

**BEFORE THE PUBLIC SERVICE COMMISSION  
STATE OF MISSOURI**

<b>In the Matter of the Petition of</b>	)	
<b>Alma Telephone Company</b>	)	
<b>for Arbitration of Unresolved</b>	)	<b>Case No. IO-2005-0468, et al.</b>
<b>Issues Pertaining to a Section 251(b)(5)</b>	)	<b>(consolidated)</b>
<b>Agreement with T-Mobile USA, Inc.</b>	)	

**Petitioners' Comments on Arbitrator's September 9, 2005 Draft Report**

Petitioners present three issues with respect to the Draft Report they wish to comment upon, or for which they request clarification. These issues are organized as follows:

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|----------|---|
| Issue 1. | Must Petitioners compensate Respondent for landline-to-mobile intraMTA calls? <sup>1</sup>  |
| Issue 2. | If the decision with respect to Issue 1 above is not changed in Petitioner's favor, the Draft Report should be modified to clarify that T-Mobile will also be responsible to compensate Petitioners for mobile-to-landline calls carried by IXC's and terminating to Petitioners.   |
| Issue 3. | If the decision with respect to Issue 1 above is not changed in Petitioners' favor, the Draft Report should be modified to clarify that the interMTA traffic resulting from the application of interMTA factors adopted by the Draft Report should be subtracted before applying the 65%/35% "Net Billing" mechanism adopted by the Draft Report. |

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<sup>1</sup> The Draft Report, at page 7, enumerated this issue as Issue 3.

## Comments

Issue 1. Must Petitioners compensate Respondent for landline-to-mobile intraMTA calls?

Petitioners agree that the Arbitrator must “defer to the FCC’s view” of reciprocal compensation, and apply that federal regime.<sup>2</sup> Petitioners agree with FCC Rule 47 CFR 51.701 that intraMTA calls “between a LEC and a CMRS provider” are subject to reciprocal compensation. Where Petitioners part with the Arbitrator is in his interpretation of that FCC view. IXC traffic is not traffic “between a LEC and a CMRS provider”.

Petitioners believe the Arbitrator, and the court decision the Draft Report relies upon, misunderstand the rules and tariffs that govern relationships between end users, LECs, CMRS providers, and IXCs. This misunderstanding of the fundamental workings on the telecommunications industry, both before and after the Act, has led to a misunderstanding of whether IXC traffic is traffic “between LECs and CMRS providers”. The Missouri Public Service Commission in a series of orders has understood these relationships correctly and has previously issued correct decisions<sup>3</sup>. The key points of these relationships are as follows<sup>4</sup>:

1. End users are customers of the rural ILECs for local service. End users of the Petitioners are not customers of the ILEC for toll service, they are customers of the IXCs who they choose through the presubscription process to be their “toll” carrier.

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<sup>2</sup> Draft Report, page 16.

<sup>3</sup> See the Petitioners’ listing of these MoPSC decisions in their post-hearing brief.

<sup>4</sup> Exhibit 8, Schoonmaker Direct, pages 31-48; Exhibit 9, Schoonmaker Rebuttal, pages 31-32.

2. The ILECs' local tariffs approved the Missouri Public Service Commission determine the areas in which calls are local calls. All calls outside of these areas are "toll" calls which by the FCC's presubscription rules must be carried by the end user's presubscribed IXC.
3. End users purchase "toll services" from their IXC of choice and pay the "toll" carrier for those services under the IXCs toll tariffs or price schedules.
4. IXC's purchase the use of ILEC facilities to provision IXC toll services to the IXCs end users in the ILEC exchanges.
5. Thus a call dialed with 1+, and carried by an IXC, is a call from an IXC end user to the CMRS provider. It is a call between an IXC and a CMRS provider. These calls do not meet the reciprocal compensation rules' definition as telecommunications traffic exchanged between a LEC and a CMRS provider.

