BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

BPS Telephone Company, et al.,	)	
	)	
Complainants,	)	
	)	
v.	)	Case No. TC-2002-1077
	)	
	)	
VoiceStream Wireless Corporation, et al.,	)	
	)	
Respondents.	)	

BRIEF OF RESPONDENTS T-MOBILE USA, INC. AND WESTERN WIRELESS CORPORATION

Come now Respondents T-Mobile USA, Inc. (T-Mobile), and Western Wireless Corporation ("Western Wireless"), and for their brief in this proceeding, state the following:

A consortium of rural local exchange carriers initiated this proceeding by filing a complaint against the Respondents, two wireless carriers with customers throughout the State, and Southwestern Bell Telephone Company ("Southwestern Bell"), which transports calls between Complainants' and the wireless carriers' networks. The Complainants seek payments for the completion of calls from the Respondents' customers to their customers . Western Wireless and T-Mobile maintain that as a matter of law the Commission lacks the power to require such payments, and that the Complaint should be dismissed.[1]

A. Introduction and Procedural History

[1] Effective August 30, 2002, VoiceStream Wireless Corporation changed its name to T-Mobile USA, Inc.

The Complainants initiated this proceeding on May 13, 2002, by filing a Complaint seeking Commission approval of their claim that the Respondents, as wireless carriers in Missouri, must pay charges for the completion of calls originated on their networks and terminated on the Complainants' networks.[2] These calls involve traffic which originates and terminates in the same Major Trading Area ("MTA"), or intraMTA traffic, and traffic which originates and terminates in different MTAs, or interMTA traffic. The Complainants also claim that Southwestern Bell, as the transiting carrier between the wireless networks and Complainants, is jointly and severally liable for the payments.

As Respondents read the Complaint, the Complainants seek recovery of traffic termination charges only from February, 2001, to date. In making their claims involving intraMTA traffic, the Complainants rely on their wireless termination tariffs which the Commission approved in its February 8, 2001, Report and Order in In the Matter of Mark Twain Rural Telephone Company, Case No. TT-2001-139. (See Complaint, para. 23). The Mark Twain decision is presently on appeal to the Court of Appeals for the Western District. State ex rel. Southwestern Bell Wireless LLC, et al. v. Public Service Commission, No. WD 60928. That appeal was argued on October 2, 2002, and is awaiting decision. With respect to interMTA traffic, the Complainants assert that they have the power to assess intrastate access charges. (See Complaint, para. 24). However, in calculating the amounts allegedly owed, the Complainants apply the rates in their wireless termination tariffs to all of the traffic, intraMTA or interMTA.

[2] The Complainants include the following local exchange carriers: BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Craw-Kan Telephone Cooperative, Inc., Fidelity Communication Services I, Inc., Fidelity Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, K.L.M. Telephone Company, Lathrop Telephone Company, and Mark Twain Rural

The Respondents denied the Complainants' claims, and stated in affirmative defense that the "Complainants' claims are preempted and/or barred by state and federal law." (Respondents' Answer, para. 15).

The Commission initially set the case for a hearing in October, 2002. However, after the Complainants filed their direct testimony on August 26, 2002, and Staff and Southwestern Bell filed rebuttal testimony on September 23, 2002, Western Wireless and T-Mobile moved for cancellation of the hearing, noting that the case involved a controlling question of law: "...under governing federal law and regulations, does the Commission have the power to approve tariffs for the transport and termination of local traffic?" (Respondents' Motion to Cancel Hearing, at para. 2). The Respondents also requested that the Commission decide the case on the record, which includes a Factual Stipulation entered into among the parties, the prefiled testimony, and the Respondents' motion to strike certain portions of the Complainants' testimony.[3]

The parties filed their Proposed List of Issues on October 2, 2002. The Respondent wireless carriers' principal issue, that of the Commission's power to require the payments sought by the Complainants, is presented in Issues 7 and 8, which ask whether the Respondents owe compensation to the Complainants, and if so, "what are the legal and factual bases for such compensation?" (See Proposed List of Issues, Issues 7 and 8). Thus, the parties informed the Commission that it would have to decide the legal grounding for any decision to award compensation to the Complainants for the traffic originated on the wireless networks and terminated on the Complainants' networks.

Telephone Company. They have joined together for regulatory purposes, and are collectively referred to as "the Small Telephone Group," or SMTG.

[3] The Respondents request that the Commission rule their motion in the context of the order on the merits of the case.

In an Order dated October 11, 2002, the Commission granted the motion to cancel the hearing and set a briefing schedule. By Order dated December 3, 2002, the Commission granted the parties' motion to amend the briefing schedule. The Commission will decide the case based on the agreed record, the parties' briefs, and the pleadings on the motion to strike testimony.

B. Statement of Relevant Facts

The Complainants filed their Complaint on May 13, 2002, alleging that Western Wireless and T-Mobile have failed since February, 2001, to compensate them for terminating traffic to the Complainants' customers. The traffic includes both intraMTA and interMTA calls, but the Complainants seek to impose identical charges on all traffic, based on the wireless termination service tariffs approved by the Commission in 2001. (Complaint, para. 23). As a derivative allegation, the Complainants claim that Respondent Southwestern Bell is also liable for those payments, if the wireless carriers refuse to pay.

The Respondents denied the allegations, relying principally on their belief that the Commission does not have the power to require the payments sought by the Complainants, even if the payments are sought in the context of enforcement of a Commission-approved tariff. (Respondents' Answer, para. 15). Southwestern Bell also denied liability for the payments, stating that it is providing a transit service for the traffic in question, and is not actually generating or delivering the calls to the Complainants. (Answer of Southwestern Bell, Affirmative Defenses, paras. 2 and 3).

In their prefiled testimony, the Complainants purport to provide support for their claims. Using precisely the same words, each of the fourteen witnesses for the Complainants carriers describes how wireless-originated traffic is terminated to their customers. In each case, traffic from wireless carriers such as Western Wireless and T-Mobile is transited by Southwestern Bell

to the local exchange carrier's exchanges over a common trunk connection between Southwestern Bell and the LEC. The LEC cannot determine the origin of the call (whether the calls comes from a wireless or wireline carrier, or from the same or another MTA). The LEC then transports the calls over its network to the called customers. (See Direct Testimony of Bill Rohde, p. 4 l. 24 - p. 5 l. 16).[4]

The Complainants' and Respondent wireless carriers' networks are not directly connected. Rather, the wireless-originated traffic is delivered to the Complainants' networks through the direct connection between Southwestern Bell and the Complainants (see David Beier Direct Testimony, p. 3 l. 19-22), an arrangement which Southwestern Bell prefers. (Hughes Rebuttal Testimony, p. 19 l. 12-14). Southwestern Bell serves as the "transiting carrier," providing switching and transport service between the wireless and LEC networks. (Hughes Rebuttal Testimony, p. 4 l. 18-22). Southwestern Bell charges the wireless carriers .4 cents per minute for this transit function, far less than the several cents per minute which would be imposed by the Complainants' access charges or wireless termination charges. The termination rates in the Complainants' tariffs are more than 10 times greater than Southwestern Bell's transit charge. (Hughes Rebuttal Testimony, p. 5 l. 1-17).

