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

MOTION OF T-MOBILE USA TO DISMISS
PETITIONERS' PROPOSED ISSUES A AND B

Comes now Respondent T-Mobile USA, Inc. ("T-Mobile"), pursuant to 4 CSR 240-2.116(4), and moves the Commission to dismiss for good cause the first two issues that the Petitioners raise in their Arbitration Petition (Issues A and B), both of which involve claims for compensation for periods prior to the date Petitioners requested negotiations with T-Mobile. As T-Mobile demonstrates in this motion, the Commission should dismiss these claims for any one of the following reasons:

1. Petitioners may not, as a matter of governing federal law, ask T-Mobile to condition or otherwise limit its rights in this arbitration proceeding based on resolution of State claims arising before they made their request for negotiations;
2. This Commission lacks the authority in this arbitration proceeding to resolve claims arising before the date the Petitioners requested negotiations;
3. This Commission lacks the authority to decline to enforce obligations imposed by federal law on incumbent LECs; and/or
4. The Petitioners' claim for compensation prior to the date they requested negotiation is invalid as a matter of federal law.

Background

Paragraph 5.4 of the Petitioners' proposed agreement provides:

> 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.

Arbitration Petition, Attachment D, at 7. For the Commission to include this paragraph in the interconnection agreements resulting from this arbitration, it would have to compel T-Mobile to "settle all claims related to traffic exchanged between the Parties prior to the effective date of this Agreement."

The Petitioners divide their claim for past compensation (i.e., compensation for traffic exchanged prior to their request for negotiations) into two categories. Issue A involves T-Mobile mobile-to-land traffic that the Petitioners claim they terminated during the time they had no wireless termination tariffs on file with the Commission (from February 1998 until their tariffs took effect in 2001). Issue B involves T-Mobile mobile-to-land traffic that the Petitioners claim they terminated during the time their wireless termination tariffs were in effect (from 2001 through April 28, 2005, when such tariffs became void under federal law).[1]

The Petitioners assert that "[u]ntil these past due amounts are paid in full," T-Mobile should "not get the benefit of any agreement" and further, transit carriers "should be authorized to take the necessary steps to block Respondent's traffic." Arbitration Petition at 6 and 7-8. Notably, the Petitioners do not attempt to explain the discrepancy in their positions – namely, that the interconnection agreements should state that T-Mobile and the Petitioners have "settled" the

[1] FCC Rule 20.11(d) provides that "[l]ocal exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs." 47 C.F.R. § 20.11(d). This new rule took effect on April 29, 2005. *See Intercarrier Compensation*, 60 Fed. Reg. 16141 (March 30, 2005).

disputes, but the Commission should refuse to approve the interconnection agreements until T-Mobile pays their claims "in full."

The rural LECs in *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*") wanted the Commission to include the same paragraph in their arbitrated interconnection agreements. The Arbitrator in that case, however, rejected this position, finding that the matter should be resolved in complaint proceedings:

> Instead of the arbitrator's ruling on pre-January 13, 2005 traffic under the extremely compressed schedule the Communications Act sets for arbitration cases, a complaint case would be a better vehicle for resolving this case. The parties' due process rights would be better protected by having more time, not less time, to argue their positions. The Arbitrator will grant [T-Mobile's] motion in limine.

Arbitrator Order Regarding Motions in Limine, the *Alma/T-Mobile Arbitration*, at 2-3 (Aug. 3, 2005).

By way of background, it is important to emphasize that this arbitration is being conducted pursuant to federal law, not state law. As the Commission recently explained:

> The Commission has only that authority which the Congress has expressly delegated to it. The obligation to apply federal law applies even if state law precedent differs from federal law. * * * [T]he Commission may not rewrite or ignore FCC rules.

Alma/T-Mobile Arbitration Report, at 15-16 (Oct. 6, 2005).

Argument

The Arbitrator should dismiss Petitioners' Issues A and B for the same reason that the Arbitrator in the Alma/T-Mobile Arbitration dismissed the past compensation issues in that proceeding. However, there are five additional, independent reasons why the Arbitrator should dismiss Issues A and B from this proceeding.

