BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of Petition for Arbitration of Unresolved Issues in a Section 251(b)(5) Agreement With T-Mobile USA, Inc.	))))	Case No. TO-2006-0147

MEMORANDUM OF T-MOBILE USA IN SUPPORT OF ITS MOTION FOR SUMMARY DETERMINATION ON ISSUE E OF THE ARBITRATION PETITION

Comes now Respondent T-Mobile USA, Inc. ("T-Mobile"), and submits this legal memorandum in support of its motion for summary determination on Issue E of the Petition.

I. T-MOBILE IS ENTITLED TO SUMMARY DETERMINATION BECAUSE THE COMMISSION HAS DECIDED THIS ISSUE OF LAW

The Petitioners contend in Issue E that they do not have to compensate T-Mobile for the cost of completing land-to-mobile calls. To use their words, they argue that they have "no obligation to pay reciprocal compensation on landline traffic [intraMTA] terminated to Respondent by third party carriers (such as IXCs) where that traffic is neither originated by, nor the responsibility of, Petitioners." Arbitration Petition at 9. They err as a matter of law. The Arbitrator should enter summary determination in T-Mobile's favor.

Summary determination is appropriate where no genuine issue of material fact remains for hearing and one of the parties is entitled to determination as a matter of law." *Commission Staff* v. *Lockheed Martin Global Telecommunications Services*, Case No. TC-2004-0415, Order Granting Motion for Summary Disposition, at 2 (Nov. 2, 2004). *See also* 4 CSR 240-2.117(E). Summary determination is appropriate because no genuine issues of material fact remain and the Commission has already decided the legal question presented in Issue E.

In this case, there are two facts material to resolution of Issue E, and neither is contested by the parties:

> (a) Persons served by the Petitioners' networks originate intraMTA calls to T-Mobile; and
>
> (b) The Petitioners route some of these calls to an IXC.

See, e.g., Small Telephone Company Group's Application for Rehearing, *In the Matter of the Petition of Alma Telephone Company for Arbitration of Unresolved Issues Pertaining to a Section 251 Agreement with T-Mobile USA, Inc*., Docket Nos. IO-2005-0468 *et al.* ("the *Alma/T-Mobile Arbitration*"), at 5 ("[V]irtually all traffic from rural LECs to wireless carriers is dialed on a '1+' basis and carried by an IXC.."). As the relevant facts are admitted, issue E, therefore, is solely an issue of law. In its October 6, 2005 Report in the *Alma/T-Mobile Arbitration,* the Commission ruled upon the scope of an ILEC's reciprocal compensation obligation under federal law, holding that all intraMTA calls are subject to reciprocal compensation, including land-to-mobile calls that the ILEC's network hands off to an IXC for delivery to T-Mobile.

In the *Alma/T-Mobile Arbitration* the rural LEC petitioners made the same argument that the Petitioners make here. The Commission squarely rejected this contention:

> Although federal appellate courts have held that the "mandate expressed in these [reciprocal compensation] provisions is clear, unambiguous, and on its face admits of no exceptions," Petitioners nonetheless ask the Commission to create a new exception. Specifically, the claim that they should be excused from paying reciprocal compensation for intraMTA traffic they deliver to interexchange carriers ("IXCs"). But the Commission may not rewrite or ignore FCC rules. * * * [*T]hese [FCC reciprocal compensation] rules apply to all intraMTA traffic exchanged between a LEC and a wireless carrier*.

Id., at 16 and 21 (emphasis added)(supporting citations omitted).

Notably, the Petitioners in this proceeding are repeating the very same arguments they themselves made several times in the *Alma/T-Mobile Arbitration*. *See* Small Telephone

Company Group's Comments on the Arbitrator's Draft Report, at 3-14 (Sept. 19, 2005); Small Telephone Company Group's Comments on the Arbitrator's Final Report, at 4-15 (Sept. 27, 2005); Small Telephone Company Group's Application for Rehearing, at 3-14 (Oct. 7, 2005). They are merely repeating the unsuccessful arguments they and the Alma petitioners made in the prior proceeding.

The Commission has already decided the question raised in Issue E. The Petitioners make no arguments here that were not presented in the *Alma/T-Mobile Arbitration*. Summary determination in T-Mobile's favor is both necessary and appropriate.

II. THE PETITIONERS UTTERLY FAIL TO DEMONSTRATE THAT THE COMMISSION'S DECISION CONTRAVENES FCC RULES

The Petitioners' basic position must be that their reciprocal compensation obligation depends on whether they rate their customer calls as local or toll and, furthermore, that land-to-mobile intraMTA toll calls are excluded from their reciprocal compensation obligation. However, as the Commission correctly found in the *Alma/T-Mobile Arbitration*, this position cannot be squared with the plain language of FCC rules (which have been affirmed on appeal).

FCC Rule 51.701(b)(2) defines the geographic scope of the Petitioners' reciprocal compensation obligation:

> For purposes of this subpart, telecommunications traffic means: . . . (2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in Sec. 24.202(a) of this chapter.