Each of the Complainant companies has filed and received Commission approval for a wireless termination service tariff. The Commission approved these tariffs in 2001. (See Rebuttal Testimony of Michael Scheperle, p. 3 l. 21 - p. 4 l. 2, and Schedule 1 to Scheperle Testimony). There is no evidence that any of the Complainants sought to negotiate the terms of those tariffs with the Respondent wireless carriers or any other wireless carrier, or of any attempt

[4] As examples of how the SMTG witnesses utilize precisely identical descriptions of call termination methodology, see the Direct Testimony of Craig Wilbert, p. 2 l. 26 - p. 3 l. 12, Direct

to negotiate an interconnection agreement or intercarrier compensation arrangement. There is no mention in the Complainants' prefiled testimony of any discussions at all with any wireless carrier before the wireless termination service tariffs were filed with the Commission.

However, there is some testimony concerning the Complainants' attempts to obtain payment from the Respondents for call terminations. The Complainants receive monthly Cellular Transiting Usage Summary Reports ("CTUSR") from Southwestern Bell, purporting to summarize the traffic delivered by Southwestern Bell to the LECs from each wireless carrier. The CTUSRs do not distinguish between interMTA and intraMTA traffic. (See Cornelius Direct Testimony, p. 7 l. 20 - p. 8 l. 13). The Complainants claim to believe that access charges should be applied to interMTA traffic (see Cornelius Direct Testimony, p. 8 l. 22 - p. 9 l. 2; Rohde Direct Testimony, p. 7 l. 10-12). However, in the invoices the Complainants have sent to Western Wireless and T-Mobile, requesting payment of termination charges, the Complainants have assumed all traffic was intraMTA and have sought payment based on the per minute rates in their wireless termination tariffs. (See Complaint, para. 29 and 30; Rohde Direct Testimony, p. 7 l. 8-10; Cornelius Direct Testimony, p. 8 l. 20-22; Direct Testimony of Kenneth Matzdorff, p. 5 l. 9-10).

In the Factual Stipulation presented to the Commission, the parties agreed that the Complainants have sent invoices to Western Wireless and T-Mobile, "specifying the minutes terminated to each Complainant's exchange(s), the applicable rate, the total amount due, and payments made, if any." (Factual Stipulation, para. 1). The Complainants' prefiled testimony also reflects any additional efforts the individual companies made to collect those payments. The Factual Stipulation states that at no time has any of the Complainants companies asked

---

Testimony of Rod Cotton, p. 4 l. 7 - p. 5 l. 1, and Direct Testimony of Brian Cornelius, p. 6 l. 9 -

Southwestern Bell to block any of the traffic in question, even though the Complainants allege they have the right to do so under the terms of their wireless termination tariffs.

C. Argument

This case presents a single dispositive legal issue: even if the Commission has approved wireless termination tariffs for each of the Complainants, does the Commission have the power to order the Respondent wireless carriers to pay the Complainants for completing wireless-to-landline traffic? The answer to this question is that the Commission does not have that power, requiring a finding in the Respondents' favor and dismissal of the Complaint.

1. Commission Jurisdiction and Power.

The Complainants are asking the Commission to assert jurisdiction over the parties and exercise its enforcement powers in requiring compliance with the wireless termination tariffs. In considering the Complaint and the relief sought by the Complainants, the Commission must limit itself to the limited jurisdiction and powers granted to it by the Legislature. Inter-City Beverage Co., Inc., v. Kansas City Power & Light Co., 889 S.W.2d 875 (Mo. App. 1994); State ex rel. Springfield Warehouse & Housing Transfer Co. v. Public Service Commission, 225 S.W.2d 792 (Mo. App. 1950). It may not take actions which encroach on the jurisdiction of federal law and the Federal Communications Commission. The Respondent wireless carriers believe that in considering this case, it will become evident to the Commission that it exceeded its power in approving the tariffs on which the Complainants rely. The Complaint should be dismissed.

---

p. 7 l. 3.

2. Motion to Strike Testimony.

In their prefiled testimony the Complainants attempted to introduce evidence concerning certain contacts with the Respondents. Much of that evidence is inadmissible hearsay which the Commission should summarily strike, as demonstrated in Respondents' pending motion.

By way of illustration of the nature of this evidence, Brian Cornelius, who says he is "responsible for all aspects of operations related to Citizens Telephone Company," attempted to put before the Commission evidence of a conversation which clearly took place out of his hearing. It appears that a Citizens employee, Kathie Munson, told him about a conversation she had with a VoiceStream (now T-Mobile) employee. Mr. Cornelius recites the content of that conversation in his prefiled testimony. (Cornelius Direct Testimony, p. 9 l. 17-22). This is obvious hearsay, and the Commission should strike it. The Complainants argue that the statement of the T-Mobile employee should be admitted because it is not being offered for the truth of the statement. The same explanation is offered with respect to Schedules 2 and 3 to Mr. Cornelius' testimony, letters to T-Mobile which open with the hearsay statement. Interestingly, in these letters Mr. Cornelius does not ask the T-Mobile employee to whom the letters are addressed whether the statement is true. The letters assume the statement is true. There is no reason for the statement to be included in Mr. Cornelius' testimony or any attached Schedule other than to prove its truth. It should be stricken.

The Respondents will not detail the other hearsay testimony which should be stricken, but rather refer the Commission to their Motion to Strike Testimony. But as demonstrated in the Motion to Strike, the Commission cannot rely on such obvious hearsay in making any finding as to the legitimacy of the Complainants' claims. In agreeing to forego the hearing, the Complainants lost the opportunity to present this evidence to the Commission. If the

Commission chooses to rely on this evidence, or even refuses to strike it, the decision arising out of this case will be infected by reversible error.

3. Compensation for InterMTA Traffic.

Missouri lies in two separate MTAs, the makeup of which is determined by the Federal Communications Commission. As demonstrated by the service maps on the Commission's website, the Complainants provide service in nearly every section of the state, north to south, east to west. To allow for appropriate examination of these facts, the Respondents ask the Commission to take official notice of the service maps on its website (http://168.166.4.147/telecommunications-reference-maps.asp), and of the MTA map on the FCC's website (http://wireless.fcc.gov/auctions/data/maps/mta.pdf).

A cursory comparison of the MTA and LEC service area maps shows that some percentage of wireless-to-landline traffic has to be interMTA. The Complainants acknowledge this fact by claiming that their access charge tariffs apply to interMTA wireless-originated traffic. (Complaint, para. 24). However, they make no attempt to allocate traffic between interMTA and intraMTA, and indicate that the invoices they have sent to the wireless carriers assume that all traffic is intraMTA. Their attempt to sneak the interMTA/intraMTA issue by the Commission only serves to undermine the credibility of their entire position. They ask the Commission to impose on interMTA traffic the wireless termination rate, a charge specifically intended for intraMTA traffic only, a position which clearly contravenes the terms of the Complainants' own tariffs. This failure to seek proper application and enforcement of their own tariffs renders suspect the Complainants' entire case.[5]

[5] Indeed, the Complainants' attempt to apply a tariff intended solely for intraMTA traffic to interMTA traffic would undermine the credibility of Complainants' reliance, if any, on the filed

4. Compensation for intraMTA Traffic.

The Complainants rely solely on their wireless termination service tariffs in claiming compensation for terminating wireless-to-wireline traffic from the Respondents. The Commission approved those tariffs in 2001, and several wireless carriers have dutifully made payments to the Complainants and other LECs under those tariffs. However, Western Wireless and T-Mobile have not made those payments. Under controlling precedent, those tariffs should never have been approved, and the Commission now has the opportunity to rectify that error by finding that the Complainants may not obtain the relief they seek.