I. FEDERAL LAW PROHIBITS PETITIONERS FROM TYING THE RESOLUTION OF ISSUES INVOLVED IN THIS ARBITRATION PROCEEDING TO ISSUES PENDING IN OTHER PROCEEDINGS

Petitioners are required by FCC rules to negotiate an interconnection agreement in good faith with T-Mobile.[2] The FCC has ruled, moreover, that an incumbent LEC acts in bad faith if it attempts to tie resolution of interconnection negotiations to another proceeding:

> We believe that requesting carriers have certain rights under sections 251 and 252, and those rights may not be derogated by an incumbent LEC demanding *quid pro quo* concessions in another proceeding.[3]

If it is unlawful (*i.e.*, constitutes bad faith) for an incumbent LEC to demand in interconnection agreement negotiations that T-Mobile resolve matters involved in a different proceeding, it is similarly unlawful for an incumbent LEC to ask a State commission to grant the same relief in an arbitration proceeding. And a State commission certainly cannot grant relief to a petitioner whose request for that relief is unlawful. Most of the Petitioners and T-Mobile are currently involved in other proceedings regarding the same issues as Issues A and B in this proceeding.[4] The Commission should dismiss Issues A and B and the Petitioners' accompanying attempt to hold up the forward-looking interconnection agreement pending resolution of past compensation issues, as an unlawful tying of separate issues and separate proceedings.

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[2] *See* 47 C.F.R. § 51.301(a)("An incumbent LEC shall negotiate in good faith the terms and conditions of agreements to fulfill the duties established by sections 251 (b) and (c) of the Act.").

[3] *Local Competition Order*, 11 FCC Rcd 15499, 15576 ¶ 153 (1996).

[4] The Missouri Public Service Commission addressed the compensation claims asserted in Issues A and B in *In the Matter of the BPS Telephone Company,* Case No. TC-2002-1077, which is currently under appeal in *VoiceStream PCS, d/b/a T-Mobile* v. *BPS Telephone, et al.,* Case No. 05-04037-CV-C-NKL, U. S. District Court for the Western District of Missouri.

II. THE COMMISSION'S AUTHORITY IN THIS ARBITRATION PROCEEDING ARISES ONLY FROM THE DATE THE PETITIONERS REQUESTED NEGOTIATIONS

Federal law is clear that Congress delegated to this Commission the authority to adjudicate claims for compensation for traffic exchanged starting on the date the Petitioners requested negotiations. Congress did not grant state commissions the authority to arbitrate compensation claims for traffic exchanged before the date interconnection agreement negotiations were requested – even assuming the Petitioners may lawfully make such a demand of this Commission.[5]

Two state commissions have already rejected the very argument made by the Petitioners here – and federal courts affirmed both state commission decisions. First, in an arbitration with a wireless carrier, a Nebraska rural LEC argued that it was entitled to compensation back to 1998 even though the request for negotiation was not made until 2002. The Nebraska Public Service Commission rejected the rural LEC argument and "disagree[d] with the Arbitrator's utilization of the March 1998 commencement date":

> According to the FCC, in order to take advantage of interim arrangements, negotiations must have been requested by the parties. The record demonstrates that on August 26, 2002, WWC transmitted to Great Plains a bona fide request for the commencement of negotiations for purposes of § 252 of the Act. As such, the Commission finds that the applicable rate per MOU determined by this Commission with regard to Issue 3 shall apply to such MOUs beginning on August 26, 2002.[6]

A federal district court affirmed this portion of the Nebraska Commission's order.[7]

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[5] FCC Rule 20.11(f) specifies that "[o]nce a request for interconnection is made" by a rural LEC to a wireless carrier, "the interim transport and termination pricing described in § 51.715 shall apply." 47 C.F.R. § 20.11(f). FCC Rule 51.715(a)(2), in turn, makes clear that a carrier "may take advantage of such an interim arrangement only after it has requested negotiation."

[6] *Petition of Great Plains Communications for Arbitration to Resolve Issues Relating to an Interconnection Agreement with WWC License,* Application No. C-2872 (Nebraska PSC, Sept. 23, 2003), at 17.

[7] *See WWC License* v. *Boyle,* No. 4:03CV3393, 2005 U.S. Dist. LEXIS 17201 *10-11 (D. Neb., Jan. 20, 2005). However, the court vacated that portion of the Nebraska Commission order which held

Similarly, an Oklahoma rural LEC sought to include in an arbitration proceeding with a wireless carrier the issue of compensation for the period prior to the request for negotiations. The Oklahoma arbitrator struck this request from the arbitration proceeding, stating, "It does not belong in an arbitration, it's a separate cause before the Commission and the Commission does not have the power to make that determination.[8] Once again, a federal district court rejected the rural LEC appeal of this issue and affirmed the Oklahoma Commission's decision.[9]

The Petitioners here requested negotiations from T-Mobile effective April 29, 2005 – the date federal law invalidated their state wireless termination tariffs in their entirety. The Commission in this arbitration proceeding certainly can establish the rate of reciprocal compensation (consistent with federal law) for the period from April 29, 2005 through the end date of the arbitrated agreement. But in this arbitration proceeding, Congress has not delegated to the Commission the authority to decide the compensation obligations of the parties prior to April 29, 2005. Accordingly, the Arbitrator should dismiss from this arbitration proceeding the first two issues raised in the Arbitration Petition – both of which address traffic for the period prior to April 29, 2005.