47 C.F.R. § 51.701(b)(2). As the Commission has correctly recognized, in quoting the Arbitrator's Final Report in the *Alma/T-Mobile Arbitration*, "The MTA's geographic boundary, and nothing else, determines whether reciprocal compensation applies." *Alma/T-Mobile Arbitration Report* at 16-17 (emphasis omitted).

If the Petitioners contend that this intraMTA rule should not apply to the intraMTA traffic they send to an IXC because it is the IXC that has the "business relationship" with the customers originating these calls and because this traffic is the "responsibility of" the IXC, their arguments must again fail. The FCC rules do not limit a LEC's reciprocal compensation duty to only those calls where a LEC has what the Petitioners define as a "business relationship" with the calling party. Rather, the determining question under FCC rules is whether the traffic originates on a LEC's network – regardless of whether a LEC or an IXC is "responsible" for this traffic:

- FCC Rule 51.701(3) makes clear that a LEC's reciprocal obligation applies to "traffic that *originates on the network facilities* of the other carrier," not whether the LEC for retail rating purposes classifies customers' calls as local or toll; and
- FCC Rule 20.11(b)(1) further makes clear that a LEC's reciprocal compensation obligation applies to "traffic that *originates on the facilities of the local exchange carrier*," again whether or not the LEC classifies this traffic as local or toll.

47 C.F.R.§ 51.701(e)(emphasis added); 47 C.F.R. § 20.11(b)(1)(emphasis added).

Moreover, the "IXC exception" that the Petitioners want to create for FCC Rule 51.701(b)(2), applicable to LEC-CMRS traffic, already exists in Rule 51.701(b)(1), applicable to LEC-LEC traffic:

> For purposes of this subpart, telecommunications traffic means: (1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, *except for telecommunications traffic that is interstate or intrastate exchange access,* information access, or exchange services for such access (see FCC 01-131, paragraphs 34, 36, 39, 42-43).

47 C.F.R. § 51.701(b)(1)(emphasis added). The only reasonable conclusion that can be drawn by comparing Rules 51.701(b)(1) and (b)(2) is that the FCC deliberately decided not to include in Rule (b)(2) the "access (or IXC) exemption" contained in Rule (b)(1).[1]

Even if a credible argument could be made that governing FCC rules are ambiguous (and no such argument can be made), the FCC removed any possible ambiguity in 2001 when it amended its reciprocal compensation rules to delete the reference to "local" traffic, explaining that the word "created unnecessary ambiguities."[2] This FCC rule amendment further confirms that a LEC's reciprocal compensation obligation is not limited to traffic that the LEC would unilaterally characterize as "local."

Finally, the FCC has ruled in complaint cases (also affirmed on appeal) that a LEC's reciprocal compensation obligations apply even if the LEC treats its customers' calls as toll.[3] And, as this Commission recognized in the Alma/T-Mobile Arbitration, "[e]very federal court

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[1] *See, e.g., Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 400 F.3d at 1265 ("Significantly, the [FCC] did not carry forward that same exception into regulation 51.701(b)(2), the operative definition in this case. We agree with the district court's conclusion that the FCC was undoubtedly aware of issues arising when access calls are exchanged, yet is chose not to extend a similar exception to LEC-CMRS traffic."); *id.* at 1266 ("We will not ignore the clear distinction drawn by the agency.").

[2] *See Implementation of the Local Competition Provisions of the Act,* 16 FCC Rcd 9151, 9173 ¶ 46 (2001). *See also Virginia Arbitration Order,* 17 FCC Rcd 27039, 27190 ¶ 315 (2002)("Verizon is correct: the Commission did find that use of the phase 'local traffic' created unnecessary ambiguities. Instead, the Commission has used the term 'section 251(b)(5) traffic' to refer to traffic subject to reciprocal compensation. . . . Accordingly, we direct the parties to substitute the term 'section 251(b)(5) traffic' where the term 'Local Traffic" appears in section 4.2.").

[3] *See, e.g., TSR Wireless* v. *U S WEST,* 15 FCC Rcd 11166, 11185 ¶ 34 (2000)("For example, to the extent the Yuma-Flagstaff T-1 is situated entirely within an MTA, does not cross a LATA boundary, and is used solely to carry U S West-originated traffic, U S West must deliver the traffic to TSR's network without charge [pursuant to the reciprocal compensation rules]. However, nothing prevents U S West from charging its end users for toll calls completed over the Yuma-Flagstaff T-1."), *aff'd, Qwest* v. *FCC,* 252 F.3d 462 (D.C. Cir. 2001).

that has considered the issue has reached the same conclusion." *Alma/T-Mobile Arbitration Report* at 17.[4]

In their pleadings in the *Alma/T-Mobile Arbitration*, the Petitioners failed to address any of these FCC rules and decisions in accusing the Commission of "misreading and misapplying FCC rules." Instead, they asked the Commission ignore these FCC rules (affirmed on appeal) and reach a different decision based on two "snippets." The Commission rejected that request. *Alma/T-Mobile Arbitration Report* at 16 ("[T]he Commission may not rewrite or ignore FCC rules.").