The Respondents have made it clear throughout this proceeding that their defense would be legal, not factual. They asserted an appropriate affirmative defense in their Answer to the Complaint. (Respondents' Answer, para. 15). In their Motion to Cancel Hearing, the Respondents indicated that they do not have records which would call into question the Complainants' evidence concerning the amount and jurisdictional nature of the traffic. (Respondents' Motion to Cancel Hearing, para. 3).[6] Finally, the issue of the Commission's legal power to require the payments sought by the Complainants was preserved in the Proposed List of Issues. (List of Issues, paras. 7 and 8). In short, the Respondents have properly presented the issue of the Commission's power to approve and enforce the wireless termination tariffs.

As an initial matter, the Complainants' access charges are not available for intraMTA traffic. The Commission has twice rejected tariffs seeking to impose access charges on intraMTA traffic, as recently as April, 2002. See In the Matter of Mid-Missouri Group's Filing

---

rate doctrine. If they claim to have a tariffed rate (intrastate access charges) applicable to interMTA calls, they cannot ignore that tariff and unilaterally choose to apply another tariff.

[6] Ironically, the Complainants concede that they do not have such evidence, either. They rely on the monthly CTUSRs from Southwestern Bell to support their claims as to the amount of

to Revise its Access Service Tariff, P.S.C. Mo. No. 2, Case No. TT-99-428 et al., Reports and Orders dated January 27, 2000, and April 9, 2002. Collectively referred to as the "Alma Telephone" decisions, these Orders make it clear that intraMTA calls are local traffic to which access charges do not apply.

Thus, the Complainants are correct that for intraMTA traffic compensation, they must rely on their wireless termination tariffs, which contain charges based largely on the charges in their access charge tariffs. The LEC wireless termination service tariffs are today the subject of two pending proceedings. Several wireless carriers have directly challenged the Commission's approval of the tariffs in their appeal of the February 8, 2001 Report and Order in Mark Twain Rural Telephone Company. The case was argued before a panel of the Court of Appeals more than two months ago, and the parties expect a ruling in the near future.

In addition, a challenge to the tariffs has been raised before the Federal Communications Commission. In a pending proceeding, In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, T-Mobile, Western Wireless, Nextel Communications, and Nextel Partners filed a Petition for Declaratory Ruling on September 6, 2002, seeking "a declaratory ruling reaffirming that wireless termination tariffs are not a proper mechanism for establishing reciprocal arrangements for the transport and termination of telecommunications..." (Petition for Declaratory Ruling, attached hereto as Exhibit 1, p. 1)(emphasis supplied). The FCC has sought comments on this Petition from interested parties. (See attached Exhibit 2). Both consortia of rural local exchange carriers in Missouri, the Small Telephone Company Group and the Missouri Independent Telephone Company Group

---

wireless-to-wireline traffic generated by Western Wireless and T-Mobile, and they have no evidence at all concerning the jurisdictional allocation of the traffic, i.e., interMTA v. intraMTA.

("MITG"), have filed initial and reply comments, on October 18 and November 1, 2002, respectively. The MITG has also concurred in a motion to dismiss the Petition.[7]

It is crucial to note that the FCC Petition seeks a reaffirmation that wireless termination tariffs are inappropriate mechanisms for intercarrier compensation (and it is intercarrier compensation which the Complainants are seeking in this case). T-Mobile, Western Wireless, and the other FCC petitioners are not seeking a ruling announcing a new federal preemption, i.e., one that does not exist today, but rather a statement to LECs and state regulatory commissions that the FCC has previously announced that tariffs which have not been negotiated between the LEC and the wireless carrier, and which contain one-sided compensation mechanisms, should neither be filed nor approved.

In seeking this Declaratory Ruling, Western Wireless and T-Mobile are not asking the FCC to take action which flies in the face of the trend of decisions among state regulatory authorities. In fact, the Iowa Utilities Board and the Oklahoma Corporation Commission have both recently found that indirectly connected wireless and local exchange carriers should follow a bill-and-keep compensation scheme, not a one-sided wireless termination tariff. See Exchange of Transit Traffic, Order Affirming Proposed Decision and Order, Dockets Nos. SPU-00-7, TF-00-275, and DRU-00-2, Iowa Utilities Board (March 18, 2002); Interlocutory Order, Order No. 466613, Cause No. PUD 200200149, et al., Oklahoma Corporation Commission, August 9, 2002.

The Complainants' absolute reliance on their unilateral wireless termination tariffs is demonstrated by their prefiled testimony. None of their witnesses indicate that their companies

[7] These documents are available on the FCC's website. The Commission's request for comments may be found at http://hraunfoss.fcc.gov/edocs_public/attachment/DA-02-2436A1.doc.

have ever asked any wireless carrier to negotiate an interconnection agreement or intercarrier compensation. There is no evidence that the Complainants have personally attempted to measure or rate the traffic from the wireless carriers, choosing to rely on the Southwestern Bell CTUSRs, which they play no role in generating and which make no distinction between interMTA and intraMTA traffic.

The Commission should reject the Complainants' wireless termination tariffs as grounds for granting the Complainants the relief they seek. As long ago as 1987, the FCC ruled that LECs may file tariffs which include charges for completing calls from cellular carriers only after the LEC and the cellular carrier have negotiated for an interconnection agreement. The FCC held that a LEC which files a tariff before reaching an agreement with the cellular carrier would violate the Communications Act. Second Radio Common Carrier Order, 2 FCC Rcd 2910, 2916 ¶ 56 (1987). Just two years later the FCC reaffirmed its finding:

> [o]ur statement regarding 'pre-tariff negotiation agreements' was intended to reflect our recognition that .. if a telephone company is able to file tariffs before reaching an interconnection agreement, a cellular carrier's bargaining power will be diminished...[U]nder our 'pre-tariff negotiation agreement' policy, we would not expect the BOC to file a tariff pertaining to 'unresolved issue.'

Third Radio Common Carrier Order, 4 FCC Rcd 2369, 2370-71 ¶¶ 13-14 (1989). The FCC mandated that LECs and cellular carriers negotiate before the LEC would be allowed to file a wireless termination tariff with a state regulatory commission. This obligation extends to LEC interconnection with any wireless provider, not just the cellular providers the FCC considered in its 1987 and 1989 Orders. Western Wireless is a cellular provider, while T-Mobile utilizes PCS technology for its wireless services; regardless, the LEC interconnection obligation applies to both companies. See Implementation of Sections 3(n) and 332 of the Communications Act,

Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994).

Congress codified this bargaining obligation in the Telecommunications Act of 1996. Section 251(c)(1) of the Act requires all carriers to negotiate interconnection arrangements in good faith. The FCC has recognized that a LEC may not circumvent negotiated rates in an interconnection agreement by filing a tariff with higher rates. Bell Atlantic v. Global NAPs, 15 FCC Rcd 12946, 12959 ¶ 23 (1999), aff'd on reconsideration, 15 FCC Rcd 5997 (2000), aff'd, 247 F.3d 252 (D.C. Cir. 2001).

The only evidence of contact between the Complainants and Respondent wireless carriers concerning the compensation sought appears to be the invoices which the Complainants sent to the Respondents and their efforts to collect the charges in the invoices. There is a complete lack of evidence of the give-and-take required by the Telecommunications Act.

The Complainants argue that the Commission should enforce their wireless termination tariff and order the Respondents to pay them termination charges. Yet the Complainants have themselves never sought to use the full force of their tariffs. They have never asked Southwestern Bell to block the wireless traffic, which they claim they may do under the tariffs. A few of the Complainants have asked Southwestern Bell how much it would cost to block the traffic, and their failure to follow up by asking that the traffic be blocked demonstrates their concern that blocking may not be an appropriate provision in such tariffs.