III. THE COMMISSION MAY NOT DECLINE TO ENFORCE OBLIGATIONS THAT FEDERAL LAW IMPOSES ON INCUMBENT LECS

Petitioners allege in Issues A and B that "until" T-Mobile pays "in full" past amounts allegedly due, T-Mobile should "not get the benefit of any agreement." Arbitration Petition at 6 and 7. Petitioners, however, do not identify the "benefit" that T-Mobile supposedly should be

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the rural LEC's reciprocal compensation obligations did not apply to all intraMTA land-to-mobile traffic. *See id.* at *9

[8] *Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 309 F. Supp. 2d 1299, 1312 n.22 (W.D. Ok. 2004).

[9] *Id.* at 1311-12. The rural LECs abandoned this issue in their appeal to the 10th Circuit. *See Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 400 F.3d 1256 (10th Cir. 2005).

denied. Presumably, Petitioners mean they should be excused from paying reciprocal compensation – that is, they want the Commission to prevent T-Mobile from recovering its costs of terminating Petitioners' intraMTA land-to-mobile calls. This is not an action that federal law authorizes the Commission to take.

The FCC required the Petitioners to provide reciprocal compensation over 11 years ago when it adopted Rule 20.11(b)(1), which provides:

> A local exchange carrier *shall pay* reasonable compensation to a commercial mobile radio service provider in connection with terminating traffic that originates on facilities of the local exchange carrier.[10]

Over nine years ago, the FCC ruled that LECs like the Petitioners were violating Rule 20.11 by failing to pay reciprocal compensation:

> Based on the extensive record in the LEC-CMRS Interconnection proceeding, as well as that in this proceeding, we conclude that, in many cases, incumbent LECs appear to have imposed arrangements that provide little or no compensation for calls terminated on wireless networks, and in some cases imposed charges for traffic originated on CMRS providers' networks, both in violation of section 20.11 of our rules.[11]

Nearly a decade ago, Congress explicitly directed the Petitioners to provide reciprocal compensation to wireless carriers like T-Mobile:

> Each local exchange carrier has the following duties: . . . (5) The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.[12]

For the past decade, the Petitioners have refused to comply with the explicit requirements of the Communications Act, FCC rules and FCC orders. Yet, they now have the arrogance to claim they should be excused from complying with the Communications Act and several FCC

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10 47 C.F.R. § 20.11(b)(1)(emphasis added).

11 *Local Competition Order*, 11 FCC Rcd 15499, 16044 ¶ 1094 (1995).

12 47 U.S.C. § 251(b)(5). *See also* 47 C.F.R. § 51.703(a).

rules for an additional period of time – *and* they want to Commission to sanction this patently unlawful conduct.

Congress has been very clear that, in its arbitration order a State commission "*shall ensure* that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the [FCC]."[13] Congress has not delegated to the Commission the authority to disregard its explicit directives. This is particularly the case where, as here, the Petitioners' prior claims are based on State law – that they themselves wrote by unilaterally filing tariffs – that conflict with federal law.[14]

The Petitioners have invoked the federally-provided arbitration procedure for resolving disputes relating to forward-looking interconnection arrangements effective as of the date negotiations of those items officially began, a timeline also defined by federal law. Petitioners cannot ask the Commission both to resolve such disputes and prevent T-Mobile from implementing the resolution. The Commission should dismiss Petitioners' Issues A and B as bad faith attempts to deny T-Mobile its right to the arbitration procedures defined in the Communications Act.

IV. THE PETITIONERS' CLAIMS FOR PAST COMPENSATION CONFLICT WITH FEDERAL LAW AND ARE THEREFORE PREEMPTED AND VOID AS A MATTER OF LAW

Petitioners claims for past compensation are based on state law – specifically, state tariffs. T-Mobile demonstrates that these state tariffs, unilaterally prepared by the Petitioners, are void under federal law because their terms conflict with federal law requirements.[15]

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13 47 U.S.C. § 252(c)(1)(emphasis added).