The first "snippet" upon which the Petitioners might again rely in this proceeding is a single sentence from an FCC notice of proposed rulemaking ("NPRM").[5] The Petitioners would

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[4] *See Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 400 F.3d at 1264 ("Nothing in the text of these provisions provides support for the RTC's contention that reciprocal compensation requirements do not apply when traffic is transported on an IXC network."), *aff'g Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 309 F. Supp. 2d 1299, 1309-10 (W.D. Okla. 2004)("The court concludes that the Oklahoma Corporation Commission did not err when it ruled that reciprocal compensation obligations apply to all calls originated by an RTC and terminated by a wireless provider within the same major trading area, *without regard to whether those calls are delivered via an intermediate carrier*.")(emphasis added); *WWC License* v. *Anne C. Boyle, et al*., No. 4:03CV3393, Slip op. at 5-6 (D. Neb., Jan. 20, 2005)("Under this rule [51.701(b)], reciprocal compensation obligations apply to *all* calls originated by Great Plains [a rural LEC] and terminated by Western Wireless within the same MTA, *regardless of whether the calls are delivered via an intermediate carrier* such as Qwest. Thus, as a matter of federal law, the Commission erred in ruling that Great Plains owed no reciprocal compensation to Western Wireless for calls originated by Great Plains and terminated by Western Wireless within the same MTA, *whether or not the call was delivered via an intermediate carrier*.")(emphasis added); *Rural Iowa Independent Telephone Ass'n* v. *Iowa Utilities Board*, 385 F. Supp. 2d 797 (S.D. Iowa 2005)(Federal court affirms Iowa Utility Board decision holding that bill-and-keep should be applied to all intraMTA traffic, including traffic delivered to an intermediate carrier.); *3 Rivers Telephone* v. *U.S. WEST*, CV-99-80-GF-CSO, 2003 U.S. Dist. LEXIS 24871 *67 (D. Mont., Aug. 22, 2003)("[T]raffic between an LEC and CMRS network that originates and terminates in the MTA is local and, therefore, subject to reciprocal compensation rather than access charges. *The FCC order makes no distinction between such traffic and traffic that flows between a CMRS carrier and LEC in the same MTA that also happens to transit another carrier's facilities prior to termination*.")(emphasis added).

have the Commission believe that in a single sentence in a lengthy NPRM (over 115 single-spaced pages and containing over 220 paragraphs), the FCC modified rules affirmed on appeal, vacated FCC decisions applying those rules, and determined that federal courts had uniformly misapplied FCC rules. Of course, the FCC did nothing of the kind. Indeed, the very purpose of an NPRM is to explore possible modification to existing rules.

The second "snippet" to which the Petitioners might point is a two-sentence footnote contained in a recent order by a Missouri federal court – a footnote that contains no legal authority.[6] This footnote is at best dicta, as it is not necessary to the decision. Moreover, that order contains many factual errors (*e.g.*, rural LECs receive no compensation when they terminate calls from T-Mobile customers that T-Mobile delivers to an IXC), which is in part why T-Mobile is considering appealing that federal district court decision to the Eighth Circuit Court of Appeals.

The Petitioners accuse the Commission of "misreading and misapplying FCC rules" – yet they never cite or quote these rules in making this argument. The reason for this omission is understandable. As the Commission has observed, FCC rules are "clear, unambiguous, and on [their] fact, admit of no exceptions." *Alma/T-Mobile Arbitration Report* at 16, quoting *Atlas Telephone v. Oklahoma Comm'n*, 400 F.3d at 1264. The Petitioners present no compelling reason for the Commission to revisit its determination of this issue in the *Alma/T-Mobile Arbitration*. The Commission has already decided the question raised in Issue E, and the Commission should grant summary determination of Issue E in T-Mobile's favor.

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[5] *See* STCG Rehearing Petition at 7-8 ¶ 8, *quoting Unified Intercarrier Compensation Further NPRM*, 20 FCC Rcd 4685, 4745 ¶ 138 (2005)(last sentence).

[6] *See* STCG Rehearing Petition at 2 ¶ 2 and 15 ¶ 15, *quoting VoiceStream PCS, d/b/a T-Mobile* v. *BPS Telephone, et al.*, Case No. 05-04037-CV-C-NKL, Slip. Op. at 3 n.3 (W.D. Mo., Aug. 24, 2005).

III. CONCLUSION

For all the foregoing reasons, T-Mobile respectfully requests that the Commission enter a summary determination in its favor on Issue E in the Petitioners' Arbitration Petition. No purpose would be served by requiring the parties to address this purely legal issue in written testimony or oral testimony during the hearing. Early resolution of this issue could, moreover, facilitate the ability of the parties to reach an agreement via negotiation.

Respectfully submitted,

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Certificate of Service

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