The Complainants may well point to the black letter law of Missouri that once the Commission approves a tariff, it has the force of law and must be enforced until withdrawn or declared unlawful. However, the Commission should not be persuaded that it has no choice but to enforce the wireless termination tariffs. A state tariff is void and unenforceable to the extent

of its inconsistency with or violation of federal law or regulations. See TSR Wireless v. U.S. West, 15 FCC Rcd 11166, 11183 ¶ 29 (2000), aff'd, 252 F.3d 462 (D.C. Cir. 2001) ("...any LEC efforts to continue charging CMRS or other carriers for delivery of such traffic would be unjust and unreasonable and violate the Commission's rules, regardless of whether the charges were contained in a state or federal tariff."). The provisions in the wireless termination service tariffs calling for one-way compensation (i.e., no compensation flowing from the Complainants to the Respondents for land-to-mobile traffic, only from the Respondents to the Complainants for mobile-to-land traffic) are inconsistent with federal law mandating reciprocal compensation, and should not be enforced.

The Complainants seek compensation for completing interMTA traffic generated by the Respondent wireless carriers and delivered by Southwestern Bell. However, the tariffs on which they rely (and they concede to seek support for their claim from no other authority) is inconsistent with controlling federal policies. Even if the Commission approved the tariffs, the Commission does not have to enforce them, to the extent they violate federal law. Given the one-sided compensation provisions of those tariffs and the failure of the Complainants to discharge their legal obligation to negotiate with the wireless carriers before filing the tariffs, the Commission should now refuse to enforce them by awarding compensation for intraMTA traffic termination.

D. Conclusion

The Complainants seek payments from Western Wireless and T-Mobile based on unilateral and unlawful wireless termination tariffs. The fact that several wireless carriers have voluntarily made payments under those tariffs only means that those carriers chose not to

challenge the tariffs. Western Wireless and T-Mobile chose to confront the issue directly by refusing to make the payments and presenting the issue to the Commission in this case.

This proceeding offers the Commission an opportunity to find that it should not have approved the wireless termination tariffs, and should not enforce them now. The LECs, including the Complainants, have no incentive to negotiate with the wireless carriers as long as the wireless termination tariffs remain in effect and are enforced by the Commission. In light of the policy of the Telecommunications Act encouraging negotiation of interconnection and intercarrier compensation arrangements, elimination and/or non-enforcement of the wireless termination tariffs will incent the LECs either to accept a bill-and-keep scheme, or to bargain with the wireless carriers and present to the Commission interconnection and compensation agreements which fairly compensate all carriers.

In short, the Commission should deny the relief sought by the Complainants and dismiss the Complaint.

Respectfully submitted,

SONNENSCHEIN NATH & ROSENTHAL

Mark P. Johnson /kn
Mark P. Johnson / MO Bar No. 30740
4520 Main Street, Suite 1100
Kansas City, Missouri 64111
Tel: (816) 460-2400
Fax: (816) 531-7545
Email: mjohnson@sonnenschein.com

ATTORNEYS FOR T-MOBILE USA, INC., and
WESTERN WIRELESS CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by first-class United States mail, postage prepaid, on the following parties on this 12th day of December, 2002:

W. R. England, III Brian T. McCartney Brydon, Swearengen & England, P.C. 312 E. Capitol Avenue P. O. Box 456 Jefferson City, MO 65102-0456	Office of the General Counsel P. O. Box 360 Jefferson City, MO 65102
Leo J. Bub, Senior Counsel Southwestern Bell Telephone Company One Bell Center, Room 3520 St. Louis, MO 63101	Office of the Public Counsel P. O. Box 7800 Jefferson City, MO 65102

Mark P. Johnson /kn

Counsel for T-Mobile USA, Inc.,
and Western Wireless Corporation

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling: Lawfulness of Incumbent Local Exchange Carrier Wireless Termination Tariffs	)	CC Docket No. 01-92
	)	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

PETITION FOR DECLARATORY RULING

September 6, 2002

Table of Contents

Summary of Petition

The undersigned CMRS Petitioners ask the Commission to reaffirm that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of telecommunications under the Communications Act and the Commission's LEC-CMRS interconnection policies.

Most CMRS providers and small ILECs do not exchange sufficient traffic volumes to justify a direct interconnection between their networks, and they instead interconnect indirectly at the LATA tandem switch. Because of the small amounts of traffic exchanged, most carriers that interconnect indirectly with each other often do so without an interconnection contract and pursuant to bill-and-keep. Some small LECs have decided they want to receive reciprocal compensation when they terminate mobile-to-land traffic, but rather than seek interconnection negotiations, they have instead filed wireless termination tariffs. These tariffs are entirely one-sided (demanding that CMRS carriers pay reciprocal compensation but not agreeing to pay such compensation to CMRS providers) and contain unlawful prices, terms and conditions. An ILEC with a lucrative wireless termination tariff in effect has no incentive to negotiate a reasonable interconnection agreement with a CMRS provider.

The Commission has previously ruled that the tariff process is incompatible with the interconnection negotiation process that Congress incorporated in the Communications Act. The Commission has also squarely ruled that an ILEC engages in bad faith if it files CMRS interconnection tariffs before the conclusion of interconnection negotiations. The CMRS Petitioners therefore ask the Commission to direct ILECs to withdraw any wireless termination tariffs in existence today or, alternatively, to declare such tariffs unlawful, void and of no effect.

The Commission has the authority to enter the requested declaratory ruling. The Supreme Court has affirmed the Commission's authority to adopt national interconnection rules. Congress has also imposed a statutory mandate for the Commission to address CMRS interconnection issues of the sort contained in this petition.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling: Lawfulness of Incumbent Local Exchange Carrier Wireless Termination Tariffs	)	CC Docket No. 01-92
	)	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

PETITION FOR DECLARATORY RULING

The undersigned providers of commercial mobile radio service (collectively, "CMRS Petitioners")[1] petition the Commission to enter a declaratory ruling reaffirming that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of telecommunications under the Communications Act.[2] In

[1] The CMRS Petitioners include: T-Mobile USA, Inc.; Western Wireless Corporation; Nextel Communications and Nextel Partners. T-Mobile USA, Inc. (formerly known as VoiceStream Wireless Corporation), combined with Powertel, Inc., is the sixth largest national wireless provider in the U.S. with licenses covering approximately 96 percent of the U.S. population and currently serving over seven million customers. T-Mobile and Powertel are wholly-owned subsidiaries of Deutsche Telekom, AG and are part of its T-Mobile wireless division. Both T-Mobile and Powertel are, however, operated together and are referred to in this request as "T-Mobile." Western Wireless is the leading provider of cellular service to rural areas in the western United States. The company owns and operates wireless phone systems marketed under the Cellular One® national brand name in 19 states west of the Mississippi River. Western Wireless owns cellular licenses covering about 30% of the land in the continental United States. It owns and operates cellular systems in 88 Rural Service Areas ("RSAs") and 18 Metropolitan Statistical Areas ("MSAs") with a combined population of around 9.8 million people. Nextel Communications, Inc. is a nationwide CMRS carrier, providing a unique combination of cellular radio service, short-messaging, Internet access, data transmission, and a two-way digital radio feature. Nextel Partners provides wireless digital communications services in mid-sized and smaller markets throughout the U.S. Through affiliation with Nextel Communications, Inc., its customers have seamless nationwide coverage on the Nextel Digital Mobile Network.