The FCC's view, as expressed in the *Local Competition First Report and Order*<sup>5</sup>, is that IXC traffic is access traffic, not reciprocal compensation traffic. Missouri approved interconnection agreements do not treat IXC traffic as reciprocal compensation traffic.<sup>6</sup> The Draft Report would change this to apply reciprocal compensation to IXC

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<sup>5</sup> August 6, 1996 First Report and Order in CC Docket No. 96-98 and 95-185.

<sup>6</sup> At hearing, T-Mobile admitted SBC, the largest ILEC in Missouri, does not pay reciprocal compensation for IXC traffic. Tr. 263. SBC is the entity in Missouri with by far the most experience with reciprocal compensation. SBC has numerous negotiated and renegotiated interconnection agreements with CMRS providers, including T-Mobile. Yet in those agreements, approved by this Commission, SBC does *not* pay reciprocal compensation for IXC traffic. This strongly suggests that, contrary to the language of the Draft Report, that excluding IXC traffic is not a "new exception". It suggests that Petitioners are correct, and that IXC traffic is not reciprocal compensation traffic.

traffic. Such a result has the potential to dramatically affect future negotiations and agreements concerning the large ILECs operating in Missouri.<sup>7</sup>

Contrary to the Draft Report, Petitioners do not ask the Arbitrator to create a “new exception” to the reciprocal compensation regime. Petitioners ask that the scope of reciprocal compensation, as established by the FCC, continue to be applied to *exclude* IXC traffic from reciprocal compensation.

The Draft Report indicates it is well settled that landline to wireless IXC traffic is reciprocal compensation traffic. Petitioners disagree. The FCC’s *Local Competition First Report and Order* must be reviewed in order to understand that the reciprocal compensation rules were not intended to apply to IXC traffic. The Draft Report fails to engage in such a review.

The Draft Report relies on four cases. Two of those cases did not address IXC traffic. They addressed toll traffic transited by RBOCs providing intraLATA toll services. Petitioners here do not provide. Two of the cases did address IXC traffic, but they did so erroneously. Neither those two cases, nor the Draft Report, correctly analyzed the relationships between end users, LECs, CMRS providers, and IXCs. The Draft Report also fails to consider precedent from the 8<sup>th</sup> Circuit Court of Appeals which correctly recognizes that access, not reciprocal compensation, was preserved by the Act and reciprocal compensation rules for IXC traffic.

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<sup>7</sup> It is not clear from the Draft Report whether IXC traffic would be subject to both access and reciprocal compensation, or whether reciprocal compensation would replace access compensation. If the latter is to be the case, there will be significant revenue losses to LECs, significant new compensation expenses for LECs, and unrequested access cost savings to IXCs.

Before visiting the FCC *Local Competition First Report and Order*, reciprocal compensation rules, and the case law, Petitioners direct the Arbitrator to a recent Notice issued by the FCC. Petitioners believe the language of the FCC displays the current view that IXC traffic is not reciprocal compensation traffic.

The FCC issued a Further Notice of Proposed Rulemaking in the *Matter of Developing a Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92, Released March 3, 2005. Paragraphs 120-134 discuss the issues of the MTA rule, reciprocal compensation, and whether reciprocal compensation should be applied to IXC traffic. In particular, at paragraphs 136-138 the FCC indicated it was aware of these issues, and wanted further comment. Paragraph 136 and excerpts from paragraph 138 are set forth here. These paragraphs contain phrases and sentences, underlined below, that seem to confirm the FCC view that currently IXC traffic is access traffic, not reciprocal compensation traffic:

“2. CMRS Issues

The IntraMTA Rule

136. ....Can these methods be applied to transited traffic, such that terminating incumbent LECs will be able to distinguish reliably between terminated traffic subject to reciprocal compensation (for which they will charge the CMRS carriers) and access traffic (for which they would presumably charge the IXC)? We seek comment on these questions.
138. For instance, we recognize that the current Commission rules may require that intraMTA calls dialed on a 1+ basis be routed through IXCs. Specifically, section 51.209 of the Commission’s rules requires LECs to implement toll dialing parity through a presubscription process that permits a customer to select a carrier to which all designated calls on a customer’s line will be routed automatically. Should this rule be changed? We ask parties to explain what technical or network changes would be needed if all intraMTA CMRS traffic were routed to CMRS providers. We also seek comment on whether, in the alternative, all intraMTA calls can be *made* subject to reciprocal compensation without requiring LECs to alter the routing of their originated traffic. We ask

parties supporting a particular approach to address any other Commission rules that may be implicated.”

