

**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
_____)	

**T-MOBILE MOTION TO DISMISS
THE FOUR CLEC PETITIONERS**

Comes now Respondent T-Mobile USA, Inc. (“T-Mobile”), pursuant to 4 CSR 240-36.040(1), and moves the Commission to dismiss the four competitive local exchange carrier (“CLEC”) Petitioners in this arbitration proceeding: Fidelity Communications Services I, Inc.; Fidelity Communications Services II, Inc.; Green Hills Telecommunications Services; and Mark Twain Communications Company. As T-Mobile demonstrates herein, the Commission lacks the legal authority to arbitrate disputes between two competitive carriers (*i.e.*, a CLEC and a wireless carrier like T-Mobile). The four CLEC Petitioners are not parties to a negotiation entered into under Sections 251 and 252 of the Telecommunications Act of 1996, and under 4 CSR 240-36.040(1), may not bring a petition for arbitration.

Congress addressed the arbitration of interconnection disputes in Section 252 of the Communications Act and limited those provisions to disputes between “an incumbent local exchange carrier” (“ILEC”) and another telecommunications carrier, such as a CLEC or wireless carrier. 47 U.S.C. § 252(b). Because the four CLEC Petitioners in this dispute are not ILECs, they may not invoke the statutory arbitration procedure. Likewise, the Commission lacks the authority to arbitrate a Section 252 dispute between a CLEC and a CMRS provider.

Congress empowered a State commission to arbitrate a dispute if an arbitration petition is filed during a certain period (135 through 160 days) “after the date on which an incumbent local

exchange carrier receives a request for negotiation under this section.”¹ The FCC recently amended its rules to confirm that an “incumbent local exchange carrier may request interconnection from a commercial mobile radio service provider and invoke the negotiation and arbitration procedures contained in section 252 of the Act.”² Congress and the FCC have thus been very clear that State commission arbitration authority extends only to the situation where one of the parties is an ILEC.³ Congress did not include all LECs within Section 252; instead, by its plain language the arbitration mechanism is limited to ILECs. By setting out a specific arbitration process for one group of LECs (the ILECs), Congress necessarily excluded the other LECs, specifically the CLECs. In other words, the Section 252 arbitration procedure only applies to interconnection/reciprocal compensation disputes when one of the carriers is an ILEC.

The four CLEC Petitioners in this proceeding are not ILECs. Therefore, they are not authorized to request the Commission to arbitrate an interconnection/reciprocal compensation dispute with a CMRS carrier. Section 252 of the Act simply does not apply to CLECs in this situation, nor does it apply to CLECs who are part of the same corporate family as an ILEC. Mere corporate affiliation does not magically grant a CLEC the right to invoke Section 252 where no such right otherwise exists.

The Commission does not have authority to arbitrate an interconnection/reciprocal compensation dispute in the absence of Section 252 authority. The Commission has recognized that it “only has that authority which the Congress has expressly delegated to it”:

As a federal district court in Missouri has held, “[a]bsent Congressional authority, the PSC would have no right to participate in the unique dispute resolution proc-

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

² 47 C.F.R. § 20.11(e)(emphasis added), *adopted in Wireless Termination Tariff Order*, CC Docket No. 01-92, FCC 05-42, 20 FCC Rcd 4855 (Feb. 24, 2005), *published in* 70 Fed. Reg. 16141 (March 30, 2005).

³ *See, e.g.*, 47 U.S.C. §§ 252(a)(1), (b)(1), (d)(2)(A), and (j).

ess devised by Congress, in which the PSC is authorized to arbitrate disputes between private telecommunications companies.’⁴

By the express language included in Section 252, Congress has made clear that the negotiation and arbitration provisions in that section apply only when one of the parties is “an incumbent local exchange carrier.”

Federal appellate courts have confirmed that this Congressional delegation of arbitration authority both establishes and limits a State commission’s role in implementing this federal program:

It is clear from the structure of the Act, however, that the authority granted to state regulatory commissions is confined to the role described in § 252 – that of arbitrating, approving and enforcing interconnection agreements. As the Supreme Court noted in *AT&T v. Iowa Utilities Board*, the Act *limited* state commissions’ authority to regulate local telecommunications competition.⁵

As another federal appellate court has held:

Under the Act, there has been no delegation to state commissions of the power to fill gaps in the statute through binding rulemaking. . . . State commissions have been given only the power to resolve issues in arbitration and to approve or reject interconnection agreements, not to issue rulings having the force of law beyond the relationship of the parties to the agreement.⁶

As applied to this case, Congress gave the Commission authority to arbitrate interconnection agreements involving ILECs, but not agreements between CLECs and wireless carriers. That limitation must be given effect.

Nor does the Commission have independent authority under State law to arbitrate disputes between a CLEC and a wireless carrier. Under State law, this Commission possesses no

⁴ *Alma/T-Mobile Arbitration Report*, Case No. IO-2005-0468, at 15 and n. 25 (supporting citation omitted).

⁵ *Pacific Bell v. Pac West Telecom*, 325 F.3d 1114, 1126-27 (9th Cir. 2003)(emphasis in original)(internal citations omitted).

⁶ *MCI v. Bell Atlantic Pennsylvania*, 271 F.3d 491, 516 (3d Cir. 2001).

general regulatory authority over wireless carriers like T-Mobile.⁷ Moreover, under the Commission's own rules, its arbitration authority extends only to arbitration petitions filed "under section 252 of the Act," which as noted above, applies only where an ILEC is one of the parties.⁸

Wherefore, for the reasons set forth in this motion, T-Mobile respectfully requests that the Commission dismiss Fidelity Communications Services I, Inc.; Fidelity Communications Services II, Inc.; Green Hills Telecommunications Services; and Mark Twain Communications Company as petitioners in this case.

Respectfully submitted,

By: /s/ Mark P. Johnson
Mark P. Johnson, MO Bar No. 30740
Roger W. Steiner, MO Bar No. 39586
Sonnenschein Nath & Rosenthal LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
Telephone: 816.460.2400
Facsimile: 816.531.7545
mjohnson@sonnenschein.com
rsteiner@sonnenschein.com

ATTORNEYS FOR T-MOBILE USA, INC.

⁷ The regulatory power of the Commission extends to telecommunications service and telecommunications companies, defined to include providers of telecommunications service. Mo. Rev. Stat. §392.190. However, under Mo. Rev. Stat. § 386.020(53)(c), wireless service is specifically exempted from the definition of "telecommunications service," and thus wireless carriers are beyond Commission regulation because they do not provide telecommunications service.

⁸ 4 CSR 240-36.010(6).

Certificate of Service

I hereby certify that a true and final copy of the foregoing was served via electronic transmission on this 16th day of November, 2005, to the following counsel of record:

W.R. England, III
Brian T. McCartney
Brydon, Swearngen & England P.C.
312 East Capitol Avenue, P.O. Box 456
Jefferson City, MO 65102-0456

Paul Walters, Jr.
15 E. 1st St.
Edmond, OK 73034

Paul S. DeFord
Lathrop & Gage LC
2345 Grand Boulevard
Suite 2800
Kansas City, MO 64108

/s/Mark P. Johnson
Mark P. Johnson