[2] This petition is submitted pursuant to Section 5(d) of the Administrative Procedures Act, 5 U.S.C. § 554(d), and Section 332(c) of the Communications Act, 47 U.S.C. § 332(c)(1)(B). The CMRS Petitioners contemplated filing Section 208 complaints against the ILECs that have engaged in this unlawful activity, but with such a procedure, interested carriers that are not parties to the complaint proceeding would have been unable to partici-

making this determination, the Commission would be reaffirming prior decisions declaring that an incumbent local exchange carrier ("ILEC") engages in an unlawful practice when it unilaterally files wireless termination tariffs. The CMRS Petitioners further ask the Commission to enter an order directing ILECs to withdraw any wireless termination tariffs in existence today or, alternatively, to declare such tariffs unlawful, void and of no effect.

I. BACKGROUND FACTS

CMRS carriers ordinarily interconnect with the public switched telephone network ("PSTN") using Type 2A interconnection – an arrangement whereby a mobile switching center ("MSC") is connected directly (generally *via* a two-way trunk group) to the LATA tandem switch.[3] With Type 2A interconnection, a CMRS provider is directly connected to the network operated by the tandem switch owner, generally, a Regional Bell Operating Company ("RBOC").[4] Type 2A interconnection also enables a CMRS carrier to obtain indirect interconnection with all other networks that are connected to (or "subtend") the same LATA tandem switch – whether the network is operated by another ILEC, another CMRS carrier, or a competitive LEC ("CLEC"). As one RBOC publication provides:

---

pate. The CMRS Petitioners therefore decided to file this declaratory ruling petition, so as to maximize the opportunity of all parties to participate in this important proceeding and enable the Commission to act upon a more complete record.

[3] *See, e.g., Unified Intercarrier Compensation NPRM*, 16 FCC Rcd 9610, 9642 ¶ 91 (2001); *Bowles v. United Telephone*, 12 FCC Rcd 9840, 9843 ¶ 5 (1997). In contrast, with Type 2B interconnection, a MSC is connected directly to a specific end office switch. "Under Type 2B interconnection, the CMRS provider's primary traffic route is the Type 2B connection, with any overflow traffic routed through a Type 2A connection." *CMRS Equal Access NPRM*, 9 FCC Rcd 5408, 5451 ¶ 105 (1994). Thus, Type 2A tandem interconnection is also needed to implement a Type 2B end office interconnection.

[4] The Commission has noted that interconnection is "direct when a carrier's facilities or equipment is attached to another carrier's facilities or equipment. Interconnection is indirect when the attachment occurs through the facilities or equipment of an additional carrier." *Advanced Telecommunications Capability Reconsideration Order*, 15 FCC Rcd 17806, 17845 n.198 (2000).

> With the Type 2A interconnection, the WSP [Wireless Service Provider] can establish connections via the LEC network to valid local network area office codes (NXXs) accessible through the tandem.[5]

When two carriers interconnect indirectly with each other (*e.g.*, a CMRS carrier and a rural ILEC), the tandem switch owner switches and often transports traffic originating on one network that is destined to the other network.[6]

Most carriers do not have sufficient traffic volumes with most other carriers to cost justify use of a direct, dedicated interconnection facility between the two networks (*e.g.*, Type 2B interconnection to an end office). Accordingly, most carriers interconnect with each other indirectly, *via* the LATA tandem switch. As the Commission has recognized:

> Where CMRS-LEC traffic volumes are small, as in rural areas, . . . the CMRS carrier connects to LEC end offices connected to the tandem together with other carriers (including IXCs) interconnected through the tandem. * * * Because intercarrier, local CMRS traffic is often insufficient to justify a dedicated trunk, the majority of CMRS-to-CMRS call exchange occurs through a RBOC tandem switch.[7]

Carriers that interconnect indirectly with each other often do so without an interconnection contract and pursuant to bill-and-keep, at least for mobile-to-land traffic.[8] In this regard, the

---

[5] Bellcore, *Notes on the Network*, § 16.2.2,1 at p. 16-8 (1997).

[6] Transit carriers do not have a customer relationship with either the calling party or the called party. A transit carrier performs its services on behalf of the originating carrier, which decides to use indirect interconnection with the destination network rather than direct interconnection. Thus, the originating carrier historically assumes the obligation to compensate the transit carrier for its transit services.

[7] *Unified Intercarrier Compensation NPRM*, 16 FCC Rcd at 9643 ¶ 91 and 9644 ¶ 95.

[8] Most CMRS carriers send their traffic destined to a small ILEC to the tandem owner, which then switches the traffic to the large trunk group connecting the tandem switch with the destination small ILEC, a trunk group that the small ILEC uses to send and receive most of its inter-network, PSTN traffic. *See id.* at 9643 n.143. The physical routing of calls in the other direction (land-to-mobile) is generally the same, although the compensation arrangement is often quite different. For land-to-mobile calls, the small ILEC generally sends its customers traffic to the tandem switch using the same common trunk group it sends and receives most other traffic. Historically, the RBOC, which operated as the exclusive intraLATA toll carrier, then switched the traffic to the two-way Type 2A trunk group connecting its tandem to the mobile switching center ("MSC"). With the introduction of intraLATA equal access, the call routing became more involved. The small ILEC generally still sends the land-to-mobile call to the tandem switch (because the IXC generally cannot cost justify a direct connection to the small ILEC end office switch); the tandem switch owner switches the call to the serving IXC switch; the IXC switch immediately returns the call to the tandem switch; and the tandem switch then forwards the call to the Type 2A facility

Iowa Utilities Board and the Oklahoma Corporation Commission ruled recently that all intraMTA LEC-CMRS traffic – both mobile-to-land and land-to mobile – should be exchanged subject to bill-and-keep.[9]

Some small ILECs have decided that they want to receive reciprocal compensation, despite the small volume of traffic exchanged with carriers indirectly interconnecting with them. The CMRS Petitioners are willing to negotiate an interconnection agreement with these small ILECs, upon request, even though the dollars involved often do not justify the time and expense associated with negotiating an interconnection contract, preparing monthly statements, and auditing amounts billed.[10] The CMRS Petitioners expect, however, the small ILECs will negotiate reciprocal compensation arrangements, not the one-way arrangements they ordinarily seek (*i.e.*, they receive terminating compensation from CMRS carriers but refuse to pay CMRS carriers terminating compensation for land-to-mobile calls).

Some small ILECs have decided, however, to bypass the bilateral negotiation process mandated by the Communications Act and the Commission's LEC-CMRS interconnection policies. These small ILECs have instead filed "wireless termination tariffs" with their state com-

---

connecting the MSC. In this scenario, the rural ILEC receives originating access charges. The tandem switch owner is compensated because it charges both originating and terminating access for one call (as its tandem switch is used twice in an intraLATA call). In contrast, the CMRS carriers have traditionally received nothing for call termination.

The CMRS Petitioners believe that an ILEC's use of the access regime for intraMTA calls with CMRS carriers is flatly inconsistent with the Commission's rules that such calls should be governed by reciprocal compensation, not access charges. This is a subject that the Commission may need to address if this issue is not resolved through negotiation, arbitration, or other means of dispute resolution.