As the FCC stated it would be necessary to *change* its access/reciprocal compensation regimes to make IXC traffic subject to reciprocal compensation, this suggests that IXC traffic currently is not subject to reciprocal compensation.<sup>8</sup>

At paragraph 17 of this NPRM, the FCC described the current structure of the access and reciprocal compensation regimes:

“17. Third, under the existing regimes, the calling party’s carrier, whether LEC, IXC, or CMRS provider, compensates the called party’s carrier for terminating the call.”

With IXC traffic the IXC is the calling party’s carrier. The IXC is the carrier that bills the calling party for the call. The IXC is the calling party’s carrier that compensates the called party’s carrier. The Draft Report would make Petitioners, who are not the calling party’s carrier, compensate the called party’s carrier.

Paragraphs 1033 and 1034 of the FCC *Local Competition First Report and Order* reveal that IXC traffic was not intended by the FCC to be reciprocal compensation traffic. These paragraphs contain the FCC’s distinction between the new “transport and termination” rules (for local reciprocal compensation traffic) and the existing access

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<sup>8</sup> There are other paragraphs of the FCC NPRM suggesting that the current treatment of IXC traffic is access traffic. At paragraph 99 of this NPRM, the FCC asked for comment on what type of new mechanisms should be adopted to “reduce or eliminate” the ability of LECs to impose access charges on IXCs. This FCC language indicates the FCC’s view that currently LECs charge access for IXC traffic. At paragraph 116 of the NPRM, the FCC recognized that under the access charge regime, compensation for access services are set forth in tariffs, and reciprocal compensation is governed by interconnection agreements. Currently LECs charge for IXC traffic from tariffs, yet the Draft Report would have LECs and CMRS providers charging for IXC traffic from interconnection agreements.

rules. First, the FCC concluded in paragraph 1033 that the new “transport and termination” rules did not replace the access rules:

“The Act preserves the legal distinction between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic.”

This conclusion was repeated by the FCC at the end of paragraph 1034:

“Pursuant to section 251(g), LECs must continue to offer interstate access services just as they did prior to enactment of the 1996 Act. We find that the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic.”

The FCC determined that reciprocal compensation rules do not apply to interexchange or access traffic. The FCC recognized the access rules apply to IXC traffic, therefore IXC traffic is not subject to reciprocal compensation.

The FCC recognized earlier in paragraph 1034 that in the access regime, the caller pays the IXC long-distance charges, and the IXC pays both the originating and terminating LEC for access service. The FCC contrasted this with the new regime for reciprocal compensation. In the reciprocal compensation regime the local caller pays charges to the originating carrier and the originating carrier must compensate the terminating carrier.

These paragraphs of the FCC *Local Competition First Report and Order* command the following conclusions: First, access and reciprocal compensation are separate and distinct, both cannot apply to the same call; Second, the existing access regime was retained intact pursuant to 251(g); Third, when the caller pays toll charges to the IXC, the access regime applies to that call, and the IXC pays the LEC and CMRS carriers; and Fourth, when the caller pays his LEC or CMRS provider for a local call,

reciprocal compensation applies, and the originating carrier must pay the terminating carrier.

In 2000, four years after issuing the *Local Competition First Report and Order*, the FCC repeated the conclusion that IXC traffic is not subject to reciprocal compensation, but falls under access rules<sup>9</sup>:

Pursuant to Section 51.703(b), a LEC may not charge CMRS providers for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA, as this constitutes local traffic under our rules. **Such traffic falls under the reciprocal compensation rules if carried by the incumbent LEC, and under our access charge rules if carried by an interexchange carrier.**

There is no mistaking this underscored language. Access charges apply to IXC traffic, not reciprocal compensation.