14 The Supremacy Clause of the U.S. Constitution provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONSTITUTION, Article VI, Clause 2.

15 The Petitioners additionally assert that T-Mobile is "in violation of the Commission's prohibition against sending such traffic in Case No. TT-97-524." Arbitration Petition at 6. Had wireless carriers participated in this 1997 proceeding, they would have advised the Commission that it lacked the authority to impose such a requirement on them. Federal law preempts States from exercising "any authority to regu-

A. THE PETITIONERS' WIRELESS TERMINATION TARIFFS ARE INVALID UNDER FEDERAL LAW

In Issue B, Petitioners seek compensation from T-Mobile for the period their wireless termination tariffs were in effect (from 2001 through April 28, 2005, when such tariffs became void under federal law). Those tariffs, however, conflict with federal law, are therefore pre-empted and, as a result, are void as a matter of law.

Effective April 29, 2005, the FCC prohibited LECs from imposing compensation for intraMTA mobile-to-land traffic via state tariffs.[16] The FCC ruled that the procedure of using wireless termination tariffs prior to that date was not unlawful *per se*, but it did not reach the *different* question whether the *substantive* terms of any wireless termination tariff were consistent with federal law: "we need not decide whether such tariffs satisfy the statutory requirements of that section" 251(b)(5).[17]

As noted above, nearly a decade ago Congress imposed on the Petitioners "[*t]he duty to establish* reciprocal compensation arrangements for the transport and termination of telecommunications."[18] Congress further required the Petitioners to set their reciprocal compensation rate consistent with the FCC's implementing rules – namely, TELRIC.[19] The Petitioners' wireless termination tariffs do not meet either of these mandatory federal requirements. Specifically, they

late the entry of . . . any commercial mobile service." 47 U.S.C. § 332(c)(3)(A). A state order purporting to prohibit wireless carriers from providing their federally-authorized services until they meet certain state conditions necessarily would constitute prohibited entry regulation.

16 *See* note 1 *supra.*

17 *Wireless Termination Order*, 20 FCC Rcd 4855, 4852 n.49 (2005).

18 47 U.S.C. § 251(b)(2)(emphasis added).

19 *See, e.g.*, 45 U.S.C. §§ 251(d)(1), 252(d)(2). *See also Verizon* v. *FCC*, 535 U.S. 467 (2002)(Supreme Court affirms FCC's TELRIC rules).

do not provide for reciprocal compensation, and the Petitioners have never shown that their tariffed rates do not exceed their TELRIC costs.[20]

Both the FCC and federal courts have held that incumbent LECs cannot ignore their federal law obligations by hiding behind state law tariffs of their creation. For example, the FCC has rejected an ILEC assertion that it could excuse itself from federal reciprocal compensation rules simply by preparing and filing an incompatible state tariff:

> [A]ny 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 federal or state tariff.*[21]

Federal courts have reached the same conclusion. For example, in *3 Rivers Telephone* v. *U S WEST,* U.S. Dist. LEXIS 24871 (D. Mont., Aug. 22, 2003), Montana rural ILECs asserted that the "filed tariff doctrine, which makes a filed tariff the 'exclusive source' of terms and conditions governing the provision of service to a common carrier to its customers, and which has the force of law, precludes a judicial challenge to the validity of a filed tariff." *Id.* at *47. The federal court summarily rejected this rural ILEC argument:

> The preemption doctrine, which derives from the Supremacy Clause of the United States Constitution, allows federal law to preempt and displace state law under certain circumstances. . . . Thus, in the instant case, the filed tariffs at issue in this case, which have the force of state law, are subject to potential preemption by federal law. *Id.* at *50.

The court thereafter ruled that the ILEC state tariffs were unlawful under federal law because the tariffs were inconsistent with federal law substantive requirements.[22]

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[20] *See* 47 C.F.R. § 51.505(e)("An incumbent LEC must prove to the state commission that the rates for each element it offers do *not exceed* the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and Sec. 51.511.") (emphasis added).

[21] *TSR Wireless* v. *U S WEST,* 15 FCC Rcd 11166, 11184 ¶ 29 (2000)(emphasis added), *aff'd, Qwest* v. *FCC,* 252 F.3d 462 (D.C. Cir. 2001).