[9] *See* Iowa Utilities Board, *Exchange of Transit Traffic,* Docket Nos. SPU-00-7, TF-00-275, DRU-00-2, *Proposed Decision and Order* (Nov. 26, 2001); *Order Affirming Proposed Decision and Order* (March 18, 2002); Corporation Commission of the State of Oklahoma, Arbitration Proceeding, Cause No. PUD 200200149, 200200150, 200200151, and 200200153, *Interlocutory Order*, Order No. 466613, August 9, 2002.

[10] For example, VoiceStream received from Fidelity Communications Services (in Minnesota) a bill dated May 24, 2002 for $42.77, with Fidelity stating that it had terminated 740 minutes of VoiceStream traffic and charging $0.058 per MOU. Similarly, VoiceStream received from Easton Telephone Company (in Minnesota) a bill dated July 1, 2002 for $78.21, with Easton stating that it had terminated 1,236 minutes of VoiceStream traffic and charging $0.063 per MOU. Clearly, with these small dollar amounts, the cost of negotiating an interconnection contract, preparing monthly statements, and auditing amounts billed cannot be economically justified.

mission. This has occurred in Missouri, where small ILECs have recently filed complaints against certain CMRS carriers for not complying with terms that they set in their tariffs. This is also now occurring in Nebraska, where the Public Service Commission has suspended the tariffs filed by small ILECs, but has opened a proceeding to address the lawfulness of wireless termination tariffs.[11] The Iowa Utilities Board addressed this matter by striking proposed rural ILEC tariffs and adopting a bill and keep form of reciprocal compensation, absent negotiated agreements. Notwithstanding the encouraging actions of the Iowa commission, unless this Commission acts promptly, small ILECs in other states can be expected to pursue the same course.

The fundamental problem with these wireless termination tariffs is that the small ILECs unilaterally set unfair and unlawful terms and conditions for interconnection and employ non-TELRIC prices. If these tariffs are allowed to take effect, ILECs then have no incentive to negotiate fair and lawful prices, terms and conditions. For example, the tariffs filed by small ILECs in Missouri:

- Are entirely one-sided, with the ILECs requiring CMRS carriers to pay their costs of call termination; however, the ILECs do not agree to pay CMRS carriers the costs they incur in terminating intraMTA traffic originating on the ILECs' networks;[12]
- The ILECs in their tariffed call termination compensation rates include costs that the Commission has ruled may not be recovered, including an indisputably arbi-

[11] In the Matter of the Commission, on its own motion, seeking to investigate telecommunications companies' terms, conditions, and rates for the provision of wireless termination service, Application No. C-2738/PI-58, *Order Opening Docket and Setting Hearing*, June 5, 2002.

[12] More specifically, the ILECs typically route intraMTA, even intraLATA traffic, land-to-mobile traffic bound for the CMRS providers *via* an IXC and will not affirm their reciprocal compensation obligations. For purposes of this Request, the term reciprocal compensation is used to emphasize that ILEC prices should be based on reciprocal (local) compensation, not access charges.

trary two cent ($0.02 per MOU) "adder" that the Missouri ILECs included to recover their non-traffic-sensitive loop costs; and

- The tariffs authorize the ILECs to block mobile-to-land-traffic if the CMRS carriers do not pay the unlawful charges that the ILECs unilaterally set in their tariffs.

The most offensive aspect of the tariffs is the chosen pricing methodology. Commission rules, which have now been affirmed by the U.S. Supreme Court,[13] require that transport and call termination rates be set using TELRIC pricing methodology.[14] In contravention of these rules, ILEC tariffs for intraMTA CMRS traffic are typically based upon the ILECs' access charge rate.

There are other problems with the use of wireless termination tariffs, including:

- A CMRS carrier may not even be aware that the ILEC has filed a wireless termination tariff with a state commission. Indeed, a CMRS carrier might not learn of a tariff until after it takes effect, when the ILEC begins attempting to impose the tariff's terms on a CMRS provider;
- In the negotiation and arbitration process, the ILEC has the burden of justifying its proposed reciprocal compensation rates and the other terms of interconnection that it is proposing; in contrast, with the tariff process, the competitive carrier has the burden of demonstrating that the ILEC's proposed prices and terms are unreasonable;
- It is unlikely that the prices contained in the tariff are consistent with the costing/pricing standards set forth in the Communications Act and the Commission's implementing rules governing interconnection and reciprocal compensation. In practice, small ILEC tariffs unabashedly set rates that include access rate elements despite the

[13] *See Verizon Communications* v. *FCC*, No. 00-511 (May 13, 2002).

[14] *See, e.g.*, 47 C.F.R. §§ 51.505(b); 51.705(a)(1).

Commission's repeated admonishment that intraMTA traffic involving a CMRS carrier is subject to reciprocal compensation, not access charges; and

- Appeals of arbitration decisions are heard in federal court, where the court reviews federal law issues *de novo*; in contrast, appeals of state commission tariff orders are heard in state appellate courts, where the state commission's decision is ordinarily subject to the deferential arbitrary and capricious standard and where the court generally has little familiarity with the federal Communications Act and the Commission's implementing regulations.

An ILEC, with a lucrative wireless termination tariff in effect that contains one-sided prices, terms and conditions, has no incentive to negotiate a reasonable interconnection agreement with a CMRS provider. It is time for the Commission to intercede before oppressive wireless termination tariffs arise on a more widespread basis.

As documented immediately below, the Commission has already ruled that an ILEC may not unilaterally file state wireless termination tariffs as a means to bypass the negotiation process. The CMRS Petitioners hereby ask the Commission to declare that wireless termination tariffs are unlawful and that ILECs do not engage in good faith negotiations by filing wireless termination tariffs to set the rates, terms, and conditions for interconnection.

II. THE COMMISSION SHOULD DECLARE WIRELESS TERMINATION TARIFFS UNLAWFUL AND REAFFIRM THAT ILECS DO NOT ENGAGE IN GOOD FAITH NEGOTIATIONS BY UNILATERALLY FILING SUCH TARIFFS

Some small ILECs do not like the *status quo*, whereby *de minimus* amounts of intraMTA traffic with CMRS providers are exchanged without a formal interconnection agreement and typically on a bill-and-keep basis. However, rather than asking CMRS carriers to commence interconnection negotiations, these ILECs have instead decided to file state "wireless termination

tariffs" so that they can unilaterally dictate the rates, terms, and conditions of the interconnection arrangement. As noted above, many of these tariffs are one-sided (*e.g.*, they purportedly obligate a CMRS carrier to pay the ILEC for call termination, but the ILEC does not agree to pay the CMRS carrier for intraMTA call termination). The Commission has previously held that an ILEC engages in bad faith when it files unilaterally a CMRS interconnection tariff, and it should reaffirm this holding here.

These small ILECs are engaging in the same course of action that certain large ILECs pursued over a decade ago – namely, to preempt interconnection negotiations by unilaterally filing state interconnection tariffs that contain all the terms they desire. In 1987, the Commission held that ILEC "tariffs reflecting charges to cellular carriers will be filed only after the co-carriers have negotiated agreements on interconnection" and that an ILEC filing a tariff before an agreement has been reached engages in bad faith, which is actionable in a Section 208 complaint.[15] Two years later, the Commission "reaffirm[ed] that tariffs should not be filed before co-carriers have conducted good faith negotiations on an interconnection agreement":

> Our statement regarding "pre-tariff negotiation agreements" was intended to reflect our recognition that . . . if a telephone company is able to file tariffs before reaching an interconnection agreement, a cellular carrier's bargaining power will be diminished. . . . [U]nder our "pre-tariff negotiation agreement" policy, we would not expect the BOC to file a tariff pertaining to "unresolved" issue."[16]

The Commission noted that to rule otherwise, "would mean that, when an impasse is reached, the landline company could proceed unilaterally to file its tariffs, thereby rendering meaningless the

[15] *Second Radio Common Carrier Order*, 2 FCC Rcd 2910, 2916 ¶ 56 (1987).