Consistent with the decision that IXC traffic is not reciprocal compensation traffic, the FCC has ruled that IXCs are responsible to pay CMRS providers access compensation for IXC provisioned traffic<sup>10</sup>.

These conclusions should be kept in mind in interpreting the FCC reciprocal compensation rule 47 CFR 51.701. The Draft Report does not evaluate the *Local Competition First Report and Order*. The Draft Report recites the wording of FCC Rules 51.701, but does not analyze whether this rule is correctly applied to IXC traffic. The Draft Report also relies upon four cases from foreign jurisdictions. Two of those cases are not applicable, as they do not address IXC traffic. The other two cases, like the Draft

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<sup>9</sup> *TSR Wireless, LLC v. U S West Communications, Inc.*, Memorandum Opinion and Order, Released June 21, 2000 FCC 00-194 (“*TSR Wireless Order*”), paragraph 31.

<sup>10</sup> See *In the Matter of Sprint PCS and AT&T's Petitions for Declaratory Ruling on CMRS Access Charge Issues*, WT Docket No. 01-316, Declaratory Ruling, 2002 FCC LEXIS 3262, released July 3, 2002.



Report, suffer from the failure to interpret and apply the *Local Competition First Report and Order* and FCC rules with respect to IXC traffic.

### **Statute**

The Draft Report initially relies upon Petitioner's § 251(b)(5) "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications". Petitioners agree they have this duty. But the existence of this duty does not answer the question of whether landline to mobile IXC traffic is subject to reciprocal compensation.

### **Rule 701**

The Draft Report next turns to FCC Rule 51.701, which in subpart (2) defines telecommunications traffic as that *exchanged between a LEC and a CMRS provider* that, at the beginning of the call, originates and terminates within the same Major Trading Area. The Draft Report fails to consider whether IXC traffic meets the "exchanged between a LEC and a CMRS provider" requirement of this definition.

The word "exchanged" is a term of art used by the FCC to denote reciprocal compensation traffic. Reciprocal compensation was intended for two interconnected competitors who compete for local customers. The term "exchanged" refers to a swapping of local traffic originated by either the LEC or the CMRS provider, and that each reciprocally delivers to the other to terminate.

The term "exchanged" has no application or meaning with respect to IXC traffic. As explained above, the IXC offers toll to the end user, receives toll revenue from the end user, and pays the LEC and CMRS provider to originate and terminate the call. The IXC provides service to the customer, the LEC does not. The IXC provides the 1+ call, the

LEC does not. The IXC is not competing with the LEC or the CMRS provider for local service, it is providing toll service. The IXC has no local traffic to “exchange” with the LEC or CMRS provider. The IXC purchases the use of LEC facilities to originate the call, and uses the CMRS facilities to terminate the call. The IXC is not terminating local traffic “exchanged” with another carrier. IXC traffic is not “exchanged between a LEC and CMRS provider”. As IXC traffic fails to meet the definition of reciprocal compensation traffic found in rule 701, the traffic at issue here is not subject to reciprocal compensation.

Rule 51.701(e) further defines reciprocal compensation as an ***“arrangement between two carriers in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier’s network facilities of telecommunications traffic that originates on the network facilities of the other carrier”***.

The Draft Report fails to apply this definition to IXC traffic. IXC traffic does not meet this definition. IXC traffic is not handled pursuant to an arrangement; it is handled pursuant to tariff. With respect to IXC traffic, there is no compensation flowing to each of the two carriers. The IXC pays compensation. It does not receive compensation from another carrier. The IXC receives its compensation from its toll customer which pays the IXC its toll charges. IXC traffic does not meet the definition of reciprocal compensation found in Rule 51.701(e).

