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January 12, 2005

VIA ELECTRONIC AND U.S. MAIL

Mr. Dale Hardy Roberts, Secretary
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Re: Case No. TC-2002-1077
T-Mobile Adoption Letter

Dear Mr. Roberts,

This letter responds to the unlawful and procedurally improper attempt by T-Mobile USA, Inc. ("T-Mobile") to adopt parts of certain Commission-approved interconnection agreements between various Complainants in this case and other Missouri wireless carriers. As a threshold matter, T-Mobile's attempt to "adopt" these agreements is unlawful because T-Mobile seeks to sever an integral condition contained in the interconnection agreements – specifically, the satisfaction and settlement of all claims for traffic delivered to the Complainants prior to the effective date of the interconnection agreement. The Federal Communications Commission (FCC) requires that any party seeking to adopt an existing interconnection agreement **must adopt that agreement in its entirety, including all terms and conditions of the existing agreement**. T-Mobile's attempt to adopt the agreements without satisfying this critical and integral condition violates federal law.

T-Mobile's purported "adoption" of the Sprint PCS and Verizon Wireless agreements and attempt to obtain service without paying for its past due amounts is also discriminatory to Missouri's other major wireless carriers such as Cingular Wireless, Sprint PCS, and Verizon Wireless. All of these other carriers have been playing by the rules and compensating the Complainants under either approved interconnection agreements or the Complainants' wireless tariffs. Complainants' December 14, 2004 correspondence shows that T-Mobile presently owes over $1,600,000 under Complainants' lawful and Commission-approved wireless termination service tariffs. T-Mobile may also owe additional amounts for pre-tariff traffic. Therefore, the Commission must reject T-Mobile's attempt to sever the settlement of past due amounts required by the agreements because it would be discriminatory to all of Missouri's other wireless carriers that have abided by the legal obligation to pay for their traffic.

T-Mobile's request is procedurally improper because it was not accompanied by a proper pleading in accordance with the Commission's rules of practice. Rather, it was submitted as a last-minute letter in an existing complaint case that has been pending before the Commission for over two years. T-Mobile failed to file a verified application or petition with the Commission that would establish a new case and give notice to all interested parties. T-Mobile also failed to provide a list of pending complaints involving customer service or rates. If the Commission does not reject T-Mobile's "adoption" letter out of hand, then at the very least T-Mobile must be directed to amend its request with a proper pleading in a new and separate case. Complainants request a hearing should the Commission allow T-Mobile to cure its defective request to adopt the agreements.

Complainants are willing to allow T-Mobile to adopt the Sprint PCS and Verizon Wireless agreements so long as T-Mobile does so on all of the same terms and conditions of those agreements, including: (1) payment for all post-wireless tariff traffic at the lawful wireless tariff rates; and (2) settlement for all pre-tariff traffic at mutually agreeable rates.

I. THE FCC'S "ALL-OR-NOTHING" RULE PROHIBITS T-MOBILE'S ATTEMPT TO "PICK-AND-CHOOSE" AMONG PROVISIONS IN THE AGREEMENTS.

The FCC's "all-or-nothing" rule "requires a requesting carrier seeking to adopt the terms in an interconnection agreement to adopt the agreement **in its entirety, taking all rates, terms, and conditions from the adopted agreement**."[1] Thus, requesting carriers must adopt all provisions in an interconnection agreement, not just the favorable ones. Here, T-Mobile is seeking to adopt the favorable rates and terms of the interconnection agreements while avoiding an essential condition contained in the agreements. Specifically, both the Sprint PCS and Verizon Wireless agreements provide:

> At the same time that the parties execute this agreement, they are entering into a confidential agreement to settle all claims related to traffic exchanged between the parties prior to the effective date of this Agreement. Each party represents that this Settlement Agreement completely and finally resolves all such past claims.

Agreements with Missouri's other major wireless carriers such as Cingular Wireless contain the same requirement for settlement of all past claims related to traffic exchanged prior to the agreement's effective date.[2] Cingular Wireless, Sprint PCS, and Verizon Wireless all paid for their post-tariff traffic under the lawful tariff rates, so the settlement agreements were only necessary to address pre-tariff traffic.