[16] *Third Radio Common Carrier Order*, 4 FCC Rcd 2369, 2370-71 ¶¶ 13-14 (1989).

compensation arrangements for the transport and termination of telecommunications." Commission rules also require a rural LEC to provide "interconnection reasonably requested by a mobile service licensee."[22] Finally, as noted above, Commission orders direct LECs to negotiate in good faith with CMRS providers.[23]

The Communications Act and the Commission's LEC-CMRS interconnection policies and rules clearly envision a process whereby two carriers attempt to negotiate an interconnection agreement for the exchange of telecommunications traffic, if either party seeks to change the *status quo*. As the Commission has already noted, an ILEC's unilateral filing of interconnection tariffs before or during interconnection negotiations usurps this process and removes the little bargaining power that CMRS carriers possess. Many ILECs throughout the country have initiated negotiations under Section 252 of the Act with CMRS providers, resulting in the establishment of negotiated rates, terms, and conditions for interconnection. When the negotiations have not lead to an agreement, ILECs have sought arbitration with state commissions under the Act. The Commission should, therefore, reaffirm that no LEC, regardless of size, may unilaterally file interconnection tariffs.

III. THE COMMISSION HAS THE AUTHORITY AND STATUTORY MANDATE TO ENTER THE REQUESTED DECLARATORY RULING

Congress has empowered the Commission to issue "a declaratory order to terminate a controversy or remove uncertainty."[24] In this regard, the Supreme Court has noted that the

---

would constitute a pointless exercise. Indeed, many rural ILECs supported indirect, Type 2A interconnection with cellular carriers before the enactment of the 1996 Act.

[22] *See* 47 C.F.R. § 20.11(a).

[23] Appellate courts have recognized that Section 332 provides "an independent basis of support *outside* the 1996 Act" to adopt rules governing LEC-CMRS interconnection. *Qwest* v. *FCC*, 252 F.3d 462, 466 (D.C. Cir. 2001)(emphasis in original). *See also Iowa Utilities Board* v. *FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997).

[24] 5 U.S.C. § 554(c).

Commission can and should play a leadership role in the administration of "the new *federal* regime."[25] The Supreme Court has further noted that the concept of "state's rights" has little relevance in the context of interconnection:

> This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew."[26]

The Commission thus possesses ample authority to address this declaratory ruling petition, because such a Commission ruling would end considerable controversy.

In fact, Congress has imposed a statutory mandate for the Commission to address CMRS interconnection issues of the sort contained in this petition. Section 332(c)(1) of the Communications Act provides:

> Upon reasonable request of any person providing commercial mobile service, the Commission *shall* order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title.[27]

The Commission has repeatedly acknowledged that this statute "requires" it to act on petitions such as this that are filed under this statute.[28]

Congress has fundamentally expanded the Commission's authority over CMRS providers so the Commission could "establish a Federal regulatory framework to govern the offering of all

---

[25] *AT&T* v. *Iowa Utilities Board*, 525 U.S. 366, 378 n.6 (1999)(emphasis in original).

[26] *Id.*

[27] 47 U.S.C. § 332(c)(1)(B)(emphasis added). The Commission has noted that its authority under Section 201 is "quite broad." Brief of Respondents, *Qwest Corp.* v. *FCC*, No. 00-1376, at 36-37 (D.C. Cir., Feb. 14, 2001). The appellate court agreed with the Commission's views concerning the scope of its regulatory authority. *See Qwest Corp.* v. *FCC*, 252 F.3d 462 (D.C. Cir. 2001).

[28] *See, e.g., Second CMRS Interconnection NPRM*, 10 FCC Rcd 10666, 10685-86 ¶ 39 (1995)("We read Section 332(c)(1)(B) . . . to mean that the Commission is *required* to respond to requests for interconnection) (emphasis added); *Specialized Mobile Radio NPRM*, 9 FCC Rcd 4405, 4410 ¶ 19 (1994)("Section 332(c)(1)(B) . . . *requires* the Commission pursuant to Section 201 to order common carriers to interconnect with CMRS providers.") (emphasis added); *1993 Budget Act NPRM*, 8 FCC Rcd 7988, 8001 ¶ 69 (1993)("Section 332(c)(1)(B) *requires* the Commission to order a common carrier to interconnect with a [CMRS] provider.")(emphasis added).

commercial mobile services."[29] Congress modified Sections 2(b) and 332(c) specifically to "foster the growth and development of mobile services that by their nature operate without regard to state lines," and because Congress considers "the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhanced competition and advance a seamless national network."[30] Federal appellate courts have affirmed this expansive regulatory authority,[31] and as the Commission recognized only last year, Section 332(c)(1)(B) "expressly grants [it] the authority to order carriers to interconnect with CMRS providers":

> The 1993 Budget Act significantly changed the regulatory framework for CMRS. . . . CMRS interconnection was a significant element of this framework. . . . [S]ection 332(c)(1)(B) . . . expressly grants the Commission the authority to order carriers to interconnect with CMRS providers. . . . Congress also added an exception to section 2(b) of the Communications Act. Section 2(b) generally reserves to the states jurisdiction over intrastate communications service by wire or radio of any carrier. The 1993 Budget Act amended section 2(b) to exempt section 332 from its provisions.[32]

The Commission has additional, separate authority to order ILECs to engage in good faith negotiation with CMRS carriers and to refrain from filing one-sided interconnection tariffs. Specifically, the Commission has preempted states in this area, ruling that it possesses "plenary jurisdiction to require cellular interconnection negotiations to be conducted in good faith":[33]

> [T]he conduct of interconnection negotiations cannot be separated into interstate and intrastate comments. Good faith cannot be quantified and allocated according to relative interstate and intrastate use. Furthermore, any state regulation which permits departures from our good faith requirement could severely affect interstate communications by preventing cellular carriers from obtaining interconnec-

---

[29] H.R. REP. NO. 103-213. 103d Cong., 1st Sess. 490 (1993).

[30] H.R. REP. NO. 103-111, 103d Cong., 1st Sess. 260-61 (1993).

[31] *See Iowa Utilities Board* v. *FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997). It is noteworthy that not a single ILEC challenged this holding in the appeal before the Supreme Court. *See AT&T* v. *Iowa Utilities Board*, 585 U.S. 366 (1999). *See also Qwest Corp.* v. *FCC*, 252 F.3d 462 (D.C. Cir. 2001).

[32] *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, 9640 31 ¶ 84 (2001).

[33] *Third Radio Common Carrier Order*, 4 FCC Rcd at 2371 ¶ 16.

tion agreements and consequently excluding them from the nationwide public telephone network.[34]

In summary, it is clear that the Commission has both the legal authority and the obligation to act on this petition and to reaffirm the interconnection obligations of ILECs as applied to CMRS providers.

IV. CONCLUSION

For the forgoing reasons, the CMRS Petitioners respectfully request that the Commission:

[34] *Second Radio Common Carrier Order*, 2 FCC Rcd at 2912-13 ¶ 21. The state/interstate distinction the Commission made in 1987 has largely become irrelevant as applied to LEC-CMRS interconnection as a result of the statutory provisions discussed above that were enacted with the 1993 Budget Act.