## Precedent

The Draft Report relies almost exclusively upon the conclusion from the “*Atlas*” decision<sup>11</sup> that “the mandate expressed in these provisions is clear, unambiguous, and on its face admits of no exceptions”<sup>12</sup>. The Draft Report also cites *WWC License*<sup>13</sup>, *Rural Iowa*<sup>14</sup>, and *3 Rivers*<sup>15</sup>. *Rural Iowa* and *3 Rivers* do not concern IXC traffic. *Atlas* and *WWC License* do. However the analysis of *Atlas* and *WWC License* are incomplete and wrong. None of these decisions from Oklahoma, Nebraska, Iowa, and Montana are binding in Missouri. None of these decisions is from the 8<sup>th</sup> Circuit. The only precedent from the 8<sup>th</sup> Circuit, the *Comptel* case, supports Petitioners.

### *Comptel*

Precedent is found in the 8<sup>th</sup> Circuit United States Court of Appeals. *Comptel v FCC*, 117 F.3d 1068 (1997) specifically held that the FCC’s refusal to subject IXC traffic to the reciprocal compensation regime was lawful:

“..it is clear from the Act that Congress did not intend all access charges to move to cost-based pricing, at least not immediately. The Act plainly preserves certain rate regimes already in place. (references to Section 251(g) omitted) ....In other words, the LECs will continue to provide exchange access to IXCs for long-distance service, and continue to receive payment, under the pre-Act regulations and rates.....Comptel also challenges the FCC’s interpretation of interconnection as having a discriminatory impact, by permitting LECs to charge different rates for the same service based on whether the carrier who is seeking interconnection and other network services is a long-distance provider or a local

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<sup>11</sup> *Atlas Telephone v Oklahoma Corporation Comm’n*, 400 F. 3d at 1264.

<sup>12</sup> Draft Report Recommended Award, page 17.

<sup>13</sup> *WWC License v Anne C. Boyle, et al.*, No. 4:03CV3393, slip op at 5-6 (D.C. Neb., Jan 20, 2005).

<sup>14</sup> *Rural Iowa Independent Telephone Ass’n v Iowa Utilities Board*, No. 4:02-cv-40348.

<sup>15</sup> *3 Rivers Telephone v U.S. West*, 2003 U.S. Dist. LEXIS 24871 \*67.

service provider. But the two kinds of carriers are not, in fact, seeking the same services. The IXC is seeking to use the incumbent LEC's network to route long-distance calls and the newcomer LEC seeks use of the incumbent LEC's network in order to offer a competing local service."

*Comptel* confirms that the FCC's *Local Competition First Report and Order*, and Rules, intended to keep access for IXC traffic separate and distinct from reciprocal compensation.

### ***Other Cases***

With respect to two of the cases the Draft Report cites from other jurisdictions, these cases do not address IXC traffic, they concern transit traffic of ILECs.

### **3 Rivers**

The *3 Rivers* case was a dispute between RBOC Qwest and terminating rural telephone companies. The traffic under scrutiny was not IXC traffic, it was traffic Qwest delivered, both landline and CMRS originated. The court ruled that Qwest was not responsible to pay the terminating LECs for CMRS originated traffic. The *3 Rivers* case has nothing to do with IXC traffic, and is not authority on point with respect to the issue under consideration here.

### **Rural Iowa**

The *Rural Iowa* case was also a dispute between rural ILECs and an RBOC with respect to transited traffic. The case addresses CMRS traffic transited by Qwest to rural ILECs in Iowa. There is no discussion in the case concerning landline to mobile IXC traffic. In fact, the Iowa Utility Board and the Court specifically determined that Qwest was not acting as an IXC with respect to the LEC-transited traffic at issue. See *Rural Iowa*, pages 20, 50. The Court in *Rural Iowa* found that for IXC traffic the IXC pays

access charges to LECs. See page 26, footnote 30, which cites paragraph 1034 of the Local Competition Order (which the Draft Report fails to evaluate). *Rural Iowa* has nothing to do with IXC traffic, and is not authority on point with respect to the issue under consideration here.

