terms and conditions to requesting carriers, the all-or-nothing rule should effectively deter incumbent LECs from engaging in such discrimination.[27]

If this Commission accepts the RLECs assertion that their settlement agreements with other wireless carriers are part and parcel of their interconnection agreements governing future terms and conditions (and it should not for the reasons discussed above), then the RLECs must make those settlement agreements available to T-Mobile so T-Mobile can choose which, if any

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24 Under T-Mobile's requested ruling, the Eight RLECs would not be required to divulge their settlement agreements with other carriers because these agreements would be irrelevant under Section 252(i).

25 *Qwest Declaratory Order*, 17 FCC Rcd 19337, 19342 at¶12 (2002).

26 Eight RLEC December 14 Response at 2 (emphasis added).

27 *Second ILEC Unbundling Order* at¶19.

of the "expanded" agreements (interconnection and settlement agreements) it should opt into. As the FCC has recognized, one of the primary purposes for making agreements publicly available is so a competitive carrier "will know which interconnection agreements (and terms) are available under section 252(i)."[28] Simply put, even under the RLECs' theory of the case, T-Mobile cannot exercise its "opt-in" rights without having access to the entire agreement–which, according to the RLECs, includes the settlement agreement.

It should be apparent that the Eight RLECs do not have the right, as they imply, to demand that T-Mobile execute a settlement agreement with them that is different from the settlement agreements they executed with other carriers.[29] In the first place, under this RLEC proposal, it would be the RLECs and not T-Mobile that would determine when T-Mobile can exercise its statutory "opt-in" rights. This is because under the RLEC proposal, the RLECs could condition (and delay) the availability of T-Mobile's "opt-in" rights until T-Mobile agrees to whatever terms that the RLECs demand unilaterally in settlement discussions.

In addition, the RLEC position would read Section 252(i) out of the Act altogether. If the RLECs do not disclose their settlement agreements with other carriers or refuse to permit T-Mobile to opt into one of those agreements, then T-Mobile would never be able to opt into any of these agreements because, according to the RLECs, T-Mobile would be unable to adopt "all of the rates, terms and conditions of the reference agreements."[30] In other words, under the RLEC position, a LEC would never be required to offer the "identical deal" to another carrier, even though Section 252(i) is unequivocal that that a competitive carrier can opt into "any . . . agreement" a LEC executes with any other carrier.

T-Mobile's December 10 letter identified the specific contracts that it wanted to opt into, but this decision was based solely on its review of the interconnection contracts that are publicly available. If the Commission agrees with the RLECs that the word "agreement" in Section 252(i) includes both interconnection agreements and settlement agreements, then the RLECs must be required to share the contents of their settlement agreements with all other carriers so T-Mobile can determine, as is its right under Section 252(i), which "package of agreements" best suits its needs.

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[28] *Qwest Forfeiture Order*, File No. EB-03-IH-0263, FCC 04-57, 19 FCC Rcd 5160, at n.12 (March 12, 2004).

[29] Of course, the traffic volumes that T-Mobile exchanges with the RLECs are different than the traffic volumes that the settling wireless carriers exchange with the RLECs. Accordingly, the settlement agreements would have to be adjusted *pro rata* to account for differences in traffic flows. Any other result (paying the same price for different volumes of traffic) would be discriminatory.

[30] Eight RLEC December 14 Response at 2 (emphasis added).

The FCC has ruled that competitive carriers like T-Mobile have the right to opt-into previously approved interconnection contracts "on an expedited basis."[31] This Commission has also predicated its approval of each of the subject interconnection agreements under Section 252(e)(2) on the express Finding of Fact, and Conclusion of Law, that these interconnection terms would be made available to other telecommunications carriers on a nondiscriminatory basis. Accordingly, T-Mobile respectfully requests that the Commission promptly reject the Eight RLECs objections to their compliance with Section 252(i) of the Communications Act.

Respectfully submitted,

Mark P. Johnson
Counsel for T-Mobile USA, Inc.

cc: Mr. John VanEschen (Manager, Telecommunications Department, Mo. PSC)
W.R. England, III, Esq. (Counsel for the Eight ILECs)
Leo Bub, Esq. (counsel for SBC)

31 *See Local Competition Order*, 11 FCC Rcd at 16141¶1321.