- ❖ Declare that ILEC wireless termination tariffs, as well as the refusal to negotiate interconnection agreements, conflict with the letter and spirit of Sections 251 and 252 and the Commission's LEC-CMRS interconnection rules and policies; and

- ❖ Clarify that an ILEC engages in bad faith by unilaterally filing wireless termination tariffs without first negotiating in good faith the terms and conditions of interconnection with the CMRS provider.

The CMRS Petitioners believe that the requested Commission actions will lay the foundation for a productive negotiation process.

Respectfully submitted,

/s/ Gene A. DeJordy
Gene A. DeJordy
Vice President, Regulatory Affairs
Western Wireless Corporation
3650 131st Avenue SE, Suite 400
Bellevue, WA 98006
(425) 586-8700

/s/ Leonard J. Kennedy
Leonard J. Kennedy
Senior V.P. & General Counsel
Joel M. Margolis
Senior Corporate Counsel - Regulatory
Nextel Communications, Inc.
2001 Edmund Halley Drive
Reston, VA 20191

/s/ Brent Eilefson
Brent Eilefson
Corporate Counsel
Nextel Partners, Inc.
10120 W. 76th Street
Eden Prairie, MN 55344
(612) 221-2181

/s/ Brian T. O'Connor
Brian T. O'Connor
Vice President,
Legislative and Regulatory Affairs
Harold Salters
Director, Federal Regulatory Affairs
T-Mobile USA, Inc.
401 9th Street NW, Suite 550
Washington, DC 20004
(202) 654-5900

Greg Tedesco
Executive Director, Intercarrier Relations
T-Mobile USA, Inc.
2380 Bisso Drive, Suite 115
Concord, CA 94520-4821

Dan Menser
Senior Corporate Counsel
T-Mobile USA, Inc.
12920 SE 38th Street
Bellevue, WA 98006
(425) 378-4000

Dated: September 6, 2002

PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: http://www.fcc.gov
TTY: 1-888-835-5322

DA 02-2436
Released: September 30, 2002

COMMENT SOUGHT ON PETITIONS FOR DECLARATORY RULING REGARDING INTERCARRIER COMPENSATION FOR WIRELESS TRAFFIC

Pleading Cycle Established

CC Docket No. 01-92

Comments Due: October 18, 2002
Reply Comments Due: November 1, 2002

The Commission hereby seeks comment on two petitions that request rulings regarding the intercarrier compensation regime applicable to certain types of wireless traffic.

T-Mobile Petition. On September 6, 2002, T-Mobile USA, Inc., Western Wireless Corporation, Nextel Communications, Inc., and Nextel Partners, Inc. (CMRS Petitioners) filed a petition for declaratory ruling in the above-referenced docket requesting that the Commission "reaffirm that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements" between local exchange carriers (LECs) and commercial mobile radio service (CMRS) providers.[1] According to CMRS Petitioners, a CMRS carrier typically will interconnect indirectly with a rural ILEC (*i.e.*, traffic will be exchanged through an intermediate carrier.) CMRS Petitioners state that indirectly interconnecting carriers often exchange traffic pursuant to a bill-and-keep arrangement, rather than an interconnection agreement, at least for mobile-to-land traffic. CMRS Petitioners state that some rural LECs recently have filed state tariffs as a mechanism to collect reciprocal compensation for the termination of intra-MTA traffic originated by CMRS carriers. The CMRS Petitioners assert that compensation for such traffic should be paid only when the LEC and CMRS carrier have entered into an interconnection agreement under section 251 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. In the absence of such an agreement, they state that traffic should be exchanged on a bill-and-keep basis. The CMRS Petitioners request that the Commission direct ILECs to withdraw any wireless termination tariffs in existence today or, alternatively, to declare such tariffs unlawful, void and of no effect. The CMRS Petitioners

[1] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Petition for Declaratory Ruling of T-Mobile USA, Inc., *et al.* (filed Sept. 6, 2002).

state that the Commission has authority to issue the requested ruling pursuant to sections 332(c)(1) and 201 of the Communications Act.

US LEC Petition. On September 18, 2002, US LEC Corp. filed a petition for declaratory ruling asking the Commission to "issue a ruling reaffirming that LECs are entitled to recover access charges from IXCs for the provision of access service on interexchange calls originating from, or terminating on, the networks of CMRS providers."[2] US LEC states that industry practice is for IXCs to pay access charges to LECs for this traffic, but that recently one IXC has declined to pay these charges. US LEC states that a requirement that IXCs pay access charges to LECs for traffic to or from a CMRS carrier is fully supported by Commission precedent. US LEC asserts that grant of the petition is necessary to eliminate controversy and avoid future challenges regarding this issue.

Pursuant to sections 1.415 and 1.419 of the Commission's rules,[3] interested parties may file comments regarding the T-Mobile Petition or the US LEC Petition in CC Docket No. 01-92 on or before October 18, 2002, and reply comments on or before November 1, 2002. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[4]

Comments filed through the ECFS can be sent as an electronic file via the Internet to http://www.fcc.gov/e-file/ecfs.html. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the filing to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic copy by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message: "get form <your email address>." A sample form and directions will be sent in reply. Commenters also may obtain a copy of the ASCII Electronic Transmittal Form (FORM-ET) at http://www.fcc.gov/e-file/email.html.

Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this

---

[2] Petition of US LEC Corp. for Declaratory Ruling Regarding LEC Access Charges for CMRS Traffic (filed Sept. 18, 2002). The petition will be placed in the record of CC Docket No. 01-92.

[3] 47 C.F.R. §§ 1.415, 1.419.

[4] *See Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322, 11326, para. 8 (1998).

location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, S.W., Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Qualex International, Portals II, 445 12th Street S.W., CY-B402, Washington, D.C. 20554 (telephone 202-863-2893; facsimile 202-863-2898) or via e-mail at qualexint@aol.com. In addition, one copy of each submission must be filed with the Chief, Pricing Policy Division, Wireline Competition Bureau, and Chief, Policy Division, Wireless Telecommunications Bureau, 445 12th Street, S.W., Washington, D.C. 20554. Documents filed in this proceeding will be available for public inspection during regular business hours in the Commission's Reference Information Center, 445 12th Street, S.W., Washington, D.C. 20554, and will be placed on the Commission's Internet site.

This proceeding will be governed by "permit-but-disclose" *ex parte* procedures that are applicable to non-restricted proceedings under section 1.1206 of the Commission's rules.[5] Parties making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required.[6] Other rules pertaining to oral and written presentations are set forth in section 1.1206(b) as well. In addition, interested parties are to file any written *ex parte* presentations in this proceeding with the Commission's Secretary, Marlene H. Dortch, 445 12th Street, S.W., TW-B204, Washington, D.C. 20554, and serve with three copies each: Pricing Policy Division, Wireline Competition Bureau, Attn: Victoria Schlesinger, and Policy Division, Wireless Telecommunications Bureau, Attn: Gregory Vadas, 445 12th Street, S.W., Washington, D.C. 20554. Parties shall also serve with one copy: Qualex International, Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, (202) 863-2893.

For further information, contact Steve Morris or Victoria Schlesinger, Pricing Policy Division, Wireline Competition Bureau, (202) 418-1530, or Gregory Vadas, Policy Division, Wireless Telecommunications Bureau, (202) 418-1798.

- FCC-

[5] 47 C.F.R. § 1.1206.

[6] *See* 47 C.F.R. § 1.1206(b)(2).