### Atlas

In *Atlas*, the 10<sup>th</sup> Circuit premised its decision on the conclusion that landline to mobile IXC calls first pass from the rural telephone company *network* to the IXC. The Court then simply concluded this traffic was subject to reciprocal compensation. The Court failed to evaluate paragraph 1034 of the *Local Competition First Report and Order* which retained access compensation for IXC traffic. *Atlas* failed to consider whether the IXC traffic met the definition of Rule 701. The Court also failed to analyze whether IXC traffic is “exchanged” between Petitioners and T-Mobile, as opposed to the IXC and T-Mobile, as required by Rule 701. The *Atlas* case also fails to recognize or consider *Comptel*.

*Atlas* simply does not address the arguments and evidence of Petitioners. By relying upon *Atlas*, the Draft Report fails to address the arguments and evidence of Petitioners as well.

### WWC License

The Nebraska District Court in *WWC License* relied upon the authority of the *Atlas* decision. There is no analysis of the arguments presented by Petitioners here. WWC License lends nothing to the analysis above and beyond that of *Atlas*.

Issue 2. If the decision with respect to Issue 1 above is not changed in Petitioner's favor, the Draft Report should be modified to clarify that T-Mobile will also be responsible to compensate Petitioners for mobile-to-landline calls carried by IXC and terminating to Petitioners.

If the Arbitrator rejects Petitioners' arguments with respect to Issue 1, the Draft Report should be modified to clarify that Petitioners are entitled to reciprocal compensation from T-Mobile for mobile-to-landline IXC traffic.

Issue 3. If the decision with respect to Issue 1 above is not changed in Petitioners' favor, the Draft Report should be modified to clarify that the interMTA traffic resulting from the application of interMTA factors adopted by the Draft Report should be subtracted before applying the 65%/35% "Net Billing" mechanism adopted by the Draft Report.

The Draft Report resolved issue 6 in favor of Chariton Valley, Mid-Missouri, and Northeast. InterMTA traffic factors of 26%, 16%, and 22.5% were awarded. The Draft Report resolved issue 10 in T-Mobile's favor, and imposed a 65%/35% net billing for intraMTA traffic.<sup>16</sup> Petitioners desire clarification of the precise steps to be taken under these factors and the net billing mechanism. Petitioners would prefer to address this now rather than risk a dispute after this arbitration is concluded.

Net billing begins its calculation by dividing the traffic terminating on SBC trunks by 65% to determine the total intraMTA traffic exchanged between both parties. The net

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<sup>16</sup> With respect to Draft Report Issue 6, the Arbitrator accepted Petitioners' interMTA factors in part because T-Mobile offered no empirical studies or appropriate surrogates. The Draft Report also criticized T-Mobile for failing to produce data requested by Petitioners. Draft Report, pages 11-12. T-Mobile also refused to provide Petitioners data with respect to IXC traffic. See Tr. 257. Yet the Draft Report accepts the 65-35% balance of traffic even though T-Mobile failed to provide data that would have allowed this proportion to be confirmed.

billing proposal is not intended to apply to interMTA traffic. Petitioners believe that the traffic produced by applying the interMTA factor times the total SBC trunk traffic should first be calculated. After the wireless to landline interMTA traffic is calculated, the interMTA traffic should be subtracted from the total traffic on the SBC trunk to produce the total of intraMTA traffic. That total intraMTA traffic quantity should then be divided by 65% to arrive at the total intraMTA traffic being reciprocally exchanged between both parties. Then 65% of that total intraMTA traffic can be allocated to T-Mobile, 35% to the Petitioner, and the difference net billed.

WHEREFORE, Petitioners respectfully request that the Draft Report be modified to remove landline to wireless IXC traffic from the scope of the arbitrated agreements. In the alternative, Petitioners request that the Draft Report be modified to clarify that access will continue to apply to such IXC traffic, and that the approved interMTA factors be applied to SBC trunk traffic to first determine the amount of interMTA traffic, which should then be subtracted from total traffic to determine the total intraMTA traffic subject to net billing.

/s/

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was emailed this 16th day of September, 2005, to the following representatives of Respondent:

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