T-Mobile attempts to characterize this provision as a "passing reference to unrelated, non-interconnection legal issues," and T-Mobile proposes that this language "could easily be removed by means of an adoption agreement."[3] On the contrary, this condition was a

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[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, 2004 FCC LEXIS 3841, *Second Report and Order*, adopted July 8, 2004, ¶1 (emphasis added).

[2] *See e.g.* §5.5 of the Interconnection Agreement between Fidelity Telephone Company and Cingular Wireless, approved by the Commission on April 6, 2004 in Case No. TO-2004-0445.

[3] T-Mobile letter of Dec. 21, 2004, p. 6.

critical component of the negotiations with Sprint PCS and Verizon Wireless, and it is an essential and integral part of Complainants' interconnection agreements. This language has been approved by the Commission in numerous small company interconnection agreements (including agreements between other small ILECs and T-Mobile). Federal law prohibits T-Mobile's attempt to take the good (lower rates) without the bad (settlement of past due amounts).[4]

Settlement of past due obligations is a matter that is particularly appropriate for resolution in interconnection agreements. For example, Sprint Missouri, Inc. includes the following provision regarding past due obligations in its interconnection agreements:

> This Agreement shall be deemed effective upon the Effective Date first stated above, and continue for a period of two years until April 10, 2005 (End Date), unless earlier terminated in accordance with this Section 5, **provided however that if CLEC has any outstanding past due obligations to Sprint, this Agreement will not be effective until such time as any past due obligations with Sprint are paid in full.**[5]

Thus, there is nothing discriminatory or uncommon about interconnection agreement language that requires payment of past due obligations before the agreement becomes effective. Moreover, such provisions have a necessary practical application because they prevent carriers that have taken service without paying from avoiding their preexisting obligations. T-Mobile should not be allowed to ignore its past due billings under the wireless termination tariffs by simply adopting another company's agreement.

The FCC and the courts have recognized important policy considerations that underlie the "all-or-nothing" rule. For example, the Eighth Circuit has commented that application of the FCC's vacated "pick-and-choose" rule would discourage voluntarily negotiated agreements:

> The FCC's "pick and choose" rule . . . would thwart the negotiation process and preclude the attainment of binding negotiated agreements. During a negotiation, an incumbent LEC would be very reluctant to make a concession on one term in exchange for a benefit on another term when faced with the prospect that a subsequent competing carrier will be able to receive the concession without having to grant the incumbent the corresponding benefit.

See also *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 377 (recognizing the Eighth Circuit's criticism of the FCC's previous "pick and choose" rule as hindering voluntarily negotiated agreements because it made ILECs "reluctant to grant quids for quos, so to speak, for fear that they would have to grant others the quids without receiving quos.")

Curiously, T-Mobile argues that it should be able to challenge the very terms it seeks to adopt. For example, T-Mobile argues that it should be able exercise its "opt-in" rights at

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[4] *Id.*

[5] *See e.g.* Master Interconnection and Resale Agreement for the State of Missouri between Sprint Missouri, Inc. and Fidelity Communications Services I, Inc., §5.1 Term and Termination, approved in Case No. TK-2003-0569 on August 26, 2003.

the same time it "exercises its legal right to challenge [Complainants'] terms and conditions in a complaint proceeding."[6] T-Mobile's effort to have its cake and eat it too are inconsistent with federal law and Commission precedent. For example, when MCI sought to adopt the provisions of the agreement between AT&T and SWBT, the Commission stated:

> The Commission finds that MCI's adoption of the AT&T and SWBT agreement would constitute a waiver of MCI's right to seek judicial review of, or otherwise contest, the provisions of that agreement (as adapted to fit the parties and personnel of MCI).[7]

Such conduct is also prohibited by the "all or nothing" rule.[8] Thus, T-Mobile is prohibited from seeking to adopt the favorable provisions in an interconnection agreement while contesting the parts of the agreement it dislikes.