In summary, even though State wireless termination tariffs were a lawful procedure (at least prior to April 29, 2005), such tariffs must still comply with the Petitioners' "duty to establish" reciprocal compensation and rates consistent with the FCC's TELRIC rules.[23] The Petitioners tariffs did neither, and the Commission should dismiss Issue B because it is predicated on tariffs that fail to comply with federal law requirements and are therefore preempted and void as a matter of law.

B. THE PETITIONERS' INTRASTATE ACCESS CHARGE TARIFFS ARE INVALID UNDER FEDERAL LAW

In Issue A Petitioners seek compensation from T-Mobile pursuant to their intrastate access charge tariffs for the period before they filed their wireless termination tariffs. These access tariffs also conflict with federal law, are therefore preempted and, as a result, are void as matter of law.

The FCC has ruled repeatedly that LECs like the Petitioners may not impose access charges in terminating intraMTA mobile-to-land traffic.[24] As the FCC stated again earlier this year:

> The Commission stated that traffic to or from a CMRS network that originates and terminates within the same Major Trading Area (MTA) is subject to reciprocal compensation obligations under section 251(b)(5), rather than interstate or intrastate access charges.[25]

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[22] *See also Illinois Bell* v. *Wright,* 2004 U.S. Dist. LEXIS 16757 (N.D. Ill., Aug. 23, 2004)(Court preempts Illinois Commerce Commission order approving tariffs containing terms incompatible with federal law requirements).

[23] T-Mobile acknowledges that the Missouri federal district court recently rejected this position. T-Mobile believes this decision is inconsistent with prior FCC and federal court precedent, and is considering an appeal to the Eighth Circuit.

[24] *See, e.g.*, 47 U.S.C. § 51.601; *Local Competition Order*, 11 FCC Rcd 15499, 16014 ¶ 1036 (1996); *Unified Intercarrier Compensation*, 16 FCC Rcd 9610, 9613 ¶ 7 (2001).

[25] *Wireless Termination Order,* 20 FCC Rcd 4855, 4856 ¶ 3 (2005).

Federal courts have similarly ruled: "As a matter of federal law, telecommunications carriers cannot impose access charges pursuant to filed tariffs for terminating intraMTA traffic."[26]

Accordingly, under controlling federal law, the Petitioners may not impose tariffed access charges on T-Mobile for terminating intraMTA mobile to-land-traffic. This is precisely what the Petitioners seek in Issue A, and the Commission should dismiss Issue A as contrary to federal law.

V. CONSIDERATION IN THIS ARBITRATION OF ISSUES RELATING TO PAST TRAFFIC VOLUMES AND PAST COMPENSATION IS INAPPROPRIATE BECAUSE SUCH ISSUES ARE THE SUBJECT OF PENDING PROCEEDINGS.

The Petitioners have already brought past compensation issues to the Commission and the courts. The Petitioners themselves note that the validity of applying exchange access tariffs to intraMTA traffic is currently before the Missouri Supreme Court in Case No. SC86529.[27] This corresponds to Petitioners' Issue A in the current proceeding. Even assuming Petitioners could bring this past compensation issue in the current arbitration (which is not permitted under federal law), the Commission should dismiss the issue because it is already under consideration in a separate proceeding.

Petitioners' Issue B has similarly been already presented for determination before this Commission in Case No. TC-2002-1007, resulting in a Report and Order issued Jan. 27, 2005. The issue of validity of Petitioners' tariffs is currently on appeal in *VoiceStream PCS, d/b/a T-Mobile* v. *BPS Telephone, et al.,* Case No. 05-04037-CV-C-NKL, U.S. District Court for the Western District of Missouri, and may be subject to further appeal to the Eighth Circuit Court of Appeals.

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[26] *Union Telephone* v. *Qwest,* 2004 U.S. Dist. LEXIS 28417, at *36 (D. Wy., May 11, 2004).

[27] *Arbitration Petition,* at 6.

In short, the issues of past compensation are under consideration in separate proceedings. Further consideration of those issues in this arbitration proceeding raises the danger of violating Missouri's policy against issue preclusion, the prospect of reaching inconsistent conclusions on the same issues between the same parties, and the certainty of a wasteful and unnecessary expenditure of the limited time and resources of the Arbitrator, Advisory Staff, the parties, and the members of the Commission.

VI. CONCLUSION

Wherefore, for the reasons set forth herein, T-Mobile respectfully requests that the Commission dismiss Petitioners' Issues A and B from this proceeding. T-Mobile requests that the Commission promptly act on this request so the parties can be assured that they need not address Issues 1 and 2 in their pre-filed testimony and pre-hearing memorandum.

Respectfully submitted,

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Certificate of Service

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