The cases cited in T-Mobile's December 21, 2004 letter either support Complainants' position or predate the FCC's adoption of the "all-or-nothing" rule.[9] Specifically, the Vermont case cited by T-Mobile only supports Complainants' position.[10] The Vermont court properly ruled that ILECs must offer "the same terms and conditions for interconnection and reciprocal compensation that the company offered to other carriers."[11] Here, Complainants are prepared to offer the same terms and conditions as they have offered Cingular Wireless, Sprint PCS, and Verizon Wireless, and these terms and conditions necessarily include the provisions regarding satisfaction and settlement for past due traffic.

The Vermont court was also correct in holding that one party could not unilaterally seek to modify the terms of the existing agreements, and the Commission should follow suit and reject T-Mobile's attempt to do so in this case. (*See e.g.* T-Mobile's suggestion that the settlement of past due traffic provision "could easily be removed" from the agreements in its December 21, 2004 letter, p. 6)

T-Mobile's most recent correspondence to the Commission in this case attempts to shift the focus to the settlement agreements rather than the settlement provisions in the agreements. For example, T-Mobile claims that the Commission "does not approve under Section 252(e) settlement agreements involving disputes over past traffic before an interconnection agreement takes effect,"[12] but this has nothing to do with the facts at hand. The key to this case is that the Commission has approved agreements that contain integral and necessary conditions resolving disputes over past traffic. This is true not just for the

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[6] T-Mobile letter of Dec. 21, 2004, pp. 5-6.

[7] In the Matter of the Mediation and Arbitration of Remaining Interconnection Issues between MCI and SWBT, Case No. TO-98-200, Order Regarding Motion to Extend Procedural Schedule, issued Mar. 11, 1998; see also Order Regarding Adoption Notice, issued Mar. 25, 1999 ("[I]f MCI were to file an adoption notice, the adoption would constitute a waiver of MCI's right to seek judicial review of, or otherwise contest, the provisions of the SWBT and AT&T agreement.")

[8] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, 2004 FCC LEXIS 3841, *Second Report and Order*, adopted July 8, 2004, ¶1 (emphasis added).

[9] For example, the 2000 Tennessee case cited by T-Mobile is of no value for the analysis in this case since it was issued before the FCC adopted the "all-or-nothing" rule.

[10] *In re Petition of Adelphia Business Solutions of Vermont, Inc.* 2004 Vt. LEXIS 354 (Aug. 20, 2004).

[11] *Id.* at *16.

[12] T-Mobile letter of Dec. 21, 2004, p. 3.

Complainants, but for other ILECs such as Sprint Missouri, Inc. The issue of settlement for past due amounts is a necessary condition in the existing Sprint PCS and Verizon Wireless agreements, not the approval of a separate settlement agreement.[13] In this case, the Complainants entered into agreements with Sprint PCS and Verizon Wireless that provided "quids for quos." T-Mobile is now attempting to receive the quids of those interconnection agreements without providing the Complainants with the quos of settlement for past traffic. T-Mobile's attempt to pick and choose from the agreements (by severing the requirement to settle past claims) violates the FCC's "all-or-nothing" rule.

II. The Sprint PCS and Verizon Wireless Agreements Are Not Discriminatory.

T-Mobile argues that the Complainants "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."[14] T-Mobile's argument fails because the settlement provision applies to all carriers that seek to adopt the agreement. Indeed, the Commission has already approved the Sprint PCS and Verizon Wireless agreements and found that those agreements do not discriminate against non-parties. **Perhaps even more telling is the fact that T-Mobile has already agreed to identical settlement and satisfaction provisions in its agreements with three other small Missouri ILECs.**[15] These agreements between T-Mobile and small ILECs have also been approved by the Commission.

If T-Mobile wants to adopt additional agreements, then T-Mobile must take the good with the bad and pay for its past due traffic just as Sprint PCS and Verizon Wireless have done. In this case, it is T-Mobile that seeks to discriminate against the Complainants by severing the critical provision about past due traffic and denying Complainants compensation for their facilities and services.

T-Mobile's attempt to receive more than $1,600,000 in free service is also discriminatory towards Missouri's other wireless carriers that pay their bills and play by the rules. None of Missouri's other major carriers refused to pay for post-tariff traffic. Any agreement that allows T-Mobile to avoid its responsibilities under Complainants' lawfully approved tariffs would discriminate against the rest of Missouri's other wireless carriers that paid for all of their post-tariff traffic under the tariff rates. In addition, the settlement agreements with Cingular Wireless, Sprint PCS, and Verizon Wireless addressed all pre-tariff traffic as well. Thus, T-Mobile's attempt to sever the satisfaction and settlement provision is both anti-competitive and discriminatory towards Missouri's other wireless carriers.

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[13] T-Mobile should be well aware of this fact because T-Mobile has already entered into separate agreements under the same provision that it objects to in this case with three other small Missouri ILECs: Goodman Telephone Company (Case No. TK-2004-0165); Ozark Telephone Company (Case No. TK-2004-0166); Seneca Telephone Company (Case No. TK-2004-0167).

[14] T-Mobile letter of Dec. 21, 2004, p. 5.

[15] *Application of Goodman Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0165, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003; *Application of Ozark Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0166, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003; *Application of Seneca Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0167, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003.

III. T-MOBILE'S "OPT-IN" LETTER IS PROCEDURALLY IMPROPER.

The Commission has previously held that agreements adopted pursuant to Section 252(i) must be submitted to the Commission for approval and explained "nothing in 252(i) would override Section 252(e)(1) of the Act, which requires that interconnection agreements be submitted for approval to the state commission."[16] But T-Mobile failed to submit a signed agreement in this case.

T-Mobile's purported "adoption" of Complainants' agreements was not accompanied by a proper pleading in accordance with the Commission's rules of practice. Instead, T-Mobile submitted a letter in an existing complaint case that has been pending before the Commission for over two years. Unlike other recent adoptions of interconnection agreements, T-Mobile failed to file a verified application or petition that would establish a new case and give notice to all interested parties. If the Commission does not reject T-Mobile's letter out of hand, then at the very least T-Mobile must amend its request with a proper pleading in a new and separate case.

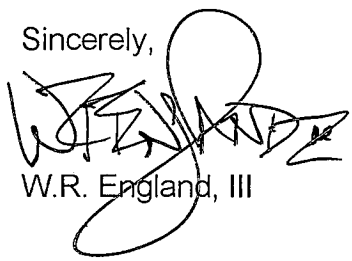
IV. IF T-MOBILE'S UNLAWFUL ATTEMPT TO "PICK-AND-CHOOSE IS NOT REJECTED OUTRIGHT, THEN COMPLAINANTS REQUEST A HEARING.

Complainants are willing to offer T-Mobile the same terms and conditions that Complainants have offered Missouri's other wireless carriers, but the Commission must reject T-Mobile's unlawful and procedurally improper attempt to "pick-and-choose" from Complainants' existing agreements by severing the provision about past due traffic. If the Commission does not summarily deny T-Mobile's attempt to "adopt" the agreements, then Complainants request a hearing on the matter.

VI. CONCLUSION

The Commission should reject T-Mobile's letter attempt to adopt the Sprint PSC and Verizon Wireless agreements as both unlawful and procedurally flawed. Alternatively, if the Commission does not reject T-Mobile's letter out of hand, then the STCG companies request that the Commission schedule a hearing to address the matter.

Sincerely,



W.R. England, III

WRE/da

cc: Judge Kevin Thompson
Mark Johnson
Mike Dandino
Leo Bub
Bill Haas

[16] *In the Matter of the Adoption of the GTE/Comm. Cable-Laying Co. dba Dial US Interconnection Agreement by Teleport Comm. Group*, Case No. TO-99-94, *Order Denying Motion to Reject*, issued Nov. 25, 1998.